

January 1983

## The Feasability of a Small Claims Procedure in Customs Matters

Philip Shuchman

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

---

### Recommended Citation

Philip Shuchman, *The Feasability of a Small Claims Procedure in Customs Matters*, 3 Pace L. Rev. 203 (1983)

DOI: <https://doi.org/10.58948/2331-3528.1637>

Available at: <https://digitalcommons.pace.edu/plr/vol3/iss2/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# **The Feasibility of a Small Claims Procedure in Customs Matters**

**PHILIP SHUCHMAN\***

## **TABLE OF CONTENTS**

Introduction .....	203
I. A Brief Description of the Antecedent Process .....	208
II. Some Empirical Data on the Process .....	213
III. The Expenses of Administrative Review (Protest) and Appeal (Summons) .....	219
IV. The Role of the Customhouse Broker .....	224
V. Nonpublication; Nonappealable; Nonprecedent .....	226
VI. Relevance of Small Tax Cases: Other Inferences From the Data .....	229
VII. Nonbusiness Protests and Appeals .....	236
VIII. Prevention of Abuse of the Proposed Small Claims Procedure .....	238
IX. Conclusion .....	241

## **Introduction**

The Customs Court, now called the United States Court of International Trade,<sup>1</sup> is the exclusive forum for judicial review of decisions of the Customs Service. The Customs Court is an Article III court<sup>2</sup> composed of nine judges. It sits in New York City,

---

\* Professor of Law, Rutgers School of Law, Newark, New Jersey. For their considerable help, the author is much indebted to Daniel A. Pinkus, Assistant Chief Counsel, Customs Court Litigation, Treasury Dep't, New York, N.Y.; Anthony Liberta, Area Director, United States Customs Service, J.F.K. Airport, N.Y. (formerly Supervisory Liquidator); and also Chief Judge Edward D. Re of the United States Court of International Trade; and Joseph E. Lombardi, Clerk of the United States Court of International Trade. For information and data on the workings of the Small Claims Tax Case procedure in the United States Tax Court, the author is grateful to Chief Judge Theodore Tannenwald, and Charles S. Casazza, Clerk of the Tax Court.

1. Act of Oct. 10, 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1727, 1728.

2. The Customs Court "is hereby declared to be a court established under Article III

but regularly holds hearings and conducts trials in many other major ports and places of entry where goods are imported into the United States. This article focuses on the relatively narrow subject of whether there should be a small claims procedure as part of the United States Customs Court.

The matter of different and separate treatment of small claims has been raised with the Customs Court and before several committees of Congress.<sup>3</sup> Trade groups of importers and customhouse brokers submitted statements and testified in favor of their proposed small claims procedure.<sup>4</sup> They contended that many valid claims against the government were not litigated because the costs of pursuing a claim under the Customs Court's procedures were substantially greater than the amounts at issue.<sup>5</sup> Their proposal, however, was never adopted by Congress. This article will address the different arguments presented to Congress in the debate over the small claims procedure. Recom-

---

of the Constitution of the United States." 28 U.S.C. § 251 (1976). See *Consolidated Merchandising Co. v. United States*, 375 F. Supp. 1356, 1360 (Cust. Ct. 1974), *rev'd on other grounds*, 527 F.2d 640 (C.C.P.A. 1976); U.S. CONST. art. III.

3. See *Customs Courts Act of 1979: Hearings on S. 1654 Before the Subcomm. on Improvements in Judicial Machinery, Senate Judiciary Committee*, 96th Cong., 1st Sess. 179 (1977) (letter dated 21 April 1977, from the trade associations to Chief Judge Re, United States Customs Court) [hereinafter cited as *Senate Hearings on S. 1654*].

Issues that necessarily need to be examined when any apparently significant change in practice or procedure is suggested, as in this instance, include: How neutral and different are rules of practice and procedure, and if there is to be a change, what kinds of possible differential effects would result, and to what groups? How do the professionals gainfully employed in the system respond to the proposals and why? How will the judges perceive changes in their status, particularly by reason of their having to preside in small claims matters, which by conventional definition are matters of little consequence? Imposed upon all of these factors is the paramount problem of knowledge in what appears to be a merely procedural change not affecting the substantive law and, presumably, not affecting outcomes: What kinds of information, and in what form and from what sources, can be said to reveal tractable problems, even given agreement on what is a problem? Many of these issues and questions arose in the history of this proposal, which encompasses more than its formal legislative history.

