

HEARING
BEFORE THE
SUBCOMMITTEE ON
IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1654

SEPTEMBER 10, 1979

Serial No. 96-34

Printed for the use of the Committee on the Judiciary



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DEPOSITORY
CUSTOMS COURTS ACT OF 1979, S. 1654

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CUSTOMS COURTS ACT OF 1979, S. 1654

MONDAY, SEPTEMBER 10, 1979

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN
JUDICIAL MACHINERY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 6226, Dirksen Senate Office Building, Hon. Dennis DeConcini (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

Also present: Romano Romani, staff director; Michael J. Altier, counsel; Pam Phillips, chief clerk; Sally Rogers, minority counsel; Kim Pearson and Mark Grady, minority counsel.

Senator DeConcini. Good morning. The subcommittee will come to order.

OPENING STATEMENT OF SENATOR DeCONCINI

Today, we will hold a hearing on S. 1654, the Customs Courts Act of 1979, a bill which has been referred to the subcommittee for consideration.

The bill's purposes, as stated in title I, are:

One: To provide for a comprehensive system of judicial review of civil actions arising from import transactions, utilizing, whenever possible, the specialized expertise of the U.S. Customs Court and Court of Customs and Patent Appeals and insuring uniformity afforded by the national jurisdiction of these courts;

Two: To assure access to judicial review of civil actions arising from import transactions, which access is not presently assured due to jurisdictional conflicts arising from the present ill-defined division of jurisdiction between the district courts and the customs courts;

Three: To provide expanded opportunities for judicial review of civil actions arising from import transactions;

Four: To grant to the customs courts the plenary powers possessed by other courts established under article III of the Constitution; and

Five: To change the name of the U.S. Customs Court to the U.S. Court of International Trade to be more descriptive of its expanded jurisdiction and its new judicial function and purpose relating to international trade in the United States.

S. 1654 appears to be substantially less controversial than its predecessor, which was introduced late in the 95th Congress. Earlier this year, the Senate Finance and House Ways and Means Commit-

tees began an examination of judicial review issues relating to countervailing and antidumping duty decisions.

Working closely with these committees on the Multilateral Trade Negotiations Implementation package, we determined that it would be possible and appropriate to incorporate portions of last year's Customs Courts Act into the implementing statute.

That statute, known as the Trade Agreements Act of 1979, is now law, and title X of that act addresses many judicial review issues which were part of last year's Customs Court Act. In addition to being less controversial, we have examined all of the suggestions which we were provided with last year as well as some very helpful preintroduction comments that were submitted this year.

As a result we have made substantial modifications in redrafting this year's proposal. Generally, I view this bill as a part of the implementation legislation and am optimistic that this year's vastly improved bill will move promptly through the Congress.

Our first witness will be the Honorable Edward D. Re, chief judge of the U.S. Customs Court. As chief judge his expertise together with his support has and will be of great assistance in evaluating the impact of this bill.

Following Chief Judge Re will be David M. Cohen, director of the Commercial Litigation Branch of the Department of Justice. He will provide us with the Department's position on the bill. Mr. Cohen has been very instrumental in the development of both this and last year's Customs Courts Acts; Richard Abbey, Deputy Chief Counsel of the Customs Service of the Department of Treasury will join Mr. Cohen.

We are also looking forward to hearing from Jeffrey Lang, Deputy General Counsel of the International Trade Commission. The American Bar Association's witnesses will follow. The ABA will be represented by Leonard Lehman, chairman of the association's standing committee on customs law, and Joseph S. Kaplan, chairman of the association's subcommittee on the customs courts.

Our witnesses today also include James H. Lundquist, president of the Association of the Customs Bar; Andrew P. Vance, an active member of that association; and Robert A. Anthony and Jeffrey Lubbers of the Administrative Conference of the United States.

Mr. Anthony is chairman of the Administrative Conference while Mr. Lubbers is a senior staff attorney. Dr. Rudy Oswald, director of the department of research of the AFL-CIO, will testify on behalf of that organization. Concluding, John B. Pelligrini and Barry Nemmers will present the views of the American Importers Association.

Mr. Pelligrini is chairman of the association's customs policy committee while Mr. Nemmers is a staff attorney.

Before we begin, if there is no objection, I would like to have placed in the record at this point a copy of S. 1654, the Customs Courts Act of 1979.

[A copy of Senate bill S. 1654 appears in the appendix.]

It is my hope that we can close this hearing record at the end of business today and proceed with the processing of this bill. We hope that anybody that has testimony will be pleased to submit it for the record, and summarize their statements.

**STATEMENT OF CHIEF JUDGE EDWARD D. RE, ACCOMPANIED BY
JOSEPH E. LOMBARDI, CLERK OF THE COURT, U.S. CUSTOMS COURT**

Judge RE. Thank you so much for all of the courtesies, Senator DeConcini.

Personally, and on behalf of the U.S. Customs Court, I appreciate your invitation to appear to present our views on the proposed Customs Courts Act of 1979. As requested in your letter of invitation, my statement will be concise and summary in nature.

It is apparent to anyone familiar with the testimony you received last year, in connection with the Customs Courts Act of 1978, S. 2857, that you have carefully considered the comments, suggestions and criticisms submitted, and have been most responsive in the present bill. It is my expectation that any suggestions offered by the witnesses at this hearing can only result in an even finer tuning of the judicial machinery than you have already provided in your bill.

In the statement submitted last year on behalf of the U.S. Customs Court, I indicated that the prior bill did not provide persons, aggrieved by agency actions pertaining to importations, with the same access to judicial review and remedies as Congress has provided for persons aggrieved by other agency actions. We suggested that the fundamental and overriding question presented for your determination was whether actions of administrative agencies affecting importations should be made subject to the same standards of judicial review as are provided for the actions of other administrative agencies. A reading of the present bill indicates clearly that you have answered that question in the affirmative.

It is also clear that you intend to extend to persons, engaged in or affected by importations, the protection offered by our traditional standards of due process and equal protection of the law. For these reasons alone, I believe that your bill will contribute immeasurably to the public interest.

Last year we urged you to consider the desirability of speedily enacting those provisions of the bill which were intended to give this court the same status and plenary powers of the district courts of the United States. The absence of those powers was an anomaly, and impeded the doing of justice in cases coming before the court. Because of the additional judicial responsibilities given to the Customs Court by the Trade Agreements Act of 1979, those plenary powers are indispensable, and we once again urge your expeditious consideration and enactment.

We believe that the provisions included in your bill will better enable us to discharge these additional responsibilities. We hope that your bill can be enacted and made effective no later than Jan. 1, 1980, to coincide with the effective date of the Trade Agreements Act of 1979.

We extend to you our strong support in connection with your continuing efforts to improve the administration of justice in matters pertaining to international trade. Of course, I should be pleased to cooperate in any further improvements that may be suggested for your consideration.

I am confident that the Customs Courts Act of 1979 together with the Trade Agreements Act of 1979 will be considered as epoch-making

legislation in the historical development of institutions involved with the resolution of disputes arising from international trade matters. I assure you that the judges and staff of the judicial tribunal, which, under your bill, will be known as the U.S. Court of International Trade, are already, willing, and able to do all that is necessary to fulfill the objectives and purposes of your bill.

Again, I wish to commend you, your committee and your staff for this most significant legislation. I thank you for the opportunity of appearing before you.

Senator DECONCINI. Judge Re, thank you very much. Let me also welcome Joseph Lombardi, your clerk, who is always very helpful to this committee.

Let me also, for the record, express my thanks to the entire court. I have heard from a couple of the court's members in support of this bill, and I want you to express to them our appreciation for their interest.

Judge RE. It will be a great pleasure.

Senator DECONCINI. Judge, since we have worked so closely with you and the court last year and this year, perhaps you could explain how the Customs Court Act complements the Trade Agreements Act? What effects the two will have on the capacity of your court?

Judge RE. Your bill rectifies an anomalous limitation pertaining to the powers of the court. Namely, this bill will grant plenary powers in law and equity to the court.

In that respect, this bill may be regarded as implementing legislation for the Trade Agreements Act of 1979. Enacting the bill, I think, is indispensable if this court is to have the required plenary powers.

Therefore, your bill not only is desirable; we regard it as indispensable.

Senator DECONCINI. Judge, when to your knowledge was the last time any legislation passed affecting the court other than the Trade Act?

Judge RE. The last major legislation was the Customs Courts Act of 1970.

Senator DECONCINI. 1970; thank you.

What was the thrust of that legislation, do you recall?

Judge RE. It was primarily procedural and did not affect the substantive powers of the court. This bill, S. 1654, is intended to give to the court the power it should have had as an article III court to adjudicate fully, and to do complete justice in the areas committed to its jurisdiction.

Senator DECONCINI. This is really, in essence, since the creation of the court, the first, major substantive change that the court would be undergoing; is that correct?

Judge RE. That is correct, Senator.

Senator DECONCINI. Thank you. I have no further questions.

Mr. Altier, do you have any questions?

Mr. ALTIER. Yes, I have a couple.

Several interested parties have indicated that the customs court be granted concurrent jurisdiction with the district courts over certain civil actions against the United States which involve disputes arising from import transactions.

This, to me, sounds like it would increase the opportunity for "forum shopping" and perhaps it would reduce the likelihood of uniformity of decisions.

Could you provide us with your comments on this matter? In your answer, could you give us the advantages and disadvantages of each option?

Judge RE. It should be made clear that to the extent there is concurrent jurisdiction, there would be a derogation from the goal of uniformity and consistency. Conceptually, the notion of concurrent jurisdiction is inconsistent with that goal.

If there are any matters which present a question of jurisdiction, it would seem to be in keeping with that overriding goal to have the case first go to the U.S. customs court. Then, if for any reason, the case does not belong there, it may, of course, be transferred to the district court.

Therefore, conceptually and ideally, to the extent there is concurrent jurisdiction, a case should first go to the customs court, to give it the broad jurisdiction that would truly effectuate uniformity in the development of the law in this important area.

Mr. ALTIER. Thank you.

Proposed section 1583 of the bill relates to setoffs, demands, and counterclaims. There has been a number of interested parties that have provided us with their comments on this provision of the bill. They are opposed to the expansion of cases beyond those issues framed by the plaintiff in its summons or complaint, and with certain limitations, certain counterclaims asserted by the United States, which arise out of the same important transaction.

Judge, what are your thoughts on this provision? Do you have any suggestions as to ways to resolve some of the controversy?

Judge RE. I am, of course, familiar with the views that have been expressed by many pertaining to this provision.

Generally the opposition stems from the concern of the plaintiffs that the setoff and the counterclaim provision will have a chilling effect on their right to sue.

Consequently, I understand the desire on the part of the plaintiffs who wish to limit the provision to counterclaims arising out of the same import transaction that gave rise to the original cause of action.

Mr. ALTIER. Thank you.

Judge, we have received some testimony in the form of a prepared statement, and we will also be hearing later this morning from representatives of the AFL-CIO.

Let me begin by saying that they are generally opposed to this legislation. In their prepared statement, they say:

The AFL-CIO believes that a specialized Court of International Trade is inappropriate in today's world of interdependence. The opportunity for fair judicial review of problems arising from the effects of hundreds of billions of dollars worth of imports, and exports every year, is an objective that most Americans share. Businesses, consumers, workers and communities throughout the nations are affected by trade. The district courts, which are in the communities, are best equipped to handle issues related to these effects, because they are not solely trade problems, but domestic problems created by trade.

Do you have any response that you could provide us with on the question of whether it is appropriate to agree with the AFL-CIO's

position, or taking the opposite view? Should these types of issues be within the jurisdiction of the customs court?

Judge RE. Mr. Altier, I am not familiar with the statement. However from what you have read, the opposition seems to indicate a lack of familiarity with the existing responsibilities of the court.

From its earliest history, the court has been concerned with legislation intended to protect domestic interests against the effect of importations. The court has for many years had jurisdiction over law suits arising under the antidumping and countervailing duty statutes.

The Trade Act of 1974 increased the jurisdiction of the court to provide domestic manufacturers with judicial review of negative antidumping and countervailing duty findings by administrative agencies.

In the Trade Agreements Act of 1979, Congress has expanded that remedy by conferring standing to challenge antidumping and countervailing duty determinations in the Customs Court upon, among others, labor unions and trade associations.

The overriding issue in all kinds of litigation arising from importations is the extent to which uniformity and consistency are desirable. Where that principle is significant, litigation should be directed to the U.S. Customs Court.

Mr. ALTIER. I am aware that during the course of the discussion, prior to the passage of the Trade Agreements Act of 1979, there was a discussion regarding where the court actually sits. Specifically, the discussion centered upon the ability of the court to sit in Washington or other parts of the country.

This could also be responsive to the AFL-CIO's position as to where the court actually sits.

Judge RE. Yes. I answered your question on the basis of what I regarded as a conceptual problem.

It is also important to know that the court can, and does, sit anywhere in this country. The chief judge of the court assigns a judge, together with necessary court personnel, to sit where the need exists. We recently have made arrangements to utilize for our purposes the courtrooms of the district courts throughout the United States to facilitate the "presence" of the court when and where needed.

Mr. ALTIER. Thank you. That was a comprehensive answer to both questions.

The American Importers Association has, last year and this year, expressed an interest in the establishment of some sort of small claims procedure. As part of the customs court's procedures. They believe that many valid claims against the Government cannot be settled in the customs court, because the cost of pursuing a claim under the court's procedures substantially outweigh the amounts at issue in the disputes.

It is my understanding that the U.S. Tax Court has utilized a successful small claims procedure. Are you aware of any similar procedure in any other district court, and, also, would you care to comment on the concept of a small claims procedure in the Customs Court?

Judge RE. Well, Mr. Altier, we will be happy to cooperate with any group in considering a so-called small claims procedure. Actually, if we thought a small claims procedure was necessary, we could have put one into effect by rule. We do not require legislation for that purpose.

I have not been persuaded that it is necessary to have a formal procedure. If any person wishes to appear before the court pro se, we have and continue to hear the case, and permit the plaintiff to present the case personally.

We could hear the case in chambers. Indeed, if the person establishes that he or she is indigent and cannot afford an attorney, we can assign counsel. I have, in at least one case that I recall, assigned distinguished counsel, Mr. Andrew Vance, to represent an indigent plaintiff.

My answer is that I do not believe that a statutory procedure is necessary.

Mr. ALTIER. Would there be any good reason to do it by statutory language? Would that be appropriate?

Judge RE. I personally would not think so.

Mr. ALTIER. My inclination, if it was pursued either by rule or by statute, would be to wait and see what happens as a result of this legislation, as well as the Trade Agreements Act, and then consider whether it should be authorized by statute.

Judge RE. I agree with that.

Mr. ALTIER. Thank you very much, Judge. I have no further questions.

Senator DECONCINI. Thank you, Judge Re. If you have no objections, and when the director of the department of research of AFL-CIO does testify today, I might offer to visit your court.

Judge RE. I should be pleased to extend an invitation.

Senator DECONCINI. I know it was an education for me to visit several circuits, and especially your court. I learned a great deal. I also want to, for the record, compliment you on the administration of the U.S. Customs Court, to all the judges there, for what I consider is, if not the best run court, certainly close to it.

I do not want to choose one court over any other, for obvious reasons, but indeed I am very impressed with the operation of the courts.

Thank you very much.

Our next witness is David M. Cohen, accompanied by Richard Abbey.

Mr. Cohen is Director of the Commercial Litigation Branch, Department of Justice. Mr. Abbey is Deputy Chief Counsel, Customs Service, Department of Treasury.

Gentlemen, we are pleased to have you here, and thank you for your time and assistance in the bill. Your statements will be printed in full in the record, if you will highlight them for us.

STATEMENT OF DAVID M. COHEN, DIRECTOR, COMMERCIAL LITIGATION BRANCH, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RICHARD ABBEY, DEPUTY CHIEF COUNSEL, CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

Mr. COHEN. Thank you, Mr. Chairman.

Mr. Chairman, as you noted, I am accompanied today by Mr. Richard Abbey, who is Deputy Chief Counsel, U.S. Customs Service, and I am authorized to say that the Customs Service concurs in the statement of the Department of Justice on this bill.

Mr. Chairman, the bill which we are discussing today, S. 1654, is a substantially revised version of S. 2857, a bill which was introduced in the last Congress by the chairman, with the support of the Department of Justice, and which was the subject of hearings by this subcommittee a little over 1 year ago.

You and your staff are to be commended, Mr. Chairman, for the very substantial effort which you have devoted to drafting S. 1654. As you know, the Department of Justice has worked closely with your staff in this process and, as was the case with S. 2857, the Department fully supports the bill.

Mr. Chairman, during the year which has elapsed since the hearings on S. 2857, the need for a bill to expand and clarify the jurisdiction of the customs courts has not lessened. Indeed, it may have become even more urgent.

The jurisdictional confusion and remedial deficiencies which we mentioned last year as one of the principal motivating factors for the enactment of S. 2857 has continued unabated. In addition to the cases which we cited last year, we can now point to *Flintkote v. Blumenthal*; *National Distilling Co. v. Blumenthal*; and *COMPACT v. Blumenthal* as examples of cases which were decided upon jurisdictional grounds rather than upon their merits.

Again, these cases represent instances in which individuals who believed they possessed real grievances in the field of international trade were frustrated in their attempts to obtain judicial relief either because, due to the uncertain state of the law, they elected the wrong courts in which to institute suit, or because the type of relief which they could obtain in the customs courts could not grant them effective redress.

As was the case with S. 2857, the enactment of a bill such as S. 1654 appears both necessary and logical. The bill, by clarifying and expanding the jurisdiction of the customs courts, and by expanding the remedial powers of those courts, would enable members of the public to concentrate their efforts upon obtaining relief according to the merits of their cases, and would obviate the need for them to waste valuable resources in an effort to jump jurisdictional hurdles. At the same time, the bill would relieve the district courts of some of their enormous caseload and make better use of the underutilized resources of the customs courts.

Mr. Chairman, S. 1654 would also be a natural complement to the Trade Agreements Act of 1979. This act, enacted into law during the year since the hearings on S. 2857, substantially expanded the jurisdiction of the customs courts and, for the first time, authorized the customs court, in limited circumstances, to grant injunctive relief.

However, the Trade Agreements Act continued the same piecemeal approach to the jurisdiction and powers of the Customs Court which has governed the courts' gradual evolution since the days of the Board of General Appraisers.

Periodically, since those early days, Congress has altered the courts' status, jurisdictions, and powers, in a manner that was intended to solve a specific problem or need in existence at a particular time. As a consequence, the statutes governing the courts' jurisdiction and remedial powers are akin to a jigsaw puzzle with enough pieces missing to

make it difficult for any but the closest observer to discern the picture which the completed puzzle was intended to depict.

The Trade Agreements Act of 1979 continued this process by adding a few pieces here and there. However, the puzzle remains. S. 1654 would add the last missing pieces of the puzzle begun so many years ago by filling the few remaining spaces left open by the Trade Agreements Act of 1979.

The bill before us today would make it clear that the new U.S. Court of International Trade possesses broad jurisdiction to entertain any civil action arising out of import transactions and arising under our trade legislation.

In addition, the bill would make it clear that, in those civil actions within its jurisdiction, the court possesses the authority to grant the relief required to remedy the injury suffered by a plaintiff.

These provisions, when coupled with those contained in the Trade Agreements Act of 1979, would make it clear to all members of the public who suffer an alleged injury in this broad area that they may seek redress in a court with confidence that their case will be heard on the merits—not decided upon jurisdictional grounds—and that, if they are successful, the court will be able to afford them the relief which is appropriate and necessary to make them whole.

For this reason, Mr. Chairman, the Department of Justice supports S. 1654, and I wish only to comment briefly upon a few specific provisions of the bill.

I would like to submit the remainder of my statement, which has some technical comments, for the record.

Senator DECONCINI. I have looked through your statement here, and I appreciate immensely the Justice Department taking the time to go through it and submit some of the technical suggestions, and we will look very carefully at them.

Several individuals have indicated that as a result of the judicial responsibilities given to the customs courts by the Trade Agreements Act of 1979, it is even more important that the courts be given the necessary plenary powers which will enable them to discharge these additional responsibilities.

Would you care to comment and, do you concur with that?

Mr. COHEN. Yes, Mr. Chairman, I do concur with that.

I think one of the major effects of the Trade Agreements Act of 1979—perhaps Mr. Abbey can add to these comments—was to increase the court's jurisdiction by allowing it to hear cases which are much closer in kind and nature to the type of case which now comes before the district courts under the Administrative Procedures Act. And I think that it is important that in those kinds of cases the district courts are able to grant full relief, because they do have full plenary powers in an article III court.

I think now under the Trade Agreements Act, with similar types of cases coming to the customs courts, it is essential that that court be able to grant the same kind of relief that you would get in a similar case in the district.

Senator DECONCINI. If the proposed Customs Courts Act is enacted into law, would you conclude that substantially fewer cases will be decided on jurisdictional grounds rather than on the merits?

Mr. COHEN. I would certainly hope that would be the case. That is a major reason for our support of the bill.

Senator DECONCINI. I have no further questions.

Mr. Romani, I forgot to ask you if you wanted to ask any questions of Judge Re. Do you have any questions?

Mr. ROMANI. No.

Senator DECONCINI. Mr. Altier?

Mr. ALTIER. Yes, I have several.

Mr. Cohen, there has been a discussion to the introduction of the bill, as to whether or not the customs courts should be granted concurrent jurisdiction as opposed to exclusive jurisdiction over merchandise imported into this country. Do you have any comments on this prior discussion?

Mr. COHEN. Well, we believe very strongly that where the customs courts are granted jurisdiction, that jurisdiction should be exclusive, in order to preserve the uniformity which we believe is very important in this area. I think if you gave the courts concurrent jurisdiction, the very real possibility exists that conflicting decisions would be issued and uniformity would not be obtained.

Mr. ALTIER. What about the subject of forum shopping? Do you think that is a question that should be addressed in the same broad issue?

Mr. COHEN. I think that is what will happen if you had concurrent jurisdiction, you would encourage forum shopping. I think that would be a very undesirable result.

Mr. ALTIER. What are some of the arguments that are put forth by those who prefer some kind of concurrent jurisdiction provisions in the bill?

Mr. COHEN. Well, I think there are various arguments that are normally put forth, but I think, at bottom, the arguments are based upon unfamiliarity with the customs court, and a fear that the court would not be able to handle these types of cases in a manner similar to the way they are now handled in the district courts. And I think that fear is unfounded, as the chief judge pointed out.

So in my opinion the arguments in favor of concurrent jurisdiction are based on fear, or unfamiliarity with the customs courts; and, in my opinion, that fear is unfounded.

Mr. ALTIER. Thank you.

In the bill, section 1581(c) provides that the Court of International Trade will have exclusive jurisdiction to review certain action of the International Trade Commission to determine the procedural regularity of those actions after the decision of the President has become final.

In my review of the statements that we received today, there seems to be some controversy on this provision of the bill. Several interested parties believe there is a serious inequity in reviewing actions of an independent agency if such review cannot be provided after the agency action but before the President has acted. Do you have any comment on this provision?

Mr. COHEN. It is clear to me that given the decisions of the Supreme Court on this subject, that if you do not delay judicial review until the President's decision has become final, you put in severe jeopardy the status of the court as an article III court.

The Supreme Court has made it quite clear in its past decisions, dealing specifically with the Court of Customs and Patent Appeals, that if the court's decision could be changed entirely by a subsequent decision of the President, then the court may not be an article III court; it may simply be an article I court.

So, I think the provision of the bill which provides for the deferral of review until after the President's decision has become final, is an attempt to prevent casting any doubt on the status of the court as an article III court.

Mr. ALTIER. Thank you.

Mr. ABBEY, I have one question on section 1581 (i) (2), the provision stating that the Court of International Trade shall not have jurisdiction to review any advice relating to classification, evaluation and so on. Could you provide the committee with your office's view on this provision of the bill?

Mr. ABBEY. Well, I think you will see in the technical comments submitted with Mr. Cohen's testimony, that both the Justice Department and the Treasury Department strongly support the particular provision as it was included in last year's bill, and were opposed to by the jurisdiction of the court, even as it has been so limited in the existing bill.

However, if this committee determines that there are situations in which the court should take jurisdiction, we have submitted certain suggestions for narrowing this, even further, so that the court does not become a substitute for the administrative review that has been given to the Treasury Department and the Customs Service.

Mr. ALTIER. Several individuals have suggested that we delete subsection (i) altogether. What would be your thoughts on that? Do you think it is necessary to have it included in the bill to clarify how these matters would be handled if they arose?

Mr. ABBEY. Yes, I think it is very necessary. I would not want to leave it in anyway open and unclear as to whether the courts may act in what would be considered as an administrative capacity. I think we want it very clear that there are only final rulings that are going to be subject to review, and not leave it wide open.

Mr. ALTIER. Our last witness, Judge Re, provided us with his comments on the inclusion of a small claims provision or small claims rule. What are your thoughts on the needs for such a provision?

Mr. ABBEY. I concur in Judge Re's comments. We believe that the Customs Service in accordance with the Customs Procedural Reform and Simplification Act enacted last year makes available now all its public rulings and unpublished rulings for review by the public. We think that this in and of itself eliminates some of the uncertainty that perhaps once was attached to importing into the United States.

We believe our administrative review provisions permits importers ample opportunity for bringing their complaints and concerns about the way we may have classified merchandise or placed merchandise to use at an early time. While we are not in the position to know whether a small claims court is really necessary, we have done everything possible to try to eliminate the need for such a court, and I think we would await the outcome of the Procedural Reform Act and the enactment of this law to see if a small claims court, small claims procedures, are really necessary.

Mr. ALTIER. Thank you.

I would guess that neither of you have had a chance to review the statement submitted by the AFL-CIO, a portion of which I read in a question to Judge Re.

Do either of you have any comment on their concept of what this bill will do, or their suggestion that it is inappropriate, that it is better to have some of these matters handled by the various districts courts throughout the country?

Mr. COHEN. If I may comment on that. I think again, to a certain extent, the opposition expressed by the AFL-CIO is in part—and this is just my opinion—is in part based upon unfamiliarity with the court.

I noticed, for example, in its statement that the organization indicates that the court, in its view, would not be familiar with issues of economics affecting a particular industry, such as those issues which may be involved in a decision on adjustment assistance.

I think that first you can start with the assumption, again as the Chief Judge has pointed out, that these are article III judges, and they are as familiar with these issues as the other article III judges.

Second, I think it is important to note that the court, in the course of reviewing the actions of the ITC, does become involved in questions involving the economics of particular industries, or economics in general.

Third, I would note that in exercising its current jurisdiction, when it reviews the question of whether or not the classification of a steel article or article made of steel is correct or incorrect, the court, in the course of the trial de novo, becomes very familiar with the intricacies of a particular industry.

So I think those three things argue against the position of the AFL-CIO, in the sense that the judges are as familiar, as other article III judges with economic issues, the court does become involved in those issues now when it reviews ITC matters, and third, the court, under its current jurisdiction, becomes involved in exploring the intricacies of various industries.

Mr. ALTIER. My last question deals with proposed section 1583, the setoff, and counterclaim provision.

Several interested parties are opposed to the language in the introduced bill. Do you have any comments on the language as found in the bill? Are there any ways to resolve some of the problems that have been raised regarding that provision?

Mr. COHEN. Well, I think the first thing that should be noted is that the language in S. 1564 has been narrowed considerably from the language last year; as we noted in the technical comments portion of our statements. In addition, I think that the provision that is in this bill can be justified on the principle that the court, in classification and valuation cases tries the issue de novo, and if it tries the issue de novo, then the result should be the correct classification or evaluation even if this results in a higher duty than that originally assessed.

The other justification for the provision is the matter of judicial economy. As we noted in our statement, from the standpoint of judicial economy, it makes sense to say that a case which would normally be brought in a district court against a defendant, should be brought in the customs court if that potential defendant is already before the court as a plaintiff in another related case.

The opposition to the provision appears to be based upon the concept that it would exercise a chilling effect upon potential plaintiffs that would preclude them, or make them hesitant to bring an action in the customs court for fear that they would be met with a counterclaim by the United States.

I can only say that there is an almost identical provision relating to the Court of Claims. The Court of Claims hears suits only against the United States initiated by private individuals or organizations who claim the Government owes them money. And whenever one of those cases is filed, we immediately ask the General Accounting Office, if it knows of any claim that the Government possesses against the plaintiff; if the General Accounting Office or the agency involved notifies us that there is such a claim, we assert the claim as a counterclaim.

Any plaintiff who institutes suit in the Court of Claims takes the risk that there will be a counterclaim filed by the United States. Yet, there are well over 1,000 cases instituted in the Court of Claims every year, and I do not think that the ability of the United States to assert a counterclaim has exercised any great chilling effect upon potential plaintiffs.

The counterclaims under this bill would be permitted only in those circumstances where the United States would be able to bring a separate action. And I do not see why a plaintiff would fear a counterclaim anymore than he would fear a separate suit by the United States.

Mr. **ALTIER**. A separate suit in the district court?

Mr. **COHEN**. In a district court of the United States. In addition, under the provisions of the bill, the counterclaim has to be related to the same import transaction, which means it is a situation in which the United States is contending that the correct classification or evaluation should have resulted in a higher duty than which was actually assessed.

Mr. **ALTIER**. Mr. Abbey, do you have any comments on that provision of the bill?

Mr. **ABBEY**. The only thing that occurred to me while Mr. Cohen was speaking was the idea of judicial economy, and that it should not be necessary for the Customs Court to render a verdict which does not uphold the Government's claims but overrules the Government's claim, but does not uphold the plaintiff's claim in the matter, and have this thing once again go through the administrative determination, and then be challenged in court at a later time.

If we are talking about judicial economy, the court should have the powers to render the correct decision in the matter at one time.

Mr. **ALTIER**. Thank you, I have no further questions.

Senator **DECONCINI**. Mr. Cohen, I want to thank you and Mr. Abbey, very much, on behalf of the committee for your time in working with the committee on this bill.

Quite frankly, without your assistance, we would still be struggling with the draft. We called upon you on numerous occasions, and we greatly appreciate the cooperativeness.

Mr. **COHEN**. Thank you very much.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF DAVID M. COHEN

Mr. Chairman, members of the committee, the bill which we are discussing today, S. 1654, is a substantially revised version of S. 2857, a bill which was introduced in the last Congress by the chairman, with the support of the Department of Justice, and which was the subject of hearings by this subcommittee a little over 1 year ago.

You and your staff are to be commended, Mr. Chairman, for the very substantial effort which you have devoted to drafting S. 1654. As you know, the Department of Justice has worked closely with your staff in this process and, as was the case with S. 2857, the Department fully supports the bill.

Mr. Chairman, during the year which has elapsed since the hearings on S. 2857, the need for a bill to expand and clarify the jurisdiction of the customs courts has not lessened. Indeed, it may have come even more urgent.

The jurisdictional confusion and remedial deficiencies which we mentioned last year as one of the principal motivating factors for the enactment of S. 2857 has continued unabated. In addition to the cases which we cited last year, we can now point to *Flintkote v. Blumenthal*, C.A. 2, No. 79-6037 (decided March 19, 1979); *National Distilling Co. v. Blumenthal*, D. D.C., Civil Action No. 79-1465; and *COMPACT v. Blumenthal*, Civil Action No. 79-1207 (D. D.C.) (decided June 26, 1979), as examples of cases which were decided upon jurisdictional grounds rather than upon their merits. Again, these cases represent instances in which individuals who believed they possessed real grievances in the field of international trade were frustrated in their attempts to obtain judicial relief either because, due to the uncertain state of the law, they elected the wrong courts in which to institute suit or because the type of relief which they could obtain in the customs courts could not grant them effective redress.

As was the case with S. 2857, the enactment of a bill such as S. 1654, appears both necessary and logical. The bill, by clarifying and expanding the jurisdiction of the customs courts and by expanding the remedial powers of those courts could enable members of the public to concentrate their efforts upon obtaining relief according to the merits of their cases and would obviate the need for them to waste valuable resources in an effort to jump jurisdictional hurdles. At the same time, the bill would relieve the district courts of some of their enormous caseload and make better use of the underutilized resources of the customs courts.

Mr. Chairman, S. 1654 would also be a natural complement to the Trade Agreements Act of 1979. This act, enacted into law during the year since the hearings on S. 2857, substantially expanded the jurisdiction of the customs courts and, for the first time, authorized the customs court, in limited circumstances, to grant injunctive relief. However, the Trade Agreements Act continued the same piecemeal approach to the jurisdiction and powers of the customs courts which has governed the courts' gradual evolution since the day of the Board of General Appraisers. Periodically, since those early days, Congress has altered the courts' status, jurisdiction, and powers, in a manner intended to solve a specific problem or need in existence at a particular time. As a consequence, the statutes governing the courts' jurisdiction and remedial powers are akin to a jigsaw puzzle with enough pieces missing to make it difficult for any but the closest observer to discern the picture which the completed puzzle was intended to depict. The Trade Agreements Act of 1979 continued this process by adding a few pieces here and there. However, the puzzle remains. S. 1654 would add the last missing pieces of the puzzle begun so many years ago by filling the few remaining spaces left open by the Trade Agreements Act of 1979.

The bill before us today would make it clear that the new United States Court of International Trade possesses broad jurisdiction to entertain any civil action arising out of import transactions and arising under our trade legislation. In addition, the bill would make it clear that, in those civil actions within its jurisdiction, the court possesses the authority to grant the relief required to remedy the injury suffered by a plaintiff. These provisions, when coupled with those contained in the Trade Agreements Act of 1979 would make it clear to all members of the public who suffer an alleged injury in this broad area that they may seek redress in a court with confidence that their case will be heard on the merits—not decided upon jurisdictional grounds—and that, if they are successful, the court will be able to afford them the relief which is appropriate and necessary to make them whole.

For this reason, Mr. Chairman, the Department of Justice supports S. 1654 and I wish only to comment briefly upon a few specific provisions of the bill.

SECTION 1581

Proposed section 1581 of title 28, the principal jurisdictional provision contained in the bill. Only two subparagraphs, subparagraphs (a) and (i), require special comment.

Subparagraph (a) of proposed section 1581, when coupled with proposed sections 2631 (a) and 2637 (a), clearly restates the law pertaining to challenges to the manner in which specific entries of merchandise are treated by the Customs Service as the law stands after the Trade Agreements Act of 1979. The major difference between this provision and the law as it stood prior to the Trade Agreements Act of 1979 is that importers must utilize the procedures set forth in section 516A of the Tariff Act of 1930, in order to challenge the imposition of a countervailing or antidumping duty. Importers can no longer utilize the procedure for challenging classification and valuation decisions to challenge the imposition of these special duties.

Of course, pursuant to the Trade Agreements Act of 1979, the same principle applies to challenges by American manufacturers, producers, and wholesalers (as well as other "interested parties"). Prior to the Trade Agreements Act of 1979, American manufacturers, producers, and wholesalers could challenge the failure to impose a countervailing or antidumping duty pursuant to the procedures set forth in section 516 of the Tariff Act of 1930. Under the law after the Trade Agreements Act of 1979 and under the provisions of this bill, these parties must utilize the procedures set forth in section 516A, rather than section 516, to challenge decisions relating to these special duties.

Subparagraph (i) (2) of proposed section 1581 relates to judicial review of advice rendered by the Secretary of the Treasury to members of the public or members of the Customs Service.

Over the years, the Customs Service has developed a procedure which it utilizes to provide advice to members of the public who wish to engage in an import transaction as to the manner in which the Service will treat an importation of merchandise, for example, the manner in which the merchandise would be classified or valued under the Tariff Schedules of the United States.

Under current law, judicial review of a ruling issued pursuant to the procedure established by the Customs Service can effectively be obtained only after an importation has occurred, the merchandise is treated in accordance with the ruling, a protest is filed and denied, the duties assessed are paid, and a civil action contesting the denial of the ruling is instituted in the Customs Court. The ruling is in effect reviewed in the course of the judicial proceeding in that the civil action challenges, in a trial de novo, a decision by the Customs Service made in accordance with the ruling.

We strongly believe that this current method of obtaining judicial review ought to be maintained. Any great deviation from the current method would open the door to the destruction of the manner in which decisions of the Customs Service have traditionally become subject to judicial review. Very few importers would import merchandise, protest and pay the duties in order to challenge Customs Service treatment of certain merchandise if they could obtain judicial review without an actual importation and without the payment of duties.

However, if the committee finds that there are circumstances in which the traditional method of obtaining judicial review of Customs Service rulings is too restrictive and that some modification is necessary, we strongly believe that any modification should be extremely limited and applicable only to those instances in which a modification is truly necessary. If the modification is too expansive, the result will be the total destruction of those current procedures which have worked well for quite a number of years.

We believe that, viewed in this light, proposed section 1581 (i) (2) is too broad and we suggest the following changes:

(1) The following phrase should be inserted in lieu of the word "advice" contained in line 7 of page 7: "ruling, or refusal to issue or to change a ruling"; and, the phrase "to members of the public or members of the Customs Service" should be deleted from lines 11 and 12 of that page. As the proposed subsection reads without this suggested change, it would apply to any advice of any type given by the Secretary to members of the Customs Service. Thus, the provision is far too broad.

Insofar as the provision can now be interpreted as permitting judicial review of "internal advice" for example, advice rendered by Customs Service headquarters to agents in the field, we do not believe that judicial review other than by means of the current procedure is necessary or warranted. "Internal advice," according to the definition contained in the relevant regulations, applies only to merchandise which has already been imported. Thus, there is no difficulty involved in obtaining judicial review by permitting the merchandise to be treated according to the internal advice, protesting, paying the duties, and contesting the denial of the protest in the Customs Court.

(2) The phrase "pursuant to applicable regulations" should be inserted after the word "Treasury" in line 11 on page 7. This phrase would make it clear that the term "ruling" is a term of art and refers to the term as used in the relevant regulations and as issued according to the procedure contained in those regulations.

(3) The reference to proposed section 1582(b) (actions instituted pursuant to section 516 of the Tariff Act of 1930) should be eliminated by changing the word "subsections" to "subsection" in line 13 and by deleting the phrase "and (b)" in lines 13 and 14.

In the Trade Agreements Act of 1979, Congress substantially expanded the right of one individual to challenge the amount of duty assessed upon the goods owned by another individual. The right to challenge a "tax" paid by another is an extraordinary right, not available in other areas of the law, and this substantive right should not be expanded further in a jurisdictional statute, such as that proposed in S. 1654, without very serious consideration.

Moreover, an American manufacturer is not injured if no importation of competing merchandise has occurred and thus there is no need for a right to obtain judicial review of a ruling with respect to a hypothetical importation of merchandise. If an importation has in fact occurred, then the American manufacturer no doubt may pursue the remedy contained in section 516 of the Tariff Act of 1930. Thus, we believe that the reference to proposed section 1581(b) in the proviso to proposed section 1581(i)(2) should be deleted.

(4) We recommend deleting all of the proviso that appears after the word "provided" on line 14 and substituting for that language the following: "That this subsection shall not apply if a plaintiff demonstrates that without substantial doubt: (a) it would be commercially impractical to obtain judicial review pursuant to subsection (a) of this section; and (b) that the plaintiff would otherwise suffer irreparable injury. If the plaintiff fulfills the conditions set forth in the preceding sentence, then the court shall award appropriate declaratory relief if the plaintiff demonstrates that the Secretary's ruling or refusal to issue or to change a ruling is arbitrary or capricious."

The addition of the requirement that a plaintiff demonstrate "irreparable injury" is desirable in order to prevent circumvention of the traditional method of obtaining review of the types of decisions mentioned in proposed subsection 1582(i)(2). It may be commercially impractical to obtain judicial review in the traditional manner, but this fact may not result in irreparable harm.

The limitation of the relief which may be obtained to "declaratory relief" is appropriate since it may be assumed that the Customs Service will abide by the court's decision.

Finally, the "arbitrary or capricious" standard is appropriate because rulings are based only upon the facts presented to the Service by the person requesting the ruling. The Service does not conduct an independent investigation of the factual context. Since the ruling is based upon the facts as presented by the person who would become the plaintiff in a suit under proposed section 1582(i)(2), that person should be bound by the facts which he presented to the Service when he requested the ruling.

One last comment concerning proposed subsection 1581(i) is appropriate. Recently, some importers have filed suits in the district courts seeking to enjoin the Customs Service from pursuing the administrative steps incident to the imposition of a penalty pursuant to section 592 of the Tariff Act of 1930. We do not believe that any court can or should grant this type of relief. The proper method of obtaining of these actions entails the exhaustion of the administration procedure, including the imposition of the penalty, if any, a refusal to pay and the initiation of suit to recover the penalty. If the person penalized believes that the penalty was wrongfully imposed, he can and should raise this issue in his defense of the suit to impose the penalty.

In order to avoid any implication that the Court of International Trade is to be empowered under S. 1654 to award the kind of relief sought in the suits

instituted in the district courts, we recommend the addition of a new subparagraph (3) to subparagraph (i) of proposed section 1581 as follows: "(3) of any civil action relating to any effort by the United States to recover a civil fine or penalty or to enforce a forfeiture, to recover upon a bond or to recover customs duties other than as specified in section 1582 of this title."

SECTION 1582

Proposed subsection 1582 provides for the transfer of certain cases from a district court to the Court of International Trade.

Proposed subsection 1582(d)(2) provides the United States with the opportunity to object to a transfer proposed by a private party. We consider this opportunity to object to be a crucial element of this entire section. In cases of this type, the United States may very well desire a jury trial. A private party should not be empowered to deprive the United States of this right by proposing a transfer to the Court of International Trade unless the United States has been afforded the right to object to the transfer.

SECTION 1583

Proposed section 1583 provides that in a limited number of circumstances the United States may assert a counterclaim or set-off against a plaintiff who has instituted an action in the Court of International Trade.

