The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar

Andrew P. Vance
THE UNREALIZED JURISDICTION OF 28 U.S.C. § 1581(i): A VIEW FROM THE PLAINTIFF’S BAR†

Andrew P. Vance*

For many, the legislation that evolved into Title 28, section 1581(i) of the United States Code (section 1581(i)) seemed at first to be the latchstring opening to the Court of International Trade (the Court)—the opportunity to exercise in customs and trade matters all the powers and jurisdiction of a full-fledged article III court. Unfortunately, this expectation has not been realized, since the Court and the Court of Appeals for the Federal Circuit seemingly have adopted the Federal Government’s very narrow interpretation of the residual jurisdiction provisions contained in section 1581(i). While it is agreed that the legislative history of the Customs Courts Act of 19801 states that section 1581(i) was “not intend[ed] to create any new causes of action,”2 the government and the courts have interpreted this language as limiting the Court’s jurisdiction to situations in which the Customs Court would have possessed jurisdiction, prior to enactment of the Customs Courts Act, instead of expanding the Court’s jurisdiction to embrace causes of action that previously could have been heard in the federal district courts.3

† Copyright 1984 by Andrew P. Vance.

* B.A., Harvard College, 1948; LL.B., Harvard Law School, 1952. The Author currently is a partner at the firm of Barnes, Richardson & Colburn in New York City and served as Chief of the Customs Section, Civil Division, United States Department of Justice from 1962 to 1976.

Furthermore, although section 1581(i) has been likened to the federal question jurisdiction provision of 28 U.S.C. § 1331, the courts have not utilized that concept to recognize that section 1581(i) could provide a vehicle for the Court and the Federal Circuit to entertain causes of action within their exclusive subject matter jurisdiction that they might not otherwise have entertained, albeit other federal courts might have. Before developing this further it will be useful to examine some of the legislative history to underscore the aforementioned expectations alluded to.

The Customs Courts Act was preceded by Senate bill 2857. Its purposes were stated to be:

(1) to provide for a comprehensive system of judicial review of matters directly affecting imports, utilizing, wherever possible, the specialized expertise of the United States Customs Court and Court of Customs and Patent Appeals, and the opportunity for ensuring uniformity afforded by the national jurisdiction of these courts; (2) to prevent jurisdictional conflicts in civil actions directly affecting imports due to the present ill-defined division of jurisdiction between the district courts and the customs courts; (3) to provide expanded opportunities for judicial review of actions directly affecting imports; and (4) to grant to the customs courts plenary powers possessed by other courts created under Article III of the Constitution.

Nevertheless, as Senator DeConcini noted in opening the Senate hearings on June 23, 1978, "the proposed legislation [was] not without some difficulties," particularly in regard to the jurisdictional provisions. Title III, the jurisdictional portion of the bill, contained many of the negative and limiting aspects that are used today to emasculate the jurisdiction of the Court. The import jurisdiction, for example, had three paragraphs negating the residual jurisdiction of the Court, and some of the sections containing an

---


6 Id. § 101, 124 Cong. Rec. at 9192.

7 1978 Senate Hearings, supra note 4, at 1.

8 S. 2857, supra note 5, § 302, 124 Cong. Rec. at 9192. The last three paragraphs of the
affirmative jurisdictional grant reiterated that nothing therein "shall be construed to create a cause of action not otherwise authorized by law." 9

The legislative history of Senate bill 2857 shows that it was designed to remedy the chaotic state of federal court jurisdiction over customs matters. 10 In her testimony before the subcommittee, Assistant Attorney General Babcock cited Sneaker Circus, Inc. v. Carter 11 as an example of the jurisdictional confusion that the bill was trying to overcome. 12 In Sneaker Circus, several parties, including importers of footwear, sought injunctive relief to invalidate certain international agreements involving the United States, Korea, and the Republic of China, pursuant to which Korea and China agreed to limit their exportation of footwear to the United States. 13 The district court dismissed the case for lack of jurisdic-

---

9 See, e.g., 28 U.S.C. § 1583(i) (1982) (general residual jurisdiction involving imports); id. § 1583(a), (g) (jurisdiction to review final agency action affecting imports).
10 House Report No. 1235, supra note 2, at 18-19, reprinted in 1980 U.S. Code Cong. & Ad. News at 3729; infra note 23 and accompanying text. It was hoped that the bill would clarify the jurisdictional limits of the Court in customs matters, and prevent a litigant who has chosen the wrong forum from being effectively foreclosed from judicial relief. S. 2857 § 103, 124 Cong. Rec. 9191 (1978) (statement of Sen. DeConcini).
11 566 F.2d 396 (2d Cir. 1977).
12 1978 Senate Hearings, supra note 4, at 50, 60. Assistant Attorney General Babcock illustrated the disagreement over the boundaries of the Customs Court's jurisdiction by comparing Sneaker Circus with Consumers Union v. Committee for the Implementation of Textile Agreements, 561 F.2d 872 (D.C. Cir. 1977), cert. denied, 435 U.S. 933 (1978). 1978 Senate Hearings, supra note 4, at 50, 60. Ms. Babcock observed that although the agreements at issue in both cases were substantially similar, the Second Circuit and the District of Columbia Circuit had reached different conclusions as to whether the district courts or the Customs Court possessed jurisdiction to determine the agreements' validity. Id.
13 566 F.2d at 398. The agreements, which were negotiated pursuant to the Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982), regulated United States imports of footwear from China and Korea for a period of 4 years. 566 F.2d at 398. Although the United States Customs Service was responsible for policing the agreements, failure to comply with the terms of the agreements also would have subjected violating exporters to both civil and criminal sanctions in the exporting countries. Id. at 398-399. The plaintiff's challenged the validity of the agreements on three grounds: failure to comply with the procedural requirements of the
The Second Circuit reversed and remanded the case for consideration on the merits. Under its present philosophy, would the Court deny jurisdiction to an importer who could come under a section 1581(a) protest once the merchandise was denied entry? Although the Court and the government recite the litany that the Customs Courts Act of 1980 was enacted to avoid jurisdictional conflict with other federal courts, vesting exclusive jurisdiction in the Court and the Federal Circuit, they have effectively limited the avenues of judicial review available to importers, in contravention of the Act's intent. It is interesting to note in this connection that when Assistant Attorney General Babcock was asked whether the Customs Court would have jurisdiction of a case like Sneaker Circus under the new act, she said "that is the . . . real, object of the bill." Such a case, Ms. Babcock continued, would "very clearly [have been] headed for the Customs Court. The Customs Court would have been able to do what is necessary." In his testimony, Chief Judge Re spoke of the "large objective" as "a comprehensive system with expanded opportunities for judicial review of agency action directly affecting importations." He said the two key provisions to solving the problem of disparate jurisdiction between the district courts and the Customs Court are "[e]ffective access and the power to grant appropriate remedies."
Chief Judge Re recognized, however, that limiting the Court to its existing subject matter jurisdiction would, as to the Department of the Treasury, now the Department of Commerce, the International Trade Commission, and the Customs Service, leave the Court to "continue to be faced with obsolete procedures which are inconsistent with the principles of accountable and responsive government."\textsuperscript{21}

Practitioners testifying at the hearing were unanimous in their disapproval of the proposed bill's analogue to the current version of section 1581(i). The Association of the Customs Bar recommended deletion of the phrase "nothing in this section shall be construed to create a cause of action" from the residual jurisdictional provision, stating that it "may raise questions and doubts."\textsuperscript{22} The New York County Bar Association also opposed the proposed residual jurisdiction provision, observing prophetically that the language, "nothing in this section shall be construed to create a cause of action" was "self-nullifying."\textsuperscript{23} In addition, Walter E. Doherty, Jr., a member of the customs bar, saw such language as an insult to the intelligence of the Court and of the customs bar.\textsuperscript{24}

Senate bill 2857 was substantially reworked and introduced in the 96th Congress as Senate bill 1654.\textsuperscript{25} The Senate report on the bill was based on the hearings on Senate bill 2857 and its revisions.\textsuperscript{26} The report stated that Senate bill 1654 "would create a comprehensive system of judicial review of civil actions arising from import transactions . . . [g]ranting [the Court] all the pow-

\textsuperscript{21}1978 Senate Hearings, supra note 4, at 74. Chief Judge Re observed that the Customs Court's jurisdiction was limited by so many exceptions that the agencies dealing with importations were left "relatively immunized from meaningful judicial review." Id. The Chief Judge also indicated that these exceptions have prevented persons adversely affected by the actions of these agencies from enjoying the same due process and equal protection rights enjoyed by persons adversely affected by the actions of other agencies. Id. at 75.

\textsuperscript{22}Id. at 145 (statement of Andrew Vance, Association of the Customs Bar). The Association of the Customs Bar recommended that the last three paragraphs of § 1581 be deleted as either obvious or redundant. Id.; see supra note 5.

\textsuperscript{23}1978 Senate Hearings, supra note 4, at 239 (statement of Donald Paley, New York County Lawyer's Association).

\textsuperscript{24}Id. at 263. Since the proposed bill emphasized the limits on the court's jurisdiction, Mr. Doherty called the entire scheme "a pretense at increasing the power and authority of the Court, [while] effectively placing such limits upon that authority as to emasculate it." Id.


\textsuperscript{26}S. Rep. No. 466, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as Senate Report No. 466].
ers in law and equity of or as conferred by statute upon, a district court of the United States.\textsuperscript{27} With respect to section 1581(h)(1) in Senate bill 1654, the residual jurisdiction provision now found in section 1581(i), the Senate report stated:

The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This residual jurisdictional provision should make it clear that all suits of the type specified are properly instituted only in the Court of International Trade . . . [and] will ensure that in the future these suits are heard on their merits.\textsuperscript{28}

In opening the 1980 House Hearings on House resolution 6394,\textsuperscript{29} a revision of which evolved as the Customs Courts Act of 1980, Congressman Seiberling stated: “The Customs Courts Act of 1980 is designed to eliminate many of the problems faced by litigants in international trade cases before the various federal courts. This bill expands the Customs Court’s substantive jurisdiction and the type of relief it may award."\textsuperscript{30} The point is that the Court’s subject matter jurisdiction was expanded by this bill and, I submit, by section 1581(i), yet one would hardly believe it from the constancy with which the government cites the language in the House report that no new cause of action has been created thereby. All that phrase really means is that the Customs Courts Act of 1980 did not create a cause of action that could not have been instituted in a court of the United States having subject matter jurisdiction prior to its passage. Further, it does not mean that if, under general principles of law, the Customs Service or other branches of the government could have been sued with regard to a customs matter in a district court prior to the Customs Courts Act of 1980 that such parties could not be sued subsequently in the Court.

The first witness before the House subcommittee was Senator

\textsuperscript{27} Id. Proposed § 2643 of Senate bill 1654 removed any doubts as to the Court’s power to enter money judgments for and against the United States, or to issue declaratory judgments, writs of mandamus, or injunctions. Id. at 20-21. For a discussion of the Court’s expanded remedial powers under § 1581(i) as enacted, including its authorization to conduct jury trials, see Re, Litigation Before the United States Court of International Trade, N.Y.L. Sch. L. Rev. 437, 442-44 (1981).

\textsuperscript{28} SENATE REPORT No. 466, supra note 26, at 10 (emphasis supplied).

\textsuperscript{29} H.R. 6394, 96th Cong., 2d Sess., 126 CONG. REC 9192 (1980).

DeConcini, the sponsor of the companion bill, Senate bill 1654. He made it clear that one of the intentions of the sponsors of this legislation was to transfer to the Court subject matter jurisdiction over cases that were then triable in the district courts.\(^{31}\) His testimony suggests that one of the tests the Court should use is whether the case is one that would likely have been heard by a district court because it was not within the subject matter jurisdiction of the Customs Court, not whether liquidation could eventually occur and a protest be filed pursuant to section 1581(a).