One of these circumstances concerns setoffs, demands, or counterclaims arising out of the same import transaction pending before the court. This provision is justified because, pursuant to section 2640(a), disputes concerning the classification or valuation of merchandise are to be tried de novo in the Court of International Trade. In these circumstances, the United States should be able to claim a classification or valuation which would result in a higher rate of duty than that actually assessed and, if it is able to prove that the asserted (rather than the actual) classification or valuation is indeed correct, it should be entitled to obtain a judgment for the increase in duties which should have been paid under the correct classification or valuation.

The other two situations mentioned in section 1583 are justified by considerations of judicial economy. Clearly, the United States may institute suit in a district court to recover on a bond or to recover customs duties. It appears more efficient, if the potential defendant is already before the Court of International Trade as a plaintiff, to permit the United States to assert a setoff, demand or counterclaim in that civil action rather than to permit one suit, instituted by a private party against the United States, to proceed in the Court of International Trade and one or more suits, instituted by the United States against the same private party, to proceed in a district court.

SECTION 2631

Subparagraphs (a) and (b) of proposed section 2631 do not make it clear that a suit, in the case of subparagraph (a), can only be instituted by the party whose protest has been denied (see proposed section 1581(a)) and, in the case of subparagraph (b), can only be introduced by the party who filed the petition. Accordingly, all of subparagraph (a) that follows the word "by" in line 10 of page 11 should be deleted and replaced by the following: "the person who filed a protest pursuant to section 514 of the Tariff Act of 1930." Similarly, the word "any" should be replaced by the word "the" in line 15 of page 11 and the phrase "who filed the petition" should be added after the term "interested party" in line 16 of that page.

SECTION 2635

Proposed section 2635 is concerned with the filing of official documents with the court. With respect to subparagraph (a), the term "a copy of" should be inserted after (I) on line 5 of page 17. Some entries may be covered by a general term bond which relates to entries in addition to the one before the court. Therefore, rather than file the original bond with the court, it would be preferable if a copy of the bond could be forwarded to the court in order to enable the original bond to remain on file with respect to the other entries, not before the court, to which the bond relates.

With respect to subparagraph (b), it should be made clear that the paragraph applies only to actions instituted pursuant to section 516A of the Tariff Act of 1930. If this action is not taken, the subparagraph could be read as applying to

the traditional classification and valuation cases. In order to prevent an interpretation of this nature, the phrase "In any action instituted pursuant to section 516A of the Tariff Act of 1930," should be inserted before the word "Within" on line 9 of page 10.

The phrase "by the agency whose action is being contested" should be inserted after the word "status" in line 5 on page 18 so as to make it clear which agency has accorded confidential or privileged status to the documents, comments, or information.

Subparagraph (e) (1) of proposed section 2635 specifies the documents which must be filed in suits to review specified types of agency action. This subparagraph should be modified so as to permit the parties to stipulate to the filing of fewer items with the court than those specified. This change would parallel the existing language of proposed section 2635(b) and could be accomplished by adding the following sentence at the end of the paragraph. "The parties may stipulate that fewer documents than those specified shall be transmitted to the court."

The suggested addition is appropriate because a particular suit may present only a narrow issue and it would be inefficient to require the transmission of a large number of documents to the court if many of the documents are not relevant to the issue presented.

SECTION 2636

Subsection (c) of proposed section 2636 would modify the time limit for instituting certain types of actions rendered subject to judicial review by the Trade Agreements Act of 1979. Pursuant to that act, the administering authority must make certain decisions in the antidumping and countervailing duty area within certain time periods. Sections 703(c) and 733(c) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, permit the administering authority to postpone these decisions to a different specified date under certain circumstances. Title X of the Trade Agreements Act of 1979 subjects the determination to postpone the decision to judicial review for the purpose of determining whether the decision was arbitrary or capricious. Pursuant to the Trade Agreements Act, a suit to challenge a decision to postpone must be instituted within 30 days of the date of publication of the decision in the Federal Register.

Any challenge to a determination to postpone a decision pursuant to sections 703(c) and 733(c) of the Tariff Act of 1930 will become moot as of the date specified in the decision to postpone. Therefore, the 30-day time period for the institution of suit specified in the Trade Agreements Act of 1979 appears to permit too long of a delay in the institution of suit. Section 2636(c) would shorten the time limit for the institution of suit, for these postponement decisions only, to 5 days.

Since proposed section 2636(c) would amend section 516 of the Tariff Act of 1930, a new section should be added to Title VI of S. 1654 which would provide as follows: "Section 516A(a)(1) of the Tariff Act of 1930 is amended so as to insert the phrase 'or such other time as provided by statute' between '30 days' and the word 'after'."

Proposed section 2636(e) establishes a time limit for the institution of a suit to obtain an order requiring the disclosure of confidential information obtained either by the administering authority or the International Trade Commission in the course of an investigation. This type of civil action was first authorized by the Trade Agreements Act of 1979. However, that act provided no time limit for the institution of suit.

In view of the fact that the provision granting jurisdiction to the customs court to entertain this type of suit specifically provides that an application for a disclosure order shall not have the effect of stopping or suspending the investigation in connection with which the information was obtained, and in view of the fact that by statute the investigation must be completed within a specified time, the 5-day time limit for the institution of suit provided for in proposed section 2636(e) is entirely appropriate.

Finally, the Trade Agreements Act of 1979 granted jurisdiction to the Customs Court to review certain decisions relating to country of origin. However, that act did not specify a time limit within which a suit must be instituted.

Proposed section 2636(f) would establish a 30-day time limit for the institution of a suit to review these country of origin decisions. This 30-day time limit is in accord with the other time limits for the institution of suit established by the Trade Agreements Act of 1979.

SECTION 2646

Subparagraph (a) (2) of proposed section 2643 would authorize the Court of International Trade to restore a case to its calendar, in order to permit, *inter alia*, a remand for such further administrative procedures as the court determines may be necessary.

We prefer the provisions of proposed section 2643(b) contained in S. 2857 (95th Cong., 2d Sess.) which you, Mr. Chairman, introduced in the last Congress. That provision provided for a remand by the Court to the Customs Service with the right of the importer to protest and seek subsequent judicial review if dissatisfied with the agency's action upon remand. In our view, this type of provision, with a remand for all purposes, is preferable to a provision which would empower the court to order a "limited remand" or a "remand with directions" which could conceivably be so restrictive that the Customs Service would possess no practical choice other than to decide a remander case in a particular manner. If a case is to be remanded, it should be remanded without restriction and for all purposes, so long as, proposed section 2643(b) of S. 2857 provided, the rights of the importers are protected by the right to appeal an order of remand and the right to return to court if dissatisfied with the agency's action on remand.

Section 2643(d) of title 28 as proposed by S. 1654 would authorize the Court of International Trade to issue permanent and preliminary injunctions in "extraordinary circumstances."

This provision would substantially increase the powers now possessed by the Customs Court. That court may presently issue certain injunctions only in the limited circumstances authorized by the Trade Agreements Act of 1979.

We expect this power to be used sparingly. It is quite unusual for Congress to authorize the use of injunctive powers in an area such as the collection of customs duties, which is akin to the collection of taxes.

The injunctive power granted to the Court of International Trade is limited by the fact that it may be utilized only in extraordinary circumstances. Moreover, proposed section 1581(e) of title 28 would prohibit the use of the power in cases involving adjustment assistance.

Finally, and most importantly, proposed section 2643(d) should make it clear that, among other considerations, the court is to weigh the harm to the party who requests an injunction which would occur in the absence of an injunction against the effect the issuance of the injunction would have upon the public interest.

This objective could be accomplished by substituting the following phrase for the last phrase of proposed section 2643(d): "the Court of International Trade shall consider, among other matters, whether the person making the request will otherwise be irreparably harmed, and if so, whether this irreparable injury outweighs the effect that the issuance of the requested injunction would have upon the public interest."

This proposed alteration of section 2643(d), we believe, would ensure that the issuance of an injunction will not become a routine matter and that an injunction will not be issued, for example, upon the basis that, in the absence of an injunction, the party requesting the injunction would suffer some inconvenience or some financial loss.

We are confident that, in exercising the powers conferred by this proposed section, the court will utilize the standards developed by other Federal courts. We, therefore, support section 616 of S. 1654. This section would repeal that portion of the Trade Agreements Act of 1979 which specified four factors which the customs court was required to take into account in deciding whether to exercise the limited injunctive powers granted to the courts by that act. Section 616 of S. 1654 would substitute the standards contained in proposed section 2643(d) for these four factors.

We believe that the four factors specified in the Trade Agreements Act of 1979 reflect the general state of the law as developed by the Federal courts governing the issuance of injunctions. Since we believe that proposed section 2643(d) directs the Court of International Trade to utilize these judicially developed standards, we agree that the repeal of the four factors specified in the Trade Agreements Act of 1979 is appropriate.

SECTION 503

In order to make it clear that the powers conferred upon the Court of Customs and Patent Appeals by proposed section 1546 of title 28 are those of the

courts of appeals and not those of a specialized court of appeals such as the Temporary Emergency Court of Appeals, the word "a" in line 21 of page 31 should be replaced by the word "the".

Senator DECONCINI. Our next witness is Jeffrey Lang, Deputy General Counsel, U.S. International Trade Commission.

Mr. Lang, if you would please summarize your statement, we will put it in the record in full.

STATEMENT OF JEFFREY LANG, DEPUTY GENERAL COUNSEL, U.S. INTERNATIONAL TRADE COMMISSION

Mr. LANG. Yes, Mr. Chairman, thank you.

The U.S. International Trade Commission is an independent agency of the United States, primarily assigned to giving independent advice on trade and tariff matters. The Commission also makes some determinations pursuant to organic statutes, such as the antidumping law, and the countervailing duty law.

We have tried to follow our traditional role in advising the Congress in our statement of simply advising on the effects of the statute, and telling the committee where, at any point, it may be unmanageable for us; and we have been particularly concerned in making our comments that this statute would dovetail with the Trade Agreements Act passed last July. In that connection, we have made four technical or policy comments, which are set forth in my statement.

Essentially, I would just summarize those comments very briefly. First, we have suggested that a minor change might prevent collateral attack upon Commission and Treasury Department determinations. There was one channel of review created in the Trade Agreements Act for review of antidumping and countervailing duty determinations. Unless a minor change is made, we believe it may be possible to have a collateral attack on those determinations at the time of duty assessment.

Second, we are concerned that the 5-day time limit on appeal from Commission determinations concerning the release of confidential business information may not be in the best interest of the parties submitting the information or the parties who seek its relief. We have made comments to that effect.

Third, we would like to make certain that information of a very sensitive nature received from businesses which cooperate with the Commission in its investigations would be no more available to the public in court actions than they are from the agency itself. The reason for this is that the Commission has very short time limits within which to make its determination, often less than 30 days, and so cooperation from businesses in obtaining the information is essential. Furthermore, we believe the intent behind the Trade Agreements Act was to allow no broader disclosure in the courts than was available before the agencies, and so we have recommended a change in that regard.

Finally, we have commented favorably on section 615 of the bill, which would make clear the standard of review in the U.S. Court of Customs and Patent Appeals for actions in the nature of review deriving from Commission determinations under 337 of the Tariff Act of 1930, which is the unfair practices section of the customs laws, administered by the Commission.

Mr. Chairman, that summarizes our comments. I would be glad to provide any additional assistance to the committee.

Senator DECONCINI. Mr. Lang, thank you for the expert review that you have given, and the four suggestions that you have given. I think we will be incorporating them into the redraft of the bill.

I have no questions. Mr. Altier?

Mr. ALTIER. In reviewing some of the statements that we received prior to today's hearing, a question was raised pertaining to section 615 of the bill.

I know you have commented about it in your prepared statement, as well as in some prior correspondence that we have received from your office. Unless you have anything else that you want to add pertaining to section 615 of the bill, I would like to ask you about section 1581 (c) as it would be enacted by the bill, which provides the Court of International Trade with exclusive jurisdiction to review certain actions of the International Trade Commission to determine the procedural regularity of those actions after the decision of the President has become final.

Recognizing the inappropriateness of judicial review of Presidential acts in the conduct of foreign affairs, several interested parties believe that there is a serious inequity in denying review of the actions of an independent regulatory agency, if such review can be provided after the agency action, but before the President has taken final action.

Could you provide the committee with some background on this provision of the bill and your office's position, the Commission's position, or perhaps your personal position on its inclusion in the bill?

Mr. LANG. Very well.

First, concerning 615, which you mentioned at the beginning of your comments, we have suggested that the bill include a provision, such that the analogous provision in the judicial code would be amended consistent with what you have done in the bill; and that is in my comment.

On section 1581 (c), perhaps a little background would be in order. The determinations which are the subject of that subsection, to the extent they are made by the Commission, are in the nature of expert factfinding by the Commission; and while the Commission's ultimate results are called recommendations, the fact is the President may accept or reject those recommendations, or modify them as he sees fit, and his standard for doing so is different than the one that is applicable to the Commission.

He looks at problems of the national interest, whereas the Commission looks at statutory criteria which are set forth in the law.

There are no provisions in these sections of the—of our organic statute, as there is in statutes such as the Antidumping Act and the countervailing duty law for judicial review.

So I think it is fair to assume that the Congress and committees that frame these parts of the law did not anticipate judicial review. The reason is probably that the Commission, in these investigations, is called on to make economic judgments.

They are not subject to the adjudicative provisions of the Administrative Procedures Act, and such hearings as are held are really more legislative in nature than they are quasi-judicial.

Mr. ALTIER. Is there a record available?

Mr. LANG. There is a transcript of the testimony involved, and the Commission keeps documents submitted by the parties in jackets, and folders; but the record requirement applicable to antidumping and countervailing duty actions, which were enacted in the Trade Agreements of 1979, much less the Administrative Procedures Act, are not applicable at all to these proceedings.

We think a standard of procedural regularity is correct, because we believe that we should follow the requirements of the statute that we hold a hearing and that parties be allowed to appear and make their views known to the Commission. But the—but the call that the Commission makes in each case is so much a matter of judgment, upon which the Congress has come to rely in these advisory matters, that we think it is very difficult to provide any sort of court review.

Mr. ALTIER. What would you expect the Commission's response would be if the court reviewed these actions before the President's action to determine whether they were based upon substantial evidence on the record made before the International Trade Commission?

I would guess that you would probably be opposed to that?

Mr. LANG. Personally, I would think it is unworkable. There is generally not enough time for that kind of review, and I think that that is not the—not consistent with the statutory scheme.

Essentially, in these actions, the President is making a determination of whether he is going to alter duties or other fees or entry regulations of the United States because of some phenomenon which is occurring in trade which is either injuring an industry or is somehow having an effect on our economy.

These are discretionary actions the Congress has delegated to the President, and the one condition upon them is that he receive expert advice. Before he does so, conditioning the adviser by judicial review seems to me just inconsistent with the scheme.

Mr. ALTIER. Thank you very much. I have no further questions.

Senator DeCONCINI. Thank you very much, Mr. Lang. We appreciate your testimony.

[The prepared statement of Mr. Lang follows:]

PREPARED STATEMENT OF JEFFREY M. LANG

My name is Jeffrey M. Lang, Deputy General Counsel, U.S. International Trade Commission. I am testifying here on behalf of the Commission at the invitation of the chairman of the committee concerning S. 1654, the "Customs Courts Act of 1979."

The U.S. International Trade Commission is an independent agency of the United States created to provide expert advice on and to investigate matters related to tariffs and trade. The Commission when full consists of six commissioners appointed by the President and confirmed by the Senate and a staff of approximately 400. There is currently one vacancy. The Commission is independent of the executive branch. In addition to general functions of advice, the Commission conducts investigations concerning antidumping under the Antidumping Act of 1921, the countervailing duty law, the Agricultural Adjustment Act, the Trade Act of 1974, and the Tariff Act of 1930. A number of these functions have been revised substantially by the Trade Agreements Act of 1979, Public Law 96-39, enacted July 26, 1979, but the Commission has in most cases either retained essentially the functions it previously held, or those functions have been expanded. The Commission, through its staff, provided technical advice and assistance to the Congress in preparing the Trade Agreements Act of 1979, and we, of course, would like the judicial review of Commission actions provided for in S. 1654 to be made consistent with the Trade Agreements Act.

S. 1654, which consists of six titles, has an impact upon the Commission because several Commission determinations are, by virtue of preexisting law or by virtue of the Trade Agreements Act of 1979, subject to review in the U.S. Customs Court or the U.S. Court of Customs and Patent Appeals, the courts that are the subjects of the bill. In particular, under the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, Commission determinations of material injury, threat of material injury, or material retardation of a domestic industry under the antidumping and countervailing duty laws will be subject to review at various stages in the U.S. Customs Court under section 516A of the Tariff Act of 1930, a new provision added to the Tariff Act by the Trade Agreements Act of 1979. In addition, Commission determinations pursuant to section 337 of the Tariff Act of 1930, which treats with certain types of unfair trade practices, are reviewable in the U.S. Court of Customs and Patent Appeals.

We have a number of technical comments concerning the statute, which we have prepared in an attachment to this statement. In addition to these technical comments, we would like to bring the following matters to the committee's attention:

(1) Under section 1581(a) of the judicial code (in section 302 of the bill), entitled "Civil Actions Against the United States," the Court of International Trade would have exclusive jurisdiction of civil actions relating to a number of matters involving essentially the technical aspects of the importation process. Appeal to the Court of International Trade from determinations of the Commission in antidumping and countervailing duty investigations is reserved for subsection (b) of section 1581. Nevertheless, subsection (a) provides that appeal under that subsection may include "the legality of all orders and findings entering into" the underlying administrative decision. We believe this language in the statute should be deleted, notwithstanding its historical place in the statute, because of changes wrought by the Trade Agreements Act.

Prior to the Trade Agreements Act of 1979, the exclusive means of obtaining review of antidumping and countervailing duty determinations was by making protest to customs entries, which were subjected or not subjected, as the case might have been, to a special duty assessed by the Secretary of the Treasury based upon underlying Treasury Department and U.S. International Trade Commission determinations under the antidumping act or the countervailing duty law. The judicial code provided with respect to antidumping and countervailing duty proceedings that the protest process triggered judicial review of the underlying administrative determinations of antidumping or countervailing duty as well as the actual amount of duty in question by virtue of the phrase "including the legality of all orders and findings entering into the same."

The Trade Agreements Act changed the administrative process necessary to get standing for judicial review. Under section 1001 of the Trade Agreements Act, a new section 516A was inserted in the Tariff Act of 1930 to provide for direct judicial review in countervailing duty and antidumping duty proceedings, without the necessity of first protesting the liquidation of the customs entry in question. This channel of review is intended to be exclusive and comprehensive. The Senate report on the trade agreements acts contains the following statement: "Unfortunately, the procedures contained in section 516 as amended were not particularly well-suited for suits not involving traditional classification and valuation questions. In addition, the amendments to section 516 made by the Trade Act of 1974 left unclear such questions as the scope and standard of review."

"The bill seeks to remedy these problems and others by restoring section 516, with some amendments, to its traditional role (section 1001(b) of this Act) and by creating a new section 516A which concerns only challenges to determinations relating to countervailing and antidumping duties. S. Rep. 96-249 (96th Cong., 2d Sess.) at 249."

Under the bill as presently framed, the old phrase, "including the legality of all orders and findings entering into the same," remains in section 1581(a). Section 1581(b) includes section 516A actions. We are concerned that there would be an opportunity for collateral attack upon Treasury Department and U.S. International Trade Commission determinations under the bill. The main attack could be made through the intended statutory channel of direct appeal to the U.S. Customs Court (or, under the bill, the U.S. Court of International Trade). However, when entries are made and duties assessed so as to include (or not to include, as appropriate) an antidumping or countervailing duty, then but for the amendment we propose, the protest against the duty itself might also allow a

collateral challenge to the legality of the underlying Treasury Department and U.S. International Trade Commission findings. That was not the intention of the Congress as we understand it in the trade agreements act and, in fact, would subject these determinations to multiple review in the new U.S. Court of International Trade.

(2) Section 2636(e) of the judicial code (in section 401 of the bill), entitled "Time for commencement of action," provides for time limits upon institution of actions in the U.S. Court of International Trade. Many of these time limits simply reflect or implement provisions of the law as amended by the Trade Agreements Act of 1979, but subsection (e) creates a time limit that is not included in the Trade Agreements Act and, we believe, may have some unfortunate aspects.

The underlying administrative action to which appeals affected by section 2636(e) relate are determinations by the Department of Treasury and the U.S. International Trade Commission denying requests for sensitive domestic business information obtained in the course of antidumping and countervailing duty investigations. The U.S. Customs Court may, under a new provision of the trade agreements act, issue an order directing the agencies to make all or a portion of the requested information, particularly domestic cost and price data, available under a "protective order," but the order "shall not have the effect of stopping or suspending the" underlying administrative investigation. This data may not be made public under the new law, but it may be released under a protective order restricting the persons who may see the data.

The bill provides in section 2636(e) of the amended judicial code that actions pursuant to the section permitting these appeals are "barred" unless the actions are commenced within 5 days of a denial of a request for confidential information. No time limit is placed upon the agencies involved in their determination of whether to grant or deny a request for information from a party, so the proposed provision has no effect of compelling the agencies to proceed expeditiously in granting or denying the request. Rather, the primary effect of the provision is to force persons whose requests are denied to go almost immediately to the U.S. Customs Court for an enforcing order. In fact, this procedure may urge parties to burden the court unnecessarily out of caution; it may also cause parties that are not aware of the time bar in the judicial code (the bar is not reflected in the trade agreements act) inadvertently to waive their rights to appeal from agency actions. Indeed, for the Congress not to place a time limit upon the agencies which must initially act upon such requests, but to place a limit upon the private parties once the agency has acted upon the request, may be interpreted as unfair.

(3) Section 2635(c) would allow the Court of International Trade to disclose confidential or privileged material "under such terms and conditions as it may order," notwithstanding the provision in the bill that confidential or privileged status be preserved in litigation. We believe that this language is potentially inconsistent with the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979.

Under the access-to-information provisions of the countervailing duty and antidumping laws as amended by the Trade Agreements Act of 1979, confidential information is given an absolute exemption from public disclosure. (Section 777(b)(1) of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979.) The protection of this information is continued in court proceedings for the disclosure of the information, since any orderable disclosure is limited by statute. Section 777(c)(2). The confidential record is required to be submitted to the court, but nothing in the amendments enacted by the Trade Agreements Act of 1979 permits the court to disclose information to the parties themselves. Therefore the overall effect of the trade agreements act is to maintain the confidentiality of information obtained by the Treasury Department and the U.S. International Trade Commission in proceedings under the countervailing duty and antidumping laws with the exception that this information may be disclosed under "protective orders," that is, orders which allow the release of the information to attorneys but bar the attorneys from releasing the information to their clients.

The statutory scheme for protecting the confidentiality of sensitive business information would be destroyed if the Court of International Trade were to be permitted in the course of proceedings challenging agency determinations to reveal the information to the parties themselves. The purpose of withholding the information from the parties was that the agencies would be better able to encourage private persons to submit information.

We suggest that the phrase on lines 12 and 13 of page 18 of the bill be amended by striking the words from, "and may disclose * * *" to the end of the

sentence, and substituting, "and may make such information available under a protective order consistent with section 777 of the Tariff Act of 1930." The language we propose is based upon the language of section 777 (c) (2), allowing the U.S. Customs Court (or Court of International Trade) to issue interlocutory orders requiring the agencies to make confidential information available in the course of administrative proceedings. Therefore, the effect of the language would be to disallow broader disclosure of information on appeal than would be allowed on an interlocutory basis.

(4) The Commission approves the provision of section 615 of the bill that would clarify standards of review in actions to review section 337 determinations in the U.S. Court of Customs and Patent Appeals. Section 337 authorizes the Commission to investigate and order to cease certain unfair trade practices in the import trade of the United States. Under the new law, the standards applicable under the Administrative Procedure Act to adjudicative actions of agencies will apply to all Commission determinations under section 337, except determinations of general public interest factors enumerated in the section, which may not be overturned except for abuse of discretion. No de novo court trial or court determination of the weight of the evidence would be authorized. A corresponding change in the judicial code is necessary, which we have proposed in our attached technical comments.

We appreciate the opportunity to be of assistance to the committee, and will be happy to provide any additional help we can in connection with this important legislation.

[The technical comments referred to follow:]

TECHNICAL COMMENTS OF THE U.S. INTERNATIONAL TRADE COMMISSION CONCERNING S. 1654, "CUSTOMS COURT ACT OF 1979"

1. Page 4, line 17: Change the title from "Civil Actions against the United States" to "Civil Actions against the United States and agencies thereof."

Reason for Change.—Actions arising under section 516A of the Tariff Act of 1930 may conceivably name as a defendant the U.S. International Trade Commission, an independent agency of the United States not a part of the executive branch.

2. Page 5, lines 5 and 6: After the phrase "any provisions of the custom laws" on line 6, add, "except actions otherwise appealable under section 337 of Tariff Act of 1930."

Reason for the Change.—Exclusion of merchandise from entry is a remedy under section 337. Section 337 determinations are reviewable exclusively by the U.S. Court of Customs and Patent Appeals.

3. Page 17, line 11: After the word "summons" insert "or, if a complaint is required, after service of a complaint."

Reason for the Change.—Pursuant to section 516A of the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979, certain actions are commenced by summons only; a complaint is not required until 30 days after service of the summons. Therefore, unless the proposed change is made, the agencies may be required to transmit a record with less than the full 40 days intended by this provision of the bill.

4. Page 17, line 21: Add the word "or" before the phrase "the Commission" and strike the phrase "or any other agency involved."

Reason for the change.—This provision evidently reproduces the requirements of a record for review in determinations under section 516A (b), which defines the record for purposes of that subsection, but this definition does not refer to any agencies other than "the Secretary, the administering authority, or the Commission." The change in the definition in the judicial code may be confusing.

5. Page 29, line 17: Insert in proposed title II a new section amending section 1543 of title 28 as follows: (deleted matter shown in brackets, added matter in italics):

Section 1543. United States International Trade Commission decisions.

The Court of Customs and Patent Appeals shall have jurisdiction to review [by appeal on questions of law only, the findings] *the determinations* of the United States International Trade Commission as to unfair practices in import trade, made under section 337 of Title 19, United States Code.

Reason for change.—Conforming change to take account of changes made in section 337 by section 615 of the bill.

6. Page 37, line 23: Change "section 1337 (c) of title 19, United States Code," to "section 337 of the Tariff Act of 1930."

Reason for change.—Section 337 of the Tariff Act of 1930 has never been codified and therefore a reference to the United States code citation may not be effective.

Senator DECONCINI. Our next witnesses will be Mr. Lehman, chairman, standing committee on customs law, American Bar Association; and Joseph S. Kaplan, chairman, subcommittee on the customs courts, international trade committee section of international law, American Bar Association.

Gentlemen, thank you for being here. Your statements will be put in the record in full. I would appreciate your highlighting them for us.

STATEMENT OF LEONARD LEHMAN, CHAIRMAN, STANDING COMMITTEE ON CUSTOMS LAW, AND JOSEPH S. KAPLAN, CHAIRMAN, SUBCOMMITTEE ON THE CUSTOMS COURTS, INTERNATIONAL TRADE COMMITTEE, SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION

Mr. LEHMAN. Mr. Chairman, my name is Leonard Lehman. I am the chairman of the American Bar Association's standing committee on customs law, an association that has entered its second century with 250,000 members; and I have been designated by that association to present its views on S. 1654.

I have with me Mr. Joseph S. Kaplan, who is also chairman of the subcommittee on the customs courts of the committee on international trade, section of international law of the ABA.

We appreciate the opportunity to appear before you today to present the views of the American Bar Association on S. 1654.

In June, 1978, in our testimony on S. 2857, predecessor to the present bill, we identified the following objectives which are supported by the American Bar Association:

One: Expansion and clarification of the subject matter jurisdiction of the Customs Court;

Two: Plenary judicial powers for the judges of the Customs Court;

Three: Appointment and tenure of Customs Court judges without reference to political affiliation;

Four: Greater access to the Customs Court for parties affected;

Five: Resolution of apparent jurisdictional conflicts between the Customs Court and the district court which have the effect of barring access to judicial review.

Because S. 2857 did not achieve these objectives, in its form as introduced, we opposed its enactment. We stated the following to be the policies affecting the jurisdiction of the customs courts which our association affirmatively supports:

One: The status of the Customs Court judges should be the same as that of judges of the district courts and other article III courts.

Two: The powers of the Customs Court should be the same as the powers of the district courts, including the power to grant preliminary relief in appropriate cases.

Three: There should be increased access to judicial review of Federal actions relating to imports.

Four: A comprehensive system of judicial review of Federal actions based on the customs law, and when appropriate, other laws regulating the importation of merchandise, should be established.

Five: Jurisdictional conflicts between the Customs Court and the district courts should be avoided.

Mr. Chairman, it is our pleasure to state our support for S. 1654 with very minor reservations and suggestions that we shall present for your consideration. This bill makes giant strides toward the realization of the policies and objectives adopted by the American Bar Association.

It also demonstrates, Mr. Chairman, the seriousness with which you and your subcommittee have considered the comments of the American Bar Association and others in their testimony on S. 2857, and the energy and dedication with which you and your staff have undertaken to address our concerns.

S. 1654 is a necessary companion to title X of the Trade Agreements Act of 1979. That recently enacted statute creates new rights of action and access to judicial review of governmental action and inaction in international trade and customs matters.

Significantly, title X of that statute grants parity of access to judicial review to both importers and domestic interests over a wide range of such matters. The effective implementation of these forward reaching steps awaits the passage of S. 1654.

I am going to ask Mr. Kaplan, who has been our chief technical analyst on this legislation and its predecessor, to comment only on those sections which are not yet fully consistent with the position of the American Bar Association, or where some technical problems may be lurking in its present language.

With your permission, we will submit the entire balance of the statement for the record, and Mr. Kaplan will highlight the major issues that he wishes to discuss, as Mr. Kaplan will indicate.

Senator DeCONCINI. Without objection, we will have the entire statement in the record, and Mr. Kaplan, you may proceed.

Mr. KAPLAN. Thank you, Senator, and good morning.

Mr. Lehman has expressed the thanks of the American Bar Association for the leadership you have shown in providing a bill which is a significant response to the need to reform the Customs Courts and, from what we have heard in discussions with other interested parties, is one which the public hopes to see enacted quickly.

May I also express my personal thanks for the opportunity to appear before you again, assured that our testimony of last year received the committee's fullest attention and consideration.

Section 1581(c) provides an extremely narrow scope of review; adjudication in the trial court is limited to review of the procedural regularity of various quasi-adjudicatory decisions of the ITC, and only after the President has made a decision which has become final. We think there are two very important problems with this approach.

First, 1518(c) is structured to delay access to judicial review until a final determination has been made by the President, which involves the discretionary exercise of his constitutional prerogatives. This disregards the special responsibility of the International Trade Commission to investigate, hear evidence, and decide whether the facts warrant that a claim for relief against imports shall be forwarded to the President.

Thus, Congress has charged the ITC with a quasi-judicial function: To construe a statute and determine whether the evidence meets the

statutory standard to support a claim for relief, and to dismiss a claim if the answer is negative.

Moreover, the significance of an affirmative determination should not be overlooked. It is clear that Congress intended for the President to rely very greatly on the ITC's determination. The questions of whether the ITC's "advice, findings, recommendations and determinations" are arbitrary, capricious, or unsupported by evidence, and whether the relief recommended is authorized by law are, therefore, questions affecting substantial rights deserving of timely judicial review.

Second, as we mentioned, delaying access to judicial review until the President has made a final determination shuts off the right to judicial review of domestic interests who have suffered a negative determination from the ITC. This disparity of access to judicial review is, in the judgment of the American Bar Association, inequitable.

Any modification of section 1581(c) along the lines proposed by ABA should provide for expedited review. Congress should not permit the availability of review to be exploited as a tactic to delay import relief which may be well deserved.

Section 1581(c) (2) : This exclusion limits the powers of the judges to determine whether a justiciable case of controversy exists. It directly derogates from the status of the customs courts as article III courts, and needlessly proscribes the powers of the Customs Court judges to grant equitable relief or declaratory judgment. This section, therefore, fails to meet the ABA request that judges of the customs courts be granted the same full powers in law and equity as judges of other article III courts.

Indeed, rather than granting the judges of the customs courts the power to adjudge the issue of ripeness, the proposed statute requires that the court find that "without substantial doubt, it would be commercially impractical to obtain judicial review pursuant to subsections (a) and (b) * * *."

This vague formulation will, no doubt, engender considerable litigation which, in the long run, will result in a body of judicial precedents teaching that the quoted phrase is either simply a quaint way of forbidding the adjudication of claims as to which no case or controversy exists, or is intended as some more stringent but as yet undefined test.

We believe that the ordinary standards for equitable relief or declaratory judgment are adequate and recommend that section 1581(i) (2) be deleted.

Section 1582(b) does not say what it appears to intend. Clearly, it is intended that the district court, not the defendant, should order a transfer. We have no objection to the purpose underlying this provision. We suggest that the language be amended to provide that the "district court order a transfer upon motion of the defendant."

Section 1582(d) (2) should be deleted and subsection 1582(d) (1) should be renumbered "1582(d)". Proposed subsection 1582(d) (2) limits the subject matter jurisdiction more narrowly than the analogous jurisdictional grants provided in section 1581. Proposed section 1582(d) (2) also fails to implement the important principle stated by the chairman in his message introducing this bill that the overbur-

dened judges of the district courts should be relieved of responsibilities of this kind.

The authority granted under proposed section 1582(d)(1) is sufficient to insure that all causes of action described in section 1582(a) which are instituted in a district court and which, on motion to transfer, are found to be within the scope of section 1582(a), will be transferred to the new Court of International Trade.

Section 1582(f) should provide that the trial or hearing take place in the same venue in which the district court action was instituted unless the Court of International Trade orders otherwise. The venue selected by the Department of Justice may not be the most convenient to the defendant and may not have the most natural tie to the case. It is important that after transfer, the Court of International Trade should be permitted to exercise its normal discretion in such matters.

Section 1583 should be amended to exclude setoffs, demands, and counterclaims against plaintiffs who are licensed customhouse brokers acting in an agency capacity unless the setoff, demand, or counterclaim exists against the principal.

Section 2631(g) would forbid the importer whose merchandise is the subject of a petition under section 516 of the Tariff Act of 1930 from intervening in the section 516 proceeding. Section 516 is unique in permitting a private party to challenge a revenue assessment against a third, also private, party. We think it is grossly inequitable to bar that third party from defending the assessment.

We have prepared amendatory language to carry out the modifications in S. 1654 which we have discussed, and to cure drafting errors not important enough to comment upon in our testimony. We shall be happy to submit this document to the subcommittee if you so request.

Thank you for permitting us to appear and participate in this important work.

Senator DECONCINI. Mr. Kaplan, we would indeed like to have your amendatory language. It will help us in preparing a final draft.

[The amendatory language referred to follows the prepared statement of Mr. Lehman and Mr. Kaplan.]

Senator DECONCINI. Let me also say, Mr. Lehman and Mr. Kaplan, that we thank you and the American Bar Association for your willingness to work with us.

It has been extremely helpful to put this legislation in a little better perspective than we had last year. I remember your testimony last year in opposition, and I was surprised then that you opposed it. Since then I have reviewed some of it and some of your suggestions, and I can see that very, very good changes have derived from your suggestions and your participation. In retrospect, I am very glad that you called those to our attention last year.

So we welcome your draft.

I only have a general question: If the Customs Court Act is enacted into law, would you conclude that substantially fewer cases will be decided upon jurisdictional grounds rather than other merits?

Mr. LEHMAN. I would expect that to be the case, Mr. Chairman. Yes, I would.

Senator DECONCINI. That seems to be the testimony here, and one of the important things for the subcommittee to attempt to do is to

streamline the justice system. I did not see that in your statement specifically, but I want to get it on the record.

I have no further questions. Again, my thanks. Mr. Altier, do you have any questions?

Mr. ALTIER. Yes; I have several.

Senator DECONCINI. Let me advise the next witnesses that I am going to leave the hearing for about 25 minutes for another appointment. Mr. Altier will continue to conduct the hearings, and I wish you would please come forward and present your statements. I will be back before the end of the hearings.

Mr. ALTIER. First, I would like to thank you for your specific comments on 1581(c). We will take a close look at them. We heard some testimony on that subsection earlier this morning.

Second, I understand that the Department of Justice, in their statement, in conjunction with the Treasury Department, has prepared a redrafting of subsection 1581(i)(2) which I would like you to take a look at in the next couple of days. If you have any comments on their proposed redrafting, we would like to hear from you.

Third, as I stated earlier this morning, we have some testimony in opposition to this bill from the AFL-CIO. I am not sure whether you heard their comments. I will try to summarize them for you in one paragraph.

They believe that "a specialized court of international trade is inappropriate in today's world of interdependence." They go on to state:

The opportunity for fair judicial review of problems arising from the effects of hundreds of billions of dollars worth of imports and exports every year is an objective that most Americans share. Businesses, consumers, workers and communities throughout the nations are affected by trade. The district courts, which are in the communities, are best equipped to handle issues related to these effects, because they are not solely trade problems, but domestic problems created by trade.

S. 1654 in our view is the first step to set up a special court for international traders, the practitioners and those who specialize in trade matters with interests external to the impact on the United States. In our view, such a separate bureaucracy would be an unfortunate development. For that reason, we oppose S. 1654.

Do either of you have any comment on these comments of the AFL-CIO statement?

Mr. LEHMAN. The American Bar Association has taken no position on the specifics involved. But we are dealing with an article III court and not a bureaucracy, and I think this underlines the basic vulnerability in the statement.

I think we are dealing, as Judge Re said, with competent judges who are article III judges, able to deal with any question.

Mr. ALTIER. Mr. Kaplan?

Mr. KAPLAN. I concur in the statements I heard earlier this morning, and Mr. Lehman's. I would add that there is a further consideration, which is that these cases which come before the Customs Court, or the International Trade Court that will be renamed, have an international dimension which affects the foreign policy of the United States as well.

It is therefore most important that there should be a court which is expert in the determination of those questions.

Mr. ALTIER. Another portion of the statement of the AFL-CIO states:

But there is no need for a special U.S. Court of International Trade to accomplish that goal. In fact, the name is not proper, because S. 1654 deals clearly only with import transactions—not with other aspects of international trade.

Do you have any comment on the proposed name change of the court?

Mr. KAPLAN. Again, the ABA does not have a position, but we think it is appropriate.

Mr. ALTIER. My last question deals with proposed section 1583, the setoffs, demands, and counterclaim provision.

I thought we resolved it this year, but I guess we have not. We are getting closer and closer.

I do not know if you have a copy of the bill in front of you, but there was a proposal, I think by the American Importers Association. Do you have a copy of it?

Mr. KAPLAN. Yes.

Mr. ALTIER. Begin on line 24, page 9, in section 1583, after the word "court"; end it right there.

Mr. KAPLAN. Yes.

Mr. ALTIER. Delete the rest of the provision. I know that I have not discussed this with you previously; however, we would be interested in having your comments on the provision and on the deletion.

Mr. LEHMAN. On the provision in general, I think we have heard testimony this morning about the appropriateness of a setoff and counterclaim procedure in the Customs Court as it exists in other courts.

I think the present formulation is a substantial step forward from previous formulations, which I think were far too broad; and as I interpret the present provision—and again, these are my personal views—they are intended to limit any setoffs and counterclaims to those asserted that arise out of the transaction actually pending before the court at that time. To that extent, we approach a parity of procedure with the other Federal courts.

I think the prior provisions for setoff and counterclaim, in their previous formulations, were far too broad. I do not know that we are prepared to comment for the record at this point on the proposal that you mentioned, but perhaps Mr. Kaplan, in working with you on these other drafts, can discuss it with you and the rest of your staff.

Mr. ALTIER. That would be fine. Do you have any further points on that at this point?

Mr. KAPLAN. Nothing to add to what Mr. Lehman says. May I? You said that was your last question?

Mr. ALTIER. The American Importers Association has, this year as well as last year, suggested that there be some kind of small claims procedure. The ABA probably does not have a position on that, since it was not incorporated in the bill; and I do not think you have discussed it before. At least, I am not aware of any discussion you had on that point. Do you have any thoughts about it now? I know the association does not have a view, but do either of you have personal comments on it?

Mr. LEHMAN. I do have some personal comments on it.

After many years of observation of the Customs Court, my own view coincides, I believe, with that of Judge Re. I do not believe that the

history of the court, to this point, establishes a record, if you will, a record of need that would justify the establishment of a small claims court and I say this without prejudice to the rights of each of us to evaluate the court after the 1978 and 1979 legislature packages have been in place for awhile.

Now, should such a need develop, it could then be reevaluated and considered legislatively, or through amendments to the court's rules. but I think S. 1654 is not a vehicle for the establishment of a small claims court.

Mr. ALTIER. Do you have any views on that, Mr. Kaplan?

Mr. KAPLAN. My personal view, I share the view with Judge Re that it is not necessary to legislate a small claims part. I do not think they are talking about a small claims court, but a small claims part.

Mr. ALTIER. Do you think there is a need for it?

Mr. KAPLAN. I think that the procedures of the court are so complicated and expensive that it is impossible to tell, based on past history, whether there is a need. I think that access to the court is difficult; it requires the services of a lawyer at the present time; it is time consuming; it is very involved; and I think that there should be such a small claims part.

I believe that just as a matter of equity and fairness, access to the court should be made available to small importers, individuals and cases involving very little money. Whether that would be utilized very much is another question, but I do not think that is the important question. I think availability and access are the important issues.

Mr. ALTIER. Mr. Lehman?

Mr. LEHMAN. Mr. Altier, of course the record will show that these are our personal views.

Mr. ALTIER. I understand.

I have one other comment.

In looking at our next witnesses from the Association of the Customs Bar, I think that Mr. Vance's statement suggests that proposed section 1583 be totally deleted.

What would be your response on this? Do you think there is a need for such a provision?