In his testimony before the House Committee, Chief Judge Re addressed the impact of the bill on administrative agency actions in the import realm and observed:

>[An] important achievement of the bill is that it will establish as matters of legislative policy two significant jurisprudential concepts...:

One, that those agencies which deal with importations are made subject to the same policy of judicial review as Congress has provided for other administrative agencies; and

Two, that persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress has made available for persons aggrieved by actions of other agencies.\(^{32}\)

Again, this would seem to underscore that one should not have to look solely to section 1581(a) as an avenue to the Court and as a limitation on jurisdiction conferred by section 1581(i) if a cause of action has been stated, that is, if a case or controversy exists. Whether a case or controversy that is ripe for decision exists ought to be the controlling consideration, not whether at some point down the road one could artificially construct a liquidation and, therefore, come into court by the protest route, if it were still economically feasible to do so. Inquiry into ripeness, rather than the applicability of section 1581(i) would seem to be more in harmony with the intent of the legislation \(^{33}\) and would not lead to the

\(^{31}\) See 1980 House Hearings, supra note 30, at 3. Senator DeConcini noted that in view of the increased volume of litigation in the federal district courts and the under-utilization of the Customs Court, it was logical to expand the jurisdiction of the Customs Court to include some of the cases then being heard in the district courts. Id.


\(^{33}\) See S. 1654, 96th Cong., 1st Sess., 125 Cong. Rec. 22, 386-87 (1979) (statement of Sen. DeConcini). When introducing Senate bill 1654, Senator DeConcini noted that the legislation was designed to cure problems arising from the fact that the Customs Court "lacks
judicialization of the administration of customs laws, as was feared at one point by both Chief Judge Re and Assistant Secretary of the Treasury Davis.4

David Cohen testified that the Department of Justice supported the bill, in part because of its "enhancement of the ability of persons who believe they have been aggrieved by Government decisions in this area to gain access to the courts."35 Amen! But has this truly been realized, particularly since the Federal Government continues to seek to limit judicial review to situations in which section 1581(a) could conceivably be utilized at some time in the future by means of a liquidation and a protest? In response to an inquiry from Congressman Butler on his concern about creating specialized courts, Mr. Cohen asserted the Department's belief "that this bill would broaden the jurisdiction of the Customs Court and make it less of a specialized court than it now is."36 But by resisting the Court's exercise of its broadened jurisdiction and powers, such as the power to render declaratory judgments, the Department of Justice seems intent on keeping the Court from becoming less specialized.

Finally, William Melahn, a member of the customs bar from Boston, opined at the House hearings: "The fact of the matter is that the Customs Court as it is presently constituted is approach-

---

34 See 1980 House Hearings, supra note 30, at 40 (statement of Richard Davis, Assistant Secretary of the Treasury). Assistant Secretary Davis explained that it was the position of the Treasury Department that few importers would import merchandise, pay customs duties, and protest if they could obtain judicial review without doing so. Id. He also asserted that "[j]udicialization of the Customs informal ruling process will discourage it from providing useful guidance to the public." Id. In questioning Assistant Treasury Secretary Davis, Congressman Seiberling noted that a ruling prior to actual importation and protest was "in effect,. . . a declaratory judgment action which we deal with constantly in the Federal district courts." Id. at 65. Not to grant the Court jurisdiction in such situations, he suggested, would be unfair to an importer who "might find himself out of business before [he] can act to correct an erroneous ruling." Id. The Assistant Secretary, while conceding that "our administrative agencies don't always dispose of cases as quickly as we like," nonetheless opposed granting jurisdiction until "an actual importation" had occurred, and objected to "let[ting] courts get heavily involved in the day-to-day operations of the administrative agencies." Id. at 65-66.

35 Id. at 47. In addition to increasing access to the Court, the Justice Department cited in its statement clarification of "jurisdictional confusion," better utilization of court resources, and delineation of the court's remedial powers as reasons justifying adoption of the bill. Id.

36 Id. at 73.
ing the 21st Century with 19th Century jurisdiction. The problem is related to the lack of meaningful statutory jurisdiction coupled with overly narrow judicial interpretations as to the jurisdiction of the court.”

Unfortunately, the latter part of this statement still could be made today.

In concluding this survey of legislative history with an examination of the House report for House Resolution 7450, it is interesting to note that section 1581(i) in House Resolution 6394 was far more specific and limited than the version of section 1581(i) proposed in House Resolution 7540 and ultimately enacted. Further, the House report states that, in response to the concerns of the Subcommittee on Trade of the House Ways and Means Committee regarding the overly specific approach of the previous bills, the Judiciary Committee adopted a “generic approach,” giving the Court “jurisdiction over those civil actions which arise out of a law of the United States pertaining to international trade.” The significance of this approach is that it represents “an effort to provide greater protection for the rights of persons involved in disputes arising out of import transactions.”

More importantly, the provisions in the proposed bills that stated that nothing in this legislation should be construed as creating a cause of action are absent from section 1581(i) as enacted. Indeed, in its discussions of the provisions of House Resolution 7540 in general, and section 1581 in particular, the Judiciary Committee did not insist as strongly as it formerly had that section 1581(i) merely confers subject matter jurisdiction on the Court and does not create any causes of action not founded on previously existing provisions of law. The Committee’s discussion of the effect of section 1581(i) on judicial review under section 516A of the Tariff Act did stipulate that no new causes of action were created,

---

37 Id. at 112 (emphasis supplied).
but even that reference was softened by a conclusory statement that "the court is not prohibited from entertaining a civil action [under 1581(i)] relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930." In that same paragraph the Committee Report also indicated that it had the same concerns with regard to possible use of subsection (a) of section 1581 to circumvent the statutory scheme of section 516A. Therefore there was nothing per se in the discussion of the provisions of sections 1581(i) and 1581(a) in the House Report, that could constitute a basis for limiting the use of section 1581(i) if a protest could be brought at some time in the future.

The Court of Customs and Patent Appeals’ decision in Montgomery Ward & Co. v. Zenith Radio Corp. is often used as the authority for this limitation on section 1581(i). Montgomery Ward, however, is not good authority for this proposition. The court in that case quite properly observed that section 1581(i) “cannot be made a resting ground for judicial review of activities neither contemplated nor permitted by Congress.” Therefore, section 1581(i) could not be the basis for Court jurisdiction over settlement negotiations in antidumping litigation, since Congress had not permitted judicial review in any court of the government’s utilization of its settlement authority. The court, in citing the language from

---

42 Id. at 48, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3759-60; see also Royal Business Mach., Inc. v. United States, 669 F.2d 692, 702 (C.C.P.A. 1982) (unless there is "express factual finding or legal conclusion" with respect to scope of antidumping order, § 516A does not preclude action based on § 1581(i)); Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1023-24 (Ct. Int’l Trade 1982) (jurisdictional subsection preceding § 1581(i) does not diminish its broad jurisdiction).

43 House REPORT No. 1235, supra note 2, at 48, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3759.


45 Id. at 1261. In Montgomery Ward, the plaintiff, Zenith, sought review of settlement agreements between the Secretary of Commerce and importers of Japanese television receivers, including Montgomery Ward, in the court. Id. at 1255-56. Zenith claimed injury in that the settlements released its competitors from potential liability for hundreds of millions of dollars in duties. Id. at 1256. Zenith asked for injunctive relief to halt consummation of the settlements, and asserted that under the antidumping statute, 19 U.S.C. § 1617 (1982), the Secretary of Commerce had no authority to enter into them. Id. at 1257. The court issued a preliminary injunction. Id. at 1256-57. On appeal, the Court of Customs and Patent Appeals held that the Court lacked jurisdiction to review Zenith’s challenge to settlements made by the Secretary of Commerce, because the scope of its judicial review of the agreements was limited to determining whether the procedural requirements were satisfied. Id. at 1260-61.

46 Id. at 1261. In applying § 702 of the Administrative Procedure Act, Judge Nies observed that the Court, like any federal court, must determine the extent to which the ad-
the House Report referred to above, agreed that "Congress intended that the Court of International Trade, and not a district court, have jurisdiction of civil actions for review of administration and enforcement of the antidumping statute to the extent appropriate under the APA [Administrative Procedure Act]."\(^4\)  

This Article has explored the legislative history of section 1581(i) in some detail because legislative history is the cornerstone of the limited interpretation for which the government has argued, and which the courts have adopted, with regard to section 1581(i) jurisdiction. It is also useful to examine some of the cases in which this limited view has worked to negate the purposes and the statutory intent of the Customs Courts Act of 1980. This Article will discuss three of the most significant cases in this area. These cases are significant because they are, unfortunately, symbolic benchmarks on which are based a number of cases that have denied plaintiffs the opportunities Congress intended to provide through its grant of expanded jurisdiction to the Court of International Trade.  

The first case, *United States v. Uniroyal, Inc.*,\(^4\)  is often cited for the proposition that a party may not obtain judicial review if "a protest-related review procedure remains available for resolving the . . . issue."\(^4\) In *Uniroyal*, the plaintiff, an importer of leather uppers and rubber soles for shoes, filed a request for internal advice after receiving three notices of redelivery from Customs for failing to mark the merchandise with the country of origin.\(^6\) Administrator's acts have been statutorily committed to agency discretion before deciding the scope of available review. *Id.* The judge posited that if Congress had committed the authority to make settlements to the discretion of the Secretary, no review was permitted. *Id.*

\(^4\) Id.  
\(^4\) 687 F.2d 467 (C.C.P.A. 1982).  
\(^4\) 687 F.2d at 468-69. The Customs Service required all improperly marked containers or articles to be returned to the regional customs office for appropriate corrections. *Id.* at 468 & n.2. After receiving the third of six notices of redelivery, Uniroyal filed a request with the regional customs office under 19 C.F.R. § 177.11(a) (1983), asserting that the shoe parts were within the ultimate purchaser exception created by 19 U.S.C. § 1304, and seeking guidance. 687 F.2d at 469 & n.3; see 19 U.S.C. § 1304 (1982). Section 1304 states that marking is
proximately 16 months later, Customs Headquarters issued a ruling in support of the marking requirement. Uniroyal then brought an action in the Court for declaratory and injunctive relief pursuant to section 1581(i). Even though the trial court agreed with the government's contention that the demands were protestable, it rejected the government's argument that Uniroyal could come within the jurisdiction of the Court only by filing a protest and appealing a denial of such protest, holding that, unlike section 1581(a), section 1581(i) "does not require the filing or denial of a protest as a prerequisite for the exercise of jurisdiction." Moreover, the Court found that the filing of a protest by Uniroyal would have been "purposeless" in light of the ruling issued by Customs Headquarters which, the Court observed, Headquarters could have refused to consider.

On an interlocutory appeal, the Court of Customs and Patent Appeals reversed, holding that even assuming that the demands for redelivery were not protestable, Uniroyal could not obtain ju-

---

51 See Uniroyal, Inc. v. United States, 529 F. Supp. 661, 662 (Ct. Int'l Trade 1981), rev'd, 687 F.2d 467 (C.C.P.A. 1982). Responding to Uniroyal's request, drafted a letter stating that the ultimate purchaser exception did not apply and that the shoe parts must be individually marked to designate the country of origin. 529 F. Supp. at 662.

52 Id. at 662-63 (quoting Wear Me Apparel Corp. v. United States, 511 F. Supp. 814, 817 (Ct. Int'l Trade 1981)). The trial court agreed with the Government's contention that Uniroyal could have protested the redelivery demands under 19 U.S.C. § 1514(a)(4). 529 F. Supp. at 662; see 19 U.S.C. § 1514(a)(4)(1982). Section 1514(a)(4) permits Customs Service review of actions that exclude merchandise under any provision of the customs laws. Id. at 662 n.4 (quoting § 1514(a)(4)). The trial court noted in Uniroyal, however, that the argument that § 1581(i) required the exhaustion of all protest remedies was previously rejected in Wear Me Apparel. 529 F. Supp. at 662.