Mr. LEHMAN. I believe that it obviously serves a purpose that is served in other courts as well, and if the objective is to establish the Court of International Trade as a full-fledged court of plenary powers and jurisdiction as an article III court, some provision for setoffs and counterclaims is probably appropriate.

You will notice that our testimony was silent on the merits of the provision itself, aside from a specific suggestion for an amendment to deal with the appropriate situation when a broker deals as an agent.

I believe that the provision as I said is appropriate, and consistent with the procedures available for setoff and counterclaim in other Federal courts.

Mr. ALTIER. Thank you very much. I have no further questions.

Mr. KAPLAN. You did ask other witnesses questions about the two sections of the law concerning which we had commented, and I wondered if we might not reply to some of the statements that have been made.

Mr. ALTIER. Which two sections were those?

Mr. KAPLAN. One of them was section 1581.

Mr. ALTIER. (i) (2) ?

Mr. KAPLAN. No, I think we covered that adequately in our testimony.

One of them was judicial review of ITC determination, various ITC determinations. We noticed that none of the witnesses this morning recognize that a negative determination of the ITC is a final determination, and that the statute as structured would prevent judicial review of that kind of determination.

I think that we are quite in agreement with Mr. Lang's analysis of the function of the ITC, which is to construe a statute, and apply the facts to the law.

We think, therefore, that there is in the ITC a quasi-judicial function which it carries out, which requires judicial review.

Now, the standards and the scope of review could be talked about at another time. The question of whether Congress intended that there should be judicial review is a question which has not been answered in the legislation itself, because the operative legislation does not provide for judicial review.

But to our minds, that is not a reason to conclude that Congress intended there should be no judicial review to the contrary.

Mr. ALTIER. Do you have any specific language in the document that you are going to provide us with?

Mr. KAPLAN. We will provide you with documents, yes.

Mr. ALTIER. Do you have any other items which need discussion?

Mr. KAPLAN. The other provision was—oh, we are, I suppose the chief proponents of concurrent jurisdiction. And we should wish to emphasize that we do not advocate concurrent jurisdiction with regard to that subject matter as to which the Constitution requires that there be absolutely uniformity of treatment to all imports throughout the United States, but the Customs Service also administers numerous statutes, insofar as they pertain to imports, which are actually within the jurisdiction of other agencies.

For example, the Food, Drug, and Cosmetics Act, FDA, and we think that there is a danger that if all cases concerning imports as to which no entry permit is issued by the Customs Service are heard in the Customs Court; but if all cases concerning domestic products are heard in the district courts, that there could be an inequality of justice in the treatment of cases of that kind.

We do not see the problem as forum shopping. We see the problem as equality of justice, as between domestic products and imported products.

Mr. ALTIER. Do you have specific language on that point also?

Mr. LEHMAN. I believe, Mr. Altier, that in our written statement we did indicate something along these lines. Our own view is that many of the areas that created a conflict with regard to concurrent jurisdiction in the prior proposals have been eliminated from S. 1654, and are no longer in controversy, and many of the other matters that are of concern to us are handled in the transfer procedures of the bill.

Mr. ALTIER. Thank you very much.

[The prepared statement and amendatory language of Mr. Lehman and Mr. Kaplan follows:]

PREPARED STATEMENT OF LEONARD LEHMAN AND JOSEPH S. KAPLAN

Mr. Chairman, my name is Leonard Lehman. I have recently been designated as Chairman of the American Bar Association's Standing Committee on Customs Law. I am accompanied today by Joseph S. Kaplan, a member of that Committee who is also Chairman of the Subcommittee on the Customs Courts of the Committee on International Trade, Section of International Law of the A.B.A.

We appreciate the opportunity to appear before you today to present the views of the American Bar Association on S. 1654. In June, 1978, in our testimony on S. 2857, predecessor to the present bill, we identified the following objectives which are supported by the American Bar Association:

(1) expansion and clarification of the subject matter jurisdiction of the Customs Court;

(2) plenary judicial powers for the judges of the Customs Court;

(3) appointment and tenure of Customs Court judges without reference to political affiliation;

(4) greater access to the Customs Court for parties affected;

(5) resolution of apparent jurisdictional conflicts between the Customs Court and the district court which have the effect of barring access to judicial review.

Because S. 2857 did not achieve these objectives, in its form as introduced, we opposed its enactment. We stated the following to be the policies affecting the jurisdiction of the Customs Courts which our Association affirmatively supports. (The ABA Resolutions are set forth in their entirety in the Appendix attached to this statement.)

1. The status of the Customs Court judges should be the same as judges of the district courts and other Article III courts.

2. The powers of the Customs Court should be the same as the powers of the district courts, including the power to grant preliminary relief in appropriate cases.

3. There should be increased access to judicial review of federal actions relating to imports.

4. A comprehensive system of judicial review of federal actions based on the customs law, and, when appropriate, other laws regulating the importation of merchandise should be established.

5. Jurisdictional conflicts between the Customs Court and the district courts should be avoided.

Mr. Chairman, it is our pleasure to state our support for S. 1654, with very minor reservations and suggestions that we shall present for your consideration. This bill makes giant strides toward the realization of the policies and objectives adopted by the American Bar Association. It also demonstrates, Mr. Chairman, the seriousness with which you and your subcommittee have considered the comments of the American Bar Association and others in their testimony on S. 2857, and the energy and dedication with which you and your staff have undertaken to address our concerns.

S. 1654 is a necessary companion to title X of the Trade Agreements Act of 1979. That recently enacted statute creates new rights of action and access to judicial review of governmental action and inaction in international trade and Customs matters. Significantly, title X of that statute grants parity of access to judicial review to both importers and domestic interests over a wide range of such matters. The effective implementation of these forward reaching steps awaits the passage of S. 1654.

I am going to ask Mr. Kaplan, who has been our chief technical analyst on this legislation and its predecessor, to comment only on those sections which are not yet fully consistent with the position of the American Bar Association, or where some technical problems may be lurking in its present language. As Mr. Kaplan will indicate, none of these problems are insurmountable, and we believe that many, if not most of these concerns can be resolved as technical drafting matters.

Mr. Kaplan: Good morning, Mr. Chairman and members of the subcommittee. Mr. Lehman has expressed the thanks of the American Bar Association for the leadership you have shown in providing a bill which is a significant response to the need to reform the customs courts and, from what we have heard in discussions with other interested parties, is one which the public hopes to see enacted quickly. May I also express my personal thanks for the opportunity

to appear before you again, assured that our testimony of last year received the committee's fullest attention and consideration.

COMMENTS ON SPECIFIC PROVISIONS

Sec. 201

We do not see why the President should not be permitted to designate a chief judge from among the judges of the Court rather than appoint a chief judge with the advice and consent of the Senate.

Sec. 302

Section 1581(c) provides an extremely narrow scope of review; adjudication in the trial court is limited to review of the procedural regularity of various quasi-adjudicatory decisions of the ITC, and only after the President has made a decision which has become final. We foresee two important problems.

First, 1581(c) is structured to delay access to judicial review until a final determination has been made by the President which involves the discretionary exercise of his constitutional prerogatives. This disregards the special responsibility of the International Trade Commission to investigate, hear evidence, and decide whether the facts warrant that a claim for relief against imports shall be forwarded to the President. Thus, Congress has charged the ITC with a quasi-judicial function; to construe a statute and determine whether the evidence meets the statutory standard to support a claim for relief, and to dismiss a claim if the answer is negative. Moreover, the significance of an affirmative determination should not be overlooked. It is clear that Congress intended for the President to rely very greatly on the ITC's determination. The questions of whether the ITC's "advice, findings, recommendations and determinations" are arbitrary, capricious or unsupported by evidence and whether the relief recommended is authorized by law, are therefore, questions affecting substantial rights deserving of timely judicial review.

Second, as we mentioned, delaying access to judicial review until the President has made a final determination shuts off the right to judicial review of domestic interests who have suffered a negative determination from the ITC. This disparity of access to judicial review is, in the judgment of the American Bar Association, inequitable.

Any modification of section 1581(c) along the lines proposed by ABA should provide for expedited review. Congress should not permit the availability of review to be exploited as a tactic to delay import relief which may be well deserved.

Section 1581(g) grants the Customs Court, renamed the Court of International Trade, exclusive jurisdiction to grant a protective order under section 777(c) (2) of the Tariff Act of 1930. This subject matter does not involve the specialized expertise of the customs courts. ABA, therefore, recommends that jurisdiction over actions of this kind be concurrent with the district courts.

Section 1581(h) : This "catch-all" conferral of subject matter jurisdiction is actually a limitation since the grant is narrower than the intended grant of a "comprehensive system of judicial review of civil actions arising from import transactions" as proclaimed in section 101 of the bill. The terms of this provision should be amplified, however, to make clear that if the issue in controversy does not involve, at least in part, an interpretation or application of a substantive provision of a Customs or trade law identified in this subsection, and if the identified statutes are involved solely because of a ministerial enforcement action required of the Customs Service, such as the exclusion of motor vehicles not certified to meet safety standards established by the Department of Transportation, and the refusal of the latter agency to certify is at issue, concurrent jurisdiction of U.S. District Courts is not precluded.

Section 1581(i) (2) : This exclusion limits the powers of the judges to determine whether a justiciable case or controversy exists. It directly derogates from the status of the Customs Courts as article III courts and needlessly proscribes the powers of the Customs Court judges to grant equitable relief or declaratory judgment. This section, therefore, fails to meet the ABA request that judges of the Customs Courts be granted the same full powers in law and equity as judges of other Article III Courts.

Indeed, rather than granting the judges of the Customs Courts the power to adjudge the issue of ripeness, the proposed statute requires that the court find that "without substantial doubt, it would be commercially impractical to obtain judicial review pursuant to subsections (a) and (b) * * *." This vague formula-

tion will no doubt engender considerable litigation which, in the long run, will result in a body of judicial precedents teaching that the quoted phrase is either simply a quaint way of forbidding the adjudication of claims as to which no case or controversy exists, or is intended as some more stringent but as yet undefined test. We believe that the ordinary standards for equitable relief or declaratory judgment are adequate and recommend that section 1581(i)(2) be deleted.

Section 1582(b) does not say what it appears to intend. Clearly, it is intended that the district court, not the defendant, should order a transfer. We have no objection to the purpose underlying this provision. We suggest that the language be amended to provide that the "district court order a transfer upon motion of the defendant."

Section 1582(d)(2) should be deleted and subsection 1582(d)(1) should be renumbered "1582(d)". Proposed subsection 1582(d)(2) limits the subject matter jurisdiction more narrowly than the analogous jurisdictional grants provided in section 1581. Proposed section 1582(d)(2) also fails to implement the important principle stated by the Chairman in his message introducing this bill that the over-burdened judges of the district courts should be relieved of responsibilities of this kind. The authority granted under proposed section 1582(d)(1) is sufficient to ensure that all causes of action described in section 1582(a) which are instituted in a district court and which, on motion to transfer, are found to be within the scope of section 1582(a), will be transferred to the new Court of International Trade.

Section 1582(f) should provide that the trial or hearing take place in the same venue in which the district court action was instituted unless the Court of International Trade orders otherwise. The venue selected by the Department of Justice may not be the most convenient to the defendant and may not have the most natural tie to the case. It is important that after transfer, the Court of International Trade should be permitted to exercise its normal discretion in such matters.

Section 1583 should be amended to exclude setoffs, demands and counterclaims against plaintiffs who are licensed customs house brokers acting in an agency capacity unless the setoff, demand or counterclaim exists against the principal.

Sec. 401.

Section 2631(a) should grant specific standing to sureties, trustees or receivers of defunct or bankrupt importers, who by subrogation or otherwise, would normally be recognized as standing in the place of a party entitled to file a protest under section 514.

Section 2631(b) should be made symmetrical to 2631(a) by conferring standing on any person entitled to file a petition pursuant to section 516 of the Tariff Act of 1930 rather than "any domestic interested party". This proposed revision is also consistent with section 2637(b).

Section 2631(c) should be clarified to confer standing on any interested party who is a party to the *administrative* proceeding from which the action in the Court of International Trade arises.

Section 2631(g) would forbid the importer whose merchandise is the subject of a petition under section 516 of the Tariff Act of 1930 from intervening in the section 516 proceeding. Section 516 is unique in permitting a private party to challenge a revenue assessment against a third, also private, party. We think it is grossly inequitable to bar that third party from defending the assessment.

Section 2636(a)(1) could be construed as barring an action commenced within 180 days after the date of mailing of a *late* notice of denial since such notice is not "pursuant to section 515(a) of the Tariff Act of 1930." It should be made clear that this result is not intended. In the interest of deciding all real controversies on their merits, the mailing of a 'late' notice should be construed as a willingness by the Government to submit to judicial review if an action is commenced within 180 days of that mailing.

Section 2637(a) permits unjust enrichment of the United States in actions instituted and won by a surety. The excess of the recovery over the amount of the principal's indebtedness to the surety should be paid to the principal or its estate.

Sections 2640(a)(1)(A), (B) and (D) should be redrafted to clarify that in countervailing and antidumping duty cases only the duty assessment process is subject to review on the record made in the Court of International Trade; the underlying determination is subject to review as provided in section 2640(b)

and section 516A of the Tariff Act of 1930. As a matter of drafting, the word "determination" should replace "assessment" in section 2640(a)(1)(A), (B) and "determination" should replace "assessment" in section 2640(a)(1)(A), (B) and (D).

Section 2640(a)(5) should be added to provide section 2640(a) scope of review to actions transferred from the district courts. The words "or remand" should be stricken from amended section 2643(b)(2). This legislation no longer provides for remand.

Section 2646(b) should provide an absolute preference for excluded perishable merchandise among various actions which may be competing for preferential consideration after enactment.

Section 2602(a) should provide an absolute preference, among competing preferences, for cases involving excluded perishable merchandise.

We have prepared amendatory language to carry out the modifications in S. 1654 which we have discussed and to cure drafting errors not important enough to comment upon in our testimony. We shall be happy to submit this document to the subcommittee if you so request.

Thank you for permitting us to appear and participate in this important work.

APPENDIX

RESOLUTIONS ADOPTED BY HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION

(a) August, 1976

Be It Resolved, That the American Bar Association recommends that Section 251 of Title 28, United States Code, be amended to provide that:

(a) The United States Customs Court shall have, in any matter within its jurisdiction, the same powers in law and equity of, or as conferred by statute upon, a district court of the United States;

(b) The present requirement in Section 251 that not more than five of the nine Judges of the United States Customs Court shall be appointed from the same political party be deleted.

(b) August, 1976

Be It Resolved, That the American Bar Association recommends a new statutory provision be added to the existing statutory provisions concerning the jurisdiction of the United States Customs Court, to provide that in an appropriate case the Court may assume jurisdiction prior to the otherwise required exhaustion of all administrative remedies.

(c) June, 1978 (Adopted by the Board of Governors)

BE IT RESOLVED that the Association recommends the adoption of new legislation concerning the jurisdiction of the United States Customs Court, to achieve the following objectives:

1. Increased access to judicial review of cases and controversies arising out of the importation of merchandise;

2. A clear statement of the subject matter jurisdiction of the customs courts;

3. A comprehensive system of judicial review in the customs courts of executive and administrative decisions, involving imported merchandise, when such decisions are based on the customs laws and, when appropriate, other laws regulating the importation of merchandise (but such jurisdiction not to be exclusive in cases involving the question of compliance of imported merchandise with general regulatory statutes that apply to both domestic and imported merchandise); and

4. Avoidance of jurisdictional conflicts between the customs courts and other federal courts.

Mr. ALTIER. Our next witness will be James Lundquist, president of the Association of the Customs Bar; and he will be accompanied by Andrew P. Vance, a member of the association.

It is my understanding that Mr. Lundquist will make a brief statement after Mr. Vance's statement.

**STATEMENT OF JAMES LUNDQUIST, PRESIDENT, ACCOMPANIED BY
ANDREW P. VANCE, MEMBER, ASSOCIATION OF THE CUSTOMS BAR**

Mr. VANCE. Thank you, Mr. Chairman.

In the effort to conserve time and assuming that our prior 23-page statement will be inserted in the record—

Mr. ALTIER. Yes, it will be.

Mr. VANCE. I will also avoid reading the first three pages of the public statement, and will limit my oral presentation to highlighting three specific areas of concern with the proposed bill, and supplement the written comments that we have submitted thereon with regard to a particular section, ad libbing some comments in light of the testimony that has gone on.

I must report that there is one provision in this proposed bill which calls forth what appears to me to be unanimous criticism from members of the private bar and the importing public who know about the legislation. That is the provision in section 302 of the bill, the proposed 28 U.S.C. 1583, calling for setoffs, demands and counterclaims.

Since preparation of the association's statement on the bill, I have had other comments orally and in writing urging "that every possible argument to eliminate the provision for setoffs, demands and counterclaims should be made." The written statement emphasizes that despite the in rem nature of the proceedings in the Customs Court on a given entry or entries, the adjudication of an issue in that court has class action overtones.

Indeed, the importance of the court lies basically in its ability to resolve issues of general application in the area of tariffs and international trade, and those decisions most often will have an impact on parties other than the party bringing the action. I would stress that I've continuously heard the concern with the "chilling effect" which the proposed provision would have on litigation in the Customs Court.

Let me interject there. Comparisons have been made with litigation in the Court of Claims, and even in the Tax Court, and in effect saying—well, judicial efficiency would call for Government to be able to assert the counterclaim.

You must realize that in the Customs Court the Government would not be able to initiate an action contesting the appraisal or classification of merchandise. After the 90-day period, if the importer has not protested and if he does not decide to summons that case into court, the Government's action is final.

This is why in the past, and even under this proposed bill, if in the course of litigation the Government's action is proved wrong, it can assert a defense to say, well, our classification should not be this, but it should not be what the importer claims. The Customs Court can find that the Government action was wrong but that its asserted claim or defense is correct, and that will serve as a means for the Government to alter its practice with regard to unliquidated entries. It will not affect any liquidated entries, whether other importers have brought them into court or not.

There is a difference. The interest of the Government in encouraging litigation by importers is to get the correct administrative action on these matters; and they, in effect, are inviting importers to contest.

And they're saying, but you do not have to be worried, if you go into court, that you are going to end up paying more duty than you would have otherwise. But by permitting counterclaims, and it is evident from the Department of Justice's written statement, the intent of the counterclaim is to get higher duties.

If people are going to have that possibility thrown at them, plus penalty counterclaims and what have you, they are not going to come into court.

You must also realize the inequities in that what you are going to be doing is hitting the one importer who has the temerity to carry through with the action. Other importers who may have cases which they suspend or sit back on can get their cases dismissed without any of this risk because the Government has no right separately to contest those matters. So it is not like the other litigations in the Court of Claims or the Tax Court or the district court in that regard.

The Government's rights have been extinguished if it does not re-liquidate an entry within 90 days after liquidation; after that, it is foreclosed.

Now, as I say, our written comments stress the inequity of threatening an importer with counterclaims and setoffs, et cetera, where he takes on the Government in an area in which he believes that officials of that Government are acting contrary to law.

If he prevails, many other importers similarly situated, and the consuming public at large, will derive the benefit of his efforts without having assumed the financial expenses involved in litigation.

To add to that burden the risks of other matters for which the Government has other recourse can only appear as an effort to inhibit the importer from questioning Customs' administrative decisions.

Of considerable concern to the bar is the potential in the proposed provision for a penalty counterclaim, something which could only be looked upon as a threat of Government retribution were you to challenge Government actions.

There is an additional consideration which one of my colleagues has brought to my attention after our written remarks were prepared and distributed. That is that the provision for counterclaim seems to be in conflict with the policy behind the Customs Procedural Reform and Simplification Act of 1978, Public Law 95-410, which, among other things, provides for automatic liquidation within 1 year, as the general rule. The policy behind this statutory provision was to allow importers to close their books on entry transactions without fear of subsequent duty increases long after the fact. Noting the time in which it takes to litigate an action, an importer challenging what he perceived to be an unjust assessment could learn, years after the fact, that not only is this challenge rejected but that he owes more to the Government by reason of his bringing that action.

Thus, if this provision were enacted, Congress would seem to be saying on one hand that you can rest assured that you will know the extent of your final duty obligation to the Government 1 year after entry, with certain exceptions. On the other hand, should you challenge that duty assessment, you can well be faced with a higher financial obligation to the Government by dint of your having brought that challenge.

On its face, it would appear that the proposed provision is really in conflict with not only historic congressional policy in seeking to facilitate judicial review of administrative decisions, but with that, as recently expressed, of seeking an early determination of the extent of the importer's obligation to the Government on imports.

For these reasons and for those expressed in our written statement, we hope that the committee will reconsider the proposal contained in 28 U.S.C. 1583, and delete that proposal from the statute. We believe that, in that way, the importers unfettered recourse to the Customs Court will continue not only to assist the Government in its overriding interest in the correct tariff treatment of merchandise but in benefiting it in those instances where, through litigation initiated by an importer, subsequent liquidations may be made at an even higher rate than that which was contested.

The second general concern I have found with the proposed legislation is the proposed right of the Government to oppose a transfer of an action instituted by the United States under 28 U.S.C. 1582, in section 302 of this bill.

I cannot emphasize too greatly the bar's belief that a transfer of such cases should be as a matter of right where sought by the defendant.

I frankly see no basis for withholding from the Court of International Trade litigation spawned by international trade transactions. Without doubt, the trial of those matters could be facilitated in such court by that court's ability to hold sessions anywhere in the United States and, if necessary, abroad. We urge that you strike 28 U.S.C. 1582(d) (2), thus permitting a transfer as a matter of right.

I would highlight just two other concerns, in closing. First, I would hope that 28 U.S.C. 2631(g) in Section 401 could be amended so as to make it clear that the provisions for intervention are not applicable in appraisalment, classification, countervailing duty, and dumping cases—the historic subject matter jurisdiction of the customs court—to those persons who could have participated in the administrative process and did not do so.

Finally, we note our concern with the inclusion in title VI, Technical and Conforming Amendments, the change in 19 U.S.C. 337(c), section 615 of the bill, which makes an unwarranted substantive change in the scope of review of actions arising under 19 U.S.C. 337.

In conclusion, I reiterate the Association of the Customs Bar's overall support for the proposed legislation. Our thanks to the chairman, the committee, and its staff for their work in considering this important legislation of concern to the international trade community; and our hope that the bill will receive prompt favorable consideration by the subcommittee, the committee, the Senate and the House.

I do not know if you want me to comment on the Department of Justice's proposed amendment 1581 on the small claims aspect of the bill, or wait for your questions on that.

Mr. ALTIER. Please proceed.

Mr. VANCE. First of all, on small claims, again, I do not think it is appropriate to compare this to the Tax Court or the Court of Claims. There, again, it is an individual claim and an individual

against the Government. We seldom have a situation in the Customs Court of a single entry, a single importer doing it for one time.

There have been pro se proceedings, and a pro se individual does not have that much difficulty in getting into court, and he is assisted by Government counsel, and by the court, and on occasions, by assigned counsel, private counsel which of course is assigned to him.

But in effect, many entries, single entries, are under \$5,000 because a big corporation can keep bringing them in day after day, week after week; so you would have entries that would meet the jurisdictional limitations, and an attempt to try in a very summary nature, cases of concern to the Government and to the public at large.

Now, the argument is generally made, well, those decisions would not have precedental value, but the provision provides for a summary or a basis of decision to be given to the importer as well as to the Government. Now, those will be shown to imports specialists throughout the country, and it would be very difficult for an import specialist to resist the rulings of a judge on particular merchandise which is shown to him by an importer.

So the purpose of the bill, for this small claims aspect, is really not going to be to help the small importer, who I assure you already has the opportunity to come into court, but to circumvent litigation in the normal way; and precluding, by the way, review. Because the proposal would even say that decision of the trial court is final.

I think the customs court could set up a small claims section if it thought it was necessary. I do not think you need legislation for that, but I am trying to explain to you why I think some of the arguments for it are without foundation, in effect, because bringing up the Tax Court and bringing up the Court of Claims is inappropriate.

Now, on page 9, Mr. Cohen's statement this morning, and I am not sure all of this is the entire proposed change to section 1582, but I am concerned immediately with the last clause which would say that the court would, in effect, be limited to ruling whether or not the Secretary's ruling is arbitrary and capricious.

We have questions of law. It is not a matter of discretion, about which you are going before the court when there is a ruling which is, in effect, going to prevent your importing merchandise. The question is not whether he exercises discretion, which is the arbitrary and capricious test, that is to make the determination whether he has acted and considered it, the determination for the court is whether his decision is in accordance with the law.

So that sort of inclusion would be, it seems to me, contrary to everything that we have considered in this matter.

I think also the insertion of the additional language that the plaintiff would otherwise suffer irreparable injury is some effort to limit the concept of his being able to go in to seek extraordinary relief where he shows it is commercially impractical in order to obtain review.

That was language worked out in giving an opportunity to go forward in extraordinary situations, and trying to find a means whereby someone could come in without having to import merchandise, where in fact they are able to satisfy the court that it is commercially impracticable to bring in merchandise under the conditions which the Customs Service has said the statute required.

Mr. ALTIER. Thank you.

Mr. Lundquist?

Mr. LUNDQUIST. I would ask that my formal statement be inserted in the record.

Mr. ALTIER. Thank you, it will be inserted into the record.

Mr. LUNDQUIST. Thank you.

I am Jim Lundquist, and I am appearing today as president of the Association of the Customs Bar, to register support for S. 1654.

The bill is sorely needed at this time, and subject to some of the comments by my colleague, Mr. Vance, our association representing the specialists in the country support it, and hope that it can be enacted quickly.

We believe it would be in the national interest to provide exclusive jurisdiction. And you will note immediately there is some dissimilarity and views from brethren at the bar. But if obfuscation and drawing out of litigation is something that we are trying to attack, then a jurisdiction change to exclusive jurisdiction on international trade and customs matters will, I believe, serve in the long run to eliminate anomalies.

We must be attuned, of course, to the fact that this is a special judicial system unlike any other system in that customs courts' decisions are routinely applied by specialists at the administrative level to commerce throughout the United States.

It was stated earlier by you, Mr. Altier that, in referring to small claims, it might be something that you watch to develop future oversight or future changes in whatever law is passed, and I agree with your judgment on small claims, and I will not repeat what Mr. Vance and others have said. But the committee should be aware of the fact that certain review procedures, in cases involving member countries to the General Agreement on Tariffs and Trade, may go to the Common Market Court for settlement.

Procedures allowing affected parties here in the United States to submit views to the office of the Special Trade Representative, and indeed, the President, are adequate in the context of limited delegation of authority by Congress to the President for 5 years or so, such as we had in the Trade Agreements Act of 1974. But long-term dispute settlement procedures established in the Trade Agreements Act of 1979, are of a higher order. Settlement of a problem in one area of commerce resulting in retaliation by the United States or another country in another area of commerce, affecting contracts made by and entered into by U.S. companies, could leave American firms as a pawn in diplomacy without protection of their rights and obligations in the courts.

No specific answer seems to be available at this time. I have suggested in my written statement an expansion of a section to include review of 301, 302, 303 and 304 of the Trade Agreements Act of 1979.

But we cannot see down the road to precisely what problems will come up.

Mr. Chairman, that is why I was pleased at the remarks that perhaps there will be some continuing review here.

I stress, however, that a single area should not cause this bill to be delayed or changed in any material respect that would limit the general jurisdiction. I merely point out on the record that there are great

and new worlds ahead of us in international trade that should come within the ambit of the Court of International Trade.

Further, I believe that it is essential that action be taken on this legislation soon. It is true, of course, that the codes, the international codes, to which we have agreed, will become effective in January of next year, but something that has not been mentioned today could become effective in July, and that is the valuation code.

There is a move abroad to bring all valuations by people who have adopted the international code into Brussels for work on, and by, in a definitive fashion, the customs comparison council.

I and my fellows at the bar object to having our rights to judicial review sent over across the ocean to another administrative forum. Therefore, I believe continuing oversight of this law, and indeed, I hope it will become law, will look to those two items, dispute settlements and settlements abroad that may force the cause and effect here, a little additional review at the executive branch of what they do in the Government to Government review procedures for dispute settlements and enactment of this bill in time for the court to work on our valuation code on the date the international code ties us in, or locks us into new procedure.

That closes my comments. It does not detract from our support.

I would like to refer to the AFL-CIO letter in an effort to save a little time in a Q and A. I think it discloses a misunderstanding of this bill, and I am pleased to go on record to that effect. Because, if anything, I read the bill as providing more protection for U.S. companies, I mean, the so-called domestic interests; and more, rather than less, protection for the interests of labor in the United States.

Therefore, I think that their comments should be subject to our careful professional review of the bill and how it would affect them. I think it would help them.

Mr. Chairman, that concludes my remarks. Thank you very much.

Mr. ALTIER. I would like to thank you both for your comments and suggestions, and your additional comments on certain portions of the bill.

I have a couple of questions that you have not covered in your oral statements, or I do not recall them being covered pertaining to 1581(c). Did you discuss that?

Mr. VANCE. No, I think we endorsed that provision in our written comments, and we agree with the statute as proposed because we think there is not a case for controversy until the President has taken action in those instances.

You would be coming into court and seeking to challenge advice to the President before he has acted. His action may avoid the necessity of any litigation. I think you should await the presidential action where it is required.

Mr. ALTIER. Pertaining to 1583, could you possibly change your position if there were some other language included regarding a provision on counterclaim setoffs and demands? Is there any possibility of any language being inserted in there that would satisfy your needs?

Mr. VANCE. Now, I have to testify personally, because not only does the association's board of directors and its committee on procedure oppose, but as I've said, I have also gotten so much comment otherwise.

I think everybody could live with it if counterclaims were deleted if, as I understand, the purpose of counterclaims is to, one, get a

higher amount of duty than was assessed; or to bring in penalty procedures.

If, as I understand, setoffs and demands relate to particular duties owing on a particular entry, that would not present a problem; except that I know that you could not come into Customs Court, or a court of international trade, without having paid all duties owing on that particular entry.

So it would seem that, contrary to some of what has been asserted, if you are having a setoff or a demand related to the particular transaction, plaintiff would not be in court unless he had paid all duties. So, again, I do not understand the purpose, except one to inhibit litigation that would be to scare off importers coming into court; because they could dream up all kinds of terrible things that would happen to them.

So I think we have gone, since 1890, without setoffs, demands, or counterclaims, and I do not believe that a good argument has been made to provide for them now.

Any suit on bonds or what have you, I could live with that, except that that is available in the district court. And if there was something on the bond again, on the particular transaction, OK. But I do not understand how they would be in court if they had not paid all their duties.

Mr. LUNDQUIST. Mr. Altier, on that point, I have a question that I think might be worth getting on the record. I agree with Mr. Vance that this is a bad provision, and so does the bar. I agree that there should be no need to clarify that setoffs, demands, or counterclaim must relate to the specific entry or the specific merchandise. But is it the committee's intention, while we broaden to equity jurisdiction, that any setoff, demand, or counterclaim must be one that is not barred by any statute of limitations?

Mr. ALTIER. We have not looked into it.

Mr. LUNDQUIST. Well, it seems to me, if you are talking about a busy lawyer for the Government deciding to delay a case or not liking a case, and as you know, many times the administration will say, I do not want to test this legal issue, let us try to get rid of it. It seems to me if we do not have severe limitations on the kind of setoffs and demands and counterclaims to be asserted, it would be a very handy way to actually avoid litigation of issues that should be litigated.

So I would say that if there has been no consideration given to it in an excess of caution, perhaps by footnote or legislative history, it should be clearly set out that any demand, setoff, or counterclaim that is by reason of statute of limitations or administrative limitation banned, cannot be raised ab initio in any court. I still oppose the provision, but I think that would improve it.

Mr. ALTIER. All right, thank you.

I have one last question for Mr. Vance.

Mr. Lundquist commented about the discussions we had about the opposition raised by the AFL-CIO. Do you have any additional comment on that?

Mr. VANCE. Yes; I just looked over their comments briefly, and I think it is a lack of understanding, in the sense that we are not establishing a court of international trade.

All we are doing, or the proposed bill seeks to do, is to change the name of an existing court. The bill seeks really only to give plenary powers to the court to do a lot of the things which apparently the union is opposed to, which Congress has already provided shall be in the subject matter jurisdiction of the court.

I think also the AFL-CIO may not be aware of the power of the Customs Court to sit, not only anywhere in the United States and Puerto Rico, but abroad. It can send a judge abroad to take testimony, one of its own judges, not a magistrate or a commissioner or notary public designated somewhere else, but a judge of the Customs Court can take testimony abroad in appropriate actions.

I think the interests of the unions and the public at large are best served by having uniformity of decision in a court which has expertise in matters relating to international trade, and I can assure them that there are questions before the court that are not related solely to an importation per se, when you think of matters such as the surcharge and of various countervailing duty determinations.

Mr. ALTIER. Thank you very much.

[The prepared statements of Messrs. Lundquist and Vance follow:]

PREPARED STATEMENT OF JAMES H. LUNDQUIST

My name is James H. Lundquist and I am a member of the bars of Washington, D.C., New York, and Illinois. I appear before you today as president of the Association of the Customs Bar, and as a lawyer who has practiced before the U.S. Customs Courts and the U.S. Customs Service, continuously since 1957. Additionally, since 1960, I have participated in matters before the Special Trade Representative in Washington, D.C., Geneva, and elsewhere, on behalf of U.S. importers, exporters, and foreign interests. My comments today are in support of those previously submitted by Andrew P. Vance, Esq., and, of course, in support of Senate bill 1654.

The Association of the Customs Bar is a national organization of practicing attorneys who specialize in the field of international trade including, of course, customs law. Our association was chartered in the State of New York over 50 years ago and we have in the past presented views to the Congress on legislation affecting trade. Since our members practice continuously before Federal administrative agencies charged with the regulation of foreign trade and import regulations, as well as the executive branch, we regard The Customs Courts Act of 1979 as a major step forward in conforming our traditional judicial procedures to the new world of international trade.

As indicated, our board of directors adopts the comments spread on the record by Mr. Vance. Therefore, my brief appearance will be to affirm that statement and comment on one or two points of special interest.

The subcommittee's efforts to preserve historic rights to full and complete judicial review are timely. The Trade Agreements Act of 1979, Public Law 96-39, places commerce of the United States with our international trading partners, squarely within the ambit of international quasi judicial settlement procedures, not based on U.S. law, but founded in diplomacy. This is particularly true of so-called dispute settlement procedures set forth in Title IX of Public Law 96-39. The determinations and actions by the President and the U.S. Special Trade Representative (STR) employed in the enforcement of United States rights under Trade Agreements, allows private parties access to the Executive, but not participation in the process which may take place in Brussels, Geneva, Luxembourg, or elsewhere. Therefore, I believe it is important for this committee to recognize that judicial review of determinations by the STR, as presently set forth in the bill, may not reach far enough into the process of dispute settlement between governments (where private rights are involved) and indeed may be no judicial review at all. Many of us who represent domestic manufacturers, exporters, and importers, remember the astonishing effect our import surcharge had on traders, without forewarning and without participation in the process. Indeed, there were so many inequities, the original proclamation

and supporting regulations had to be amended a number of times on equitable grounds. That so-called "Nixon Shock" 10 percent import surcharge in 1971, is still in litigation.

Section 301 of S. 1654, new section 1481 of the U.S. Code title No. 28, would seem to establish full review of Presidential actions, as well as the adequacy of access to the decision-making process under most laws. One might ask, why then, there is no right to judicial review under sections 301, 302, 303, and 304, of the Trade Agreements Act of 1979, Public Law 96-39? Private rights, not privileges, may be most seriously affected by dispute settlement procedures and rulings of the Common Market Commission and/or Common Market Court in Luxembourg.

Accordingly, I suggest that the committee consider broadening judicial review in this area. A simple amendment to section 1581(f) including sections 301, 302, and 304, before specific reference to section 305(b) (i), would do the job.

One other part of the Bill deserves brief comment. Section 302, title 28, new section 1583, was covered in detail by Mr. Vance. I must add my voice in opposition. The concept of setoffs, demands, and counterclaims by the U.S. Government in cases involving judicial review of decisions by Officials after full and often very lengthy review of the law and facts, will serve only to inject non-substantive or ancillary issues in important cases of broad application. The United States Government is amply protected by various provisions of the Tariff Act and the Criminal Code. It would be undesirable to establish an obstacle of this type to speedy conclusion of judicial review.

Subject to the foregoing, we support S. 1654.

PREPARED STATEMENT OF ANDREW P. VANCE

My name is Andrew P. Vance. I am a practicing attorney in the field of customs law and international trade. From 1962 to 1976, I was Chief of the Customs Section, Civil Division, United States Department of Justice, and, since June 1976, I have engaged in the private practice of law. I appear this morning with my colleague James H. Lundquist, to present my views as an active practitioner and also to submit for the record, comments on behalf of the Association of the Customs Bar.

We support Senate bill 1654, the Customs Courts Act of 1979.

This bill has evolved as a result of the extensive hearings held last year by this committee on S. 2857 in the 95th Congress. It is obvious that the committee and its staff have studied the comments received at the hearings and thereafter from importers, Customs brokers, unions, sureties, bar associations, consumer groups, Government agencies, and the courts, and has brought forth a bill which is not only vastly improved but has had removed from it most of the controversy which surrounded the prior effort. As a practitioner and on behalf of the association, I would like to offer congratulations and thanks to the chairman, the committee, and the staff for the care and attention which has been given to this very important piece of legislation.

In fact, while the association does have suggestions which we believe will improve the bill, and while we are particularly concerned with the counterclaim and 337 review procedures presently included therein, this bill is one which but with a few changes should be speedily enacted as a noncontroversial and landmark piece of legislation.

We particularly commend and endorse the following achievements of the bill:

(1) The granting of plenary powers to the customs courts, the necessary and ultimate completion of their transformation to article III courts [Sec. 302, 28 U.S.C. 1585];

(2) The elimination of the requirement of partisanship in the selection of judges of the customs court, or the Court of International Trade as it is proposed to be called [Sec. 201];

(3) The emphasis and clarification of the Congressional intent that the customs courts' expertise in international trade matters be utilized to resolve conflicts and disputes arising out of the tariff and trade laws (Sec. 302, 28 U.S.C. 1581);

(4) The liberalization of the opportunity for, and the enlargement of the scope of, judicial review in penalty, that is, section 592, situations (Sec. 302, 28 U.S.C. 1582);

(5) The enlargement of the class of persons who can litigate or intervene in actions in the customs courts to now include exporters, foreign governments, trade associations, consumer groups, unions, and those otherwise adversely affected by administrative decisions or litigation involving our international trade and tariff laws (Sec. 401, 28 U.S.C. 2631) ;

(6) The availability of judicial review at an earlier stage in extraordinary circumstances (Sec. 302, 28 U.S.C. 1585 ; Sec. 402, 28 U.S.C. 2642(d)) ;

(7) The clarification of the record requirements and scope of review (Sec. 401, 28 U.S.C. 2635 and 2640) ; and

(8) Removal of the anomaly of having the Government prevail even when the Court has concluded it erred by permitting the courts to retain jurisdiction until the Court is able to adjudge what the proper decision should be under the statutes (Sec. 401, 28 U.S.C. 2642(b)).

As stated, we generally endorse the Bill and urge its speedy adoption with the changes recommended. We take heart from the fact it's called the Customs Courts Act of 1979, and hope it can be enacted so that the Courts' enhanced ability to give judicial relief will coincide with the enlarged jurisdiction which they have obtained in the Trade Agreements Act of 1979, effective January 1, 1980. However, we do hope the Committee will consider the following comments which we have with regard to the proposed legislation in the hope that the final legislation will be an even better realization of the purposes set out in Title I of the Bill.

TITLE I—PURPOSE

Section 101. Comment.—We endorse the laudable purposes of the act set out in section 101. However, we believe that if the Congress decides to change the name of the U.S. Customs Court to the U.S. Court of International Trade as proposed in section 101(e), then the purpose should also be stated to change the name of the U.S. Court of Customs and Patent Appeals to the U.S. Court of International Trade and Patent Appeals. We suggest that this would be a conforming change and should be made at this time regardless of the pendency of other legislation involving the possible merger of the Court of Customs and Patent Appeals and the Court of Claims. In the event that merger does occur, revisions would have to be made in various statutory provisions anyway. Therefore, it would seem appropriate that the present appellate court name be changed to indicate "its expanded jurisdiction and its new judicial function and purpose relating to interational trade in the United States" until such time as a different name is more appropriate in later legislation which would further expand its jurisdiction.

Recommendation.—Section 101(e) of Title I should be amended to read as follows :

"(e) To change the name of the United States Customs Court to the United States Court of International Trade and the name of the United States Court of Customs and Patent Appeals to the United States Court of International Trade and Patent Appeals to be more descriptive of the expanded jurisdiction and new judicial functions and purpose relating to international trade in the United States of these courts."¹

TITLE II—COMPOSITION OF THE COURT OF INTERNATIONAL TRADE AND ASSIGNMENT OF JUDGES TO OTHER COURTS.

Section 201. Comment.—The provision in the third sentence of the proposed first paragraph of the new 28 U.S.C. 251 provides for the President to "appoint" a new Chief Judge when the Chief Judge reaches 70 years of age. The last sentence provides that the Chief Judge may continue to serve until the appointment of a successor is confirmed by the Senate. As phrased, we are concerned that the use of the word "appoint" may raise a question as to whether the Chief Judge would continue to serve as a judge after the age of 70. We would suggest that the use of the word "designate" in place of "appoint" would clarify

¹ Because of this recommended change, we would change the title of the Court of Customs and Patent Appeals to the Court of International Trade and Patent Appeals wherever it appears in the proposed legislation. However, to save space, we will not make this change the subject of a separate comment each time a reference is made to the appellate court in the Bill, but will assume that recommendation to have been made and will note the change only where it occurs in a section in which we are commenting and proposing a change for other reasons.

what we believe to be the Congressional intent in a situation where a Chief Judge reaches the age of 70.

Recommendation.—Replace the word “appoint” in the third sentence of the proposed revision of 28 U.S.C. 251 with the word “designate.”

Section 202. Comment.—We endorse the proposed changes made to 28 U.S.C. 293 by section 202 of Title II.

TITLE III—JURISDICTION OF THE COURT OF INTERNATIONAL TRADE

Section 301. Comment.—We endorse the proposed repeal of the present 28 U.S.C. 1581 and 1582.

Section 302, 28 U.S.C. 1581. Comment.—We endorse the proposed 28 U.S.C. 1581(a), (b), (c), (d), (e), (f), (g), and (h).

We assume that the last clause in the proposed 28 U.S.C. 1581 (i) (2) is to take care of the concern we had expressed earlier with regard to the preceding language being construed as foreclosing “judicial review of decisions of the secretary with regard to marketing, restricted merchandise, and entry requirements which could really be final in nature and be construed by the court as creating a case or controversy worthy of judicial review. For example, advice on marking could be such as to effectively foreclose importation without an opportunity, therefore, to test the validity of the ‘advice.’ The court should be available to a business man who wishes to contest the Customs Service’s advice as to a marking requirement which would effectively foreclose importation and is arguably contrary to statutory or regulatory requirements. The judicial forum should also be available in those circumstances where a case or controversy can be shown to exist with regard to ‘advice’ on restricted merchandise or entry requirements.” In the expectation that the courts will liberally construe the proviso and the test of commercial practicality, we have no objection to the proposed 28 U.S.C. 1581 (i).

Section 302, Par. 1582. Comment.—We endorse the proposed provisions for 28 U.S.C. 1582(a), (b), (c), (d) (1), (e), and (g). For the reasons hereinafter stated, we oppose the proposed language in 28 U.S.C. 1582(d) (2) and (f).

We oppose 28 U.S.C. 1582(d) (2) on the ground that the language therein is inconsistent with the implication in section 1582(a) that the actions filed thereunder evolve from or involve imports and import transactions. That being so, there seems to be no reason why the Court of International Trade should not be the proper forum to consider all aspects of those cases. The proposed language would appear to recognize that if the case involves an issue which is historically protestable, it should be transferred. However, specifying that even such historical issues must be a “substantial” question in a case not only complicates the question of transfer for a district court but raises unnecessary complications since any of the civil actions described in 28 U.S.C. 1582(a) are usually intertwined with international trade matters and a defendant’s action should be able to be judged and construed by the specialized courts with expertise in the normal commercial practices involving importations of merchandise. There is no apparent substantive or policy reason for the enactment of this section, which goes contrary to the whole statutory scheme of this legislation. We are aware of no basis for preventing the customs courts from acquiring jurisdiction in matters which obviously arise out of importations or related import transactions.

We continue to see no reason for the inclusion in 28 U.S.C. 1582(f) of the requirement that the trial of any transferred action shall take place within the judicial district in which the action was “first instituted, as if civil action had been instituted in the Court of International Trade in the first instance.” If the case had been instituted in the Court of International Trade in the first instance, the place of trial would be controlled by the Rules of the Court. We believe that those Rules should apply to transferred cases as well. At the least, the statute should not prevent the court and the parties from having the trial at a place that may be most convenient for the parties and witnesses, and more convenient than a place in the judicial district in which the United States may have originally commenced the suit. It should also be observed that trials in the Court of International Trade often take place in more than one city for the convenience of the parties and witnesses. There should not be a statutory prohibition against the usual conduct of trials just because a case has been transferred to the Court of International Trade.

Recommendation.—Strike 28 U.S.C. 1582(d) (2) and redesignate 28 U.S.C. 1582(d) (1) as 28 U.S.C. 1582(d).

Strike everything that follows the word "jury" on the third line so that 28 U.S.C 1582 (f) shall read:

"(f) Upon receipt of the copies of the pleadings and documents, the civil action shall be heard by the Court of International Trade, sitting without a jury."

Section 302, 28 U.S.C. 1583. Comments.—We continue to oppose quite strenuously any provision for setoffs, demands, and counterclaims. We believe that the proposed provision, even if somewhat altered in this version over that proposed in section 1592 of S. 2857, is nevertheless still open to the same objections which we noted in our comments on that section. A provision for counterclaim can only have a chilling effect on litigation in the customs courts and not only continues to fail to recognize the unique nature of that litigation, but is actually contrary to the provisions of 28 U.S.C. 2643(b) of title IV of the bill which is limited to situations where the plaintiff has been unable to establish its claim although establishing the error of the Government's contested decision.

Basically, litigation in the Court of International Trade is of an in rem nature with class action overtones. Under constitutional precepts, the court's decision on classification questions or in cases involving principles generally applicable to imports will affect not only the particular importations or merchandise before the court, but all such or similar importations or merchandise. The congressional policy heretofore has sought to facilitate resort to the specialized judicial forum when importers, small or big, feel that their importations are not receiving the administrative treatment contemplated by the Congress and by the Constitution. It should be noted that absent the initiation of an action by an importer, the Government's administrative decision on the importation in question would be final unless reliquidation occurs within 90 days, in accordance with statutory prerequisites.

Merchandise and its uniform treatment for customs purposes is at the heart of litigation in the Court of International Trade, not the individual importer or plaintiff. The Constitution requires uniform treatment of merchandise at any port in the United States. Importer A should not receive more favorable treatment than Importer B, and one should not be able to seek out a port in State A over a port in State B because the customs treatment in State A will be different than the customs treatment in State B.

The appeal and protest provisions in the tariff acts and the resultant review, first exercised by the Board of General Appraisers under the 1980 Tariff Act and since 1926 by the Customs Court, has signified not only the importance which the United States gives to judicial review but the recognition by Congress of the need to satisfy the constitutional command that there be uniform treatment. Customs litigation is looked upon as a means of assuring uniform administrative interpretations of legislative initiatives and commands. Historically, the intent has been to encourage and facilitate review of Customs administrative decisions.

Until the Customs Courts Act of 1970, judicial review was automatic after the administrative filing of an appeal for reappraisal or of a protest against classification. With the tremendous increase in the volume of trade and importations, the number of cases automatically referred to the customs court was deemed to be drowning the judicial process and so changes were made which equated the initiation of actions in the customs court with initiations of actions in other courts. But at no time was it intended to inhibit the importers from seeking judicial review: the effort was merely to assure that judicial review was desired when administrative review was completed. In fact, emphasizing the desire that access to the court be facile, the filing fee in the customs court was kept considerably lower than that in other Federal courts and the initial filing paper, a summons as contrasted with a complaint, was decided upon as not only underscoring the greater ease of obtaining judicial review but in recognition of the fact that many actions are filed in the customs court which are dependent upon the result in so-called test cases. This is so because it is importations of merchandise which are the core of a civil action in the Court of International Trade. Therefore, before an issue or a question of law is resolved with regard to particular merchandise, there may be many importations of such or similar merchandise by a number of importers.

To the present day, the recognition that normally the essence of, or concern in, customs litigation is the correct (uniform) tariff treatment of merchandise rather than the individual importer is underscored by the fact that no interest is paid to an importer upon his establishing that more than the duty legally due the Government was exacted from him, and that no impediment has been placed to his initiating or taking the risk and the financial cost of litigation by threatening

him with a higher duty should he challenge the duty originally assessed. The Government's overriding interest is the correct tariff treatment of merchandise and the importer's unfettered recourse to the Court of International Trade is a means of assuring the realization of that goal. The proposed language would drastically alter this whole concept and chill the initiation of litigation. In effect, it says to an importer that if you are so brash as to challenge the Government you will run the risk of a judgment that can be higher than what we have assessed, and it is likely that counterclaims for higher assessments of duty will be asserted often as a defensive tactic. Defense against such kinds of claims will appreciably increase the cost of litigation, and on this basis alone will deter recourse to the judicial forum. At present, the Government is able to assert a counterclaim and if the customs court agrees with it to be able to use the court's declaration to that effect as the basis for customs treatment of unliquidated entries. This is a benefit which the Government derives from the initiation of litigation by an importer—it may never attain that correct treatment at a higher duty if its erroneous decisions are not challenged because of unreasonable risks—all by the importer. There seems to be no valid reason for overturning the present law in this regard.

As far as the recovery of Customs duties or recovery on a bond, we would frankly not have as much problem with a provision for a setoff or a demand limited to the same import transaction pending before the court, although we note that the Government has been provided with the facility to do both by commencing an action pursuant to 28 U.S.C. 1582. It seems pertinent to point out that no provision is made in matters commenced pursuant to 28 U.S.C. 1582 for the defendant to be able to plead as a defense any counterclaim which it may have against the Government relating to Customs duties.

It seems to us that the principle of facilitating recourse to judicial review of the usual Customs administrative decisions outweighs any provision for setoffs, demands, or counterclaims which has not hitherto been available in the usual Customs litigation and which can only be viewed as an attempt to deter or chill judicial review. We are not aware of any demonstrated needs by the Government for this provision. Absent an overwhelming public policy need to overcome the historic nature of Customs litigation, we believe that this proposed provision should be stricken in its entirety.

Recommendation.—Strike 28 U.S.C. 1583 as proposed, deleting the proposed section heading under Chapter 95 and renumbering 28 U.S.C. 1584 as 1583 and 28 U.S.C. 1585 as 1584, correcting the chapter headings as appropriate.

Section 302, 28 U.S.C. 1584 and 1585. Comment.—We endorse and support the proposed language for 28 U.S.C. 1584 and 1585, although as we note supra, we hope those sections will be renumbered 1583 and 1584 with the elimination of the provision for set-offs, demands and counterclaims, the presently proposed 1583.

TITLE IV—COURT OF INTERNATIONAL TRADE PROCEDURE

Section 401, 28 U.S.C. 2631. Comments.—We note that, as redrafted, the proposed 28 U.S.C. 2631(a) increases the class of persons who may bring an action by including any person who is entitled to file a protest under section 514, not limiting it solely to the person who had filed a protest which was denied in whole or in part. We have no objection to this enlargement of the group who can bring an action contesting the denial of a protest.

We also have no objection to enlarging the class who may bring a civil action under 28 U.S.C. 2631(b) contesting denial, in whole or in part, of the petition under section 516 of the Tariff Act of 1930, if that is really what the committee desires. See the inconsistency provision in 28 U.S.C. 2637(b) and our comments thereon, *infra*.

We have no objection to the proposed provisions of 28 U.S.C. 2631(c), (d), and (e).

As revised, we now have no objection to the proposed 28 U.S.C. 2631(f).

We assume that the provisions in what is now 28 U.S.C. 2631(g) were written to meet our objections to the problems which would be encountered by permitting intervention in the classical customs cases before the Court of International Trade. We believe that same concern applies to the cases which would come into the court by virtue of section 516A of the Tariff Act of 1930, as amended, which includes classical types of litigation, or extensions thereof. We would have no objection to the proposed language if such cases were included in the exception. This could be done very easily by excluding cases arising out of section 1581(b) as well as section 1581(a).

We support and endorse the proposed provisions of 28 U.S.C. 2631(h) and (i).

Recommendation.—(g) Substitute the phrase “sections 1581(a) and (b) of this Title,” for the phrase “section 1581(a) of this Title or section 516 of the Tariff Act of 1930.”

Section 401, 28 U.S.C. 2632, 2633, and 2634. Comment.—We support and endorse the proposed provisions of 28 U.S.C. 2632(a) and (b), 2633(a), (b), and (c), and 2634.

Section 401, 28 U.S.C. 2635. Comment.—We support and endorse the proposed provisions of 28 U.S.C. 2625(a) and (b). We believe that the confidential documents provided for forwarding in 28 U.S.C. 2635(c) should be accompanied by a nonconfidential description such as provided for in 28 U.S.C. 2635(e)(1). We endorse and support the provisions in 28 U.S.C. 2635(d) and (e).

Recommendation.—We recommend that the following sentence be added after the first sentence in 28 U.S.C. 2635(c): “Any such documents, comments or information shall be accompanied by a nonconfidential description of the nature of such confidential documents, comments or information.”

Section 401, 28 U.S.C. 2636. Comment.—We support and endorse the provisions of 28 U.S.C. 2636(a), (b), (c), (d), (e), and (g). We assume that the reference to section 305(b)(1) of the Trade Agreements Act of 1979 in 28 U.S.C. 2636(f) is inadvertent and the intended reference is to section 301 of the Trade Act of 1974. If we are correct in our assumption, we would also support and endorse that provision as amended.

Recommendation.—Substitute “301” for “305(b)(1)” in the proposed 28 U.S.C. 2636(f).

Section 401, 28 U.S.C. 2637. Comment.—We support and endorse the proposed provisions of 28 U.S.C. 2637(a) and (c).

With regard to 28 U.S.C. 2637(b), we note that it appears to be in conflict with the proposed language in 28 U.S.C. 2631(b). If this language is intended, and we would not oppose a continuation of that historic requirement, if that is the committee’s desire, we suggest that the change be effected by adding the phrase “who has first exhausted the procedure specified in that section” to 28 U.S.C. 2631(b). If that is not to be done, then the present proposed 28 U.S.C. 2637(b) should be deleted and the proposed 28 U.S.C. 2637(c) should be redesignated (b).

Section 401, 28 U.S.C. 2638 and 2639. Comment.—We support and endorse the proposed provisions of 28 U.S.C. 2638(a), (b), and (c).

Section 401, 28 U.S.C. 2640. Comment.—28 U.S.C. 2640(a)(1)(A), (B), and (D) except from determination by the Court of International Trade upon the basis of record made before the court, those actions contesting denial of a protest under section 515 to the extent judicial review is available under 19 U.S.C. 516A in the case of “assessment of countervailing or antidumping duties.” In fact, cases brought under section 516A of the Tariff Act of 1930 do not involve assessment of such duties but rather final determinations by the Secretary, by the Commission, or by the administering authority. Particular assessments per se are not at issue in those cases whereas particular assessments may be involved in entries of merchandise made subject to such determinations. We believe the Congressional intent would be better expressed by referring to determinations made reviewable under section 516A of the Tariff Act of 1930.

We support and endorse the remaining provisions of 28 U.S.C. 2640(a), (b), and (c).

Recommendation.—It is recommended that the phrase “assessment of countervailing or antidumping duties” in 28 U.S.C. 2640(a)(1)(A), (B), and (D) be stricken and the following substituted therefor: “determinations made reviewable under section 516(A) of the Tariff Act of 1930;”

Section 401, 28 U.S.C. 2641 and 2642. Comment.—We support and endorse the proposed provisions of 28 U.S.C. 2641(a) and (b), and 28 U.S.C. 2642.

Section 401, 28 U.S.C. 2463. Comment.—We believe the provisions in 28 U.S.C. 2643(a), (b), and (d) are salutary and heartily endorse and support them. In 2643(b) there is a phrase “or remand” which is left over from an earlier version and does not belong in the paragraph as presently constituted since remand is not provided but, rather, restoration to the calendar. We would therefore propose that those words “or remand” be stricken so that no ambiguity may result.

Recommendation.—Strike the words “or remand” from the last sentence in 28 U.S.C. 2643(b).

Section 401, 28 U.S.C. 2644, 2645, and 2646. Comment.—We endorse and support the proposed provisions of 28 U.S.C. 2644(a), (b), and (c), 2645, and 2646.

TITLE V—COURT OF INTERNATIONAL TRADE AND PATENT APPEALS

We support and endorse all of the proposals set forth in sections 501, 502, 503, and 504 of title V of the bill.

TITLE VI—TECHNICAL AND CONFORMING AMENDMENTS

Sections 601 through 614. Comment.—We endorse the provisions set out in sections 601 through 614 of title VI of the bill.

Section 615, 19 U.S.C. 1337(c). Comment.—We oppose this provision and were, frankly, surprised to find it in title VI of the bill, which is supposed to have appeared heretofore in other versions of this legislation and there is no provision in the other Titles of this Bill which is any basis for the proposal herein.

19 U.S.C. 337(c) currently provides that:

“(c) The Commission shall determine, with respect to each investigation conducted by them under this section whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of Chapter V of Title V. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d), (e), or (f) of this section may appeal such determination to the United States Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Customs Court.”

This provision was enacted in the Trade Act of 1974, and amended (by the inclusion of the reference to subsection (f)) in the Trade Agreements Act of 1979. It is obvious that the Congress in 1974 intended to enlarge the scope of review of the Court of Customs and Patent Appeals over determinations of the International Trade Commission under section 337. Hitherto, the Court's scope of review had been limited to questions of law only. (28 U.S.C. 1543). However, the President's role was diminished under the Trade Act of 1974 amendments and the Commission was required to make its decisions with regard to “the effect of such exclusion upon the health and welfare, competitive conditions of the United States economy, the production of like or directly competitive articles in the United States, and United States consumers” in 19 U.S.C. 337(e) upon the record and after notice and opportunity for a hearing (19 U.S.C. 337(c)).

While we question whether this substantive change in the tariff law is within the jurisdiction of the Judiciary Committee rather than the Finance Committee, we do not understand the basis for its inclusion in this statute this late in the game. The aggrieved parties from an ITC decision have been given the right of an appeal to the Court of Customs and Patent Appeals as if they were going there from a trial court. In many respects, the Commission's proceedings do parallel those of a trial situation. Since the judgment of a trial court is the nexus of an appeal, and the appellate court considers all aspects of the trial court's consideration going into that judgment, including the appropriateness of the judgment, we submit that the appellate court should be able to treat the final determinations in a 337 proceeding in a similar vein. There has been no showing of which we are aware that the appellate court has sought to overstep the usual appellate considerations and forbearance exercised in review of administrative proceedings such as those under 19 U.S.C. 337. It would seem to us that if there were going to be any technical conforming amendment with regard to 19 U.S.C. 337, it should be to amend 28 U.S.C. 1543 to conform to the language in 19 U.S.C. 337 (c).

Recommendation.—Strike section 615 as proposed and insert in its place the following:

“Sec. 615. Section 1543 of Title 28, United States Code, is amended by striking everything that appears after “review,” and inserting in its place “by appeal of a final determination of the International Trade Commission under subsection (d), (e) or (f) of section 337 of Title 19. Such determination shall be subject to review in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the United States Court of International Trade.”

Section 616. Comment.—We heartily endorse the amendment proposed in section 616 to 19 U.S.C. 516A (c) (2).

Section 617. Comment.—In accordance with our prior comments, we believe it would be appropriate to include in this section the statement that any reference to the United States Court of Customs and Patent Appeals shall be deemed a reference to the United States Court of International Trade and Patent Appeals.

Recommendations.—Insert after “Trade” the following: “and any references to the United States Court of Customs and Patent Appeals shall be deemed a reference to the United States Court of International Trade and Patent Appeals.”

Section 618. Comment.—We do not see the relation of liquidation to the provisions of subsections (c), (d), and (e) of 28 U.S.C. 2631, as added by section 401 of the Act. Perhaps the reference is meant to subsections (a) and (b). At any rate, not being sure of the intention of the drafter in this situation, we can only recommend the striking of the references to subsections (c), (d), and (e).

We endorse the proposals included in section 618 (b), (c), and (d).

Recommendation.—Strike “subsections (c), (d), (e), and” and substitute “subsection” therefor in section 618(a).

Mr. ALTIER. Our next witness will be representatives from the Administrative Conference of the United States, Robert Anthony, Chairman of the Administrative Conference, and he will be accompanied by Jeffrey Lubbers, senior staff attorney.

Because of time constraints, I would ask you to summarize your statement, if at all possible, and a copy of your prepared statement will be inserted in the record.

**STATEMENT OF ROBERT A. ANTHONY, CHAIRMAN, ACCOMPANIED
BY JEFFREY LUBBERS, SENIOR STAFF ATTORNEY, ADMINISTRATIVE
CONFERENCE OF THE UNITED STATES**

Mr. ANTHONY. Thank you, Mr. Altier.

Mr. Lubbers and I are pleased to be here today to testify.

This is a technical bill, and it raises technical issues. Though we are not specialists like the witnesses who have gone before, we are prepared to address those issues on a technical level.

I have at the outset a more general point to make. Like your subcommittee, the Administrative Conference is concerned with improvements in our governmental processes; more specifically, in our case, the procedures of the Federal agencies and judicial review of their actions.

The Administrative Conference is comprised of 91 members, of whom 11 are appointed by the President, and some 44 others are prominent officials of the agencies, and 36 are distinguished persons from private life.

Its objective is to address issues of administrative procedure and attempt to arrive at consensus judgments about good procedures.

Some of the issues addressed are very broad; some are narrow and technical.

In 1977, the Administrative Conference addressed a number of the topics that are the subject of S. 1654, and on those topics, to the extent they are embodied in the bill—which, I might interject, seems to me to be an uncommonly well drafted bill—the recommendations of the Administrative Conference are in support of the proposals.

I should mention as a caveat that the Administrative Conference takes formal positions only through its semiannual plenary sessions of

the full membership. The membership as a body has not considered S. 1654 as such. But as I say, in 1977, it did adopt its recommendation 77-2, entitled Judicial Review of Customs Service Actions, which touches several matters before you.

The Congress has already taken some significant actions to implement our recommendations. This session has seen the passage of the Trade Agreements Act of 1979 which, among other things, followed our recommendations in expanding the opportunity for affected persons to seek administrative and judicial review of Customs Service actions.

Generally, S. 1654 would enact the last significant elements of the reforms urged by our recommendation 77-2. Our recommendation addresses the adequacy of judicial review only of actions of the Customs Service, while S. 1654 addresses judicial review of all actions arising directly from transactions under the major trade acts, including actions of several other trade agencies.

Thus, there are matters covered by S. 1654 that we have not studied and upon which we can take no position. In fact, in my oral presentation, I will not touch even all of the elements of our recommendation that bear upon S. 1654, but will highlight some of the high spots.

On the composition of the court, the provisions of title II, which would remove the political limitations on appointees, and the provisions permitting the President to redesignate the chief judge from time to time, implement a paragraph of our resolution, and we support them.

The provisions in the existing law are perhaps appropriate for multimember administrative agencies, but are not consistent with the article III judicial role of the court.

With respect to the jurisdiction of the court, title III of the bill significantly expands the jurisdiction of the Customs Court. As it does so, it is largely consistent with the important paragraph (A) (1) of our recommendation 77-2, which with limited exceptions would give the customs courts exclusive jurisdiction to review any challenges to actions of the Customs Service.

Proposed section 1581 provides that the Customs Court has exclusive jurisdiction essentially over all import-related civil actions against the United States, its agencies and officers under the four major trade acts of 1930, 1962, 1974, and 1979.

Enactment of the 1979 Trade Agreements Act has paved the way for this in its title X, which added a new section 516(a) that placed the review of enumerated actions arising in countervailing duties and antidumping proceedings in the Customs Court.

So now S. 1654 seems to have been drafted to assure that all significant import-related judicial review actions will be heard by the newly constituted court, or as it is to be renamed, the Court of International Trade.

Section 1582 covers civil actions commenced by the United States. In an important portion of our recommendation, paragraph (E)—that is a misprint in my prepared testimony—we proposed a complete reform of section 592 of the Tariff Act of 1930.

This reform was largely accomplished in the 95th Congress with the passage of the Customs Procedural Reform Act, which we supported.

The amended section 592 still, however, provides for district court jurisdiction of penalty cases. The Conference, as part of its recommendation, urged that exclusive jurisdiction of penalty actions be in the customs court. The bill's approach—that is, the approach of S. 1654—of allowing the transfer of cases to the customs court upon the initiative of the defendant, seems a reasonable and worthwhile alternative.

I might interject in line with the comments of earlier witnesses, that it seems persuasive to me that the transfer should be a matter of right.

With respect to standing to seek administrative and judicial review, the question of standing to sue in the Customs Court for review of protests and review of petitions, which are covered by the principal provisions, sections 514 and 515 of the Tariff Act of 1930, this standing to sue in the Customs Court turns on resolution of who had standing to seek administrative review of the original customs action. That standing is limited by the respective sections I cited.

Our recommendation 77-2 supported an expansion in both of these areas. First, with respect to petitions, paragraph (B) of our recommendation urged expansion of the category of persons who are able to contest value, rate, or classification decisions pertaining to imports by filing petitions under section 516 of the Tariff Act of 1930.

The 1979 Trade Agreements Act and S. 1654 do just that by utilizing as a test, and broadly defining, the term "domestic interested parties" as those who may have standing.

With respect to protests, we also urged that broadening of the standing provision be effected to enable persons other than importers to seek review of actions to exclude or to admit merchandise.

The 1979 act did amend section 514 of the 1930 Tariff Act by revising the enumeration of persons who may file protests; and the amendment specifies that a protest may be filed, among others, by "any person seeking entry or delivery."

Now, this was a reformatting of the provisions of section 514, but as it is formulated, it seems to me that it may at least have a broad liberalizing effect on standing to protest, for example, by permitting a consumer organization seeking entry of merchandise to file a protest. In a recent case, *Consumers Union v. The Committee for the Implementation of Textile Agreements*, the plaintiff consumer organization was unable to obtain review of import quotas under the old law in either the district court, which had no subject matter jurisdiction, or the Customs Court, since the plaintiff, not an importer, could not protest the decision under the then language of section 514.

A further and more general expansion in standing would apparently be accomplished by subsection 2631 (f) of S. 1654. This appears to be a catchall, standing provision and it utilizes the Administrative Procedure Act's adversely affected test to cover any action not enumerated in the previous portions of that standing section 2631. This subsection would cover the final actions of the Customs Service which are not now subject to protest or petition; that is, those which primarily are at present heard in the customs court.

Therefore, the new section could take on added importance if we are wrong in our above reading of the 1979 act's amendments; for example, if we were wrong that the 1979 amendments would permit a consumer

organization the right to protest, the new catchall or residual subsection might be invoked by the organization on the ground that it was unable to file a protest, and then if it made a showing that it was adversely affected, it would have standing to obtain review.

Finally, I will address the question of burden of proof under proposed section 2639. The presumption of correctness should continue except in penalty cases, consistently with the recommendation of the Administrative Conference.

We very strongly, Mr. Chairman, support section 2643(b) which addresses a problem analyzed by our study. Under the current situation, a plaintiff challenging a protest denial in the Customs Court has a dual burden of proof: He must not only overcome a statutory presumption that the customs action was correct, but then he must also prove what specific action would have been correct. Curiously, where the plaintiff can only prove the incorrectness of the administrative action, the court has been unwilling to modify the action or remand the case to the Customs Service, and the admittedly incorrect action remains uncorrected. This portion of the bill provides a reform that is long overdue.

In closing, I would like to commend the chairman of the subcommittee and its staff for their interest in the reform of procedures for judicial review under the customs law.

Thank you, Mr. Chairman.

Senator DECONCINI. Mr. Anthony, thank you very much. Do you have any questions, Mr. Altier?

Mr. ALTIER. Yes, I have two. Is it correct that the Administrative Conference has not addressed the question of a small claims procedure in its Gerhart study?

Mr. ANTHONY. That is correct. That is to say the entire range of possible issues about judicial review of customs court actions was something that the committee—the Administrative Conference is divided into committees—our Committee on Judicial Review and our consultant, Professor Gerhart could have considered. But in the ultimate expression of the Conference's opinion, namely this Recommendation 77-2, the subject of small claims procedure was not included and I, frankly, do not know if it is some earlier preliminary stage along the line if it was discussed.

Senator DECONCINI. Mr. Anthony, just for my information, since I did not see it at the beginning of your statement, although I was not here and I just have looked at it; can you for the record and for this Senator explain the Administrative Conference? How it is organized and where did it stem from?

Mr. ANTHONY. The Administrative Conference was established by the Administrative Conference Act of 1964 after two previous temporary conferences of Members of the Congress and of high Government officials who attempted to deal with some of the common vexing problems of administrative procedure that we had been experiencing in the two previous decades, the 1950's and the 1960's. It was made a permanent agency by the 1964 act. Its mission is to work for improvements in the efficiency and fairness of the procedures of Federal administrative agencies and departments and also with respect to judicial review of the actions of such agencies. Its structure is this: It has one full-time member, namely the chairman, who is appointed;

by the President, by and with the advice of the Senate for a period of 5 years. It has 10 members of a council who serve much as a board of directors, appointed by the President for 3-year terms. It has 44 members who are the heads of agencies, or more frequently those designated by the heads, usually general counsels or from the collegial regulatory commissions, usually they are commissioners.

Finally, there are 36 distinguished people from private life who are appointed by me as chairman, with the approval of the Council, and represent a broad range of expertise and of constituent interests of persons concerned with the operation of our Government.

Senator DECONCINI. Are they an advisory committee?

Mr. ANTHONY. Yes, it is an advisory committee, but it is also an agency.

Senator DECONCINI. What kind of staff? How much staff is there?

Mr. ANTHONY. We have a staff of about 20 persons full time, of whom roughly half are lawyers and the others are support people.

Senator DECONCINI. Do you do an annual report?

Mr. ANTHONY. Yes, sir, we do. It looks like this, and I am proud to say that a copy was sent to you.

Senator DECONCINI. I am sorry I did not see it. I appreciate that background. I have no further questions.

Thank you very much.

Mr. ANTHONY. Thank you, Mr. Chairman.

[The prepared statement of Mr. Anthony follows:]

PREPARED STATEMENT OF ROBERT A. ANTHONY

Mr. Chairman and members of the committee, I am pleased to be here today to testify on S. 1654, the Customs Courts Act of 1979.

I should mention at the outset that the Administrative Conference is an agency with 91 members and takes formal positions only through actions at its semi-annual plenary sessions. The membership as a body has not considered S. 1654 as such. But in 1977 the Conference did study and make specific recommendations relating to aspects of Judicial Review of Customs Service Actions (Recommendation 77-2).

Congress has already taken some significant actions to implement our recommendation. The passage last session of the Customs Procedural Reform and Simplification Act of 1978 (Public Law 95-410) effected a long-needed reform, which we advocated, of the Customs civil penalty process. This session has seen the passage of the Trade Agreements Act of 1979 (Public Law 96-39) which, among other things, followed our recommendation in expanding the opportunity for affected persons to seek administrative review of Customs Service actions.

Generally, S. 1654 would enact the last significant elements of the reforms urged by our recommendation 77-2, a copy of which we have attached as appendix B to this statement. Copies of the report supporting this recommendation have been made available to the committee (see Gerhart, *Judicial Review of Customs Service Actions*, 9 Law & Pol'y Int'l Bus 1101 (1978)). Our recommendation addresses the adequacy of judicial review only of actions of the Customs Service, while S. 1654 addresses judicial review of all actions arising directly from import transactions under the major trade acts including actions of several other agencies. Thus, there are matters covered by S. 1654 that we have not studied and upon which we can take no position.

COMPOSITION OF THE COURT

Title II of the bill would remove both the political limitation on appointees to the Customs Court¹ and the provision permitting the President to designate the

¹ Although the bill would change the name of the U.S. Customs Court to the U.S. Court of International Trade, for convenience I will refer to the Court in this Statement as the Customs Court.

chief judge "from time to time". These proposals implement paragraph A(3) of recommendation 77-2 and we support them. The provisions in the existing law are appropriate perhaps for multimember administrative agencies, but are not consonant with the article III judicial role of the court.

I would observe that section 201 needs a minor clarification on the issue of whether a chief judge may continue to serve as an associate judge on the court after being replaced as chief upon reaching the age of seventy.

JURISDICTION OF THE COURT

Title III of the bill significantly expands the exclusive jurisdiction of the Customs Court. It is largely consistent with paragraph A(1) of recommendation 77-2, although it takes a somewhat different approach from our recommendation which focused exclusively on actions of the Customs Service.

Proposed section 1581 provides that the customs court have exclusive jurisdiction essentially over all civil actions against the United States, its agencies and officers arising under the four major trade acts (of 1930, 1962, 1974 and 1979). Enactment of the 1979 Trade Agreements Act has paved the way for this in its title X, which added a new section 516A (to be 19 U.S.C. § 1516a) that placed the review of enumerated actions arising in countervailing duties and antidumping proceedings in the customs court. S. 1654 seems to have been drafted to assure that all significant import-related judicial review actions will be heard by the newly constituted Court.²

Section 1582 covers civil actions commenced by the United States. In paragraph D of recommendation 77-2, we proposed a complete reform of section 592 of the Tariff Act of 1930. This was largely accomplished in the 95th Congress with the passage of H.R. 8149 (Public Law 95-410), the Customs Procedural Reform Act, which we supported. The amended section 592 (19 U.S.C. § 1592) still, however, provides for district court jurisdiction of penalty cases. The Conference, as part of its recommendation, urged that exclusive jurisdiction of penalty actions be in the customs court. This was urged on the theory that the court's ability to hold hearings outside New York could be improved and that a jury-trial provision could be added if necessary. Although the bill does not adopt this approach, its proposal to allow the transfer of cases to the customs court, upon the initiative of the defendant, seems a reasonable and workable alternative.

The amendment of section 592, however, may necessitate a revision in the bill's proposed transfer scheme. I refer specifically to the new section 592(e) which describes the scope of review and burden of proof in district court cases. These provisions probably should also be made applicable to cases that have been transferred to the customs court. If so, proposed subsection 1582(g) could be changed to incorporate by reference the provisions of 19 U.S.C. § 1592(s).

The proposed provision permitting transfer of misfiled cases, section 1584, seems worthwhile. The Administrative Conference has made a similar recommendation with respect to transfer of cases under the Federal pollution laws, see ACUS Recommendation 76-4(B)(3). [1 C.F.R. § 305.76-4]

The provision in section 1585 granting the customs court those general powers conferred by statutes upon district courts is consistent with our recommendation, paragraph A(2).

STANDING TO SEEK ADMINISTRATIVE AND JUDICIAL REVIEW

Section 401 amends 28 U.S.C. §§ 2631-2646. Proposed new section 2631 articulates the test for standing to sue for litigants in the customs court. Subsection (a) provides that where the action is filed to contest the denial of a protest under section 515 of the Tariff Act of 1930, the action may be instituted by the person who has filed the protest under section 514. Subsection (b) provides similarly that actions to contest a denial of a petition under section 516 of the Tariff Act may be filed by the petitioner.

² A possible omission, however, might be suits challenging the exclusion of merchandise by the Customs Service under a law that is neither a "customs law" nor one of the enumerated Acts (for example, switchblade knives, 15 U.S.C. § 1241). We have no information on the frequency of such cases. In our comments on S. 2857, 95th Cong., the predecessor to this bill, we suggested that all final actions of the Customs Service be explicitly made reviewable in the customs court except (1) actions pertaining to the exclusion of merchandise under a law that is not a customs law and taken by the Customs Service on the request or at the direction of a court or another federal agency, and (2) as otherwise provided by law. See proposed section 2640(a)(1)(C).

Thus, the standing-to-sue question, for review of protests and petitions covered by these sections, turns on resolution of who had standing to seek administrative review. Our recommendation 77-2 supported an expansion in both areas. Paragraph B of the recommendation urged expansion of the category of persons who are able to contest value, rate or classification decisions pertaining to imports by filing petitions under section 516 of the Tariff Act of 1930. The 1979 Trade Agreements Act did just that by utilizing as a test, and broadly defining, "domestic interested parties." This bill makes no change in that liberalization.

We also urged that broadening of the standing provision be effected to enable persons other than importers to seek administrative review (by protest) of actions to exclude or to admit merchandise. The 1979 act did amend section 514 of the 1930 Tariff Act (19 U.S.C. § 1514) by revising the enumeration of persons who may file protests. The amendments specify that a protest may be filed, inter alia, by "any person seeking entry or delivery." This change may have broad liberalizing effects on standing to protest, for example, by permitting a consumer organization seeking entry of merchandise to file a protest. (Compare *Consumers Union v. Comm. for the Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), where the plaintiff consumer organization was unable to obtain review of import quotas under the old law in either the district court (which had no subject matter jurisdiction) or the customs court (since the plaintiff, not an importer, could not protest the decision).)

The expansion in standing to seek administrative review under the trade act is incorporated in the provisions of S. 1654 relating to standing to seek judicial review. Subsection 2631(f) is a residual standing provision, utilizing the Administrative Procedure Act's "adversely affected" test to cover any action not enumerated in section 2631(a)-(e). This subsection would cover the final actions of the Customs Service not now subject to protest or petition (for example, suspension of immediate delivery permits). The residual standing provision could, however, take on added importance if our above reading of the 1979 act's amendments to the protest section is incorrect. If, for example, a consumer organization is denied the right to protest an exclusion under the amended section 1514, we assume it could then invoke § 2631(f) (since the organization was unable to file a protest) and make a showing that it was adversely affected.

BURDEN OF PROOF

Proposed section 2639 is consistent with the Conference recommendation that the presumption of correctness should continue except in penalty cases.

We strongly support section 2643(b) which addresses a problem analyzed by our study. Under the current situation, a plaintiff challenging a protest denial in the customs court has a dual burden of proof: He must not only overcome a statutory presumption that the customs action was correct, but must then also prove what specific action would have been correct. Curiously, where the plaintiff can only prove the incorrectness of the administrative action, the court has been unwilling to modify the action or remand the case to the Customs Service, and the admittedly incorrect action remains uncorrected. This portion of the bill provides a reform that is overdue.

SCOPE OF REVIEW

There is a possible difficulty with the scope-of-review section in the bill, section 2640. Subsection (c) provides that in all actions not enumerated in section 2640(a) and (b), the scope of review is as provided in 5 U.S.C. § 706. Section 706, of course, provides for substantive and procedural review. However, the category of cases covered by this subsection would include those specified in section 1581(c) and (d) which provide that review is "solely for the purpose of determining the procedural regularity". This inconsistency should be rectified, possibly by adding an additional subsection to section 2640.

EXPEDITED CASES

Section 2646 adopts our recommendation (paragraph (D)(1)) to grant precedence on the court's docket to cases involving the exclusion of merchandise. As our study pointed out, imports may be perishable or seasonal merchandise or the importer may need the merchandise to fulfill production or marketing

commitments. In such instances even temporary exclusion may have a permanent and irreparable effect on the importer. Administrative review of exclusion decisions can be had rapidly via protest procedures. It is important that judicial review of such cases also be as speedy as possible. Proposed section 2602, which we also support, applies this provision to the Court of Customs and Patent Appeals.

In closing, I would like to commend the Chairman, the Subcommittee and its staff for their interest in the reform of procedures for judicial review under the customs laws.

Thank you Mr. Chairman.

Minor Textual Corrections

- p. 12, line 18: substitute "listed in" for "under"
- p. 16, line 25: add "or petition"
- p. 17, line 1: should read "denial of protest or petition"
- p. 19, lines 14, 18: "court" should be capitalized
- p. 25, line 19: "Civil" should not be capitalized
- p. 27, line 13: "order" should be "orders"

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

APPENDIX B

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OFFICE OF
 THE CHAIRMAN

RECOMMENDATION 77-2: JUDICIAL
REVIEW OF CUSTOMS SERVICE ACTIONS
 (Adopted September 15-16, 1977)

A. Jurisdiction and Powers of the Customs Court

The Customs Court has exclusive jurisdiction to review decisions of the Customs Service (1) denying protests of importers relating to certain enumerated matters and (2) rejecting petitions of United States manufacturers, producers or wholesalers to challenge certain actions taken with respect to merchandise imported by others. Actions of the Customs Service suspending or revoking customs brokers licenses are reviewable, by statute, in the courts of appeals.^{1/} There are other actions of the Customs Service that are administratively final but for which no specific statutory provision for review has been made. These include decisions made by the Service to suspend or discontinue permits for immediate delivery of merchandise as well as decisions to exclude certain types of merchandise from entry. Such actions are now reviewable, if at all, in the district courts pursuant to their general or special jurisdiction.

Moreover, the Customs Court does not have power at present to "compel agency action unlawfully withheld or unreasonably delayed," as can district courts under the APA, 5 U.S.C. §706(1). The Customs Service sometimes fails to act on significant matters for such extended periods that its inaction may amount to agency action, as defined by 5 U.S.C. §551(13) to include "failure to act." An example is the failure or refusal of the Service to complete the final assessment of duties payable on an importation. Finally, the Customs Court has no power at present to provide relief until after the protest or petition process has run its course even though the Customs Service has taken action with such immediate and drastic impact on a person that a district court considering comparable action of another agency would treat it as final for purposes of review. The recommendation would provide for review by the Customs Court of the final actions and failures to act just described.

Decisions to exclude merchandise may be made either by the Customs Service or another agency, such as the Food and Drug Administration. All exclusion decisions pursuant to a customs law (*i.e.*, a law applicable only to imported merchandise, usually codified in Title 19 of the United States Code), whether made by the Customs Service or some other agency, are now reviewable in the Customs Court. This review would be unaffected by the recommendation. Exclusion decisions under a law that is not a customs law are never reviewed in the Customs Court. When such an exclusion decision is made by an agency other than the Customs Service, the Customs Court does not, and under the recommendation would not, review the decision. However, when such an exclusion decision is made by the Customs Service, the recommendation would give the Customs Court exclusive jurisdiction to review it.

The Customs Court has sometimes been said not to have "equity powers." What is meant by this is not clear, but the recommendation would give the Customs Court all powers, injunctive and other, of the district courts.

^{1/} The Conference has not studied the advisability of a change in the reviewing forum for such action. Nor does the Conference intend that the current method of reviewing personnel actions of the Customs Service or its determinations under the Freedom of Information Act or like statutes be disturbed.

The Customs Court is unique among Article III courts in being subject to a requirement that not more than five of its nine judges be appointed from the same political party and in having a chief judge selected from time to time by the President. These requirements, appropriate perhaps for multi-member administrative agencies, are not consonant with the Article III judicial role of the Customs Court, especially as that role would be expanded by these recommendations.

1. Jurisdiction Without a Protest or Petition

Congress should amend 28 U.S.C. §1532 to broaden the jurisdiction of the Customs Court by giving the court exclusive jurisdiction of any civil action brought to challenge final agency action (as defined in the Administrative Procedure Act) of the Customs Service except (1) action specifically subject to review in another court and (2) action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

2. Remedial Powers

Congress should amend 28 U.S.C. §1581 to confer upon the Customs Court in respect of actions properly pending before it the remedial powers of a United States district court.