54 Id. at 665. Judge Maletz rejected the Government's contention that judicial review was barred by 28 U.S.C. § 2637(d), since the plaintiff had not exhausted its administrative remedies. Id. Section 2637 provided that the Court "shall, where appropriate, require the exhaustion of all administrative remedies." 28 U.S.C. § 2637(d) (1982). The Court noted that Customs, in its response to Uniroyal's request for advice, rejected the argument that the merchandise need not be marked. 529 F. Supp. at 665. Under 19 C.F.R. § 177.11(b)(6) (1976), advice received from the Headquarters Office represents the official position of the Customs Service concerning the applicable customs laws in a specific transaction. Id. The court therefore reasoned that requiring the plaintiff to protest and mandating further administrative proceedings would have served no purpose, since it did not appear likely that the Customs Service would reconsider its official position. Id. Consequently, no appropriate administrative remedy remained and § 2637(d) did not bar the exercise of jurisdiction. Id.

55 United States v. Uniroyal, Inc., 687 F.2d 467, 470 (C.C.P.A. 1982). In April of 1980, when Uniroyal had received the notices of redelivery, such notices were not enumerated in §
dicial review of the six notices of redelivery, "since a protest-related review procedure remain[ed] available for resolving the marking issue." Although Uniroyal conceded that the marking issue could be addressed in a protest upon the assessment of marking duties or liquidated damages made as a result of its failure to redeliver the unmarked merchandise, it urged that the case was "‘encompassed within the broad jurisdictional parameters’ of § 1581(i), thereby allowing the Court of International Trade to exercise its discretionary authority under 28 U.S.C. § 2643(c)(1) to grant Uniroyal declaratory relief from any further assessments." Uniroyal contended further that a declaratory judgment in these circumstances would enable a prompt resolution of the controversy without forcing Uniroyal either to proceed at its peril or to succumb to the government’s interpretation of the law by marking its goods, and thus, being denied its opportunity for judicial review.

In a strange mix of reliance upon the assumption that these six importations for which notices of redelivery had been received were completed transactions and upon its reading of the legislative history of section 1581(h) concerning the "testimony by enforcement officials against allowing an appeal from a ruling prior to an actual importation, the denial of a protest regarding that importation, and the payment of assessed duties as a prerequisite to filing a civil action," the Court of Customs and Patent Appeals concluded that the Court was without jurisdiction. The court also stated that "[t]he jurisdiction of the Court of International Trade under § 1581(i) is expressly ‘in addition to the jurisdiction con-

514 of the Tariff Act as customs determinations subject to protest. Id. at 469 n.5; see 19 U.S.C. § 1514(a) (1982). The statute subsequently was amended to include such notices, clarifying the issue. Customs Courts Act of 1980, Pub. L. No. 96-417, § 605, 94 Stat. 1727, 1744 (codified at 19 U.S.C. § 1514(a)(4) (1982)). Prior to the amendment, the Court had held that notices of redelivery were protestable determinations under 19 U.S.C. § 1514(a), reasoning that a notice of redelivery "is in reality no different than a decision to exclude merchandise from entry or delivery"— determinations that were protestable before the amendment. Wear Me Apparel Corp. v. United States, 511 F. Supp. 814, 817 (Ct. Int’l Trade 1980) (quoting S. REP. No. 466, 96th Cong., 1st Sess. 7 (1979)). The Court of Customs and Patent Appeals in Uniroyal, noted that this issue was "not easily resolved," 687 F.2d at 470 n.8 and, therefore, based its resolution of the question of reviewability of the import transactions on the premise that notices of redelivery were not protestable under the pre-amendment version of § 514, id. at 470.

56 687 F.2d at 470.
57 Id. at 470 (quoting Appellee's Brief).
58 Id. at 470-71.
59 See id. at 470.
60 Id. at 471.
ferred . . . by subsections (a)-(h),’ and the legislative history of § 1581 further evidences Congress’ intention that subsection (i) not be used generally to bypass administrative review by meaningful protest.61

It is submitted that the appellate court was wrong in concluding that the transactions before it were completed transactions that could be heard by the Court only via the protest route, while assuming for the purposes of its decision that such notices of redelivery were not protestable.62 Further, insofar as the term “completed transaction” implies that all Uniroyal had to do was protest, this premise was erroneous, since Uniroyal would have to await liquidation or the assessment of liquidated damages before the transactions would be complete for Customs purposes and thereby protestable.63 In addition, the court’s reliance on the legislative history regarding section 1581(h) and rulings issued prior to the importations seems strained, since review was sought of notices of redelivery and jurisdiction was not claimed under section 1581(h).64

Both the majority and the concurring opinions concluded that the statutory language to the effect that section 1581(i) jurisdiction was granted in addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) is limiting language rather than broadening language.65 The legislative history previously referred to could properly support the alternative proposition. The appellate court made an unfortunate choice, dictated by neither the statutory language, the legislative history of section 1581(h), or the decisions of the district and customs courts made before the enactment of section 1581(i), in which the district courts sought to avoid jurisdiction if it were possible to find Customs

61 Id. at 472.  
62 See id. at 470.  
63 See id. The Court determined that Uniroyal would be able to protest “when and if” the Customs Service assessed liquidated damages or marking duties against Uniroyal for its failure to redeliver or to mark the merchandise. Id. at 472 (emphasis supplied). Denial of such protest would be appealable to the Court under § 1581(a). See id. at 470. The Court of Customs and Patent Appeals also “decline[d] to follow Uniroyal’s suggestion” that the internal advice request be deemed a protest. Id. at 472 n.16.  
64 See id. at 469. Perhaps the court addressed § 1581(h) because of the presence of the internal advice in the case. The court characterized the internal advice, given pursuant to 19 C.F.R. § 177.11 (1982) at the request of Uniroyal, as a “ruling,” 687 F.2d at 472, even though the court “express[ed] no opinion on whether a ruling under 19 CFR § 177.11 could even constitute a ‘ruling’ within the meaning of 28 U.S.C. § 1581(h),” id. at 472 n.17.  
65 See 687 F.2d at 472 (majority opinion); id. at 475 (Nies, J., concurring).
Court jurisdiction. It is from these precedents that the concurring judge would limit invocation of section 1581(i) to those situations "when no other remedy is available or the remedies provided under other provisions of 28 U.S.C. § 1581 are manifestly inadequate."