3. Political Affiliation of Court Appointees and Selection of Chief Judge

Congress should amend 28 U.S.C. §251 to delete the requirement that not more than five of the nine judges of the Customs Court be appointed from the same political party and to provide that the chief judge is appointed by the President with the advice and consent of the Senate, as in the case of the Court of Claims and the Court of Customs and Patent Appeals.

B. Standing to Seek Administrative and Judicial Review

Under Section 516 of the Tariff Act of 1930, 19 U.S.C. §1516, an "American manufacturer, producer, or wholesaler" may ask for and receive information on the duty imposed on imported merchandise of a kind manufactured, produced or dealt in by him and, thereafter, contest the appraised value of, classification of, or the rate of duty assessed upon, that merchandise by petition to the Customs Service. As stated under heading A, a decision concerning such a petition may be reviewed in the Customs Court. The recommendation is that Congress consider broadening the category of persons entitled to seek this sort of administrative relief and, thereafter, review in the Customs Court to include all persons adversely affected by an incorrect determination by the Customs Service. The Conference believes that the category of persons eligible to challenge such determinations by the Customs Service should thus conform with modern administrative practice, unless Congress determines that overriding considerations of economic policy make this undesirable.

Only the importer of excluded merchandise may now protest within the Customs Service the exclusion of merchandise and have denial of that protest reviewed by the Customs Court. The recommendation contemplates a broadening of the standing provision to enable any adversely affected person to seek administrative and judicial review of action either to exclude or to admit merchandise (unless the action is taken under a law that is not a customs law upon the request or at the direction of a court or another agency).

Under A(1) final actions of the Customs Service other than the denial of protests or petitions relating to classification, appraisal, duty and admission of merchandise, such as the suspension of immediate delivery permits, would be subject to review in the Customs Court. The recommendation contemplates conferring upon any adversely affected person who has exhausted his administrative remedies standing to seek review of such actions. The recommendation does not specify what procedures must be exhausted.

1. Decisions Concerning Duties

Congress should consider amending Section 516 of the Tariff Act of 1930, 19 U.S.C. §1516, to allow any person adversely affected by an incorrect determination of the appraised value of, classification of, or rate of duty assessed upon, imported merchandise to obtain from the Customs Service information concerning such appraisal, classification or rate and to petition for a change. Denials of such petitions should be reviewable in the Customs Court.

2. Exclusion Cases

Congress should consider enacting a new provision giving any person adversely affected by an action of the Customs Service, concerning merchandise that is, or should be, excluded from entry or delivery, a means of seeking administrative review of such action, with subsequent review in the Customs Court. Such a procedure should not be available to challenge action pertaining to the exclusion of merchandise, under a law that is not a customs law, and taken by the Customs Service on the request or at the direction of a court or another federal agency.

3. Other Actions

If Congress broadens the jurisdiction of the Customs Court as recommended in A(1), it should also consider providing that actions within the broadened jurisdiction may be brought by any adversely affected person who has exhausted his administrative remedies

C. Burden of Proof in the Customs Court

The Customs Court operates under a statute that establishes a presumption that a Customs Service decision under review is correct and places upon a party seeking review the burden of proving the decision incorrect. Trial in the Customs Court is had on a record made in the court although 28 U.S.C. §2632(f) provides that, upon the service of a summons, the Customs Service is to transmit certain documents underlying the Customs Service decision to the court "as part of the official record of the civil action." The Customs Court and the Court of Customs and Patent Appeals have inferred from the statute a further requirement, that in order to prevail the party seeking review must prove, in addition to the incorrectness of the agency's decision, what the correct decision should be. The recommendation would do away with that unorthodox further requirement and make Customs Court review of Customs Service actions conform in this respect with the review of actions of other agencies by other courts. The mode of review would continue to be a de novo trial (in the sense indicated above), which is considered appropriate because of the high degree of informality of most Customs Service procedures.

1. Elimination of the Plaintiff's Double Burden

Congress should amend 28 U.S.C. §2635(a) to revise the Customs Court's standard of review in the following way: The presumption of correctness of Customs Service decisions and the imposition upon a party challenging a decision the burden of proving otherwise would be retained, but an additional requirement read into the statute by the Customs Court and the Court of Customs and Patent Appeals would be eliminated. The additional requirement is that the challenging party prove not only that the Customs Service was wrong but also what a correct decision would be or risk suffering affirmance of the incorrect adverse decision.

Specifically, the amended statute should provide that, if the Customs Court determines that action taken by the Customs Service is erroneous, the court should modify or set aside such action; if the court is able to determine what action is correct, it should so determine and order that the correct action be taken; if the court, after exhausting its processes and procedures, cannot determine what action is correct, it should remand the case to the Customs Service with instructions to take action consistent with the decision of the court; any redetermination made by the Customs Service pursuant to a remand should be subject to a new protest or petition; a decision by the Customs Court to remand a case should be appealable.

D. Review of Decisions to Exclude Merchandise

Exclusion of merchandise is a severe remedy. The recommendation would attempt to ensure expedited review of exclusion decisions and would delete the extraordinary authority of the Customs Service to detain and seize imported merchandise that allegedly infringes a United States trademark or copyright in the absence of the same sort of court order that is required before action may be taken against allegedly infringing domestic merchandise.

1. Expedited Review

Congress should amend the statutes giving preference to certain types of cases in the Customs Court, 28 U.S.C. §2633, and the Court of Customs and Patent Appeals, 28 U.S.C. §2602, to ensure a similar preference for cases properly before either court involving the exclusion of merchandise from entry or delivery.

2. The Customs Service's Authority Under the Trademark and Copyright Statutes

Congress should amend the statutes under which the Customs Service is authorized to detain and seize merchandise that allegedly infringes a United States trademark, 19 U.S.C. §1526, or copyright, 17 U.S.C. §603, to provide that the Customs Service may take no such action until after the owner of the trademark or copyright has obtained an order in a United States district court enjoining the importation. Alternatively, Congress should amend the trademark statute, as it has the copyright statute, to authorize the Customs Service to establish by regulation such a condition precedent to its acting to detain and seize allegedly infringing merchandise, and the Customs Service should promulgate such a regulation. In either event, the Customs Service should then adopt express procedures that would enable the owner of a trademark or copyright to identify imported merchandise that may infringe his mark or copyright.

E. Imposition of Civil Penalties

The penalty for violations of Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, and some other import statutes is forfeiture of imported merchandise or its value. These penalty provisions are unsatisfactory. The statutory forfeiture penalty is likely to be disproportionate to the gravity of the alleged offense. Although the Customs Service is usually prepared to mitigate the penalty, the statutes pose the following dilemma: If the alleged violator does not wish to accept the proffered mitigation because he believes he did not violate the statute or because he believes that he is entitled to a greater degree of mitigation, he is subject to suit in the district court for the full forfeiture value. Moreover, he will lose the benefit of any mitigation if the government can prove a violation, however insignificant, on his part. The recommendation would rationalize penalty procedures.

1. The Rationalization of Section 592

Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, prohibiting fraudulent or false statements or practices respecting imports, should be revised to make it fairer and more rational in its operation.

a) Section 592 should be amended to provide for civil money penalties against the person violating the statute rather than for forfeiture of the merchandise or the full value thereof. Congress should establish maximum penalties based upon the revenue deficiency, if any, resulting from the violation and upon the degree of culpability of the violator. In any case in which the violation does not result in a revenue deficiency, the maximum penalties should be based upon a percentage of the value of the imported merchandise and upon the degree of culpability of the violator. If the violator is an importer, he should be given the option of surrendering his merchandise in lieu of payment of any penalty assessed.

b) The Customs Service should continue to have the authority to mitigate civil penalties. If an assessment is contested, an action by the government to enforce the penalty should be in the Customs Court. In such an action, the government should have the burden of proving the act or omission constituting a violation and, if so alleged, the intentional nature thereof. The Customs Court should be authorized to determine de novo the amount of the penalty.

c) In order to ensure that those subject to possible penalties under Section 592 know what is expected of them under the laws administered and enforced by the Customs Service, the Service should, to the maximum extent feasible, adopt and publish standards that will guide its determinations under such laws.

d) The authority of the Customs Service to seize and hold merchandise under Section 592, other than prohibited or restricted merchandise, should be limited to instances where such seizure and holding are necessary to protect its ability to collect any revenue deficiency or penalty, and the Customs Service should be required to release the merchandise to the owner upon his provision of security for payment of such revenue deficiency or penalty. Where no such release is effected by the owner, the Customs Service should be required

to release the merchandise not later than 60 days after seizure unless the government has initiated an action in the Customs Court within that period and obtained an extension for good cause from the court. In instances where the Customs Court permits the Service to hold merchandise for sale by the Service to satisfy any revenue deficiency or penalty determined by the judgment of the court, the net proceeds of such sale, after allowance for the judgment and costs of the sale, should be paid to the owner.

2. Other Statutes

Each of the other penalty provisions enforced by the Customs Service should be reviewed and, if appropriate, revised in a manner consistent with the foregoing recommendations for the revision of Section 592.

SUMMARY OF RECOMMENDATION 77-2 JUDICIAL
REVIEW OF CUSTOMS SERVICE ACTIONS

This recommendation involves a series of proposals for change concerning the judicial review of actions taken by the United States Customs Service. All but two parts of the recommendation require legislative action. Thus, it is recommended that the Customs Court be permitted to exercise equitable powers under its present jurisdiction, that the court be permitted to hear cases even though administrative remedies had not been fully explored in situations where delay would result in immediate and irreparable injury to an aggrieved party, and that the political party affiliation requirement that now applies to Custom Court appointees be eliminated. The recommendation also calls for extensive legislative revision of the civil penalty and fraud provisions of Section 592 of the Tariff Act of 1930 to provide for a more rational system of civil money penalties against violators, instead of the existing sanction which empowers the Customs Court to seek forfeiture of the imported merchandise or its face value for any violation.

~~The recommendation also urges the Customs Service to establish, by regulation, a procedure by which it may detain and seize merchandise allegedly infringing a U.S. trademark or copyright only when it receives a court order to do so. And, more generally, the Customs Service is urged, without awaiting legislative changes, to adopt and publish standards that will guide its determinations under the laws enforced by civil penalties.~~

The recommendation also urges the Customs Service to establish, by regulation, a procedure by which it may detain and seize merchandise allegedly infringing a U.S. trademark or copyright only when it receives a court order to do so. And, more generally, the Customs Service is urged, without awaiting legislative changes, to adopt and publish standards that will guide its determinations under the laws enforced by civil penalties.

Senator DeCONCINI. Our next witness will be Dr. Rudy Oswald, director, Department of Research, AFL-CIO.

Mr. Oswald, let me thank you for being with us today and let me assure you that we appreciate AFL-CIO's concern on any legislation. This Senator is keenly aware of the movement for interest in things that are not related to the direct labor movement in the sense of legislation. Certainly, notwithstanding some of the questions asked here, we welcome your observations and suggestions and even your opposition to the bill. If you would highlight your statement, please proceed.

**STATEMENT OF DR. RUDOLPH OSWALD, DIRECTOR OF RESEARCH,
ACCOMPANIED BY KENNETH A. MEIKLEJOHN, LEGISLATIVE
REPRESENTATIVE, AND ELIZABETH JAGER, ECONOMIST**

Dr. OSWALD. Mr. Chairman, I thank you for this opportunity to appear before you.

Accompanying me this morning is Kenneth Meiklejohn, legislative representative of the AFL-CIO, and Elizabeth Jager, economist for the AFL-CIO.

Our statement is very short and if I could, I would like to go through that statement.

The AFL-CIO welcomes this opportunity to discuss S. 1654 which would establish a new special Court of International Trade to review import transactions and to establish new procedural and jurisdictional arrangements regarding such transactions.

The AFL-CIO believes that a specialized Court of International Trade is inappropriate in today's world of interdependence. The opportunity for fair judicial review of problems arising from the effects of hundreds of billions of dollars' worth of imports and exports every year is an objective that most Americans share. Businesses, consumers, workers and communities throughout the nations are affected by trade. The district courts, which are in the communities, are best equipped to handle issues related to these effects, because they are not solely trade problems, but domestic problems created by trade.

S. 1654, in our view, is a first step to set up a special court for international traders, their practitioners and those who specialize in trade matters, with interests external to the impact on the United States. In our view, such a separate bureaucracy would be an unfortunate development. For that reason, we oppose S. 1654.

The AFL-CIO has repeatedly stated its support for improving the customs machinery and the removal of jurisdictional problems that have prevented some who are protesting import actions by the Government from having their day in court. We have also repeatedly supported the use of the customs courts and improved customs machinery to handle problems requiring expertise related to customs transactions. Those problems will grow in number and the litigation will grow in size, because the Customs Valuation Code and the Trade Agreements Act of 1979 make many changes in U.S. law and international agreements on valuation of imports. The complexities of these provisions need extensive review. Certain technical clarifications of customs procedures and jurisdictions incorporated in S. 1654 are warranted.

But there is no need for a special U.S. Court of International Trade—which emphasizes all types of import transactions—to accom-

plish that goal. In fact, the name is not proper, because S. 1654 deals clearly only with import transactions—not with other aspects of international trade.

Trade adjustment assistance—provisions of the Trade Act of 1974 to give import relief to workers, firms and communities harmed by imports—is clearly given to the jurisdiction of the new Court of International Trade which this bill would establish. We do not think that a specialized court, a court designed for import transactions, can have the expertise in U.S. communities, industry, economics, and labor to give adequate judgments on these effects of imports.

The new bill lists many other trade issues which are not properly import transactions but their relation to the court is not clear. Section 1581 (c) states:

(c) After the decision of the President has become final, the Court of International Trade shall have exclusive jurisdiction to review advice, findings, recommendations, and determinations of the International Trade Commission pursuant to sections 131, 201, 202, 203, 301, 406, and 503 of the Trade Act of 1974, sections 336 and 338 of the Tariff Act of 1930, and section 22 of the Agricultural Adjustment Act, solely for the purpose of determining the procedural regularity of those actions.

Thus, agriculture cases, escape clause cases for industries injured by imports, such as specialty steel and color TV, advice to the President and tariff negotiations, market disruption from imports from Communist countries, and the inclusion of items on the generalized system of preferences for zero tariffs from low-wage countries—“are exclusively within the courts’ jurisdiction ‘solely for the purpose of determining the procedural regularity of those actions.’” But section 1581 (h) of the bill gives the court “exclusive jurisdiction over all civil actions against the United States, its agencies and its officers which arise directly from import transactions and which arise under the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974 or the Trade Agreements Act of 1979.” This seems to contradict the earlier section.

There is no need for a special Court of International Trade to decide procedural issues. If the Court has no other jurisdiction over the matters in section 1581 (c), then the district courts would get the cases anyhow or the chance for judicial review would be dead. There would be grounds for endless litigation about the meaning of “directly from impact transactions” for most issues arising under the new laws which clearly relate to imports, exports and the effects on the United States.

The AFL-CIO believes that parties harmed by trade should be able to bring to the courts their legitimate claims. However, we do not believe that a separate court system would best accomplish that goal.

I think that the previous witnesses may have summarized our position on some of the approaches of the bill, as they divided the bill into two aspects: The judicial review of customs and the judicial review of all import actions.

We have supported improvements which go to the judicial review of customs, but we are deeply concerned about giving the Customs Court review of all import actions. That, I think, is, in a nutshell, a summary of our disagreement with S. 1654, Senator.

Senator DeCONCINI. Mr. Oswald, how do you stack S. 1654 up with last year’s bill. I recall you testified last year in opposition. Is it an im-

provement over last year's bill, or is it in your judgment worse than last year's bill?

Dr. OSWALD. Senator, there are some things that were in last year's bill that are now out, and some of which we think are appropriately out. But it still, in our view, goes too far in trying to bring into the jurisdiction of the Customs Court, things which we believe would be handled better separately, because they impinge on matters that are of concern of other aspects of domestic life—for example, in trade adjustment assistance, one of the issues deals with impact on a community, or the impact on a domestic industry. We believe the issues could better be adjudicated closer to the communities and the workers injured than necessarily in the customs courts. While the court may sit in that same locality, it has no ties to that locality. It is a nine-member court that is sent out from Washington to sit at various places.

Senator DECONCINI. Of course, the court is not in Washington, you realize that.

Dr. OSWALD. It is in New York.

Senator DECONCINI. Let me go back to last year's bill, S. 2857. In your opinion, is 1654 better, or does it stack up the same as far as your objections to it?

Dr. OSWALD. Senator, I believe that there are some improvements.

Senator DECONCINI. I understand.

Dr. OSWALD. And I think, on balance, those items that improve, because of current jurisdiction, should be incorporated.

Senator DECONCINI. Let me ask you this question: Do you support one of the points, the appointment and tenure of customs court judges without reference to political affiliation; is that something that you would support?

Dr. OSWALD. Senator, we support that sort of—

Senator DECONCINI. You have no problem with that provision of the bill?

Dr. OSWALD. No.

Senator DECONCINI. What about the plenary judicial power for the judges of the Customs Court, where they could have equity jurisdiction which they do not have now?

Mr. MEIKLEJOHN. I suppose, Senator, that we would—I do not know, Senator. I think I would prefer not to try to give you an answer on that. I am not sufficiently familiar with the specific powers of the Customs Court.

Senator DECONCINI. I realize what the thrust of your statement is and I respect your organization's viewpoint.

What I am trying to find out is what you feel is good, because it seems to me, notwithstanding your objections that are in accordance with your testimony this year and last year, there are some things here that you would probably find beneficial to your members and to your organization.

I am trying to pick those out to see where we are in agreement and where we are not.

Mr. MEIKLEJOHN. I think our problem goes mainly to the attempt to bring into a specialized area problems involving trade which in our judgment have very broad ramifications.

Senator DECONCINI. No question about it.

Mr. MEIKLEJOHN. And that the tendency in those circumstances would be to apply coloring appropriate to situations solely involving

trade which would not give a proper basis for judgment as applied to these other issues.

Senator DECONCINI. Let me ask you this: Do you oppose the Court Reform Act that we passed last Friday, which zeroes in more on the specialty of a tax court and a claims court?

Mr. MEIKLEJOHN. I believe we have some questions about that act, yes, Senator.

Senator DECONCINI. Based on the same approach?

Mr. MEIKLEJOHN. Yes.

Senator DECONCINI. Because I am somewhat sympathetic, at least not to overproliferation of specialized courts. I have, however, looked at it and practiced before some of these courts and find that it is extremely sophisticated law and that district judges can get themselves prepared for it, but often have a difficult time of taking a heavy tax case where the tax court and the customs court have the expertise developed over the years.

I share your concern that justice ought to be as close to the people as possible, and certainly district judges have a closer tie. I wonder if you were here this morning when Judge Re testified.

Dr. OSWALD. No, we were not.

Senator DECONCINI. I asked him—or Mr. Altier asked him about some of your objections—and he indicated his high regard for the AFL-CIO and felt that it might be advantageous for your membership, if you have not had an opportunity, to visit that court, not that I am asking you to change your testimony.

I understand what you said here, but I wonder if you do have a propensity to do that? He would welcome a thorough review of this court.

Quite frankly, I have practiced before the Tax Court as a lawyer but never before the Customs Court. Since being in the Senate and handling jurisdictions of that court, I have been up there on several occasions and I am greatly impressed with their operations and their administration and their sensitiveness toward traveling to various areas.

So let me extend to you on behalf of Chief Judge Re an invitation. I would suggest that he invite you up there and if anyone from your staff would like to go spend half a day, I think you will have a better understanding of the court and what we are trying to do.

I have no further questions.

Do you?

Mr. ALTIER. No.

Senator DECONCINI. I want to thank you very much for your testimony.

[The prepared statement of Dr. Oswald follows:]

PREPARED STATEMENT OF DR. RUDOLPH OSWALD

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the nations are affected by trade. The district courts, which are in the communities, are best equipped to handle issues related to these effects, because they are not solely trade problems, but domestic problems created by trade.

S. 1654, in our view, is a first step to set up a special court for international traders, their practitioners and those who specialize in trade matters, with interests external to the impact on the U.S. In our view, such a separate bureaucracy would be an unfortunate development. For that reason, we oppose S. 1654.

The AFL-CIO has repeatedly stated its support for improving the customs machinery and the removal of jurisdictional problems that have prevented some who are protesting import actions by the government from having their day in court. We have also repeatedly supported the use of the customs courts and improved customs machinery to handle problems requiring expertise related to customs transactions. Those problems will grow in number and the litigation will grow in size, because the Customs Valuation Code and the Trade Agreements Act of 1979 make many changes in U.S. law and international agreements on valuation of imports. The complexities of these provisions need extensive review. Certain technical clarifications of customs procedures and jurisdictions incorporated in S. 1654 are warranted.

But there is no need for a special U.S. Court of International Trade (which emphasizes all types of import transactions) to accomplish that goal. In fact, the name is not proper, because S. 1654 deals clearly only with import transactions—not with other aspects of international trade.

Trade adjustment assistance—provisions of the Trade Act of 1974 to give import relief to workers, firms and communities harmed by imports—is clearly given to the jurisdiction of the new Court of International Trade which this bill would establish. We do not think that a specialized court, a court designed for import transactions, can have the expertise in U.S. communities, industry, economics and labor to give adequate judgments on these effects of imports.

The new bill lists many other trade issues which are not properly import transactions but their relation to the court is not clear. Section 1581(c) states:

“(c) After the decision of the President has become final, the Court of International Trade shall have exclusive jurisdiction to review advice, findings, recommendations, and determinations of the International Trade Commission pursuant to sections 131, 201, 202, 203, 301, 406, and 503 of the Trade Act of 1974, sections 336 and 338 of the Tariff Act of 1930, and section 22 of the Agricultural Adjustment Act, solely for the purpose of determining the procedural regularity of those actions.”

Thus, agriculture cases, escape clause cases for industries injured by imports, such as specialty steel and color TV, advice to the President on tariff negotiations, market disruption from imports from communist countries, and the inclusion of items on the generalized system of preferences for zero tariffs from low-wage countries—“are exclusively within the courts’ jurisdiction ‘solely for the purpose of determining the procedural regularity of those actions.’” But section 1581 (h) of the bill gives the Court “exclusive jurisdiction over all civil actions against the U.S., its agencies and its officers which arise directly from import transactions and which arise under the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974 or the Trade Agreements Act of 1979.” This seems to contradict the earlier section.

There is no need for a special Court of International Trade to decide procedural issues. If the court has no other jurisdiction over the matters in section 1581(c), then the district courts would get the cases anyhow or the chance for judicial review would be dead. There would be grounds for endless litigation about the meaning of “directly from import transactions” for most issues arising under the new laws which clearly relate to imports, exports and the effects on the U.S.

The AFL-CIO believes that parties harmed by trade should be able to bring to the courts their legitimate claims. However, we do not believe that a separate court system would best accomplish that goal.

Senator DeCONCINI. Our last witnesses will be John Pellegrini, chairman of the AIA Customs Policy Committee, and Barry Nemmers, staff attorney, American Importers Association, Inc.

Gentlemen, welcome to the committee. Thank you for your testimony today and if you would, your full testimony will be printed in the record in full and if you would highlight that for us.

STATEMENT OF JOHN B. PELLEGRINI, CHAIRMAN, CUSTOMS POLICY COMMITTEE, AND BARRY NEMMERS, STAFF ATTORNEY, AMERICAN IMPORTERS ASSOCIATION, INC.

MR. PELLEGRINI. I would be happy to do so.

First, I would like to express our appreciation for this opportunity to comment on S. 1654.

By way of background, the American Importers Association is a nonprofit organization formed in 1921 to represent the common interests of the U.S. importing community.

S. 1654 is the product of many hours of study, debate, and drafting by this subcommittee and its able staff, as well as representatives of the Department of Justice, the Customs Service, the Customs Courts, and many private groups.

We are particularly pleased that many of the points made in our testimony in June 1978 were picked up and are incorporated in S. 1654. We believe the bill contains numerous features which will improve access to judicial review, facilitate court procedures and expand the range of remedies available in litigation arising out of import transactions.

Before discussing the specifics of this bill, I would like to restate to this committee what is ultimately the fundamental purpose of this reform exercise. We are seeking changes in the jurisdiction and procedures of the Customs Court in order to improve the quality of justice available to the corporate and individual citizen engaged in, or affected by, international trade. We are seeking to facilitate the tasks of private attorneys, Government agencies, and the courts, but only secondarily—as a means in pursuit of the primary goal: improvements in the quality of justice. As we become immersed in the legal concepts and technical problems in this bill, it will be natural to lose sight of this goal.

AIA supports much of the substance of S. 1654. However, a number of provisions cause us sufficient concern that we must withhold support for its passage, pending satisfactory resolution of these issues.

The fact that S. 1654 does not provide congressional authorization and endorsement for a small claims procedure in the Court of International Trade—customs courts—is of particular concern to AIA. We are disappointed in the committee's apparent lack of interest in establishing a small claims procedure. The AIA membership has expressed regularly over the years, and particularly since the enactment of the Customs Court Act of 1970, dismay that many valid claims against the Government cannot be settled in Customs Court because the costs of pursuing a claim under the court's procedures substantially outweigh the amounts at issue in the disputes. A small claims procedure would provide these importers their "day in court" and would be a clear affirmation of the basic American principle that the judicial process must be open to all nonfrivolous claims. The first declared purpose of S. 1654 is "to provide for a comprehensive system of judicial review of civil actions arising from import transactions." By neglecting to facilitate judicial review of small claims, this bill fails to create a truly comprehensive system.

The validity and fairness of small claims procedures have been recognized across the Nation as, increasingly, courts are authorized to

implement such a procedure. The U.S. Tax Court has utilized a successful small claims procedure for a number of years, and its judges have been publicly enthusiastic about its merits and its effect on the public's perception of the Government's willingness to provide justice for all. An outline of the principles for a small claims procedure in the Court of International Trade and proposed implementing language are included in our written submission.

Let us go on to a few other specific problems that we have with the bill.

Section 1581.—Earlier drafts of this bill proposed that the Customs Court be granted concurrent jurisdiction with the district courts over all other civil actions against the United States arising under the Constitution, laws, or treaties of the United States which involve disputes arising from import transactions. We strongly endorse this jurisdictional grant and believe it should be included in S. 1654. The provision has many useful applications both for the importer and the Government. Cases which might be brought to the Court of International Trade under this jurisdiction would include, for example, claims regarding importations regulated under the Federal Food, Drug, and Cosmetics Act or the Toxic Substances Control Act. Of particular importance here is our experience with the EPA on the Toxic Substances Control Act. We have discussed regulations of the importation of chemicals and other substances under this act with EPA for over 2 years now. EPA has recognized that import transactions present very different questions than do wholly domestic ones and has made an effort to learn enough about the trade to write realistic and enforceable rules. It would be a distinct advantage to both sides to be able to bring these questions to the judges of the Court of International Trade with their extensive background and expertise in trade.

Earlier drafts of this bill went too far by giving the court exclusive jurisdiction over these questions; this bill does not go far enough in failing to grant concurrent jurisdiction.

With respect to section 1581(c), we would just say that the AIA endorses the testimony of the American Bar Association regarding the limitation on review of certain actions of the International Trade Commission to determining the procedural regularity of those actions after the decision of the President has become final.

With respect to 1581(i) (2), like others who have testified, we are confused by the language. We assume that it was intended to allow review of advice in cases where postponement of review until administrative processes are completed would moot the purpose of review. However, we find no grant of jurisdiction elsewhere in section 1581. We assume that the general jurisdictional grant in subsection 1581(h) is intended to cover this situation. We believe that a restrictive reading of the phrase "arise directly from import transactions" could unnecessarily limit this grant, and suggest that the committee report state that this language is intended to cover advice given which relates to potential as well as actual import transactions.

AIA supports the bill's provision for transfer of customs penalty cases from the district court to the Court of International Trade at the importers option. This provision permits the utilization of the more appropriate forum on a case-by-case basis. In penalty cases where an important classification issue is involved, for example, the importer may well wish to have the benefit of the Customs Court ex-

pertise in such matters and to have both disputes heard in a single action.

We believe, however, that the ultimate decision as to transfer should belong to the defendant, subject to review by the district court under the standards of subsection 1582(a), and not to the Government. Therefore AIA recommends that paragraph (d)(2) be deleted.

The bill also should provide the importer the opportunity to institute judicial review in the Customs Court of penalty cases at any time after the administrative process is complete and before collection action is commenced. In penalty cases, the importer may be required to carry very large potential liabilities on its books until the Government decides to institute an action for its claim—often a period of years. The importer should be allowed the opportunity to resolve the matter by initiating judicial review proceedings at an earlier date. AIA stands ready to propose necessary statutory language, should this committee so request.

Section 1583.—AIA remains opposed to the expansion of cases beyond the issues framed by the plaintiff in its summons or complaint and, with certain limitations, counterclaims asserted by the United States which arise out of the same import transaction. We suggest that the language “or a claim to recover upon a bond relating to the importation of merchandise or to recover customs duties” be deleted from the bill. We see little purpose in allowing unrelated counterclaims. In most instances, this provision will not result in a more efficient use of judicial resources and will only serve to discourage importers from seeking judicial review of Government acts. If the Government has a valid collection claim, it should be brought in a district court.

Proposed section 2643(a).—This proposed section, read in conjunction with proposed section 1583, would appear to allow the court to enter a judgment assessing additional duties against the importer in cases instituted under proposed section 1581. This represents a radical change from present law and practice and could have a profound, chilling effect on potential litigation in the Customs Court.

While we do not object to the Government being allowed to demonstrate that a claimed classification or value is incorrect by showing that another classification or appraised value is more accurate, we do not believe that the Government should be allowed to recover additional duties. This limitation is justified by both legal and commercial equities and is consistent with our understanding of income tax litigation. At time of entry, the Government dictates the entered value and classification. After entry and before liquidation, the Government may change the classification or value. After liquidation, both the importer and the Government have 90 days in which to claim alternative classification or values—the importer through the protest procedures of section 514 of the Tariff Act of 1930, and the Government under its reliquidation authority in section 501 of the Tariff Act of 1930. Consistent with provisions of review of administrative action generally, it would be inequitable to permit the Government to recover additional duties after the importer and the Government have exhausted the administrative process and after which the importer has made a decision to seek judicial review based upon the Government's position stated at liquidation.

The proposed Customs Court Act of 1979 is a commendable bill which, with the addition of an authorization of a small claims proce-

ture in the Court of International Trade and certain other modifications, the AIA will strongly support.

The express grant of equity powers, resolution of existing jurisdictional uncertainties, and the elevation of the status of the court are needed reforms.

The coming years in international trade will challenge these courts with an array of unique and difficult legal questions. By enacting S. 1654 with the additions we suggest, particularly a small claims procedure, this committee and the Congress will have equipped the courts with the ability to serve its constituents.

We thank the committee for this opportunity to present our views.

Senator DECONCINI. Thank you very much. As you know, this bill grants expansion of plenary powers in order that the Customs Court would have equity powers.

Do you support that?

Mr. PELLEGRINI. Certainly. Yes, Senator.

Senator DECONCINI. Are you not fearful that if you would not provide for counterclaim provision, that you would somewhat hamper the court's ability to exercise equity?

They would have to distinguish that counterclaim if they felt it was the equitable part of the resolution of the case itself, rather than having it brought to them by one of the parties to the litigation.

Mr. PELLEGRINI. I think our major concern with the counterclaim provision is that if an importer makes a certain claim as to the classification of merchandise he should not be subject to the assessment of additional duties. The Government, like the importer, has 90 days following liquidation in which to change. Once the importer files suit, he should have some reasonable certainty that he will not be subject to a separate claim, or at least additional duties based upon such claims. We are not saying that the Government cannot come in and argue that the importer's classification is not accurate and try to support that argument by showing that another classification is accurate. We are saying that the importer should not be required to pay additional duties, based upon that kind of a claim or that kind of an argument, and we think that this is basically consistent with Tax Court procedure where the Government does not exercise its right to change the assessment within the administrative statute of limitations. We think the same thing should apply here with respect to duties.

Senator DECONCINI. Very good. I have no further questions.

Mr. Altier?

Mr. ALTIER. I only have one and that is found in your prepared statement. You said you would provide us with some statutory language regarding section 1582. We would appreciate it if you could provide us with such language.

Mr. PELLEGRINI. This is with respect to an importer initiating judicial review in a penalty case; is that it?

Mr. ALTIER. Yes, I believe that is it.

Mr. PELLEGRINI. We would be happy to work with you on that. We have something in draft form which we can get to you in a few days.

Mr. ALTIER. I have no further questions.

[The joint prepared statement of Messrs. Pellegrini and Nemmers follows:]

PREPARED STATEMENT OF JOHN B. PELLEGRINI AND BARRY NEMMERS

Mr. Chairman and Members of the Committee, my name is John Pellegrini. I am a Senior Attorney with J.C. Penney Company, Inc., New York City. I appear here in my capacity as chairman of the Customs Policy Committee of the American Importers Association. I am accompanied by Barry Nemmers, staff attorney for AIA.

The American Importers Association is a non-profit organization formed in 1921 to represent the common interests of the United States importing community. AIA is the only association of national scope not limited to specific commodities or product lines. As such it is the recognized spokesman for American companies engaged in the import trade.

As present, AIA is composed of nearly 1,300 American firms directly or indirectly involved with the importation and distribution of goods produced outside the United States. Its membership includes importers, exporters, import agents, brokers, retailers, domestic manufacturers, customs brokers, attorneys, banks, steamship lines, insurance companies, and others connected with foreign trade.

We welcome this opportunity to present our views on the Customs Court Act of 1978.

I. INTRODUCTION

S. 1654 is the product of many hours of study, debate, and drafting by this Subcommittee and its able staff, as well as representatives of the Department of Justice, the Customs Service, the Customs Courts, and many private groups. The bill reflects clearly these labors. It contains numerous features which will improve access to judicial review, facilitate court procedures, and expand the range of remedies available in litigation arising out of import transactions. It will largely eliminate the severe jurisdictional problems of the past decade. The import community, domestic industry, the government, and other interested parties will be well served by the proposed reforms, and we hope they can be brought to fruition.

Before discussing the specifics of this bill, I would like to restate to this Committee what is ultimately the fundamental purpose of this reform exercise. We are seeking changes in the jurisdiction and procedures of the Customs Court in order to improve the quality of justice available to the corporate and individual citizen engaged in or affected by international trade. We are seeking to facilitate the tasks of private attorneys, government agencies, and the courts, but only secondarily—as a means in pursuit of the primary goal: improvements in the quality of justice. As we become immersed in the legal concepts and technical problems in this bill, it will be natural to lose sight of this goal. The purpose of any reform of the Customs Court and CCPA is not just to write a law which embodies jurisdictional and procedural efficiency, but to ensure that the rights of Americans affected by international trade are protected by adequate judicial oversight of government action.

AIA supports much of the substance of S. 1654. However, a number of provisions cause us sufficient concern that we must withhold support for its passage pending satisfactory resolution of these issues.

II. SMALL CLAIMS PROCEDURE

The fact that S. 1654 does not provide Congressional authorization and endorsement for a small claims procedure in the Court of International Trade (Customs Court) is of particular concern to AIA. We are disappointed in the committee's apparent lack of interest in establishing a small claims procedure. The AIA membership has expressed regularly over the years, and particularly since the enactment of the Customs Court Act of 1970, dismay that many valid claims against the government cannot be settled in Customs Court because the costs of pursuing a claim under the Court's procedures substantially outweigh the amounts at issue in the disputes. A small claims procedure would provide these importers their "day in court" and would be a clear affirmation of the basic American principle that the judicial process must be open to all nonfrivolous claims. The first declared purpose of S. 1654 is "to provide for a comprehensive system of judicial review of civil actions arising from import transactions." By neglecting to facilitate judicial review of small claims, this bill fails to create a truly comprehensive system.

The validity and fairness of small claims procedures have been recognized across the nation, as increasingly courts are authorized to implement such a

procedure of division. The United States Tax Court has utilized a successful small claims procedure for a number of years, and its judges have been publicly enthusiastic about its merits and its effect on the public's perception of the government's willingness to provide justice for all. (See, e.g., Sterrett, "Small Tax Cases" TAXES—The Tax Magazine, October 1972; and Dawson, "Small Tax Case Procedures in the United States Tax Court," The Tax Adviser, March 1972.) AIA feels that the Tax Court procedure is an appropriate model.

To this end, we have prepared an outline of principles for a small claims procedure in the Court of International Trade and a proposed new section 2647, "Disputes involving \$5,000 or less," for inclusion in S. 1654. Both are attached as an Appendix. The Tax Court's procedure—upon which our proposal is based—is authorized at 26 U.S.C. § 7463, and is provided for in Rules 170–179 of the Tax Court.

We hope that you will find this procedure as meritorious as we do. A small claims procedure is a concept that will fulfill a real need and is consistent with the efforts of both the Department of Justice and your Committee to make our judicial processes more accessible to all.

III. OBJECTIONABLE PROVISIONS

A. Section 1581. Civil actions against the United States

Earlier drafts of this bill proposed that the Customs Court be granted concurrent jurisdiction with the district courts over all other civil actions against the United States under the Constitution, laws, or treaties of the United States which involve disputes arising from import transactions. We strongly endorse this jurisdictional grant and believe it should be included in S. 1654. The provision has many useful applications both for the importer and the government. Cases which might be brought to the Court of International Trade under this jurisdiction would include, for example, claims regarding importations regulated under the Federal Food, Drug, and Cosmetics Act of the Toxic Substances Control Act (TSCA). In our association's discussions with the Environmental Protection Agency (EPA) concerning regulation of imported chemicals under TSCA, EPA has recognized that import transactions present very different questions than do wholly domestic ones and has made an effort to learn enough about the trade to write realistic and enforceable rules. Despite these extensive efforts at self-education, we continue to have difficulty explaining the many subtle differences which can have a significant influence on the ultimate effects of the rules. When import cases under these rules begin to reach the courts, a similar education will be necessary for the Court in the importer's brief, but in the pressure of litigation such efforts may or may not be sufficiently effective. It would be a distinct advantage to both sides to be able to bring these questions to the judges of the Court of International Trade with their extensive background and expertise in trade. Because jurisdictions will be concurrent, the importer may still choose the district court if the issues do not require the Court's special expertise. Concurrent jurisdiction will also prevent the possibility of separate bodies of law for imported and domestic chemicals.

Earlier drafts of this bill went too far by giving the Court exclusive jurisdiction over these questions; this bill does not go far enough in failing to grant concurrent jurisdiction. We hope this Committee will include this grant of concurrent jurisdiction.

(Should this jurisdiction be granted, the Committee may wish to reinstate in section 1581 (g) certain actions over which the Court shall not have jurisdiction which were deleted from earlier drafts in the preparation of S. 1654.)

B. Section 1581 (c)—Review of certain findings of the International Trade Commission

The AIA endorses the testimony of the American Bar Association regarding the limitation of review of certain actions of the International Trade Commission to determining the procedural regularity of those actions after the decision of the President has become final.

We recognize the inappropriateness of review of Presidential acts in the conduct of foreign affairs. Nevertheless there is a serious inequity in denying review of the actions of an independent regulatory agency—even if the President's acts are based on the actions of that agency—if such review can be provided after the agency's actions become final but before the President has acted. To emphasize our point, we note the difference between review of ITC actions of the Office of the Special Representative for Trade Negotiations pur-

suant to sections 302(b)(1) and 304 of the Trade Act of 1974 where such limited review is more likely to be appropriate. We urge the Committee to amend section 1581(c) to allow court review of these ITC actions, before the President's action, to determine whether they are based upon substantial evidence on the record made by the ITC.

C. Section 1581(i)(2)—Limitation of jurisdiction

AIA is unsure of the intended meaning of this paragraph and requests that it be clarified. We assume that it was intended to allow review of advice in cases where postponement of review until administrative processes are completed would moot the purpose of review. However, we find no grant of jurisdiction elsewhere in section 1581. We assume that the general jurisdiction grant in subsection 1581(h) is intended to cover this situation. We believe that a restrictive reading of the phrase "arise directly from import transactions" could unnecessarily limit this grant and suggest that the committee report state that this language is intended to cover advice given which relates to potential as well as actual import transactions.

D. Section 1582—Civil actions commenced by the United States

AIA supports the bill's provision for transfer of customs penalty cases from the district court to the Court of International Trade at the importer's option. This provision permits the utilization of the more appropriate forum on a case by case basis. In penalty cases where an important classification issue is involved, for example, the importer may well wish to have the benefit of the Customs Court expertise in such matters and to have both disputes heard in a single action.

We believe, however, that the ultimate decision as to transfer should belong to the defendant, subject to review by the district court under the standards of subsection 1582(a), and not to the government. Therefore we recommend that paragraph (d)(2) be deleted.

The bill also should provide the importer the opportunity to institute judicial review in the Customs Court of penalty cases at any time after the administrative process is complete and before collection action is commenced. In penalty cases, the importer may be required to carry very large potential liabilities on its books until the government decides to institute an action for its claim—often a period of years, the importer should be allowed the opportunity to resolve the matter by initiating judicial review proceedings at an earlier date. AIA stands ready to propose necessary statutory language should this Committee so request.

E. Section 1583—Setoffs, demands, and counterclaims

Although we recognize that some judicial efficiency would be introduced by this section, AIA remains opposed to the expansion of cases beyond the issues framed by the plaintiff in its summons or complaint and, with certain limitations, counterclaims asserted by the United States which arise out of the same import transaction. We suggest that the language "or claim to recover upon a bond relating to the importation of merchandise or to recover customs duties" be deleted from the bill. We see little purpose in allowing unrelated counterclaims. In most instances this provision will not result in a more efficient use of judicial resources and will only serve to discourage importers from seeking judicial review of government acts. If the government has a valid collection claim, it should be brought in a district court.

We are also concerned that section 1583 may be read to permit the government to assert counterclaims based upon penalties assessed under section 592 of the Tariff Act of 1930 or other penalty provisions. Either the Committee's report or the section itself should clearly state that penalties may not be enforced in any fashion under this section.

F. Section 2642—Analysis of imported merchandise

This section provides that a judge of the Court of International Trade may order an analysis of imported merchandise by laboratories or agencies of the United States. We see no reason to limit the court's authority to government laboratories or agencies. There could well be situations where government laboratories do not possess the necessary expertise. Under these circumstances the court should be allowed to engage a private laboratory to perform the required analysis.

G. Section 2643(a)—Relief

This proposed section read in conjunction with proposed section 1583 would appear to allow the court to enter a judgment assessing additional duties against

the importer in cases instituted under proposed section 1581. This represents a radical change from present law and practice and could have a profound, chilling effect on potential litigation in the Customs Court.

While we do not object to the government being allowed to demonstrate that a claimed classification or value is incorrect by showing that another classification or appraised value is more accurate, we do not believe that the government should be allowed to recover additional duties. This limitation is justified by both legal and commercial equities and is consistent with our understanding of income tax litigation. At time of entry the government dictates the entered value and classification. After entry and before liquidation, the government may change the classification or value. After liquidation both the importer and the government have 90 days in which to claim alternative classifications or value—the importer through the protest procedures of section 514 of the Tariff Act of 1930, and the government under its reliquidation authority in section 501 of the Tariff Act of 1930. Consistent with provisions for review of administrative action generally it would be inequitable to permit the government to recover additional duties after the importer and the government have exhausted the administrative process and after which the importer has made a decision to seek judicial review based upon the government's position stated at Liquidation. Liquidation should become final as with respect to claims against the importer 90 days after the date of liquidation as is currently provided in section 501.

V. CONCLUSION

The proposed Customs Court Act of 1979 is a commendable bill which with the addition of an authorization of a small claims procedure in the Court of International Trade and certain other modifications, the AIA will strongly support.

The express grant of equity powers, resolution of existing jurisdictional uncertainties, and the elevation of the status of the Court are needed reforms. The coming years in international trade will challenge these Courts with an array of unique and difficult legal questions. By enacting S. 1654 with the additions we suggest, particularly a small claims procedure, this Committee and the Congress will have equipped the Courts with the ability to serve its constituents.

AIA thanks the Committee for this opportunity to present our views.

APPENDIX

OUTLINE OF PRINCIPLES FOR A SMALL CLAIMS PROCEDURE IN THE COURT OF INTERNATIONAL TRADE

1. Small claims cases should be limited to questions protested under sections 514 and 515 of the Tariff Act of 1930. A "small" claim should be one in which the total amount of duty in dispute does not exceed \$5000, the amount in dispute being the difference between the amount of duty claimed due by the government and the amount the importer asserts is due. We note in this regard that while the present ceiling in the Tax Court is a deficiency of less than \$1500, a bill in the 95th Congress, H.R. 13082, which was passed by the House of Representatives on October 10, 1978, would have increased that amount to \$5000. (Congressional Record, October 10, 1978, at H 11902.)

2. The case would be brought to the Court by a summons, but we suggest that a separate summons form be devised for these cases. (See Tax Court Form 2—Petition (Small Tax Case); the petition for regular cases is Tax Court Form 1.)

3. Discovery should be kept to an absolute minimum. At most the rules could provide that with the consent of the parties, the testimony of all witnesses, in affidavit form, be deposited with the Clerk to be released by him simultaneously to each opposite party. Each party would then have the right to serve "cross-in terrogatories" on deposing witnesses which the party would satisfy with supplementary affidavits. Alternatively the Court could permit oral testimony of witnesses at trial.

4. The hearing or trial should be as informal as possible—perhaps even held in chambers. The making of a record should be optional. The importer should be allowed the option of having an attorney or broker present.

5. The decision should be final and nonappealable.

6. The decision should not be published but a summary of the bases for the decision should be given to both parties.

7. The decision must not stand as a precedent and should be binding only on the entries that were before the Court.

8. If the Court decides that the jurisdictional ceiling has been exceeded, the importer should have the option of proceeding as in a normal case. (See 26 U.S.C. § 7463(d).)

9. Corporations must be allowed to appear through an authorized agent.

10. Small claims cases should be heard throughout the country wherever a judge is present on Court business. If the Court becomes too burdened in the future, magistrates might be authorized as in the Tax Court.

11. The success of a small claims procedure depends very much on the perceived receptivity of the Court and, to a lesser extent, the Customs Service and the Department of Justice. The Court not only should be committed to making this procedure as informal, inexpensive, and unintimidating as possible, it also should include a statement of policy to that effect in the Rules. The importer should be made to feel that the Court welcomes these cases. (We made this statement not as a comment on the Court's attitude but as an indication of what the importer may need to hear.)

12. Further, explanations of the means of access to this procedure should be made widely available and written in lay language. With every eligible Notice of Deficiency the Internal Revenue Service mentions the small claims procedure of the Tax Court. Similarly the Customs Service should include a notice with eligible denied protests and let the importer know that a small claims kit is available from the Court. The Tax Court includes in its kit the applicable forms and rules and, best of all, a pamphlet "Election of Small Tax Case Procedures & Preparation of Petitions" written for the layman.

"Section 2647. Disputes involving \$5,000 or less

"(a) In the case of any summons filed with the Customs Court for review of Customs Service decisions protested under sections 514 and 515 of the Tariff Act of 1930 where

(1) the total amount of duties, charges, or a claim for drawback not exceed \$5,000, or

(2) the value of excluded merchandise does not exceed \$5000.

at the option of the plaintiff concurred in before the hearing of the case by the Customs Court, proceedings in the case shall be conducted under this section. Notwithstanding the provisions of section 2641, such proceedings shall be conducted in accordance with such rules of evidence, practice, and procedure as the Customs Court may prescribe, except that such proceedings should be implemented with due regard for minimizing the expenses of all parties and expediting the proceedings without impairing the requirements of due process and justice. A decision, together with a brief summary of the reasons therefor, in any such case shall satisfy the requirements of section 2644.

"(b) A decision entered in any case in which the proceedings are conducted under this section shall not be reviewed in any court and shall not be treated as a precedent for any other case.

"(c) At any time before a decision entered in a case which the proceedings are conducted under this section becomes final, either party may request that further proceedings under this section in that case be discontinued. The Customs Court, if it finds that (1) the amount of duties, charges, or exactions or the value of excluded merchandise placed in dispute exceeds the applicable jurisdictional amount described in subsection (a), and (2) the amount of such excess is large enough to justify granting that request, may discontinue further proceedings in such case under this section. Upon any discontinuance under this subsection, further proceedings in that case shall be conducted in the same manner as cases to which the provisions of section 2632 apply."

Senator DeCONCINI. Thank you very much, gentleman.

The record will be closed today, subject to the information that is coming forth from the witnesses who testified, so we will be able to consider the bill in the markup of the subcommittee.

This will conclude the hearings on S. 1654, and the committee will stand in recess, subject to the call of the chairman.

[Whereupon, at 12:22 p.m., the subcommittee was in recess, subject to the call of the Chair.]

1 (a) to provide for a comprehensive system of judi-
2 cial review of civil actions arising from import transac-
3 tions, utilizing, whenever possible, the specialized ex-
4 pertise of the United States Customs Court and Court
5 of Customs and Patent Appeals and insuring uniform-
6 ity afforded by the national jurisdiction of these courts;

7 (b) to assure access to judicial review of civil ac-
8 tions arising from import transactions, which access is
9 not presently assured due to jurisdictional conflicts
10 arising from the present ill-defined division of jurisdic-
11 tion between the district courts and the customs courts;

12 (c) to provide expanded opportunities for judicial
13 review of civil actions arising from import transactions;

14 (d) to grant to the customs courts the plenary
15 powers possessed by other courts established under ar-
16 ticle III of the Constitution; and

17 (e) to change the name of the United States Cus-
18 toms Court to the United States Court of International
19 Trade to be more descriptive of its expanded jurisdic-
20 tion and its new judicial function and purpose relating
21 to international trade in the United States.

1 TITLE II—COMPOSITION OF THE COURT OF IN-
2 TERNATIONAL TRADE AND ASSIGNMENT OF
3 JUDGES TO OTHER COURTS

4 SEC. 201. Section 251 of title 28, United States Code,
5 is amended by striking out the first and second paragraphs of
6 such section and inserting in lieu thereof the following:

7 “The President shall appoint, by and with the advice
8 and consent of the Senate, a chief judge and eight judges who
9 shall constitute a court of record known as the United States
10 Court of International Trade. The Court is a court estab-
11 lished under article III of the Constitution of the United
12 States. The chief judge shall be less than seventy years of
13 age and shall continue as chief judge until he reaches such
14 age, at which time the President shall, by and with the
15 advice and consent of the Senate, appoint a new chief judge.
16 The chief judge may continue to serve after reaching seventy
17 years of age until the appointment of a successor is confirmed
18 by the Senate.”.

19 SEC. 202. (a) Section 293(b) of title 28, United States
20 Code, is amended by striking out all that appears after
21 “duties”, and inserting in lieu thereof the following: “in any
22 circuit, either in a court of appeals or district court, upon
23 presentation of a certificate of necessity by the chief judge or
24 circuit justice of the circuit in which the need arises.”.

1 (b) Section 293(d) of title 28, United States Code, is
2 amended to read as follows:

3 “(d) The chief judge of the Court of International Trade
4 may, upon presentation to him of a certificate of necessity by
5 the chief judge of the Court of Customs and Patent Appeals
6 or the chief judge of the Court of Claims, designate and
7 assign temporarily any judge of the Court of International
8 Trade to serve as a judge of the Court of Customs and
9 Patent Appeals or the Court of Claims.”.

10 TITLE III—JURISDICTION OF THE COURT OF
11 INTERNATIONAL TRADE

12 SEC. 301. Sections 1581 and 1582 of title 28, United
13 States Code, are repealed.

14 SEC. 302. Chapter 95 of title 28, United States Code, is
15 amended to read as follows:

16 **“CHAPTER 95—COURT OF INTERNATIONAL TRADE**

“Sec.

“1581. Civil actions against the United States.

“1582. Civil actions commenced by the United States.

“1583. Setoffs, demands, and counterclaims.

“1584. Cure of defects.

“1585. Powers generally.

17 **“§ 1581. Civil actions against the United States**

18 “(a) The Court of International Trade shall have exclu-
19 sive jurisdiction of civil actions instituted by any person
20 whose protest pursuant to the Tariff Act of 1930 has been
21 denied, in whole or in part, by the appropriate customs offi-
22 cer, where the administrative decision, including the legality

1 of all orders and findings entering into the same, involves: (1)
2 the appraised value of merchandise; (2) the classification and
3 rate and amount of duties chargeable; (3) all charges or exac-
4 tions of whatever character within the jurisdiction of the Sec-
5 retary of the Treasury; (4) the exclusion of merchandise from
6 entry or delivery under any provisions of the customs laws;
7 (5) the liquidation or reliquidation of an entry, or a modifica-
8 tion thereof; (6) the refusal to pay a claim for drawback; or
9 (7) the refusal to reliquidate an entry under section 520(c) of
10 the Tariff Act of 1930.

11 “(b) The Court of International Trade shall have exclu-
12 sive jurisdiction of civil actions instituted pursuant to sections
13 516 and 516A of the Tariff Act of 1930.

14 “(c) After the decision of the President has become
15 final, the Court of International Trade shall have exclusive
16 jurisdiction to review advice, findings, recommendations, and
17 determinations of the International Trade Commission pursu-
18 ant to sections 131, 201, 202, 203, 301, 406, and 503 of the
19 Trade Act of 1974, sections 336 and 338 of the Tariff Act of
20 1930, and section 22 of the Agricultural Adjustment Act,
21 solely for the purpose of determining the procedural regular-
22 ity of those actions.

23 “(d) After the decision of the President has become
24 final, the Court of International Trade shall have exclusive
25 jurisdiction to review the actions of the Office of the Special

6

1 Trade Representative pursuant to section 302(b)(1) and 304
2 of the Trade Act of 1974, solely for the purposes of deter-
3 mining the procedural regularity of those actions.

4 “(e) The Court of International Trade shall have exclu-
5 sive jurisdiction to review any decision of the Secretary of
6 Labor or the Secretary of Commerce certifying or refusing to
7 certify workers, communities, or businesses as eligible for ad-
8 justment assistance under the Trade Act of 1974. No injunc-
9 tion or writ of mandamus shall be issued in any case arising
10 under this subsection.

11 “(f) The Court of International Trade shall have exclu-
12 sive jurisdiction of any civil action brought by a party-at-
13 interest to review a final determination made under section
14 305(b)(1) of the Trade Agreements Act of 1979.

15 “(g) The Court of International Trade shall have exclu-
16 sive jurisdiction of any application for the issuance of a pro-
17 tective order under section 777(c)(2) of the Tariff Act of
18 1930.

19 “(h) In addition to the jurisdiction conferred upon the
20 Court of International Trade by this section, and subject to
21 the exceptions contained in paragraph (i), the Court of Inter-
22 national Trade shall have exclusive jurisdiction over all civil
23 actions against the United States, its agencies and its officers
24 which arise directly from import transactions and which arise
25 under the Tariff Act of 1930, the Trade Expansion Act of

1 1962, the Trade Act of 1974, or the Trade Agreements Act
2 of 1979.

3 “(i) The Court of International Trade shall not have
4 jurisdiction—

5 “(1) of any civil action arising under section 305
6 of the Tariff Act of 1930; or

7 “(2) to review any advice relating to classifica-
8 tion, valuation, rate of duty, marking, restricted mer-
9 chandise, entry requirements, drawbacks, vessel re-
10 pairs, and similar matters issued by the Secretary of
11 the Treasury to members of the public or members of
12 the Customs Service other than in connection with a
13 civil action instituted pursuant to subsections (a) and
14 (b) of this section: *Provided*, That this subsection shall
15 not apply if a member of the public demonstrates that
16 without substantial doubt, it would be commercially
17 impractical to obtain judicial review pursuant to sub-
18 sections (a) and (b) of this section.

19 “§ 1582: Civil actions commenced by the United States

20 “(a) The Court of International Trade shall have juris-
21 diction, upon transfer from a district court, over any civil
22 action which arises from an import transaction and which has
23 been instituted by the United States to—

1 “(1) recover a civil fine or penalty or enforce a
2 forfeiture imposed under any revenue statute adminis-
3 tered by the Customs Service;

4 “(2) recover upon a bond relating to the importa-
5 tion of merchandise required by the laws of the United
6 States or by the Secretary of the Treasury; or

7 “(3) recover customs duties.

8 “(b) A defendant may transfer a civil action referred to
9 in subsection (a) of this section by filing a motion to transfer
10 in the district court in which the action is pending.

11 “(c) The motion to transfer shall be filed within thirty
12 days after the service upon a defendant of a copy of the com-
13 plaint.

14 “(d)(1) Upon receipt of a motion to transfer, the district
15 court shall determine whether the civil action is an action
16 described in subsection (a) of this section. If the determina-
17 tion of the district court is affirmative, it shall order the
18 transfer.

19 “(2) In the case of a civil action described in subsection
20 (a) of this section, the United States shall be afforded an op-
21 portunity to object to the transfer and, if the United States
22 objects, such motion shall be granted only if the district court
23 determines that the civil action involves a substantial ques-
24 tion, other than the amount of any penalty involved, as to the
25 proper classification or valuation of imported merchandise.

1 The decision of the district court upon such motion shall be
2 final and conclusive and shall not be reviewable on appeal or
3 otherwise, except on appeal from a final judgment on the
4 merits.

5 “(e) Within ten days after the issuance of an order of
6 transfer, the clerk of the district court shall transmit copies of
7 all pleadings and documents to the Court of International
8 Trade.

9 “(f) Upon receipt of the copies of the pleadings and doc-
10 uments, the civil action shall be heard by the Court of Inter-
11 national Trade, sitting without a jury, and unless the parties
12 otherwise agree, the trial or hearing of the civil action shall
13 take place within the judicial district in which the civil action
14 was first instituted, as if the civil action had been instituted in
15 the Court of International Trade in the first instance.

16 “(g) The relevant provisions of sections 2461, 2462,
17 2463, 2464, and 2465 of this title shall apply in any action
18 transferred to the Court of International Trade pursuant to
19 this section.

20 **“§ 1583. Setoffs, demands, and counterclaims**

21 “The Court of International Trade shall have jurisdic-
22 tion to render judgment upon any setoff, demand, or counter-
23 claim asserted by the United States which arises out of the
24 same import transaction pending before the Court or a claim

1 to recover upon a bond relating to the importation of mer-
2 chandise or to recover customs duties.

3 **“§ 1584. Cure of defects**

4 “(a) If a civil action within the exclusive jurisdiction of
5 the Court of International Trade is filed in a district court,
6 the district court shall, in the interest of justice, transfer such
7 civil action to the Court of International Trade, where the
8 civil action shall proceed as if it had been filed in the Court of
9 International Trade on the date it was filed in the district
10 court.

11 “(b) If a civil action within the exclusive jurisdiction of a
12 district court or a court of appeals is filed in the Court of
13 International Trade, the Court of International Trade shall,
14 in the interest of justice, transfer such civil action to the ap-
15 propriate district court or court of appeals where the civil
16 action shall proceed as if it had been filed in the district court
17 or court of appeals on the date it was filed in the Court of
18 International Trade.

19 **“§ 1585. Powers generally**

20 “‘The Court of International Trade shall possess all the
21 powers in law and equity of, or as conferred by statute upon,
22 a district court of the United States.’”.

1 **TITLE IV—COURT OF INTERNATIONAL TRADE**
2 **PROCEDURE**

3 **SEC. 401.** Chapter 169 of title 28, United States Code,
4 is amended to read as follows:

5 **“CHAPTER 169—COURT OF INTERNATIONAL TRADE**
6 **PROCEDURE**

“Sec.

“2631. Persons entitled to commence a civil action.

“2632. Commencement of a civil action.

“2633. Procedure and fees.

“2634. Notice.

“2635. Filing of official documents.

“2636. Time for commencement of action.

“2637. Exhaustion of administrative remedies.

“2638. New grounds in support of a civil action.

“2639. Burden of proof; evidence of value.

“2640. Scope and standard of review.

“2641. Witnesses; inspection of documents.

“2642. Analysis of imported merchandise.

“2643. Relief.

“2644. Decisions; findings of fact and conclusions of law; effect of opinions.

“2645. Retrial or rehearing.

“2646. Precedence of cases.

7 **“§ 2631. Persons entitled to commence a civil action**

8 “(a) A civil action contesting the denial, in whole or in
9 part, of a protest under section 515 of the Tariff Act of 1930
10 may be instituted in the Court of International Trade by any
11 person entitled to file a protest pursuant to section 514 of the
12 Tariff Act of 1930.

13 “(b) A civil action contesting the denial, in whole or in
14 part, of a petition under section 516 of the Tariff Act of 1930
15 may be instituted in the Court of International Trade by any
16 domestic interested party.

1 “(c) A civil action contesting a determination listed in
2 section 516A of the Tariff Act of 1930 may be instituted in
3 the Court of International Trade by any interested party who
4 is a party to the proceeding in connection with which the
5 matter arises.

6 “(d) A civil action to review a final determination made
7 under section 305(b)(1) of the Trade Agreements Act of 1979
8 may be instituted by a party-at-interest.

9 “(e) A civil action involving applications for orders di-
10 recting the administering authority or the International
11 Trade Commission to make confidential information available
12 pursuant to section 777(c)(2) of the Tariff Act of 1930 may
13 be filed in the Court of International Trade by any interested
14 party who is a party to the administrative proceeding.

15 “(f) A civil action, other than one instituted pursuant to
16 section 777(c)(2) of the Tariff Act of 1930 or one contesting
17 the denial of a protest under section 515, the denial of a
18 petition under section 516, a determination under section
19 516A of the Tariff Act, or a determination under section
20 305(b)(1) of the Trade Agreements Act of 1979, may be in-
21 stituted in the Court of International Trade by any person
22 adversely affected or aggrieved by an agency action within
23 the meaning of section 702 of title 5, United States Code.

24 “(g) Except in cases instituted pursuant to section
25 1581(a) of this title or section 516 of the Tariff Act of 1930,

1 any person, by leave of court, who would be adversely affect-
2 ed or aggrieved by a decision in a civil action pending in the
3 Court of International Trade, may intervene in that action.
4 In exercising its discretion, the court shall consider whether
5 the intervention will unduly delay or prejudice the adjudica-
6 tion of the rights of the original parties.

7 “(h) By leave of court, any person who would be ad-
8 versely affected or aggrieved by an order disposing of an ap-
9 plication for the issuance of an order pursuant to section
10 777(c)(2) of the Tariff Act may intervene with regard to that
11 application.

12 “(i)(1) The term interested party means—

13 “(A) a foreign manufacturer, producer, or export-
14 er, or the United States importer, of merchandise
15 which is the subject of an investigation under title VII
16 of the Tariff Act of 1930 or a trade or business associ-
17 ation a majority of the members of which are importers
18 of such merchandise;

19 “(B) the government of a country in which such
20 merchandise is produced or manufactured;

21 “(C) a manufacturer, producer, or wholesaler in
22 the United States of a like product;

23 “(D) a certified union or recognized union or
24 group of workers which is representative of an industry

1 engaged in the manufacture, production, or wholesale
2 in the United States of a like product; and

3 “(E) a trade or business association a majority of
4 whose members manufacture, produce, or wholesale a
5 like product in the United States.

6 “(2) The term domestic interested party means a party
7 as defined in subparagraphs (C), (D), and (E) of paragraph
8 (1).

9 “(3) The term party-at-interest means—

10 “(A) a foreign manufacturer, producer, or export-
11 er, or a United States importer of merchandise which
12 is the subject of a final determination;

13 “(B) a manufacturer, producer, or wholesaler in
14 the United States of a like product;

15 “(C) United States members of a labor organiza-
16 tion or other association of workers whose members
17 are employed in the manufacture, production, or
18 wholesale in the United States of a like product; and

19 “(D) a trade or business association a majority of
20 whose members manufacture, produce, or wholesale a
21 like product in the United States.

22 “(4) The term ‘like product’ means a product which is
23 like, or in the absence of like, most similar in characteristics
24 and uses with the article subject to an investigation under
25 title VII of the Tariff Act of 1930 or a final determination

1 under section 305(b)(1) of the Trade Agreements Act of
2 1979.

3 **“§ 2632. Commencement of a civil action**

4 “(a) Except as otherwise provided in subsection 516A of
5 the Tariff Act of 1930, each civil action in the Court of Inter-
6 national Trade shall be instituted by the filing of a summons,
7 or of a complaint, or both, each with the content and in the
8 form, manner, and style prescribed in rules adopted by the
9 Court.

10 “(b) The Court of International Trade may prescribe by
11 rule that any pleading or other document transmitted by reg-
12 istered or certified mail properly addressed to the clerk of the
13 Court with the proper postage affixed and return receipt re-
14 quested shall be filed as of the date of postmark.

15 **“§ 2633. Procedure and fees**

16 “(a) A filing fee shall be payable upon commencing an
17 action. The amount of the fee shall be fixed by the Court of
18 International Trade but shall be not less than \$5 nor more
19 than the filing fee for commencing a civil action in a United
20 States district court. The Court of International Trade may
21 fix all other fees to be charged by the clerk of the Court.

22 “(b) The Court of International Trade shall provide by
23 rule for pleadings and other papers, for their amendment,
24 service, and filing, for consolidations, severances, suspensions
25 of cases, and for other procedural matters.

1 “(c) All pleadings and other papers filed in the Court of
2 International Trade shall be served on all parties in accord-
3 ance with the rules of the Court. When the United States, its
4 agencies, or its officers are adverse parties, service of the
5 summons or complaint, or both, shall be made upon the At-
6 torney General and the head of the Government agencies
7 whose actions are complained of, and where injunction relief
8 is sought, upon the named officials sought to be enjoined.

9 **“§ 2634. Notice**

10 “Reasonable notice of the time and place of trial or
11 hearing before the Court of International Trade shall be
12 given to all parties to any proceeding, under rules prescribed
13 by the Court.

14 **“§ 2635. Filing of official documents**

15 “(a)(1) Upon service of the summons on the Secretary of
16 the Treasury in any civil action contesting the denial of a
17 protest under section 515 of the Tariff Act of 1930, or the
18 denial of a petition under section 516 of that Act, the appro-
19 priate customs officer shall forthwith transmit to the Court of
20 International Trade as part of the official record—

21 “(A) consumption or other entry and the entry
22 summary;

23 “(B) commercial invoice;

24 “(C) special customs invoice;

25 “(D) copy of protest;

1 “(E) copy of denial or protest in whole or in part;

2 “(F) importer’s exhibits;

3 “(G) official and other representative samples;

4 “(H) any official laboratory reports; and

5 “(I) any bond relating to the entry.

6 “(2) If any of the items listed in paragraph (1) do not
7 exist in a particular case, an affirmative statement to that
8 effect shall be transmitted to the Court.

9 “(b) Within forty days, or within such period of time as
10 the Court of International Trade may specify, after service of
11 a summons on the Secretary of the Treasury, the administer-
12 ing authority established to administer title VII of the Tariff
13 Act of 1930, the United States International Trade Commis-
14 sion, or any other agency whose determination or action is
15 being contested, the Secretary or any other agency involved
16 shall file with the Court of International Trade, as provided
17 by its rules, the record which, unless otherwise stipulated by
18 the parties, shall consist of:

19 “(1) a copy of all information presented to or ob-
20 tained by the Secretary, the administering authority,
21 the Commission or any other agency involved, during
22 the course of the administrative proceedings, including
23 all governmental memorandums pertaining to the case
24 and the record of ex parte meetings required to be kept
25 by section 777(a)(3) of the Tariff Act of 1930; and

1 “(2) a copy of the determination, all transcripts or
2 records of conferences or hearings, and all notices pub-
3 lished in the Federal Register.

4 “(c) Any documents, comments, or information accorded
5 confidential or privileged status and required to be filed with
6 the Court of International Trade pursuant to subsection (b)
7 shall be filed with the clerk of the Court of International
8 Trade under seal and its confidential or privileged status shall
9 be preserved in the litigation. Notwithstanding the first sen-
10 tence of this subsection, the Court of International Trade
11 may examine, in camera, the confidential or privileged mate-
12 rial and may disclose such material under such terms and
13 conditions as it may order.

14 “(d) Within ten days, or within such period of time as
15 the Court of International Trade may specify, after service of
16 a summons and an application for an order directing the ad-
17 ministering authority or the International Trade Commission
18 to make confidential information available pursuant to section
19 777(c)(2) of the Tariff Act of 1930, the administering authori-
20 ty or the Commission shall file with the Court of Internation-
21 al Trade under seal the confidential information involved
22 along with pertinent parts of the record.

23 “(e)(1) In any other civil action in which judicial review
24 is to proceed upon the basis of the record made before an
25 agency, the agency, upon service of a summons or complaint,

1 or both, shall, within forty days of service of the summons,
2 transmit to the United States Court of International Trade a
3 copy of the contested determination, the findings or report
4 upon which it is based, a copy of any reported hearings or
5 conferences conducted by the agency, any documents, com-
6 ments, or other papers filed by the public, interested parties,
7 or governments with regard to the agency's action, identify-
8 ing and submitting under seal any documents, comments, or
9 other information obtained on a confidential basis and includ-
10 ing a nonconfidential description of the nature of such confi-
11 dential documents, comments, or information.

12 “(2) The confidentiality accorded such documents, com-
13 ments, and information shall be preserved in the litigation,
14 but the court may examine such documents, comments, and
15 information in camera if necessary to the disposition of the
16 action, and may order the disclosure of such documents, com-
17 ments, or information under such terms or conditions as the
18 court may order.

19 **“§ 2636. Time for commencement of action**

20 “(a) A civil action contesting the denial of a protest
21 under section 515 of the Tariff Act of 1930, is barred unless
22 commenced in accordance with the rules of the Court of In-
23 ternational Trade—

24 “(1) within one hundred and eighty days after the
25 date of mailing of notice of denial, in whole or in part,

1 of a protest pursuant to section 515(a) of the Tariff
2 Act of 1930;

3 “(2) in any case in which notice is not mailed
4 within the two-year period specified in section 515(a)
5 of the Tariff Act of 1930, at any time after the date of
6 the expiration of the two-year period specified in such
7 section prior to the mailing of a notice of denial; or

8 “(3) within one hundred and eighty days after the
9 date of denial of a protest by operation of law pursuant
10 to the provisions of section 515(b) of the Tariff Act of
11 1930.

12 “(b) A civil action contesting the denial of a petition
13 under section 516 of the Tariff Act of 1930 is barred unless
14 commenced within thirty days after the date of mailing of a
15 notice transmitted pursuant to section 516(c) of the Tariff
16 Act of 1930.

17 “(c) A civil action contesting a determination by the ad-
18 ministering authority, under section 703(c) or 733(c) of the
19 Tariff Act of 1930, that a case is extraordinarily complicated
20 is barred unless commenced within five days after the date of
21 the publication of the determination in the Federal Register.

22 “(d) A civil action contesting a reviewable determina-
23 tion listed in section 516A of the Tariff Act of 1930, other
24 than a determination under section 703(c) or 733(c) of that
25 Act, is barred unless commenced within thirty days after the

1 date of the publication of the determination in the Federal
2 Register.

3 “(e) A civil action involving an application for an order
4 making confidential information available pursuant to section
5 777(c)(2) of the Tariff Act of 1930 is barred unless com-
6 menced in accordance with the rules of the Court of Interna-
7 tional Trade within five days from the denial of a request for
8 confidential information.

9 “(f) A civil action contesting a final determination made
10 under section 305(b)(1) of the Trade Agreements Act of 1979
11 is barred unless commenced within thirty days after the date
12 of the publication of the determination in the Federal
13 Register.

14 “(g) A civil action, other than one enumerated in sub-
15 sections (a) through (f), over which the Court has jurisdiction
16 pursuant to section 1581 of this title is barred unless com-
17 menced in accordance with the rules of the Court of Interna-
18 tional Trade within two years after the right of action first
19 accrues.

20 **“§ 2637. Exhaustion of administrative remedies**

21 “(a) A civil action contesting the denial of a protest
22 under section 515 of the Tariff Act of 1930 may be instituted
23 only if all liquidated duties or exactions shall have been paid
24 at the time the action is filed, except that a surety’s obliga-
25 tion to pay such liquidated duties or exactions is limited to

1 the sum of any bond relating to each entry included in a
2 denied protest. If a surety institutes a civil action in the
3 Court of International Trade, any recovery of the surety
4 shall be limited to the amount of the liquidated duties or ex-
5 actions paid on the entries included in the action.

6 “(b) A civil action contesting the denial of a petition
7 under section 516 of the Tariff Act of 1930 may be instituted
8 only by a person who has first exhausted the procedures
9 specified in that section.

10 “(c) In all other cases, the Court of International Trade,
11 where appropriate, shall require the exhaustion of adminis-
12 trative remedies.

13 **“§ 2638. New grounds in support of a civil action**

14 “In any case in which the denial, in whole or in part, of
15 a protest is a precondition to the institution of a civil action in
16 the Court of International Trade, the Court, by rule, may
17 consider any new ground in support of the civil action if the
18 new ground—

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

21 “(2) is related to the same administrative deci-
22 sions listed in section 514 of the Tariff Act of 1930
23 that were contested in the protest.

1 **“§ 2639. Burden of proof; evidence of value**

2 “(a) The decision of the Secretary of the Treasury, or
3 his delegate, is presumed to be correct. The burden to prove
4 otherwise shall rest upon the party challenging a decision.

5 “(b) Where the value of merchandise or any of its com-
6 ponents is in issue—

7 “(1) reports or depositions of consuls, customs of-
8 ficers, and other officers of the United States and dep-
9 ositions and affidavits of other persons whose attend-
10 ance cannot reasonably be had may be admitted into
11 evidence when served upon the opposing party in ac-
12 cordance with the rules of the Court;

13 “(2) price lists and catalogs may be admitted in
14 evidence when duly authenticated, relevant, and mate-
15 rial; and

16 “(3) the value of merchandise shall be determined
17 from the evidence in the record and that adduced at
18 the trial whether or not the merchandise or sample
19 thereof is available for examination.

20 “(c) The requirements of subsections (a) and (b) apply in
21 any matter in the Court of International Trade except an
22 action transferred to the Court of International Trade pursu-
23 ant to section 1582 of this title.

1 **“§ 2640. Scope and standard of review**

2 “(a) The Court of International Trade shall determine
3 the matter upon the basis of the record made before the
4 Court in the following categories of civil actions:

5 “(1) Civil actions contesting the denial of a pro-
6 test under section 515 of the Tariff Act of 1930
7 involving—

8 “(A) the appraised value of merchandise,
9 except to the extent judicial review is available
10 under subsection (b) of this section in the case of
11 assessment of countervailing or antidumping
12 duties;

13 “(B) the classification, rate, and amount of
14 duties or fees chargeable, except to the extent ju-
15 dicial review is available under subsection (b) of
16 this section in the case of assessment of counter-
17 vailing or antidumping duties;

18 “(C) the required redelivery of imports pur-
19 suant to the terms of an entry bond or the exclu-
20 sion of merchandise from entry or delivery under
21 the customs laws or pursuant to an action of the
22 Customs Service not taken upon the request or
23 direction of a court or other Federal agency,
24 except the exclusion of imports alleged to be
25 pornographic;

1 “(D) all charges or exactions imposed upon
2 imported articles, except to the extent judicial
3 review is available under subsection (b) of this
4 section in the case of assessment of countervailing
5 or antidumping duties;

6 “(E) the refusal to pay a claim for a draw-
7 back; and

8 “(F) the refusal to reliquidate an entry under
9 section 520(c) of the Tariff Act of 1930.

10 “(2) Civil actions instituted pursuant to section
11 1581(f) of this title.

12 “(3) Civil actions instituted under section 516(c)
13 of the Tariff Act of 1930.

14 “(4) Civil actions for a protective order instituted
15 pursuant to section 1581(g) of this title.

16 “(b) In civil actions instituted under section 516A of the
17 Tariff Act of 1930, the Court shall determine the matter as
18 specified in subsection (b) of that section.

19 “(c) In all other Civil actions, the Court shall determine
20 the matter as provided in section 706 of title 5 of the United
21 States Code.

22 **“§ 2641. Witnesses; inspection of documents**

23 “(a) Except as otherwise provided by law, in any pro-
24 ceeding in the Court of International Trade, the parties and
25 their attorneys shall have an opportunity to introduce evi-

1 dence, to hear and cross-examine the witnesses of the other
2 party, and to inspect all samples and all papers admitted or
3 offered as evidence under rules prescribed by the Court.
4 Except as provided in section 2639, subsection (b) of this
5 section, or any rules prescribed by the Court, the Federal
6 Rules of Evidence apply to all proceedings in the Court of
7 International Trade.

8 “(b) In any civil action, the Court of International
9 Trade may order that trade secrets and commercial or finan-
10 cial information which is privileged and confidential or any
11 information provided to the United States by foreign govern-
12 ments or foreign persons, shall not be disclosed or shall be
13 disclosed to a party, its counsel, or any other person, only
14 under such terms and conditions as the Court may provide.

15 **“§ 2642. Analysis of imported merchandise**

16 “A judge of the Court of International Trade may order
17 an analysis of imported merchandise and reports thereon by
18 laboratories or agencies of the United States.

19 **“§ 2643. Relief**

20 “(a) In any case instituted under section 1581 of this
21 title, the Court of International Trade may, if appropriate,
22 enter a money judgment for and against the United States.

23 “(b) If, in any civil action referred to in section 2640
24 (a)(1) or (a)(3), the plaintiff—

1 “(1) proves that the original decision was incor-
2 rect, and

3 “(2) introduce evidence as to the correct decision,
4 but, based upon the evidence introduced by the plaintiff and
5 the defendant, the Court of International Trade is unable to
6 determine the correct decision, such Court shall restore the
7 case to the calendar for all purposes, including such further
8 administrative or adjudicative procedures as may be neces-
9 sary to enable the Court to reach a determination as to the
10 correct decision. The order of restoration or remand shall be
11 final and appealable pursuant to sections 1541(a) and 2601 of
12 this title.

13 “(c) In addition to the order specified in subsections (a)
14 and (b) of this section, the Court of International Trade may
15 order in any civil action any form of relief which is appropri-
16 ate including, but not limited to, declaratory judgments,
17 orders of remand, writs of mandamus, and prohibition and
18 injunction.

19 “(d) In extraordinary circumstances, the Court of Inter-
20 national Trade may grant appropriate preliminary or perma-
21 nent injunctive relief upon a request by a person who would
22 have the right to institute a civil action after exhausting all
23 appropriate administrative remedies. In ruling upon such a
24 request for injunctive relief, the Court of International Trade
25 shall consider whether the person making the request will

1 otherwise be irreparably harmed, and the effect of the re-
2 quested injunction on the public interest.

3 **“§ 2644. Decisions; findings of fact and conclusions of law;**
4 **effect of opinions**

5 “(a) A final decision of the judge in a contested case or
6 a decision granting or refusing an interlocutory injunction
7 shall be supported by—

8 “(1) a statement of findings of fact and conclu-
9 sions of law, or

10 “(2) an opinion stating the reasons and facts upon
11 which the decision is based.

12 “(b) Upon motion of a party made not later than thirty
13 days after entry of judgment, the Court may amend its find-
14 ings or make additional findings and may amend the judg-
15 ment accordingly.

16 “(c) The decision of the judge is final and conclusive,
17 unless a retrial or rehearing is granted pursuant to section
18 2645 of this title or an appeal is made to the Court of Cus-
19 toms and Patent Appeals within the time and the manner
20 provided in section 2601 of this title.

21 **“§ 2645. Retrial or rehearing**

22 “The judge who has rendered a judgment or order may,
23 upon motion of a party or upon his own motion, grant a
24 retrial or rehearing, as the case may be. A party’s motion
25 shall be made or the judge’s action on his own motion shall

1 (b) Section 1541 is amended by adding at the end there-
2 of the following:

3 “(c) The Court of Customs and Patent Appeals has ju-
4 risdiction of appeals from interlocutory orders of the Court of
5 International Trade granting, continuing, modifying, or dis-
6 solving injunctions, or refusing to dissolve or modify injunc-
7 tions.”.

8 SEC. 502. (a) Section 2601(a) of title 28, United States
9 Code, is amended by adding the following new sentence at
10 the end thereof: “If a timely notice of appeal is filed by a
11 party, any other party may file a notice of appeal within
12 fourteen days after the date on which the first notice of
13 appeal was filed.”.

14 (b) The first sentence of section 2601(b) of title 28,
15 United States Code, is amended—

16 (1) by inserting “or cross appeal” after “appeal”
17 each time it appears; and

18 (2) by striking “which shall include a concise
19 statement of the errors complained of”.

20 (c) The third sentence of section 2601(b) of title 28,
21 United States Code, is amended by striking out “and the
22 Secretary of the Treasury or their designees” and inserting
23 in lieu thereof “and any named official”.

24 (d) Section 2601(c) of title 28 is amended by inserting
25 the following after the first sentence: “Findings of fact shall

1 not be set aside unless clearly erroneous and due regard shall
2 be given to the opportunity of the trial court to judge the
3 credibility of the witnesses. A party may raise on appeal the
4 question of the sufficiency of the evidence to support findings
5 of fact, whether or not the party raising the question has
6 made an objection to such findings in the Court of Interna-
7 tional Trade or has made a motion to amend them or a
8 motion for judgment.”.

9 SEC. 503. (a) Chapter 93 of title 28, United States
10 Code, is amended by adding at the end thereof the following
11 new section:

12 **“§1546. Rules of evidence; powers in law and equity; ex-**
13 **clusive jurisdiction**

14 “(a) Except as provided in section 2639 of this title,
15 subsection (b) of section 2641 of this title, or any rules pre-
16 scribed by the court, the Federal Rules of Evidence shall
17 apply in the Court of Customs and Patent Appeals in any
18 appeal from the Court of International Trade.

19 “(b) The Court of Customs and Patent Appeals shall
20 have all the powers in law and equity of, or as conferred by
21 statute upon, a court of appeals of the United States.

22 “(c) The Court of Customs and Patent Appeals shall
23 possess exclusive jurisdiction to review—

1 pears after "United States" and by inserting in lieu thereof
2 "Court of International Trade".

3 SEC. 602. (a) The second sentence of the second para-
4 graph of paragraph (b) of section 641 of the Tariff Act of
5 1930 is amended by deleting all that appears after "filing,"
6 and before "sixty," and by inserting in lieu thereof "in the
7 Court of Customs and Patent Appeals, within".

8 (b) The second paragraph of section 641(b) of the Tariff
9 Act of 1930 is amended by inserting the following immedi-
10 ately after the third sentence of that paragraph: "For pur-
11 poses of this paragraph, all relevant rules prescribed in ac-
12 cordance with sections 2072 and 2112 of title 28, United
13 States Code, apply to the Court of Customs and Patent
14 Appeals.".

15 SEC. 603. Section 1340 of title 28, United States Code,
16 is amended by adding at the end thereof the following: "The
17 Court of International Trade shall have jurisdiction of any
18 civil action, not within its exclusive jurisdiction, arising under
19 any Act of Congress providing for revenue from imports or
20 tonnage upon transfer from a district court as provided in
21 section 1582 of this title.".

22 SEC. 604. Section 1355 of title 28, United States Code,
23 is amended by adding at the end thereof the following: "The
24 Court of International Trade shall have jurisdiction of any

1 such action or proceeding upon transfer from a district court
2 as provided in section 1582 of this title.”.

3 SEC. 605. Section 1356 of title 28, United States Code,
4 is amended by adding at the end thereof the following: “The
5 Court of International Trade shall have jurisdiction of any
6 such action or proceeding upon transfer from a district court
7 as provided in section 1582 of this title.”.