Finally, the Uniroyal court failed to consider whether section 1581 sought to reach cases or controversies in which a final administrative decision had been reached and the matter was therefore ripe for decision. This was a case in which the facts were unique, in the sense that there had been no opportunity to protest the notices of redelivery under prior law. The court thus could have limited the invocation of jurisdiction on the facts of the case to situations in which such notices were not protestable, while still recognizing that Congress intended the Customs Courts Act of 1980 to make the courts more accessible to persons aggrieved by administrative decisions and to allow the courts to give adequate remedies. It is suggested that Judge Maletz's decision in the Court more correctly carried out the intent of the legislature.

The ramifications of the Uniroyal decision were promptly felt by the Court. On August 31, 1982, in American Air Parcel Forwarding Co. v. United States, Judge Landis of the Court granted the plaintiff's motion for a preliminary injunction against the abrogation by Customs Headquarters of a ruling having to do with the valuation of made-to-measure clothing from Hong Kong. The

---

See id. at 470-72 (majority opinion); id. at 475 & n.9 (Nies, J., concurring).

Id. at 475.


16 Cust. B. & Dec., No. 39, at 39. The Customs Service ruling at issue permitted the use of sales made by Hong Kong tailors to distributors to establish the export value of made-to-measure clothing. Id. Use of the sales was conditioned on the assumption that the tailor's sale price encompassed all the important components of the garments' value, including fabric costs. Id. The ruling also allowed that under the facts of the particular case, the sales could be used "to establish the price actually paid or payable" for the clothing once it was sold for export to the United States pursuant to statute. Id.; see 19 U.S.C. § 2532(2) (1982). On March 12, 1981, Customs Headquarters received a request to reconsider the ruling from the District Director, Port of San Francisco. 16 Cust. B. & Dec., No. 39, at 40. Customs Headquarters initially affirmed the ruling, but it abrogated it after the Office of Regulations and Rulings concluded that the trade patterns in Hong Kong's made-to-measure clothing industry conflicted with the precedents upon which the ruling was based. Id.

The plaintiff, American Air Parcel, was in the business of forwarding completed garments from Hong Kong to Detroit by air freight. Id. It would then forward the clothing to ultimate purchasers in the United States. Id. The duties that the plaintiff had to pay incorporated the prepaid C.O.D. charges incurred in forwarding the garments. Id.
Court did so in reliance "upon its general equity powers in
conjunction with 28 U.S.C. § 1581(i) for subject matter jurisdiction
over the previously imported goods." On rehearing, Judge Landis
dissolved the preliminary injunction, noting that within 2 days of
the granting of the injunction, the Uniroyal decision had come
down from the Court of Customs and Patent Appeals. Quoting
the Uniroyal decision, the Court observed:

"It is judicially apparent that where a litigant has access to this
court under traditional means, such as 28 U.S.C. § 1581(a), it
must avail itself of this avenue of approach complying with all the
relevant prerequisites thereto. It cannot circumvent the prerequi-
sites of 1581(a) by invoking jurisdiction under 1581(i) as the lat-
ter section was not intended to create any new causes of action
not founded on other provisions of law."72

The Federal Circuit affirmed Judge Landis' interpretation of
Uniroyal,73 despite the appellant's contention that the section
1581(a) remedy was inadequate because the importer could not
pay the unexpected assessment of additional duties without going
into bankruptcy, and thus would be deprived of judicial review.74
Interestingly, in discussing this aspect of the case, the Federal Circuit quoted the Ninth Circuit decision in *Jerlian Watch Co. v. United States*, wherein the court held that "financial impossibility" did not excuse the plaintiffs from failing to meet the jurisdictional prerequisite of payment of duty. The weight of the *Jerlian* case is questionable, since the Ninth Circuit was affirming a district court dismissal for want of subject matter jurisdiction. Indeed, *Jerlian*, and a number of similar cases, involved claims where the Customs Court had exclusive jurisdiction over the subject matter, but was without the power to frame equitable remedies or to take jurisdiction of cases within the international trade area in which jurisdiction was not sought via the protest route. Thus, *Jerlian* was not authority for a case in which the Court arguably had subject matter jurisdiction. Rather, given the expanded jurisdiction of the Court, the question should have been whether the plaintiff had stated a claim upon which relief might be granted.

Thus, *Jerlian* was not authority for a case in which the Court arguably had subject matter jurisdiction. Rather, given the expanded jurisdiction of the Court, the question should have been whether the plaintiff had stated a claim upon which relief might be granted. 

---

the sum of the charges. *Id.* Therefore, American Air Parcel would have to declare bankruptcy if it were forced to pay the increased duties. *Id.* For a discussion of a different aspect of this matter, see American Air Parcel Forwarding Co. v. United States, 17 Cust. B. & Dec., No. 41, at 32-36 slip op. (Ct. Int'l Trade 1983), wherein Judge Carmen declined jurisdiction over protested entries in which the duties were not paid.

*75* 597 F.2d 687 (9th Cir. 1979), *quoted in American Air Parcel*, 718 F.2d at 551.

*76* *Id.* at 692. In *Jerlian*, the plaintiffs sought declaratory and injunctive relief in district court against the implementation of allocation rules by the Government. *Id.* at 689-90. The district court dismissed the action for lack of jurisdiction, finding that the Customs Court had exclusive jurisdiction over the cause of action. *Id.* at 690. The plaintiffs maintained that if the rules were implemented, they would have to go out of business and would be unable to pursue the administrative remedy provided by statute. *Id.* at 691. Since it was not practical for the plaintiffs to pay the assessed duties first and subsequently to sue for a refund, they argued that the "adequate remedy" exception was applicable, and that the district court had jurisdiction over the action. *Id.* The Circuit Court of Appeals held, however, that the plaintiffs' financial impossibility did not come within the "adequate remedy" exception, and affirmed the district court's judgment. *Id.* at 692.

*77* *Id.*


*79* See American Air Parcel, 515 F. Supp. 47, 51 (Ct. Int'l Trade 1981). In this *American Air Parcel* case, Chief Judge Re determined that the critical question before the court was whether the "complaint ha[d] 'any legal substance,' in coming within the subject matter jurisdiction of the court." *Id.* (quoting Bush v. State Indus., Inc., 559 F.2d 780, 784-85 (6th
The most recent progeny of the Uniroyal interpretation of the relationship between sections 1581(a) and 1581(i), under which the eventual availability of jurisdiction under the former section makes recourse to the latter section impossible unless section 1581(a) is "manifestly inadequate," is Lowa, Ltd. v. United States. In Lowa, the importer sought reversal of the denial of its protest against the Customs Service requirement that Lowa file a consumption entry under a 1979 provision for aircraft imports that made such items dutiable at 5% ad valorem. More specifically, Lowa challenged the Customs Service's refusal to accept free entry under the 1981 provision in force when the plaintiff, in response to a 1981 demand by Customs, tendered entry papers to be substituted for the vessel repair entry Customs had required to have been made in 1979.

In spite of a protest of the refusal to accept the proffered entry papers, and an appeal, as well as consideration of the matter by the Assistant Secretary of the Treasury, the Court denied section 1581(i) jurisdiction on the ground that the issue was one of classification falling within the ambit of the Court's section 1581(a) jurisdiction. The plaintiff, however, had founded its complaint upon

---

Cir. 1979)). The Chief Judge concluded that whether or not the complaint stated a cause of action upon which relief could be granted was irrelevant to the determination of the court's subject matter jurisdiction, since the court must first exercise its subject matter jurisdiction to determine whether the complaint states a cause of action upon which relief may be granted. 515 F. Supp. at 51.


561 F. Supp. at 442; see 19 U.S.C. § 1202, annex A, schedule 6, part 6(C), TSUS item 694.40 (Supp. II 1978). Item 694.40 imposed a 5% duty on the value added to the aircraft by the repairs. 561 F. Supp. at 442.

561 F. Supp. at 443; see 19 U.S.C. § 1202, annex A, schedule 6, part 6(C), TSUS item 694.41 (1981). The plaintiff in Lowa had the interior of its Boeing 707 refurbished in New Zealand. 561 F. Supp. at 442. When the plane was returned to the United States, Customs officials, in the mistaken belief that the aircraft had been of American registry at the time it was being repaired, imposed a 50% duty on the cost of the repairs. Id. After the plaintiff posted a $750,000 bond, the airliner was released into the United States. Id. at 443. On the basis of subsequently received information, Customs later determined that the 50% vessel repair duty was improper, but notified the plaintiff that it would have to file an entry summary with the appropriate duty before the bond would be terminated. Id. The plaintiff's responsive filing sought to enter the aircraft free of duty under a revised 1980 tariff, but Customs rejected the entry, stating that Lowa would have to pay the 5% ad valorem duty that had been in effect when the plane was released into the United States in 1979. Id. The plaintiff filed a protest in which it objected to the refusal by Customs to approve the entry. Id. In response, Customs stated that the rejection of the entry was not properly protestable. Id. Treating this response as a denial of its protest, the plaintiff brought its action before the Court of International Trade. Id.

561 F. Supp. at 448.
section 1581(i), alleging that the Customs Service's decision was contrary to specific provisions of the Tariff Act of 1930.\textsuperscript{84} Nevertheless, the Court held that the invocation of section 1581(i) in this case "would frustrate the orderly administration of the customs laws by permitting plaintiff to circumvent the usual and normal administrative review process."\textsuperscript{85} Even if the question be termed "'strictly legal,'" the Court concluded, "the decision should be made in the first instance by the administrative agency to whom Congress has delegated the responsibility of administering the statutory plan."\textsuperscript{86} 'Treating the issue therein as one of classification and rate of duty, the Court stated that the only avenue to the Court was through section 1581(a),\textsuperscript{87} such remedy, in its view, not

\textsuperscript{84} Id. at 447. The plaintiff alleged that the Customs Service's decision violated §§ 315 and 505 of the Tariff Act of 1920. Id. Section 315 of the Tariff Act provides that the rate of duty to be imposed on any imported goods is, absent an applicable exception, the rate in force when the entry documents "and any estimated or liquidated duties then required to be paid have been deposited with the appropriate customs officer." 19 U.S.C. § 1315(a) (1982). Section 505 of the Tariff Act provides that the importer must deposit the estimated amount at the time the entry is made, except when the goods are "entered for warehouse or transportation, or under bond." 19 U.S.C. § 1505(a) (1982). Lowa's argument was that the Customs Service misapplied these statutory directives by requiring the plaintiff to deposit duties based on the 1979 rates, even though, due to an error by Customs, its entry documents were not actually filed until 1981, at which time the repairs were duty-free under the tariff schedules. 561 F. Supp. at 447.

\textsuperscript{85} 561 F. Supp. at 447. Chief Judge Re observed that it is a "'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" Id. at 448 (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)).

\textsuperscript{86} 561 F. Supp. at 447. Even if it were held not to have exhausted its administrative remedies, the plaintiff had argued in the alternative that administrative exhaustion should not be required in this case for several reasons, including the fact that the issue to be addressed was a "narrow strictly legal question." Id. The substantive legal issue presented by the plaintiff was whether an item could be physically delivered into the United States and still be deemed excluded from entry. Id. at 444. In other words, the plaintiff contended that the mistake made by Customs in the plaintiff's 1979 entry documents denied it "entry" at that point. Id. at 447. Since proper entry documents were not filed until 1981, it should have had the benefit of the 1980 no-duty rate. Id. The Lowa Court, however, rejected this argument, holding that the mistake in the original entry documents did not render them null and void and that the plaintiff's plane was thus entered in 1979. Id. at 445.

\textsuperscript{87} Id. at 448. Although Chief Judge Re noted that complaints involving issues of classification and rate of duty are reviewable under § 1581(a), he made clear that such review would be premature unless the denial of a proper protest and the payment of all liquidated duties could be shown to have occurred. Id.; see 28 U.S.C. § 1581(a) (1982) (protest jurisdiction); 28 U.S.C. § 2637(a) (exhaustion of administrative remedies necessary to exercise protest jurisdiction). Because review of this type of complaint was available under § 1581(a), the court held that the statutory scheme precluded the exercise of jurisdiction under § 1581(i) unless the plaintiff had shown that the existing scheme of judicial review was "manifestly inadequate or [would] cause irreparable injury." 561 F. Supp. at 448.
being manifestly inadequate.\textsuperscript{88}

It appears that the matter in \textit{Lowa} presented a case or controversy that was both within the subject matter jurisdiction of the Court and ripe for decision. The administrative agency had more than considered the question and the parties were at an impasse. Perhaps, absent the \textit{Uniroyal} doctrine, the Court would have decided this case on the merits. Such consideration certainly would have been consonant with the congressional intent to give aggrieved persons a prompt opportunity to obtain judicial review on the merits.