8 SEC. 606. Section 751 of title 28, United States Code,
9 is amended by adding at the end thereof the following:

10 “(f) When the Court of International Trade is sitting in
11 a judicial district, other than the Southern and Eastern Dis-
12 tricts of New York, the clerk of that district court or an au-
13 thorized deputy clerk, upon the request of the chief judge of
14 the Court of International Trade and with the approval of
15 that district court, shall act in the district as clerk of the
16 Court of International Trade in accordance with rules and
17 orders of the Court of International Trade for all purposes
18 relating to the case then pending before that court.”.

19 SEC. 607. The second paragraph of section 1491 of title
20 28, United States Code, is amended by inserting “within the
21 exclusive jurisdiction of the Court of International Trade, or”
22 after “suits” the first time it appears in the first sentence.

23 SEC. 608. The first paragraph of section 2414 of title
24 28, United States Code, is amended by inserting “or Court of
25 International Trade” after “court” in the first sentence.

1 SEC. 609. Section 1919 of title 28, United States Code,
2 is amended by inserting "or the Court of International
3 Trade" after "court" the first time it appears.

4 SEC. 610. (a) Chapter 125 of title 28, United States
5 Code, is amended by inserting immediately after section
6 1963 the following new section:

7 **"§1963A. Registration of judgments of the Court of Inter-**
8 **national Trade**

9 "(a) A judgment in an action for the recovery of money
10 or property entered by the Court of International Trade
11 which has become final by appeal or expiration of time for
12 appeal may be registered in any district by filing a certified
13 copy of such judgment. A judgment so registered shall have
14 the same effect as a judgment of the district court of the
15 district where registered and may be enforced in like manner.

16 "(b) A certified copy of the satisfaction of any judgment
17 in whole or in part may be registered in like manner in any
18 district in which the judgment is a lien."

19 (b) The table of sections for chapter 125 is amended by
20 inserting immediately after the item relating to section 1963
21 the following:

**"§1963A. Registration of judgments of the Court of International
 Trade."**

22 SEC. 611. Section 1331(a) of title 28, United States
23 Code, is amended by adding at the end thereof the following:
24 "The district courts shall not possess jurisdiction pursuant to

1 this section over any matter within the exclusive jurisdiction
2 of the Court of International Trade.”.

3 SEC. 612. (a) Section 2602 of title 28, United States
4 Code, is amended to read as follows:

5 **“§ 2602. Precedence of cases**

6 “(a) Each civil action involving the exclusion of mer-
7 chandise or arising under section 1582 of this title or sections
8 516 or 516A of the Tariff Act of 1930, shall be given prece-
9 dence over other cases on the docket of such court, and shall
10 be assigned for hearing at the earliest practicable date and
11 expedited in every way.

12 “(b) Of the civil actions given precedence under subsec-
13 tion (a) of this section, any civil action for the review of a
14 determination under section 516A(a)(1)(B) or 516A(a)(1)(E)
15 of the Tariff Act of 1930 shall be given priority over other
16 such civil actions.

17 “(c) Appeals from findings by the Secretary of Com-
18 merce provided for in headnote 6 to schedule 8, part 4, of the
19 Tariff Schedules of the United States shall receive preference
20 over all other matters.”.

21 (b) The table of sections for chapter 167 of title 28,
22 United States Code, is amended in the item relating to sec-
23 tion 2602 to read as follows:

“2602. Precedence of cases.”.

1 SEC. 613. Section 3 of the Act of July 5, 1884 (23 Stat.
2 119), is amended to read as follows: "The decision of the
3 Commissioner of Customs on all questions of interpretation
4 arising out of the execution of the laws relating to the collec-
5 tion of tonnage tax and to the refund of such tax when col-
6 lected erroneously or illegally, shall be subject to judicial
7 review in the Court of International Trade as provided in
8 title 28, United States Code. In the Court of International
9 Trade, and upon appeal, if any, from that Court, the findings
10 of the Commissioner as to any fact, if supported by substan-
11 tial evidence, shall be conclusive."

12 SEC. 614 (a) Section 1345 of title 28, United States
13 Code, is amended by adding at the end thereof the following
14 new sentence: "The Court of International Trade shall have
15 jurisdiction of any such action or proceeding upon transfer
16 from a district court as provided in section 1582 of this
17 title."

18 (b) Section 1352 of title 28, United States Code, is
19 amended by adding at the end thereof the following new sen-
20 tence: "The Court of International Trade shall have jurisdic-
21 tion of any such action upon transfer from a district court as
22 provided in section 1582 of this title."

23 SEC. 615. Section 1337(c) of title 19, United States
24 Code, is amended by inserting immediately after "Appeals"
25 the following ", subject to chapter 7 of title 5, United States

1 Code,” and, striking out the last sentence and inserting in
2 lieu thereof: “Notwithstanding the foregoing, review of Com-
3 mission determinations under subsections (d), (e), and (f) as to
4 its findings on the public health and welfare, competitive con-
5 ditions in the United States economy, the production of like
6 or directly competitive articles in the United States, and
7 United States consumers, the amount and nature of bond, or
8 the appropriate remedy shall be reviewable only for abuse of
9 administrative discretion.”.

10 SEC. 616. The second sentence of section 516A(c)(2) of
11 the Tariff Act of 1930 is amended so as to read as follows:
12 “In ruling upon a request for such injunctive relief the court
13 shall consider the factors set forth in sentence 2643(d) of title
14 28.”.

15 SEC. 617. Any references to the United States Customs
16 Court, the U.S. Customs Court, or the Customs Court shall
17 be deemed a reference to the United States Court of Interna-
18 tional Trade.

19 SEC. 618. (a) The provisions of subsections (c), (d), (e),
20 and (f) of section 2631 of title 28, United States Code, as
21 added by section 401 of this Act apply to entries liquidated
22 on and after the date of enactment of this Act.

23 (b) This Act shall become effective on the date of its
24 enactment.

1 (c) Nothing in this Act shall cause the dismissal of any
2 action instituted prior to the date of enactment under jurisdic-
3 tional statutes relating to the Court of International Trade or
4 the Court of Customs and Patent Appeals in effect before the
5 date of enactment of this Act.

6 (d) Notwithstanding section 106 of the Trade Agree-
7 ments Act of 1979, any civil action in the Court of
8 International Trade on January 1, 1980, pursuant to the An-
9 tidumping Act of 1921, shall be governed by the provisions of
10 the Antidumping Act, 1921, in effect on the day before the
11 effective date of title I of the Trade Agreements Act of 1979.

PREPARED STATEMENT OF CORNING GLASS WORKS

Please accept my thanks and appreciation for the opportunity of submitting this testimony as part of the record of your Subcommittee's hearings regarding S. 1654. For the record my name is Henry F. Frailey. ~~I am a vice president of Corning Glass Works, Corning, New York. For the past ten years my company has been involved in efforts to stop what it believes is unfair and excessive importation of television receivers into this country.~~ I personally have served as Chairman of the Imports Committee, Tube Division of the Electronic Industries Association which has been very active in its efforts to secure proper enforcement of the Antidumping Act of 1921. I have also been active in an organization called COMPACT, the Committee to Preserve American Color Television. COMPACT is a Labor-Industry Coalition formed in 1976 to promote fair international trade and to stop what it felt was unfair and excessive importation of television receivers into this country. Since the early 1960's tens of thousands of jobs have been lost in America's consumer electronics industry because of imports. The television industry and its workers can testify from bitter experience about the failure of our laws and the people who administer them to prevent unfair trade practices. The comments I offer today are based on my long experience in working with these organizations in attempting to deal with these problems. These comments are my own views and are not offered as the views of either COMPACT or the Electronic Industries Association.

On March 10, 1971 the Secretary of the Treasury entered a formal dumping finding with respect to television receivers from Japan, T.D. 71-76. 36 F.R. 4597. This formal finding was preceded by a finding by the Secretary of the Treasury that television receivers from Japan were being dumped in this country illegally

and a unanimous determination by the Tariff Commission (now the International Trade Commission) that an industry in this country was being injured by that illegal dumping.

Documents available in the public reading file at the United States Customs Service indicate that several hundred million dollars in dumping duties may be due on television receivers imported since 1971; yet the great bulk of these duties remain unassessed and uncollected. In May of this year COMPACT and the Imports Committee, the original petitioner in the dumping case, brought a civil action against the Secretary of the Treasury and others in the United States District Court for the District of Columbia. COMPACT v. Blumenthal, D.D.C. Civil Action No. 79-1207. The purpose of that suit was to compel proper enforcement of the Antidumping Act of 1921, 19 U.S.C. 160 et seq. We have been advised by counsel that the United States Customs Court does not have subject matter jurisdiction over our case and that the only present forum where relief is available is in the District Court. Testimony previously given before this Subcommittee^{2/} has described the confusion which presently exists with respect to the jurisdictional boundaries between the Customs Court and federal district courts. In our case the District Court ruled that it does not have subject matter jurisdiction. We are appealing that decision. Because our case is still in litigation it would be inappropriate for us to comment on the underlying merits of the controversy or on the jurisdictional issue now before the Court of Appeals. We can, however, speak to the need for eliminating current uncertainty with respect to the jurisdictional boundaries surrounding the Customs Court as well as the need to confer additional powers upon that Court so that it can deal adequately with the full range of issues which may be brought before it.

The present jurisdiction of the United States Customs Court is narrowly circumscribed with respect to the parties who may obtain relief as well as subject matter of the controversies which may be adjudicated.^{2/} Moreover, the Customs Courts' lack of equity powers has proven to be a substantial limitation on the ability of that Court to fashion appropriate remedies in those cases where it has subject matter jurisdiction.^{3/} Because of these circumstances aggrieved parties have been forced to seek relief in U.S. District Courts pursuant to the residual grant of jurisdiction

found in 28 U.S.C. 1340. Plaintiffs in such actions must first establish that the Customs Court has no subject matter jurisdiction over the controversy as a prerequisite to the District Court's jurisdiction. In the typical case the Department of Justice has argued that if there is no remedy in the Customs Court then Congress intended that there be no remedy at all. As a result, relief in the District Courts has been a rather uncertain proposition limited to the most egregious cases involving unlawful, arbitrary or capricious conduct.

Resort to District Courts in customs related matters has been criticized because of the lack of uniformity which adjudication in individual federal districts may produce. Nevertheless for those involved in international trade, it has been important to have a forum available to deal with genuine cases and controversies which are beyond the reach of the Customs Court.

In considering legislative changes to the existing jurisdiction of the United States Customs Court, the Subcommittee must focus upon four items:

1. The subject matter jurisdiction of that Court to hear specific cases and controversies.
2. The standing of various entities to bring cases before the Court.
3. The scope of review which specific agency action will be subjected to in that Court.
4. The powers of that Court to fashion effective legal and equitable relief in specific cases.

~~It would do little good to enlarge the subject matter jurisdiction and the class of persons who may file actions in the Customs Court if the scope of review is unduly narrow or if that Court lacked the powers to fashion adequate relief.~~ Expansion of the exclusive jurisdiction of the Customs Court by necessity reduces the residual jurisdiction of the District Courts. Accordingly, the scope of the relief presently available to aggrieved parties may be narrowed if the subject matter jurisdiction of the Customs Court is enlarged, but the powers of that Court to deal with specific controversies are not at the same time enlarged.

As Chief Judge Edward D. Re of the U.S. Customs Court said when he testified before this Subcommittee on June 23, 1978:^{2/}

"There are two key provisions: Effective access and the power to grant appropriate remedies."

S. 1654 is designed to eliminate the jurisdictional uncertainties which exist under present law and to expand the opportunities for judicial review of agency action affecting customs matters in a court that possesses the special expertise to deal with such problems. We support these objectives and we believe that S. 1654 as presently drafted goes a long way towards accomplishing them. We do, however, offer several comments and suggestions for the purpose of clarifying the wording of the proposed law. We believe that our suggested changes are consistent with the stated purposes of the statute.

1. The subject matter jurisdiction of the Court of International Trade.

A. Controversies concerning the disclosure of confidential information.

§302 of the proposed law amends Chapter 95 of Title 28. Section 1581(g) as it is presently drafted (p.6, 1.15-18) provides for jurisdiction over the denial of an application for a protective order under §777(c)(2) of the Tariff Act of 1930. Since any decision regarding the disclosure of confidential information has an impact on both the party seeking disclosure and the party whose information may be subject to disclosure, it is suggested that the jurisdictional grant over controversies involving discovery be broadened as follows:

The Court of International Trade shall have exclusive jurisdiction of any civil action brought by a party-at-interest adversely affected or aggrieved by a final determination made under section 777 of the Tariff Act of 1930.

provisions are well suited to determine standing in situations where a specific statutory grant of standing has not been enacted.

§2636 establishes the times within which various actions must be commenced. Several of the deadlines provided for in the legislation as now drafted are very short and, in our opinion, do not permit sufficient time to evaluate the complex issues which must be addressed before an appeal is filed. We recommend that the time limitations presently established in the following subsections be enlarged as follows:

§2636(b)	sixty (60) days
§2636(c)	fifteen (15) days
§2636(d)	sixty (60) days
§2636(e)	sixty (60) days

3. Scope of review

28 U.S.C. 2640 as amended by Section 401 of the proposed law sets forth standards for review in the Court of International Trade. §2640(a) and §2640(b) largely reflect standards previously established under specific statutes. Subsection (c) covers the standard of review in cases where a specific statute does not create a specific standard of review. That section permits the Court to review matters as provided for in the judicial review provisions of 5 U.S.C. 706. Since that section provides for several different standards of review including trial *de novo*, we assume that the Court will be free to select and apply under general principles of administrative law a standard of review which is appropriate for the specific administrative action or determination under review. This type of flexibility is undoubtedly needed in view of the broad subject matter jurisdiction which the new Court will have.

The legislation as presently drafted does not attempt to deal with the problems which arise when the scope of review called for in a particular situation is limited to a review of the administrative record, but where there are genuine questions with respect to the completeness, accuracy or authenticity of the record presented for review. Certainly the broad equitable powers conferred upon the Court will enable it, under appropriate circumstances, to

permit inquiry into the completeness, accuracy and authenticity of an administrative record before it for review.7/

We recommend that a new subsection (d) be added to §2640 to read as follows:

2640(d) Nothing contained in this Chapter shall prevent the Court of International Trade from inquiring into the completeness, accuracy or authenticity of any administrative record presented to it for review. The Court may issue such orders as it deems appropriate, including an order for remand, in order to resolve any questions with respect to any administrative record presented to it.

§2639 establishes a presumption that the "decision of the Secretary of the Treasury, or his delegate is presumed to be correct" and that the "burden to prove otherwise shall rest upon the party challenging a decision." This language is presently found in 28 U.S.C. 2635. Because of the very narrow subject matter jurisdiction which the Customs Court now has under existing law, this presumption necessarily applies in only a few situations. In view of the fact that the new court will have much broader subject matter jurisdiction which will cover a great variety of agency action and activity, we believe that carrying over this presumption from existing law is unwise. The presumption is much too broad to apply in a wide variety of cases which will come before the Court of International Trade. It is recommended that this provision either be eliminated entirely or limited in its application to decisions of the Secretary now reviewable in the Customs Court under existing law which are described in §2640(a) (1), (2) and (3) of the proposed legislation.

4. The powers of the Court of International Trade .

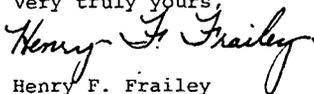
Section 1585 confers upon the Court of International Trade all of the powers held by a district court of the United States. We support this provision enthusiastically. Without such a grant of power, the new Court would be wholly unable to discharge its newly acquired jurisdictional responsibilities.

5. The Court of Customs and Patent Appeals

Section 2601(c) addresses the standard of review to be applied by the Court of Customs and Patent Appeals on appeals from the Court of International Trade. Unfortunately this section as drafted deals only with a standard of review which is appropriate when the Court below conducted a trial de novo. No mention is given to the standards which should be applied by the appeals court when the Court of International Trade merely reviewed an administrative record under a "substantial evidence" test or under an "unreasonable, arbitrary or capricious" standard. The Subcommittee should add greater detail to the review standards to be used by the appellate court in such cases.

We hope you find these comments both useful and constructive. We concur with your feeling that the proposed legislation is urgently needed and join with you in hoping for its early adoption.

Very truly yours,

A handwritten signature in cursive script that reads "Henry F. Frailey". The signature is written in dark ink and is positioned above the typed name.

Henry F. Frailey

Footnotes to the Statement of Henry F. Frailey

- 1/ Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, United States Senate, 95th Congress, Second Session on S-2857, June 23 and 27, 1978.
- 2/ Dexter v. United States, 78 Cust Ct. 179, 424 F.Supp. 1069 (1977); Alberta Gas Chemicals, Inc. v. Blumenthal, - Cust. Ct. - CD 4792 (March 23, 1979).
- 3/ See Alberta Gas Chemicals, Inc. v. Blumenthal, supra at note 2, where the Court expresses the view that it was "painfully frustrated and disturbed" by the inability of the Customs Court to deal with important questions affecting American manufacturers, producers and importers. Customs Bulletin of Mar.23,1979 at p.56-57.
- 4/ Timken Co. v. Simon, 176 U.S. App. D.C. 219, 539 F2d 221.
- 5/ Hearing transcript at p.70.
- 6/ See for example Scanwell Laboratories, Inc. v. Shaffer, 424 F2d 859 (D.C. Cir. 1970); and Ballerina Pen Co. v. Kunzig, 433 F2d 1204 (D.C. Cir. 1970).
- 7/ An interesting discussion of the Customs Courts current approach to problems which arise when the administrative record is incomplete may be found in Airco, Inc. v. United States - Cust. Ct. - (C.R.D. 79-9, dated April 16, 1979).

PREPARED
STATEMENT OF
NATIONAL CUSTOMS BROKERS & FORWARDERS ASSOCIATION OF AMERICA, INC.

Our Association is a nationwide organization of approximately 400 members located in all of the major ports of the country, as well as 23 affiliated local associations. Our members include customs brokers licensed by the U. S. Treasury Department as qualified to enter and clear merchandise through Customs, ocean freight forwarders licensed by the Federal Maritime Commission to handle export shipments, international air cargo forwarders licensed by the Civil Aeronautics Board, and IATA air freight sales agents.

We handle through our membership most of the general cargo imported into, as well as exported from, this country. Our Association is the only nationwide organization representing the customs brokerage and international freight forwarding industry.

Our customs broker members are specialists in all facets of the problems relating to the entry and clearance of imported merchandise. They daily handle thousands of import shipments. They are to be found as active members in all of the principal organizations in this country dealing with imports, and they are the advisers to the importing community in connection with technical and everyday customs matters. They frequently are importers of record. If they do not speak in this field on behalf of importers, they are their principal consultants

whenever customs problems arise, particularly those matters that take place prior to actual litigation in court.

Our Association supports S. 1654. The Bill is desirable and laudable. Several recommendations we are convinced would improve it are summarized below.

REMARKS AND RECOMMENDATIONS

Section 1546 (c) - Jurisdiction. Brokers' Licenses

There is one provision in S. 1654 which we regard as highly objectionable, namely, Section 1546 (c) which vests exclusive jurisdiction in the Court of Customs and Patent Appeals to review "(1) any decision of the Secretary of the Treasury to deny or revoke a customs brokers' license xxx or (2) any action challenging an order to revoke or suspend a (customs broker's) license xxx". We urge that this provision be modified so that a broker can have the option of bringing such matters for review either before the Court of Customs and Patent Appeals, or, as under the present law, before the local Court of Appeals of the United States where the aggrieved broker resides or has his principal place of business.

Customs brokers are located in every port of the United States where substantial quantities of merchandise are imported. Most of them are individuals or small organizations who work hard to make a modest living with small profits. Those brokers who live and work far from Washington, D.C., where the Court of Customs and Patent Appeals is located, will be needlessly injured if they are compelled to travel long distances with their attorneys in order to have their complaints reviewed. A personal appearance and an oral hearing is a necessity when a broker's livelihood is at stake. We support this provision insofar as it extends jurisdiction to the Court of Customs and Patent Appeals to review such actions by the Secretary of the Treasury, but that court should not be given exclusive jurisdiction.

Section 1581 (a) - Demands For Redelivery - Jurisdiction

Customs officials frequently make demands for the redelivery of merchandise for alleged violations of the Customs laws. Such demands may be without merit, but they prevent the importer from disposing of his merchandise. The Court of International Trade should be given exclusive authority to provide prompt relief.

Section 1581 (a) - Jurisdiction Over Final Agency Action

Importers should be allowed, when extraordinary circumstances exist, to appeal immediately to the Customs Court from final agency action ("advice") relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, and the like issued by the Secretary of the Treasury or his delegate to the public or to the Customs Service without being required to wait many months until there will have been a liquidation of an import entry. The Customs Court should be given the authority to determine whether or not the extraordinary circumstances are such as to warrant immediate court review. See the preliminary injunctive relief procedures in the event of extraordinary circumstances as set forth in Section 2643 (d).

Section 1582 (a) and (d) (1) - Actions Commenced By The United States

Importers and brokers may have good reason to object to a transfer of a case from a local District Court to the Court of International Trade for such things as actions brought by the United States to (1) recover a civil fine or penalty or enforce a forfeiture, (2) recover upon a bond, or (3) recover customs duties. The District Court should be given final authority to determine promptly if the objection by the defendant to the transfer has merit, and if so, to deny the transfer. Note that Section 1582 (d) (2) allows the government to object to a transfer desired by the

Importer.

Section 1583 - Also Section 2643 - Setoffs

These provisions are objectionable. They will subject an importer who brings protest action in the Customs Court to the possibility of paying duties at a higher duty rate, or on the basis of a higher dutiable value on all pending protested entries where sales prices on the imported goods had been finalized on the basis of the cost of the duties as liquidated by Customs. Section 1583 should be deleted and Section 2643 should be modified since the government already has adequate judicial means to enforce its demands and other set-off claims. An importer who wants relief from government imposed duties and dutiable values believed to be unfair and unreasonable should not be subject to greater import barriers as the outcome and reward for efforts to obtain justice.

The authorizations permitted by the proposed provisions are also objectionable because they would preclude a trial by jury wherever the set-off, demand, or counterclaim, whether or not on the same import transaction, would otherwise be under the jurisdiction of the District Courts.

Section 2643 (d) - Injunctive Relief

We heartily endorse a preliminary injunctive relief procedure. It is urgently needed. Importers and brokers at ports other than New York will be injured if they will be able to obtain injunctive relief from a substantial irreparable injury only in the Court of International Trade. Haste is here an important factor, and a hearing at the local port of entry is of utmost importance. Delays in arranging for a hearing by that Court at a port away from New York will occur. The injured party should not be bound to undergo the expense and hardship of traveling from a distant city to New York with his attorney and witnesses. The expense to the government of bringing the Court of International Trade to a distant port (Hawaii,

Alaska, West Coast, etc.) must also be considered. Such an injured party should have the option of bringing his action either in the Court of International Trade, or in the local District Court. Appeals from either court should go only to the U. S. Court of Customs & Patent Appeals.

Small Claims Procedures

The proposed law is defective in that it does not cure the complaint of all importers having small claims who cannot afford the delays and expenses of contesting in the Customs Court adverse decisions by Customs officials. Attorneys who specialize in customs law have not been willing to promote the cause of a small claims procedure, and the Customs Court apparently will not voluntarily provide in its Rules for procedures which will allow importers to obtain judicial review of complaints involving small amounts of money.

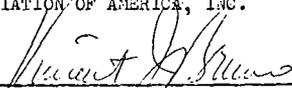
The position of the National Customs Brokers & Forwarders Association of America, Inc., is set forth in the attached copy of letter dated April 21, 1977 to Chief Judge Re. We urge that a small claims procedure be included in this Bill.

Conclusion

In conclusion, and except for the above matters, we endorse this Bill to increase the powers and jurisdiction of the Customs Court and the Court of Customs & Patent Appeals.

NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.

By



Vincent J. Bruno
Executive Vice President

National
Customs Brokers & Forwarders Association of America, Inc.

ONE WORLD TRADE CENTER - NEW YORK, N.Y. 10048 Suite 1109

Telephone 432-0050

April 21, 1977

Honorable Edward D. Re, Chief Judge
United States Customs Court
One Federal Plaza
New York, New York 10007

Dear Judge Re:

We are informed that some consideration has been given to a suggestion for the creation of a procedure in the United States Customs Court which, by changes in the Court Rules, would permit an importer to have his complaint concerning a small protestable matter reviewed in an informal way by a judge of the court without the procedural requirements of discovery, with no record, and without appeal review.

We find that the present court procedures are very costly. Many protestable disputes do not involve large sums of money. These smaller cases are not litigated even though the importers believe that the U. S. Customs Service has made erroneous decisions. Attorneys who specialize in customs law have little interest in handling these smaller cases, and the time-consuming paperwork and discovery proceedings related to incidental matters are frequently out of all proportion to the amounts involved.

Customs brokers, who must closely follow and be knowledgeable about customs procedures and the expenses pertaining to contesting customs decisions claimed to be erroneous, must be in a position to advise their clients about customs litigation problems. We, therefore, have knowledge as to the reasons why so few small customs disputes are brought before the court for adjudication. In the interests of the importing community, of which we are a primary segment, we are much in favor of having the court provide for a simple inexpensive small claims procedure.

We find that there are few qualified attorneys specializing in customs law who are willing to handle court litigation that involves less than about \$2,500.00. If such specialists are willing to do so, their fees invariably constitute a substantial portion of the amounts involved. Hence, where the amounts involved are less than about \$2,500.00 the importer should be permitted to handle the matter himself without the necessity of engaging an attorney who is admitted to practice before the U. S. Customs Court. We recognize the advisability of having a qualified attorney handle all litigation, including small claims. In many instances their services are essential. However, there are many other instances where the facts are comparatively simple and there are few legal complications; it is this type of small claim matter to which our suggestions are directed.

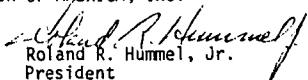
We would sum up our views as follows:-

1. To avoid statutory changes, the proceedings should be confined to protestable matters authorized by 19 U.S.C. 1514 and 19 U.S.C. 1515, and the summons requirements for taking protests into court.
2. There should be a \$2,500.00 limitation on the duties, charges or drawback involved, and a \$5,000.00 limitation on the value of excluded merchandise.
3. The proceedings should relate to only one shipment and be informal, in chambers, and without a record unless desired or authorized by the court; without discovery proceedings; without setting a precedent; without a published decision; binding upon the importer and the government as to that shipment; without appeal.
4. The importer, whether an individual, or a partnership (which may be represented by a partner), or a corporation (which may be represented by an authorized officer) should be allowed to present his own case to the judge without the necessity of engaging an attorney. By the word "importer" we mean not only the importer of record (who may be a customs broker because such brokers frequently handle shipments on a duty paid basis on behalf of the exporters) but also the ultimate consignee who usually is responsible for and ordered the goods. In any event, the customs broker who handled the entry should be allowed to participate with the consignee in the hearings because he is usually the only person who has knowledge (outside of the government service) of the problem and its ramifications.
5. When an importer files his summons with the court he should at the same time notify the court that he wants the small claims relief procedures, and he should then set forth his reasons in detail for disputing the government's action with a copy to the U. S. Customs Service and to the Department of Justice. The U. S. Customs Service should, within a short period of time (such as 30 days of notice of the request for small claims relief procedures), file with the court, with the Department of Justice, and with the importer its reasons for its protested action.
6. Before the hearing the Department of Justice should investigate, within a short time limitation (such as 30 days), to determine if there are factual disputes or serious legal ramifications which might cause the hearing judge to conclude that justice would require the services of an attorney. In this event, the importer should be allowed to withdraw from the small claims procedures, and then to proceed with normal litigation with an attorney.

If you feel that the foregoing suggestions warrant further consideration, we shall be glad to discuss the same with you at your convenience.

Respectfully,

NATIONAL CUSTOMS BROKERS & FORWARDERS
ASSOCIATION OF AMERICA, INC.


Roland R. Hummel, Jr.
President

PREPARED STATEMENT OF CONSUMERS UNION

Consumers Union* appreciates this opportunity to comment on S.1654, the proposed Customs Court Act of 1979. We believe that this bill represents a great improvement over its predecessor, S.2857, 95th Congress, 2d Sess. (1978). S.1654 is more specific and contains fewer terms that could be construed as granting the court exclusive jurisdiction over an excessively broad range of problems. Particularly, we commend the elimination of the potentially ambiguous phrase "directly affecting imports."

Although S.1654 is more technically sound than S.2857, some of the problems which we previously discussed still remain. Section 1581 may be construed to vest the Court of International Trade with exclusive jurisdiction over a number of non-technical matters not specific to the process of importation and clearance through customs. Sections 1581 (c) and (d) would give the Court of International Trade exclusive jurisdiction to review a number of actions of the International Trade Commission and the Office of the Special Trade Representative. In conjunction with the broad language of section 1581 (h), certain questions involving the scope of statutory authority, procedural requirements of the APA or the proper application of the Freedom of Information Act might be assigned to the exclusive jurisdiction of the Court of International Trade. We believe that a federal court of general jurisdiction would serve as a more appropriate forum for these matters and the legislation therefore should vest exclusive jurisdiction in the federal district courts with respect to such cases.

*Consumers Union is a non-profit membership organization chartered in 1936 in New York to provide information, education and counsel regarding consumer goods and services and the management of family income. Its income is derived primarily from the sale of its publications, including its monthly magazine, Consumer Reports, which has a paid circulation in excess of 2.2 million readers.

This letter is only a preliminary response to a highly complex and technical bill. A more detailed consideration of the legislation will follow shortly. Again, I would like to emphasize Consumers Union's position that S. 1654 contains many salutary provisions, and reiterate their willingness to work with the Subcommittee and its staff in an attempt to develop optimal legislation on judicial review of administrative decisions in the field of customs law.

Sincerely,

Leonard C. Meeker (cc)

Leonard C. Meeker
Scott C. Verges**
Counsel for Consumers Union

**Law student intern

LCM/jlw

PREPARED STATEMENT OF GTE

This transmittal constitutes the comments of GTE Products Corporation, One Stamford Forum, Stamford, Connecticut 06904, with respect to the subject bill S.1654.

The scope of the jurisdiction of the United States Customs Court, and what legal and equitable means are available to the United States Customs Court with which to implement its decision, are questions which have been addressed in the past by the Subcommittee on Improvements in Judicial Machinery (the "Subcommittee"). S.1654 presents these questions once more for consideration and action by the Subcommittee. On this occasion, however, because of the passage by the Congress of the United States (the "Congress") of the Trade Agreements Act of 1979, these questions are presented at a time when this country is about to inaugurate a new era in its conduct of international trade. The introduction of S.1654 offers the Congress, and particularly this Subcommittee, a genuinely rare

because of its genesis, i.e., it is the successor to the Board of General Appraisers, by virtue of the Act of 28 May, 1926, C.411, §1, 41 Stat. 669, the Customs Court has not felt that it possessed the authority to exercise all of the powers of an "Article III" Court. This restraint in the exercise of equitable power by the Customs Court has resulted in situations wherein a remedy was clearly warranted, but none could be given - clearly an undesirable result. Therefore, it is imperative that this bill, S.1654, not only state that the Court is established under Article III of the Constitution of the United States, but also, to preclude any misunderstanding of the intent of Congress in establishing the Court, that the bill repeat the language of the present §251 of 5 U.S.C., i.e.: "Such Court is hereby declared to be a Court established under Article III of the Constitution of the United States." (Emphasis that of the writer.) As the United States Supreme Court said in the cases of *The Glidden Company, etc., v. Olga Zdanok, et al.*; and *Benny Lurk, Petitioner v. United States*, 82 S.Ct. 1459 (1962), at page 1468; 37 U.S. 530, at page 541:

'Subsequent legislation which declares the intent of an earlier law', this Court has noted, 'is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction'.

[It is suggested that the considerations described above be reflected in Section 201 of S.1654 (28 U.S.C. §251).]

2. As we stand at the threshold of the dramatically altered trading world which we have brought about by the participation of the United States in the "Tokyo Round" of trade negotiations, concluded this past April, in Geneva, Switzerland, and which we have brought about by the passage of the Trade Agreements Act of 1979, it is in the

interests of this country that a court be assigned the exclusive jurisdiction of disposing of cases and controversies involving trade or trade related matters. Therefore, we should use the opportunity afforded by S.1654 to shape and hone our judicial machinery to respond with speed, expertise and uniform decisions in matters of international trade. We also should take advantage of S.1654 to clarify the jurisdiction in trade matters of the Court and of the Federal District Court. This classification of jurisdiction would mandate the transfer to the Court of a trade related matter, upon proper motion, and would avoid the creation of confusion with respect to the jurisdiction of the Court by denying to the United States Government greater power than the importer to keep a trade action in the Federal District Court.

[It is recommended that the considerations discussed above be reflected in Section 302 of S.1654 (28 U.S.C. §§1581 and 1582).]

3. Perhaps the greatest of the opportunities offered by S.1654 is that of making the Court more accessible to aggrieved parties. This greater accessibility can be achieved by the adoption of the following three proposals, and will assure the availability of a remedy for a corresponding wrong in actions involving international trade:
 - A. In order to render a denied "protest" subject to the jurisdiction of the Court, permit the importer to appeal the denial by paying only the duty at issue, and allow the appealing importer to defer paying other "charges or exactions" until after a final decision of the Court of International Trade (or Court of Customs and Patent Appeals) has been rendered in the matter. To require an appealing importer to pay all liquidated

duties, charges or exactions, in order to be able to appeal to the Customs Court, is to provide no remedy or access to a remedy in many situations. The amount of the "charges or exactions" (which would include penalties and interest) payable with respect to a protest can be prohibitive in amount. Most smaller importers, which, perhaps, constitute the greatest percentage of the members of the importing community, are effectively precluded from a remedy, or even the opportunity for a remedy, by the requirement that all "charges or exactions" be paid in advance of the appeal of a denied protest. To require the payment of only the liquidated duties in issue, in order to appeal a denied protest, would achieve the objective of liberalizing access to the Court, and at the same time protect the tariff revenues of the United States.

- B. Permit any aggrieved party in a case or controversy within the jurisdiction of the Court, pursuant to S.1654, to bring suit before the Court; and allow, subject to the liberally exercised discretion of the Court, the addition to the suit of other parties who are aggrieved by the action, or who might be aggrieved by the decision in the suit.
- C. Modify S.1654 to provide that the number of justices composing the Court can be enlarged, always resulting in an uneven number of total justices, in order that the Court might be positioned to deal with increased activity, without the need of enabling legislation.

[It is suggested that Sections 201, 302, and 401 of S.1654 (28 U.S.C. §251, 28 U.S.C. §§1581, et seq., and 28 U.S.C. §§2631, et seq.) be considered by the Subcommittee as the appropriate Sections within which to reflect the modifications recommended above.]

4. The Subcommittee is urged, in its consideration of S.1654, to specifically eliminate the "double burden of proof" requirement - a most inequitable aspect of present procedure before the Customs Court. As you know, in protesting a decision of the United States Customs Service, the appealing party must not only prove that that decision of the Customs Service was incorrect, but that the appealing party is correct. If the appealing party fails to carry this "double burden," the decision of the United States Customs Service prevails - even though it has already been proven incorrect. The Subcommittee is urged to consider modifying S.1654, to ensure that, if the position of the Customs Service is proven incorrect, the appealing party will prevail if it has introduced any reasonable evidence in support of its position. If the position of the Customs Service has been proven incorrect at trial, but the Court does not have sufficient evidence before it to convince it of the correctness of the complaining party's position, then the Subcommittee is urged to modify S.1654 to require that the case be remanded, in order that additional evidence might be produced by the complaining party.

[Section 401 of S.1654 (28 U.S.C. §2639), is recommended to the Subcommittee as an appropriate section within which to reflect the modification suggested above.]

5. Because it would be inappropriate to apply 5 U.S.C. §706 as the standard of judicial review of the decision or action of an agency which does not arrive at its decision or take its action following a hearing conducted pursuant to 5 U.S.C. §§551, *et seq.*, the Subcommittee is urged to ensure that S.1654 provides that the scope of review or agency actions by the Court be as follows:
- A. With respect to those agencies which are required to hold hearings and develop a

record of those hearings pursuant to 5 U.S.C. §§551 et seq., the review by the Court of the decisions and actions of those agencies should be limited to a review of the record developed during the agency action, to ensure due process, and to ensure that the decisions and actions of the agency are supported by substantial evidence apparent from the record as a whole.

- B. With respect to those agencies which are not required to conduct hearings and develop a record of those hearings pursuant to 5 U.S.C. §§551 et seq., the review of the actions of those agencies by the Court should be a trial de novo.

[It is suggested that the Subcommittee consider modifying Section 401 of S.1654 (28 U.S.C. §2640), in order to reflect the revisions recommended above.)

The above comments are respectfully submitted on behalf of GTE Products Corporation by the undersigned. If you have any questions with respect to this submission please do not hesitate to contact the undersigned at the letterhead address or telephone number.

The language for suggested modifications of specific portions of S.1654 is attached hereto as Appendix A.

Respectfully,

J.J. Scanlon, Jr.
J.J. Scanlon, Jr. *(ps)*

JJS/JR:pjl

Attachment

cc: P.D. Cullen, Esq.
A.R. Frischkorn, Jr., Esq.
E.J. Goldstein, Esq.
W.F. Rueger, Esq.

GTE Products Corporation
Comments - S.1654
September 10, 1979

APPENDIX A

BILL S.1654

Suggested language for specific modifications:

- The references to the Customs Court in subparagraphs (b) and (c), 28 U.S.C. §293, should be revised to read "Court of International Trade."
- Section 1581(a) is amended by renumbering that subparagraph §1581(a)(1), and adding thereto the following new subparagraph §1581(a)(2):

"The Court of International Trade shall not have jurisdiction of an action unless (1) a protest has been filed, as prescribed by Section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of Section 515 of the Tariff Act of 1930, as amended, and (2) all liquidated duties, where applicable, have been paid at the time the action is filed. The term "liquidated duties" shall be limited to the tariff duties applicable to the imported merchandise, and shall not include within its meaning any other charges or exactions."
- Section 1581(d) is hereby revised to read as follows:

"Solely for the purposes of determining the procedural regularity of the actions of the Office of the Special Trade Representative, pursuant to §§302(d)(1) and 304 of the Trade Act of 1974, the Court of International Trade shall have exclusive jurisdiction to review said actions after the decision of the President has become final with respect thereto."
- Section 1581(e) is revised as follows: The words "the procedural regularity of" shall be inserted after the word "review" in line 2 of said subparagraph.
- Section 2637(a) is amended by deleting the phrase "or exactions" wherever it appears in said subparagraph.
- Section 2639(a) is amended in its entirety to read as follows:

"Section 2639. Burden of Proof.

- (a) In any civil action contesting the denial of a protest under Section 515 of the Tariff Act of 1930, or contesting the denial of petition under Section 516 of the Tariff Act of 1930, the decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging the decision. The challenging party shall have carried this burden if the decision of the Secretary of the Treasury, or his delegate, is proven to be incorrect, and the challenging party has introduced any reasonable evidence in support of its position. If the challenging party has proven the decision of the Secretary of the Treasury to be incorrect, but the Court of International Trade does not have before it sufficient evidence to support the challenging party's position, the Court shall remand the case for the presentation of evidence by the challenging party in support of its position."

Reference to the "Customs Court" in 28 U.S.C. §1541(a) should be revised to refer to the "Court of International Trade."

Reference to the "Customs Court" in Section 2601(a) should be revised to refer to the "Court of International Trade."

PREPARED
STATEMENT
of
ST. PAUL FIRE AND MARINE INSURANCE COMPANY

St. Paul Fire and Marine Insurance Company ("St. Paul") greatly appreciates your invitation to submit this Statement concerning the "Customs Courts Act of 1979" (S. 1654, 96th Congress, 1st Session).

As St. Paul noted during the hearings on the "Customs Courts Act of 1978" (S. 2857, 95th Congress, 2nd Session), "the surety is a stepchild in the Customs administrative and judicial process." St. Paul's report on S. 2857 primarily addressed the omission of sureties from those persons legislatively authorized to file protests under Section 514 of the Tariff Act of 1930, 19 U.S.C. §1514. The provisions St. Paul proposed to remedy this inequity were subsequently included in Section 1001, entitled "Judicial Review," of the Trade Agreements Act of 1979 (P.L. 96-39), which became law on July 26, 1979.

Having obtained the right to meaningfully participate in the Customs administrative process, this Statement focuses on the proposed provisions of S. 1654 which will ensure and define the surety's participation in the Customs judicial process.

I

§1581 Civil Actions Against the United States

The jurisdictional grant contained in Section 1581(a) of Title III is in conflict with the procedural provisions contained in Section 2631(a) of Title IV. Section 1581(a) proposes that:

"(a) The Court of International Trade shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930 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:

* * *"

Section 2631, entitled "Persons Entitled to Commence a Civil Action", proposes that:

"(a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 may be instituted in the Court of International Trade by any person entitled to file a protest pursuant to section 514 of the Tariff Act of 1930."

While Section 2631(a) would entitle any one of several persons interested in an import transaction to institute an action contesting the denial of a protest,^{1/} Section 1581(a) only authorizes one person to do so. St. Paul believes that the broader procedural provisions of Section 2631(a) accurately reflect the Subcommittee's desire to expand the opportunities for judicial review of a denied protest. Accordingly, St. Paul suggests that proposed Section 1581(a) be amended to read as follows:

"(a) The Court of International Trade shall have exclusive jurisdiction of civil actions

1/ 19 U.S.C. §1514(c) provides, inter alia:

". . . Except as provided in sections 485(d) and 557(b) of this Act, protests may be filed with respect to merchandise which is the subject of a decision specified in subsection (a) of this section by—

"(A) the importers or consignees shown on the entry papers, or their sureties;

"(B) any person paying any charge or exaction;

"(C) any person seeking entry or delivery;

"(D) any person filing a claim for drawback; or

"(E) any authorized agent of any of the persons described in clauses (A) through (D)".

instituted to contest the denial, in whole or in part, of a protest pursuant to the Tariff Act of 1930, where the administrative decision by the appropriate customs officer, including the legality of all orders and findings entering into the same, involves:

* * *

II

\$1583 Setoffs, Demands and Counterclaims

Section 1592 of Title III of S. 2857 proposed that:

"The Customs Court shall have jurisdiction to render judgment upon any setoff, demand, or counterclaim, which arises out of an import or export related transaction, by the United States against any plaintiff in such court."