A symposium such as this one seems to be an appropriate vehicle for reflective consideration of, and a candid reply to, the question of where we are. It is in that spirit that this Article approaches this question with regard to section 1581(i). On reflection, the box in which the Court has been placed with regard to its invocation of section 1581(i) jurisdiction is regrettable. Earlier, it seemed that the Court was going to view section 1581(i) as an enhancement or completion of its jurisdiction, permitting it to afford judicial review in areas where it previously had possessed expertise but lacked the requisite subject matter jurisdiction or the equitable powers necessary to frame an appropriate remedy.

The approach taken by the Court in \textit{Sacilor, Acieries et laminieurs de Lorraine v. United States}\textsuperscript{89} more closely agrees with the legislative intent. Judge Watson stated therein:

> The Court considers 28 U.S.C. § 1581(i) to be an unmistakable expression of legislative intent that this Court be the exclusive forum for actions against the United States which arise from the laws mentioned therein, which for convenience we refer to as the laws of international trade.

> The specificity which is displayed in the preceding jurisdictional subsections, [28 U.S.C. § 1581(a) to (h)] is simply a combi-

\textsuperscript{88} 561 F. Supp. at 448. An example of a case in which relief available under § 1581(a) has been held to be manifestly inadequate is United States Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399 (C.C.P.A. 1982). In that case, the plaintiff sought to enjoin the enforcement of a Presidential proclamation designed to limit the amount of sugar that could be imported into the United States. \textit{Id.} at 400. The Court of Customs and Patent Appeals held that the Court had properly exercised its injunctive power under § 1581(i) because the delay involved in bringing the action under § 1581(a) would have rendered any relief manifestly inadequate. \textit{Id.} at 402 n.5. The factors considered by the court in reaching this determination included "the potential for immediate injury and irreparable harm to an industry and a substantial impact on the national economy." \textit{Id.}

\textsuperscript{89} 542 F. Supp. 1020 (Ct. Int'l Trade 1982).
nation of a repetition of details of the former jurisdiction of the Court, together with specific mention of newer actions which have been specially provided for. Unless these preceding jurisdictional subsections express or contain in their manifest legislative history, a limitation on jurisdiction of other related actions, they do not operate to diminish the broad grant of jurisdiction contained in section 1581(i) or to nullify causes of action which originate elsewhere.\(^9\)

It is the task of nongovernment lawyers to urge the courts to reexamine their thinking with regard to section 1581(i) and to assist them in this reexamination, so that cases within the Court’s subject matter jurisdiction in the broadest sense will be accepted if they state a cause of action—that is, if they constitute a controversy that has been considered administratively and is ripe for decision. If the customs bar continues to fail in this, the only recourse is to seek clarifying legislation from Congress. Moreover, the courts must balance the executive branch’s dislike of judicial review and its apparent interest in limiting both the availability and scope of that review with the citizen’s concerns. The courts are looked to as the bulwark of the citizen’s defense against unchecked and unbridled government action. By appearing to be deaf to pleas for judicial review, and justifying this deafness on the basis of decisions and principles applicable at the time when its predecessor body was not even a court (or was, at most, a very limited specialized court), the Court appears to invite unchecked and arbitrary governmental action. Such action becomes possible if, as a practical matter, judicial review becomes impossible. Customs, the International Trade Association, and the International Trade Commis-

\(^9\) Id. at 1022-23. In Sacilor, a decision rendered only 2 months before the court’s holding in Uniroyal, a group of foreign steel producers brought an action to enjoin the International Trade Administration of the Commerce Department (ITA) from disclosing confidential information submitted by the plaintiff producers as part of an ongoing carbon steel antidumping investigation. Id. at 1021. These producers alleged that the ITA intended to release this confidential material to certain domestic producers in response to a general request for information made by the domestic producers before the confidential filings were made. Id. at 1021-22. The Sacilor court read § 1581(i) as representing a broad grant of jurisdiction over matters of international law that were previously triable in the federal district courts. Id. at 1022-23. Since he found that the determination to disclose the confidential information constituted a final administrative action, Judge Watson held that judicial review was proper. Id. at 1022-23. Moreover, the court concluded that the ITA had acted in contravention of the Tariff Act of 1930 by failing to employ extreme care to safeguard the confidential documentation submitted by the foreign producers, id. at 1024, and, therefore, enjoined disclosure of any of the information, id. at 1025.
sion should no more be immunized from judicial review than any other branch of government.

Chief Justice Burger recently criticized the bar, with some merit, for adding to the expense of judicial review by unnecessary discovery and other dilatory practices. Where there has in every sense been administrative consideration of a problem, are not the courts chargeable with adding to unnecessary expense by postponing consideration of the question for archaic reasons? As has oft been stated, justice delayed is often justice denied.

It is hoped that the bench and bar together can take a fresh look at section 1581(i) as a legitimate basis for invoking the Court's jurisdiction when there has been a practical exhaustion of administrative remedies and there exists a case or controversy involving international trade matters ripe for decision. With regard to the relationship between subsections 1581(a) and 1581(i), Customs has the power not to make final administrative determinations subject to review where the protest route is applicable and the matter is the usual valuation/classification/rate of duty case. The cases where section 1581(i) jurisdiction can or will be invoked will still be a small particle of the Court's historical jurisdiction, but the recognition that the Court's historical jurisdiction has been enhanced by the Customs Courts Act of 1980 truly will bring the Court out of the backwaters into the mainstream. Such an approach will not open the floodgates to litigation, but only dam up the growing chorus of disappointment and wonderment.

---