The provision was uniformly attacked as oppressive by various private sector interests. The statement of Andrew P. Vance on behalf of the Association of the Customs Bar epitomized those concerns:

"The giving to the United States the right to have judgment on a set-off[sic], demand or counterclaim which arises out of any import or export related transaction (no such right is granted to plaintiff, interestingly) is contrary to the past history of litigation in the U.S. Customs Court. Therefore, any institution of such a procedure should be based on some overriding reason. This is particularly true as it is apparent that the enactment of such a provision would have a chilling effect on the initiation of litigation in the Customs Court.

* * *

". . . In effect, it says to an importer that if you are so brash as to challenge the Government you will run the risk not only of a judgment on the particular entry that can be higher than what we have assessed, but if there are any other setoffs or demands with regard to any of your imports they will be set forth in this action.

. . .

". . . The proposed change will have the effect of drying up Customs litigation and giving unfettered powers to the administrators, which powers are many times effectively exercised at the lowest administrative levels."^{2/}

The Committee on Customs Law of the New York County Lawyers Association strongly argued that any right of set-off, demand or counterclaim be limited to the transaction before the Court, and proposed the following alternative language:

"The Customs Court shall have jurisdiction to render judgment upon any setoff, demand or counterclaim, asserted by the United States against the plaintiff, which arises out of the same import transactions before the court."^{3/}

Although Section 1583 of S. 1654 adopts that recommendation, the following language has been added:

"The Court of International Trade shall have jurisdiction to render judgment upon any setoff, demand, or counterclaim asserted by the United States which arises out of the same import transaction pending before the Court or a claim to recover upon a bond relating to the importation of merchandise or to recover customs duties."
(Emphasis added)

If the Subcommittee found the arguments concerning the possible chilling effect of Section 1592 of S. 2857 compelling, St. Paul strongly urges careful reconsideration of the emphasized language which has been added to Section 1583. In a vastly magnified fashion, that language reapplies the identical chilling effect to surety litigation.

Under Section 1592 of S. 2857, various entries of a single importer could be subject to judicial scrutiny in a single proceeding. Corporate sureties are jointly and severally liable on the bonds of thousands of importers, ensuring multitudinous entries at ports around the country. At any given time Customs has asserted outstanding bond

^{2/} Hearings on S. 2857 before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 95th Congress, 2nd Session, June 23 and 27, 1978, pp. 149-50.

^{3/} Ibid, p. 244.

claims totalling millions of dollars which are not "fixed and undisputed." Such claims will be at various stages of administrative activity and may involve solvent importers. The proposed language of Section 1583 would not only result in chaotic litigation but also selective and oppressive collection efforts by Customs.

Equally significant is the fact that the proposed language of Section 1583 will provide sureties with strong incentive never to avail themselves of the transfer provisions of Section 1582. This would clearly thwart the intent of Section 101(a) of this Bill.

St. Paul believes that the rationale which restricted Section 1592 of S. 2857 must again be accepted to identically restrict Section 1583 to limit the Government's right of setoff, demand or counterclaim to the import transaction pending before the Court. Accordingly, St. Paul proposes that Section 1583 be amended as follows:

"The Court of International Trade shall have jurisdiction to render judgment upon any setoff, demand or counterclaim asserted by the United States which arises out of the same import transaction pending before the Court, or a claim to recover upon a bond or to recover customs duties relating to such transaction."

III

§2640 Scope and Standard of Review

There is a dire need for further legislative action if sureties are truly to be given "expanded opportunities for judicial review of civil actions arising from import transactions."

Most bond charges asserted by Customs either seek payment of "duties" or "liquidated damages." Sureties can now obtain administrative review of duty assessments under the recent amendment to Section 514 of the Tariff Act, 19 U.S.C. §1514, contained in P.L. 96-39. Under the proposed provisions of Section 2640(a), a surety will then be entitled to de novo review of a decision denying its protest.

The authority to administratively contest liquidated damage charges is found at Section 623(c) of the Tariff Act of 1930:

"(c) The Secretary of the Treasury may authorize the cancellation of any bond provided for in this section, or of any charge that may have been

made against such bond, in the event of a breach of any condition of the bond, upon the payment of such lesser amount or penalty, or upon such other terms and conditions as he may deem sufficient." 19 U.S.C. §1623(c)

The Customs Regulations contain detailed provisions relating to the filing of petitions to obtain administrative relief when liquidated damages are assessed against a bond. The principal and his sureties are entitled to receive notice of the liquidated damages incurred and of their right to petition for relief from payment. (19 C.F.R. §172.1) Petitions must be filed within sixty days from the date the notice is mailed, unless an extension of such period has been granted by the district director. (19 C.F.R. §172.12) If the interested parties are not satisfied with a decision on a petition, a supplemental petition may be filed seeking further relief. (19 C.F.R. §172.33(a)) Mitigations or cancellations are largely left to the unbridled discretion of district fines, penalties & forfeitures officers. Customs has never made specific standards available to enable obligees to meaningfully evaluate the fairness or uniformity of rulings on liquidated damages petitions. St. Paul's experience is that petitions are not uniformly treated. The Customs Regulations also prescribe that:

". . . If payment of the stated amount is not made, or arrangements made for delayed payment or installment payments, or a supplemental petition filed within the effective period, the full claim for liquidated damages shall be deemed applicable and shall be promptly referred to the U.S. attorney for collection, unless other action has been directed by the Commissioner of Customs." 19 C.F.R. §172.32 (Emphasis added)

In such a situation, the surety is effectively precluded from judicially contesting the liquidated damage assessment because of a unique exception to the law of contracts.

The general rule relating to the enforceability of liquidated damage clauses is that any damages which exceed the actual loss sustained by the obligee will be treated by a court of equity as an unenforceable "penalty." (Williston on Contracts 3d, Vol. V, §776).

However, the following rule applies to liquidated damages assessed against Customs bonds:

"Where the law imposes by statute a penalty for the doing or failure to do a particular act, it is no defense that the failure has not caused damages equal to the statutory penalty, and the wrongdoer is not the less liable for the full penalty if under the authority of law a bond is taken to secure performance. This principal was established at an early day and has been applied whenever the penalty or forfeiture is inflicted by the sovereign for a breach of law, or where the bond is given to a public body as a condition of a privilege." Williston on Contracts 3d, Vol. v, §775B.

United States v. Dieckerhoff, 202 U.S. 302 (1905), involved an action to recover on a Customs redelivery bond. The bond condition allegedly breached required the obligors to pay an amount equal to double the estimated value of any merchandise not returned to the collector upon demand. The United States conceded that there was no proof in the case that it had suffered actual damage, nor could it make such proof. The Second Circuit Court of Appeals reversed the judgment of the Circuit Court, which had directed a verdict in favor of the Government in an amount equal to twice the estimated value of the unreturned package.

In upholding the decision of the Circuit Court, Mr. Justice Day stated:

"The real question in the case, then, is what, if anything, can be recovered under the circumstances shown on the obligation incurred in this bond. It is the contention of the respondents that the United States can recover only for actual damages which it has shown that it sustained, and that it was not the purpose of the statute or the obligation of the bond given to enlarge the liability beyond such damages as the government shall be able to allege and prove. But we think the purpose of the statute and the purpose of the requirement in the bond provided for therein, and the one given in this case, was to secure the performance of the duty imposed of returning the package or packages, where an importer availed himself of the privilege of withdrawing merchandise from the custody of the governmental officials before it has been examined and appraised.

* * *

"In carrying out this purpose, we hold the law permitted the taking of such a bond as was given in this case, providing that if the party did not return the package required, he should pay double the amount of the value thereof. We think such undertaking, for this manner of discharging this duty, or paying the value stipulated, was intended to and does relieve the government from the necessity of showing any actual damage or loss. . . .

"It is strongly urged that this in many cases may work serious hardship, and that in all the years in which this statute or its equivalent has been enforced, no action is shown to have been brought upon this theory. . . . But if we are correct in holding that it was the intention of Congress to provide a specific penalty for failing to return the merchandise as required, it is not within the province of courts of equity to mitigate the harshness of penalties or forfeitures in such cases, for such relief would run directly counter to the statutory requirements."

(See also, T.D. 50745, containing the opinion in United States v. Daniel F. Young, Inc. and United States Guaranty Company, (U.S.D.C. S.D.N.Y., 1942), which reached an identical result.)

When a bond principal is insolvent and the revenue has not been jeopardized, sureties should not be required to pay "penalties" the principal incurs in connection with liquidated damage assessments. Sureties should have the right to seek and obtain de novo review of liquidated damage assessments. The proposed provisions of Section 2640(1) will not provide that right because it is limited to "all charges or exactions imposed upon imported articles" (Emphasis added) and not those assessed against a bond.

Prior to the enactment of the Customs Procedural Reform and Simplification Act (P.L. 95-410), the civil penalty provisions of Section 592 of the Tariff Act of 1930, 19 U.S.C. §1592, were administered in a similarly oppressive fashion.

Section 592 is the most frequently invoked Customs penalty. It is intended to encourage accurate completion of the entry documents upon which Customs must rely to assess duties and administer other Customs laws.

Violation of Section 592 was penalized by forfeiture of the merchandise or a payment equal to the value of merchandise. The penalty applied to negligent, as well as intentional, violations and whether or not an underpayment of duties resulted from the violations.

Upon receiving a penalty claim, an importer could either satisfy the penalty, wait thirty days for Customs to refer the claim to the U.S. Attorney who would begin civil enforcement proceedings, or petition the Treasury to mitigate the penalty under Section 618 of the Tariff Act of 1930 (19 U.S.C. §1618). An importer who refused to pay a Section 592 penalty, whether or not it was mitigated, was sued for the penalty in the District Court. After the Government established "probable cause" to believe Section 592 was violated, the importer bore the burden of proving there was no violation. If he succeeded, there was no penalty; if he failed, the Court was required to impose the full statutory penalty. The Court had no power to reduce the penalty or review the appropriateness of a mitigated penalty proposed by Customs. Because of the all-or-nothing nature of litigation under Section 592, virtually every importer petitioned and paid the mitigated penalty proposed by Customs.

After receiving more attention than any other provision of P.L. 95-410, Section 592 was extensively amended to, *inter alia*, provide that "all issues, including the amount of the penalty shall be tried de novo," 19 U.S.C. §1592(e)(1).

Because of an omission in Section 2640(a), the Court of International Trade may lack authority to grant the de novo review in any penalty case transferred from the District Court under Section 1582. Unless Section 2640(a) is amended to provide for de novo review of "penalty" cases, importers will be discouraged from transferring such cases to the Court of International Trade under Section 1582(1). Likewise, if Section 2640(a) is amended, sureties and other bond obligees will be encouraged to transfer their "penalty" cases under Section 1582(2).

Accordingly, St. Paul proposes that Section 2640(a) be amended by adding the following subsection:

"(5) Civil actions arising under section 1582 of this title."

CONCLUSION

St. Paul believes that if the foregoing amendments to S. 1654 are adopted, the right of sureties to meaningfully participate in the Customs judicial scheme will be ensured.

Respectfully submitted,

ST. PAUL FIRE AND MARINE INSURANCE CO.

By _____
Its Attorneys

WJ:sf

PREPARED STATEMENT OF
NEW YORK COUNTY LAWYERS' ASSOCIATION

This report is issued by the Committee pursuant to the By-laws of the Association which permit such dissemination. It has not been submitted to the Board of Directors for approval and therefore does not necessarily represent the views of the Board.

Report by Donald W. Paley, Esq., Chairman, Committee on Customs Law, New York County Lawyers' Association, on S.1654, 96th Congress, 1st Session, introduced by Senator DeConcini ("Customs Courts Act of 1979"), which seeks to improve the Federal judiciary machinery by clarifying and revising certain provisions of Title XXVIII, United States Code, relating to the judiciary and judicial review of international trade matters (United States Customs Court and United States Court of Customs and Patent Appeals).

RECOMMENDATION

It is recommended that the bill be approved, but with recommendations as noted below.

GENERAL COMMENTS

We believe that as introduced, S.1654 represents a considerable improvement over the predecessor bill, S.2857, 95th Congress, 2nd Session. We believe the basic concepts of S.1654 are sound and workable, and we are confident that with further improvements, the final legislation will offer the international trade community, as well as domestic interests, consumer groups, labor unions, and other concerned citizens,

opportunity to adjust and shape the judicial arm of our government to deal with speed, expertise and uniformity in matters of foreign trade. Accordingly, in its consideration of S.1654, the Subcommittee is urged to focus its attention upon the following matters of concern, and to adjust S.1654 so that these matters are reflected in the language of S.1654 recommended by the Subcommittee:

- 1) The character of the Court of International Trade (the "Court") - i.e., "legislative or judicial";
 - 2) The exclusive subject matter jurisdiction of the Court, and the concurrent subject matter jurisdiction of the Court and the Federal District Court;
 - 3) Making the Court more easily accessible to aggrieved parties;
 - 4) The standing of parties to bring suit before the Court;
 - 5) The elimination of the "double burden" of proof placed upon parties challenging decisions of the United States Customs Service before the Court; and
 - 6) The scope of review of agency actions by the Court.
1. For many years a force has been at work within the Customs Court which has restrained that Court from exercising full equitable powers in Customs matters, especially in terms of issuing restraining orders, preliminary injunctions, and the like. Persuasive arguments have been advanced to the effect that the Customs Court has such powers, by virtue of its being declared by the Congress to be a court established under Article III of the Constitution of the United States, on 14 July, 1956, by the Act of 14 July, 1956 C.589, §1, 70 Stat. 532. However, apparently

a vastly improved forum for judicial review of administrative actions of the United States Customs Service and other government agencies dealing with imported merchandise.

REMARKS AND RECOMMENDATIONS

PAGE 1, LINE 5, - PAGE 2, LINE 21

Comment: We support the purposes of the bill as expressed in Title I. We do recommend a conforming change in Title I to change the name of the Court of Customs and Patent Appeals to the Court of International Trade and Patent Appeals.^{1/}

PAGE 3, LINE 1 - PAGE 4, LINE 9

We approve the language of Title II of the bill.

PAGE 4, LINE 10 - PAGE 5, LINE 3

We support Title III, §301, and §302 through and including the second category of reviewable Customs decisions.

PAGE 5, LINES 3-5

As we noted in our statement submitted before this Subcommittee in connection with last year's bill, the jurisdiction of the Customs Court with regard to the "all charges or exactions" clause has been interpreted in an inconsistent and poorly outlined fashion.^{2/}

^{1/} Reference herein will be to the Customs Court, or to the Court of Customs and Patent Appeals. We do not oppose the change in name of the Customs Court to the Court of International Trade.

^{2/} Hearings on S.2857, 95th Congress, 2nd Sess. (hereinafter "S.2857 hearings"), at page 242.

Recommendation: Clause (3) of proposed §1581(e) should be amended by the addition of the following language immediately following "Secretary of the Treasury": "including, but not limited to, ~~charges or exactions such as navigation fees, special penal duties, and liquidated damages or penalties assessed and collected under Customs bonds (whether or not such liquidated damages or penalties were administratively mitigated)~~".

PAGE 5, LINES 5-6

In addition to excluding merchandise from entry or delivery under the Customs laws, Customs officials frequently resort to demands for redelivery of merchandise allegedly in violation of the Customs laws. Although the enforcement of such redelivery demands depends in the long run upon the entry bond, we believe that redelivery demands per se should be directly reviewable in a speedy fashion, in order that the importer may remove any cloud hanging over his ability to dispose of the merchandise remaining in his possession.

Recommendation: Add, after the words "entry or delivery", the words ", or a demand for redelivery to Customs custody (including a notice of constructive seizure)".

PAGE 5, LINES 7-13

We approve the remainder of proposed §1581(a) and proposed §1581(b).

PAGE 5, LINE 14 - PAGE 6, LINE 3

To remove any doubt as to when the President's decision becomes "final", we recommend that the initial clause of proposed §1581(c) and §1581(d) be amended to read "After the decision of the President has been published in the Federal Register". This should settle any question as to the "finality" of a particular Presidential decision covered by §1581(c) and (d).

With the above recommendations, we approve proposed §1581(c) and §1581(d).

PAGE 6, LINES 4-18

We approve proposed §1581(e), §1581(f), and §1581(g).

PAGE 6, LINE 19-PAGE 7, LINE 2

We approve the new "residual" cause of action in proposed §1581(h), with the following recommendation:

In addition to the provisions of the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974, and the Trade Agreements Act of 1979, imported merchandise is subject to the operation of literally hundreds of other statutory provisions, many of which deal exclusively or primarily with imported merchandise (e.g., 7 U.S.C. 281, pertaining to importation of honeybees).^{3/} In such cases, the Customs

^{3/} See hearings before the Subcommittee on Trade, House Committee on Ways and Means, on H.R. 9220, 94th Congress, 2nd Sess., pages 110-169, for an exhaustive compilation of such laws.

Service envisions itself as the enforcing arm of other Federal agencies. In such situations, the importer should be entitled to judicial review utilizing the specialized international trade knowledge and technical expertise of the Customs Court. However, an aggrieved party should also be able, if he so desires, to bring his case before the District Court, his traditional forum in such cases. We therefore recommend the addition of a new subsection to proposed §1581, reading as follows:

"The Court of International Trade shall have concurrent jurisdiction, together with the District Courts, over all civil actions against the United States, its agencies and its officers, which arise directly from import transactions and which arise under provisions of law which operate exclusively or primarily on imported merchandise".

PAGE 7, LINES 3-6

We have no objection to proposed §1581(i)(1).

PAGE 7, LINES 7-18

The apparent purpose of subsection (2) of proposed §1581(i) is to foreclose, in the normal case, a direct review of any Customs ruling per se and to allow review of such ruling only to the extent that it is tied up with an entry of merchandise, the liquidation thereof, a protest and its denial,

followed by the filing of a summons and complaint with the Customs Court. We have no objection to the concept; but to avoid overlapping of, and confusion with, the vitally necessary new extraordinary injunctive powers contained in proposed new §2643(c) and (d) (page 27, lines 19ff.), we suggest the addition of the following proviso at page 7, line 18: "and provided further, that nothing contained herein shall limit the power of the court to grant appropriate relief under subsections (c) and (d) of §2643 of this title".

PAGE 7, LINE 19-PAGE 9, LINE 19

We believe the concept of transfer jurisdiction contained in proposed §1582 is an excellent one, and we endorse the idea wholeheartedly. However, we submit that the transfer procedures are too limited in the bill as presently written and recommend that the District Court be empowered to grant the transfer motion as a matter of routine. In this regard we endorse the position taken by the Association of the Customs Bar.

PAGE 9, LINE 20-PAGE 10, LINE 2

Section 1583 should be deleted in its entirety. At the outset, the language "or a claim to recover upon a bond relating to the importation of merchandise or to recover Customs duties" permits demands and counterclaims relating to transactions totally remote from those before the Court. There is absolutely no justification for allowing the government to

threaten the importer with massive and possibly spurious counterclaims pertaining to transactions completely unrelated to those the subject of the action, and thereby to needlessly frighten many importers into forced abandonment of otherwise meritorious cases.

We strongly objected during last year's consideration of S.2857 to the proposed new provisions authorizing the Customs Court to affirmatively return a judgment in favor of the United States upon a setoff, demand or counterclaim asserted by the United States.^{4/} We emphatically renew our objections, for the reasons that the proposed provisions would have such a chilling effect upon importers as to discourage many of them pressing otherwise valid claims before the Customs Court. We urge that the present system be retained, whereby a decision by the Customs Court that an alternative duty, value, etc., other than that determined by the appropriate Customs official, properly applies, becomes in effect a declaratory judgment under which the government is authorized to apply such higher rate, etc., to unliquidated entries, or to merchandise to be entered in futuro. The government has ample remedies to collect whatever is properly due from a particular importer without the threatening, if not bludgeoning, effect of a massive counterclaim, which might affect not only the entry or entries that the importer is actually litigating but all other entries pending before the Customs Court, the disposition of

^{4/} See S.2857 hearings, page 244.

which had been "suspended" pending the outcome of the test case.

For these reasons, and for the reasons set forth by the Association of the Customs Bar, we urge that \$1583 be deleted.

PAGE 10, LINES 3-22

We have no objections to proposed \$1584 and \$1585.

PAGE 11, LINE 7-PAGE 15, LINE 2

We endorse proposed \$2631(a) through \$2631(i).

PAGE 15, LINES 3-9

Proposed §2632(a) provides that with the exception of civil actions provided for in subsection 516A of the Tariff Act of 1930, all civil actions before the Customs Court shall be instituted by the filing of a summons, or of a complaint, or both, pursuant to rules of court. We object to this provision and adhere to our prior position ^{5/} that with regard to the categories of civil actions enumerated in proposed new §1581(a), covering the "bread-and-butter" of Customs litigation, a summons alone should be sufficient to initiate a civil action. We much prefer to have the present procedure retained: the filing of a short, plain and simple document, the summons alone, as the initiating document. Once action has been

5/ See S.2857 hearings, page 246. •

initiated by the filing of a summons, the Customs Court is perfectly capable of controlling its dockets by rules providing for the filing of complaints within specified time periods, or upon motion.

We therefore recommend that proposed §2632(b) be renumbered §2632(c), and that proposed §2632(a) be replaced by new §2632(a) and §2632(b) as follows:

"(a) A civil action in the Court of International Trade contesting the denial of a protest under §515 of the Tariff Act of 1930 shall be instituted by the filing of a summons with the content and in the form, manner, and style prescribed in rules adopted by the court."

"(b) Civil actions other than those described in subsection (a) of this section shall be instituted by the filing of a summons or of a complaint, or of both, each with the content and in the form, manner, and style prescribed in ruled adopted by the court."

PAGE 15, LINE 15-PAGE 17, LINE 8

We have no objection to proposed §2633, §2634, and §2635(a).

PAGE 17, LINE 9-PAGE 19, LINE 18

With regard to §2635(b) pertaining to transmission of the administrative record to the court, we urge that for the sake of clarity and simplicity, the section be redrafted and the following requirements be inserted as across-the-board provisions with regard to confidential or privileged information:

1. That the confidentiality accorded material subject to a claim of confidentiality or privilege be preserved in the litigation.

2. That notwithstanding this requirement, the court may examine the material subject to the claim of confidentiality or privilege in camera if necessary to the disposition of the action.

3. That the court be granted discretion to order disclosure of the material subject to the claim of confidentiality or privilege under such terms and conditions as it may order (subject to governing law).

4. That in all instances, the administering agency transmitting material subject to a claim of confidentiality or privilege include as part of the transmitted record, a non-confidential description of the nature of the material claimed subject to confidentiality or privilege.

PAGE 19, LINE 19-PAGE 21, LINE 19

We have no objection to any of the time limits to commence action specified in proposed §2636, except the 5-day limitations specified in subsection (c) and (e). With regard to the 5-day statute in §2636(c), we note that presently the time allowed to commence the action is 30 days (§516A(a)(1), Tariff Act of 1930 as amended by the Trade Agreements Act of 1979). We know of no reason to shorten such time to 5 days (a remarkably short statute).

With regard to the proposed 5-day period within which to initiate a §777(c)(2) action (proposed §2636(e)) we suggest the interests of justice require extending the time to at least
 15 days.

PAGE 21, LINE 20-PAGE 22, LINE 12

We endorse proposed §2637, with the recommendation that subsection (c) be referenced to the new extraordinary relief powers granted to the court by addition of the following clause at the end of this section: "subject to the exceptions contained in subsection 1581(i)(2) and subsections (c) and (d) of §2643 of this title".

PAGE 22, LINES 13-23

We have no objections to proposed new §2638.

PAGE 23, LINES 1-4

Section 2639(a) restates existing law. However, to curb recurring and regrettable tendencies on the part of the Customs Court to treat the presumption of correctness as evidence, we recommend that the following proviso be added at the end of line 4: "provided, however, that no evidentiary weight shall be afforded to the presumption of correctness and it shall not be used to weigh the evidence introduced by a party challenging the decision".

PAGE 23, LINES 5-19

We support proposed §2639(b), which restates existing law.

PAGE 23, LINES 20-23

We have no objections to §2639(a) being applied to cases transferred to the Customs Court under the new transfer system. However, with regard to matters transferred to the Customs Court involving the proper appraised or dutiable valuation of merchandise, we see no reason to arbitrarily exclude the operation of §2639(b) in such matters. Accordingly, we suggest the words "and (b)" be deleted.

PAGE 24, LINE 1-PAGE 25, LINE 9

We support the retention of trial de novo with regard to the categories of Customs decisions identified in proposed §2640(a)(1)(A) through (F). However, we believe that the ex-

~~cepting clauses in subsections (A), (B), and (D) pertaining to assessment of countervailing or antidumping duties are liable to be troublesome.~~ We therefore recommend that a separate §2640(b) be enacted to provide for the retention of trial de novo with regard to case-by-case liquidations of entries subject to outstanding countervailing or antidumping duty orders, for the following reasons:

It is important to note that the actual assessment of antidumping or countervailing duties proceeds in two distinct and different stages:

1. The promulgation of a "countervailing duty order" (§706, Tariff Act of 1930 as added by the Trade Agreements Act of 1979) or an "antidumping duty order" (§736, Tariff Act of 1930 as added by the Trade Agreements Act of 1979). Both countervailing duty orders and antidumping duty orders are administrative determinations, made upon the record, which operate prospectively upon specific classes or kinds of merchandise. Customs field officials cannot assess liquidated countervailing duties or antidumping duties prior to the issuance of the pertinent order.

2. Once a countervailing duty order or an antidumping duty order has been issued as a legal prerequisite, Customs field officials thereafter proceed to liquidate

affected entries on an entry-by-entry basis, assessing the exact liquidated countervailing duties or antidumping duties due on each entry.

Section 516A of the Tariff Act of 1930 as added by Title X of the Trade Agreements Act of 1979 establishes a system of judicial review for various interlocutory and final determinations entering into and culminating in the issuance of antidumping or countervailing duty orders. Such judicial review is of the type traditionally had in administrative procedure cases generally. However, Title X does not direct that judicial review of the actual amount of liquidated countervailing duties or antidumping duties due on an entry-by-entry basis be conducted on anything less than the present de novo basis.

A trial de novo is appropriate to determine the amount of liquidated countervailing duties or antidumping duties properly assessable on an entry-by-entry basis because such determination is made by Customs liquidating officials in the field under essentially the same methods as in the case of ordinary duties. Therefore, there is neither an "administrative record" nor an "administrative hearing".

However, at a (de novo) trial of the civil action involving the proper amount of liquidated countervailing or antidumping duties due on specific entries, the plaintiff at

that stage could not challenge those prior and underlying determinations entering into the issuance of the countervailing duty order or the antidumping duty order. Legal issues pertaining to such orders would be subject to challenge only under the new §516A procedures, as added by the Trade Agreements Act of 1979, and subject to proposed §2640(b) (now renumbered, under our proposal, as §2640(c)).

~~For the foregoing reasons, we recommend the enactment~~
of the following §2640(b):

"In civil actions contesting the denial of a protest under §515 of the Tariff Act of 1930 involving the assessment of liquidated countervailing duties or antidumping duties on entries of merchandise subject to antidumping duty orders or countervailing duty orders, the court shall determine the matter on the basis of the record made before it, with the exception of those underlying determinations made subject to judicial review by §516A of the Tariff Act of 1930".

We believe the above revision is necessary since under the present language of S.1654, it could be maintained that no aspects whatsoever of assessments of antidumping or countervailing duties would be subject to trial de novo-- clearly a result repugnant to the interests of justice. For instance, let us assume that product X is subject to counter-

vailing duty if exported to the U. S. on or after January 1, 1981. The importer claims exportation was completed on December 31, 1980. He should be able to prove, in a de novo trial, that factually and legally, the product was "exported" prior to January 1, 1981. (Determination by Customs field officials of the later export date would have been on an informal basis, with no administrative "record" or "hearing"; hence, trial de novo is warranted under established principles of administrative law.)

PAGE 25, LINES 19-21

We endorse the concept contained in proposed §2640(c) (renumbered §2640(d) under our suggested revision), which would provide for the ordinary statutory form of review of administrative action contained in 5 USC §706, to cover those residual causes of action not specified elsewhere in proposed §2640.

PAGE 25, LINE 22-PAGE 26, LINE 18

We approve proposed §2641 and §2642.

PAGE 26, LINES 19-22

We do not object in principle to a grant of power to the court to enter a money judgment against the United States. We are deeply concerned that the power to enter a money judgment in favor of the United States may be used as a counter-offensive weapon to chill the exercise of an importer's rights to judicial review and to frighten importers out of

court (see discussion above regarding proposed §1583 on setoffs, demands, and counterclaims). We urge that the provision authorizing the court to return a money judgment in favor of the government be dropped.

PAGE 26, LINE 23-PAGE 27, LINE 12

The intention of proposed §2643(b) is to grant to the Customs Court a much-needed element of flexibility, by introducing the concept of a remand to the administering agency. See hearings on S.2857, page 251, last paragraph; we also note inclusion of "orders of remand" in proposed §2643(c), as one of several major new equity powers conferred upon the court. We therefore strongly endorse the concept of proposed §2643(b). We also recommend that the administrative remand procedures should be broadened to cover any situation in which the court determines that a remand to the Customs Service or other administrative agency is required, in the interests of justice. It is fundamental that an Article III court, when reviewing the actions of an administrative agency, has the inherent power to remand the case to the agency for such further findings of fact or other determinations as the litigation may require. See: N. L. R. B. v. Food Store Employees Union, Local 347, Dist. Col. 1974, 94 S.Ct. 2074, 417 U.S. 1, 40 L.Ed.2d 612; U. S. v. Jones, Ct. Cl. 1949, 69 S.Ct. 787, 336 U.S. 641, 93 L.Ed. 938, rehearing denied 69 S.Ct. 1150, 1151, 337 U.S. 920, 93 L.Ed. 1729; Proletti v. Levi, C.A.Cal. 1976, 530 F.2d 836; National Nutritional Foods Ass'n.

v. Weinberger, C.A.N.Y. 1975, 512 F.2d 688, certiorari denied 96 S.Ct. 44, 423 U.S. 827, 46 L.Ed.2d 44, on remand 418 F.Supp. 394; Secretary of Labor of U. S. v. Farino, C.A.Ill. 1973, 490 F.2d 885; Braniff Airways, Inc. v. C. A. B., 1967, 379 F.2d 453, 126 U.S.App. D.C. 399; General Dynamics Corp. v. Marshall, C.A.Mo. 1978, 572 F.2d 1211. In addition, the new §516A procedures for judicial review of antidumping or countervailing duty determinations clearly grant the Customs Court remand powers in this area. See Senate Finance Committee Report No. 96-249 on H.R. 4537, at page 252.

We therefore suggest the following revision of proposed §2643(b):

"(b) If in any civil action the plaintiff --

"(1) proves that the original administrative decision was incorrect, and

"(2) introduces evidence as to the correct decision, but based upon the evidence the Customs Court is unable to determine the correct decision, such court shall restore the case to the calendar in order to permit the parties to introduce additional evidence, or shall remand the matter to the administering agency for a determination of the correct decision. The order of restoration or remand shall be final and appealable pursuant to sections 1541(a)

and 2601 of this title. The decision of the administering agency upon a remand shall be subject to judicial review in the same manner and under the same procedures as the original decision, but limited to the factual and legal determinations the subject of the order of remand."

The last sentence of our proposed revision is necessary to properly complete, where appropriate, the full cycle of judicial review. For instance, the court may determine that a different basis of value than that originally utilized by the Customs Service in appraising merchandise is legally required, and may remand the case to the Customs Service to determine such new basis of value. The Customs Service may thereafter determine such new value, but in an amount the importer believes is too high. Obviously, the importer should be able to invoke further judicial review under such circumstances.

We believe that in the great majority of remand situations, the importer (or other challenging party) should be able to settle his differences with the administering agency at the administrative remand level, and terminate the cycle at that point.

PAGE 27, LINE 13-PAGE 28, LINE 2

We endorse the additional powers granted to the Customs Court by §2643(c) and (d). Such powers are entirely appropriate to repose in an article III court.

PAGE 29, LINE 17-PAGE 31, LINE 21

We endorse §501 and §502 of the bill, and that portion of §503 pertaining to proposed new §1546(a) and (b).

PAGE 31, LINE 22-PAGE 32, LINE 6

We urge that the Court of Customs and Patent Appeals be granted concurrent jurisdiction in matters involving denial, revocation or suspension of a Customs broker's license under §641 of the Tariff Act of 1930. Customs brokers are located throughout the country, wherever ports of entry exist. It is manifestly unfair to require a Customs broker located in, say, Sweetgrass, Montana to take his case to the Court of Customs and Patent Appeals in Washington -- especially in a matter as critical to the broker's livelihood as the validity of his license. While we recognize that some instances the Court of Customs and Patent Appeals is an appropriate form to review a §641 denial, revocation or suspension, we think concurrent jurisdiction should be retained by the courts of appeal, and therefore recommend that lines 22 and 23 at page 31 be amended to read as follows:

"(c) the Court of Customs and Patent Appeals shall possess concurrent jurisdiction with the court of appeals of the United States within any circuit wherein the aggrieved person resides or has his principal place of business, to review--".

PAGE 32, LINES 1-19

We support the remainder of the provisions of Title

V.

PAGE 32, LINE 20-PAGE 39, LINE 11

With regard to proposed Title VI, technical and conforming amendments, we endorse in general the proposed statutory language. However, we note that the Association of the Customs Bar has raised certain objections to §615 and §618. We support such objections and urge that the Subcommittee amend the bill in accordance with the statement of the Association of the Customs Bar.

We also note that page 38, line 13 contains an apparent typographical error, i.e., substitute the word "section" for the word "sentence" immediately preceding reference to §2643(d).

Respectfully submitted,

Donald W. Paley, Esq.
Committee ChairmanNorman C. Schwartz, Esq.
David Ostheimer, Esq.



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September 13, 1979

Senator Dennis DeConcini, Chairman
 Subcommittee on Improvements in Judicial Machinery
 6306 Dirksen Senate Office Building
 Washington, D.C. 20510

Dear Senator DeConcini:

AIA is pleased to provide the legislative language which you requested during the hearings on S. 1654, the Customs Court Act of 1979. This language would provide the importer with the opportunity to institute judicial review in the Court of International Trade of section 592 penalty cases at any time after the administrative process is complete and before collection action is commenced by the government.

We suggest that a new section 303 be added to S. 1654 as follows:

SEC. 303. Section 592 of the Tariff Act of 1930 is amended --

(1) by designating the existing language in subsection (e) as paragraph (1); by redesignating paragraphs (1) through (4) as (A) through (D) respectively; and by adding the following new paragraph (2):

"(2) A proceeding under this subsection may not be commenced until after the 90th day following the date of the issuance of a written claim under subsection (b) (2) or of a final determination in a proceeding under section 618 of this Act, whichever is the later: Provided, That the running of the period prescribed under section 621 of this Act for the institution of any suit or action shall be tolled during such 90-day period;"

and,

(2) by adding the following new subsection:

"(f)(1) Notwithstanding any other provision of law, within 90 days after the date of the issuance of a penalty claim under subsection (b)(2) or of a final determination in a proceeding under section 618 of this Act, whichever is the later, any person affected adversely thereby may commence a civil action against the United States to challenge such claim or determination, as the case may be, in the United States Court of International Trade.

"(2) In any civil action commenced under paragraph (1) subsection (e), provided that, when the monetary penalty is based on negligence, the plaintiff shall have the burden of proof.

"(3) The commencement of a civil action under paragraph (1) shall bar institution of any suit or action for the collection of any monetary penalty assessed under this section and shall toll the running of the period prescribed under section 621 of this Act for the institution of any suit until such civil action is finally decided."

This provision will allow the importer to avoid carrying very large potential liabilities on its books until the government decides to institute an action for its claims. This period often lasts for years. It will relieve the importer of a serious burden unrelated to the possible violation without handicapping the government's enforcement efforts. AIA urges its inclusion in the bill.

If we can be of further assistance to you, please advise me at your convenience.

Very truly yours,



Barry Nemmers
Staff Attorney

BN:jc

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September 12, 1979

Michael J. Altier, Esquire
Counsel
United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Dear Mike:

Enclosed are proposed revisions of S. 1654, which are consistent with the position of the American Bar Association.

It has been a pleasure working with you on this bill.

Sincerely,

RIVKIN SHERMAN and LEVY



Joseph S. Kaplan

JSK:pgh

Enclosure

cc: Leonard Lehman

Section 201

Delete the proposed amendment of section 251 of title 28, United States Code, and insert in lieu thereof the following:

"The President shall appoint, by and with the advice and consent of the Senate, nine judges who shall constitute a court of record known as the United States Court of International Trade. The Court is a court established under Article III of the Constitution of the United States. The Chief Justice of the United States shall from time to time designate as chief judge one of the judges so appointed who shall be less than seventy years of age at the time of his or her designation. Such person shall continue as chief judge until a successor is designated by the Chief Justice. The chief judge may continue to serve as chief until the designation of a successor."

Section 302

Delete proposed section 1581(c) and insert in lieu thereof the following:

"(c) The Court of International Trade shall have exclusive jurisdiction to review findings and determinations

of the International Trade Commission pursuant to sections 131, 201, 202, 203, 301, 406, and 503 of the Trade Act of 1974, sections 336 and 338 of the Tariff Act of 1930, and section 22 of the Agricultural Adjustment Act solely on questions of law, including the question of whether any such finding or determination is arbitrary, capricious or unsupported by evidence."

Delete proposed section 1581(g) and insert in lieu thereof the following:

"(g) Concurrently with the district courts, the Court of International Trade shall have jurisdiction of any application for the issuance of a protective order under section 777(c)(2) of the Tariff Act of 1930."

Delete proposed section 1581(i) and insert in lieu thereof the following:

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

Delete proposed section 1582(b), (c) and (d) and insert in lieu thereof the following:

"(b) Upon receipt of a motion to transfer, the district court shall determine whether the civil action is an action described in subsection (a) of this section. If the determin-

ation of the district court is affirmative, it shall order the transfer.

"(c) A defendant shall file a motion to transfer a civil action referred to in subsection (a) of this section within thirty days after the service upon a defendant of a copy of a complaint.

"(d) The United States shall be afforded the opportunity to object to the transfer by filing a response to the motion."

Delete proposed section 1582(f) and insert in lieu thereof the following:

"Upon receipt of the copies of the pleadings and documents, the civil action shall be heard by the Court of International Trade, sitting without a jury. Unless the Court of International Trade shall by order otherwise direct, the trial or hearing of the civil action shall take place within the customs district in which the civil action was first instituted."

Amend section 1583 by inserting "(a)" before the first paragraph and adding a new paragraph "(b)" as follows:

"(b) The Court of International Trade shall not have jurisdiction to render judgment upon any setoff, demand or counterclaim asserted by the United States against a licensed custom house broker except a counterclaim arising out of the

same administrative action which is the subject of the civil action in which the counterclaim is asserted."

Section 401

Amend section 2631(a) by changing the period following "1930" to a comma, and insert the following:

". . . or by such person or his estate, heirs, successors or assigns or by a surety of such person in the transaction which is the subject of the protest."

Delete proposed section 2631 (b) and insert in lieu thereof the following:

"(b) A civil action contesting the denial, in whole or in part, of a petition under section 516 of the Tariff Act of 1930 may be instituted in the Court of International Trade by any person entitled to file a petition under section 516 of the Tariff Act of 1930."

Delete proposed section 2631(e) and insert in lieu thereof the following:

"(c) A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be instituted in the Court of International Trade by any interested party who was a party to an administrative proceeding in connection with which the matter arises."

Delete section 2631(g) and insert in lieu thereof the following:

"(g) By leave of court, any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may intervene in that action unless the action is instituted pursuant to section 1581(a) of this title or, unless the person seeking leave to intervene is the importer of record or actual importer on the disputed transaction, an action instituted pursuant to section 516 of the Tariff Act of 1930. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Amend section 2636(a)(1) by changing the semi-colon to a comma, and adding the following:

". . . whether or not such notice of denial is mailed within the two-year period specified in such section;"

Amend the second sentence of section 2637(a) by changing the period to a semi-colon and adding the following:

". . . the excess amount of any such recovery shall be paid to the importer of record, its estate, or its heirs, successors or assigns."

Amend sections 2640(a)(1)(A), (B) and (D) by deleting from each such section "in the case of assessment of countervailing or antidumping duties"

Add the following section 2640(a)(5):

"(5) Civil actions transferred to the Court of International Trade pursuant to section 1582 of this title."

Delete section 2646(b) and insert in lieu thereof:

"(b) Except in civil actions involving the exclusion of perishable merchandise, any civil action for the review of a determination under sections 516A(a)(1)(B) or 516A(a)(1)(E) of the Tariff Act of 1930 shall be given priority over other such civil actions. Actions involving the exclusion of perishable merchandise shall be given a priority over all other civil actions."

Section 612

Delete section 2602(b) and insert in lieu thereof:

"(b) Except in civil actions involving the exclusion of perishable merchandise, any civil action for the review of a determination under sections 516A(a)(1)(B) or 516A(a)(1)(E) of the Tariff Act of 1930 shall be given priority over other such actions. Actions involving the exclusion of perishable merchandise shall be given a priority over all other civil actions."

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