4. Apparently, the trade groups had espoused a small claims procedure for several years, particularly after the enactment of the Customs Court Act of 1970. See *Senate Hearings on S. 1654*, *supra* note 3, at 73 (statement on behalf of the American Importers Ass'n).

5. See, e.g., *Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law, House Judiciary Committee*, 96th Cong., 2d Sess. 95 (1980) (written statements of American Importers Ass'n and National Customs Brokers & Forwarders Ass'n of Am.) [hereinafter cited as *House Hearings on H.R. 6394*]; See also *id.* at 12 (questions of Subcomm. General Counsel).

mendations will be made based largely on various types of empirical data.<sup>6</sup>

Beginning in 1977, trade groups and some lawyers sought amendment of the Customs Court Act of 1970<sup>7</sup> to provide that in disputes with the Customs Service involving \$5000 or less, the importer would have the option to proceed under the proposed small claims provision of the Act.<sup>8</sup> A "small claim" was later defined as a matter "in which the total amount of the duty in dispute does not exceed \$5000, the amount in dispute being [defined as] the difference between the amount of duty claimed by the government and the amount the importer asserts is due"<sup>9</sup> The proposal contained an "Outline of Principles,"<sup>10</sup> which raised several controversial matters: the decision would be final and unappealable; the decision would not be published, but the parties would receive a summary of the reasons; the decision would have no precedential effect and would be binding only on the specific imported merchandise at issue. The Outline of Principles also placed particular emphasis on allowing corporations to appear by authorized agents in small claims matters. This would permit customhouse brokers to represent their customers (usually business firm importers) in the protest process before

---

6. Most of the data on which this article is based was submitted to the Federal Judicial Center which, however, is not responsible for the accuracy of the data or the contents of this article. The data range from simple statistical analysis to interview questions, the answers to which cannot be attributed to a specific source.

7. Pub. L. No. 91-271, 84 Stat. 274.

8. COMM. ON JUDICIARY, CUSTOMS COURTS ACT OF 1979, S. REP. NO. 96-466, 96th Cong., 1st Sess. 1 (Mr. DeConcini submitted the report to accompany S. 1654) [hereinafter cited as S. REP. NO. 96-466].

The proposal provided that disputes involving \$5000 or less exist "where (1) the total amount of duties, charges, or a claim for drawback does not exceed \$5000, or (2) the value of excluded merchandise does not exceed \$5000. See *Senate Hearings on S. 1654*, *supra* note 3, at 81.

9. *House Hearings on H.R. 6394*, *supra* note 5, at 104. In February 1980, the Customs Brokers and Forwarders Ass'n added to its earlier letter proposal, *supra* note 3, that the "amounts should be doubled due to the depreciation of the dollar since 1977." *Id.* at 271. This would result in a small claim being limited to \$5,000 in duty difference and \$10,000 in gross value of the merchandise. The Outline of Principles, *infra* text accompanying note 10, defined a "small" claim as "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." *Id.* at 104.

10. *House Hearings on H.R. 6394*, *supra* note 5, at 104-5; *Senate Hearings on S. 1654*, *supra* note 3, at 81.

the Customs Service and through the "appeal" process in the Customs Court.

The various arguments concerning the small claims proposal proceeded in the absence of any empirical data, despite available files and records containing information from which supporting data could have been generated.<sup>11</sup> The proponents of the small claims procedure, therefore, could only describe the advantages of their proposal in general and nonspecific terms. They did not document the particular problems and could not gauge the probable efficacy of their resolutions. As this article will reveal, data could have been compiled to support the desired legislation.

Strongly in favor of the small claims proposal were the major trade associations of importers and customhouse brokers, the American Importers Association (AIA) and the National Customs Brokers and Forwarders Association. The American Bar Association (ABA) was in favor, but with some equivocation.<sup>12</sup> The ABA's formal proposal was for legislation "directing the United States Customs Court to establish, by Court rule, a 'Small Claims Procedure,' to assure that no person will be deprived of a right to judicial review of his claim before that Court because of the expenses and related burdens of formal litigation procedures."<sup>13</sup> But the accompanying commentary states "the intention that the [Customs] Court should be given primary responsibility to ascertain the actual justification for such a procedure. . . ."<sup>14</sup> The ABA statement then urges that the bill be amended "to authorize the . . . Court . . . to consider the establishment of a Small Claims procedure."<sup>15</sup> It seemed evident, however, that the Customs Court would not establish a small claims procedure unless Congress explicitly required it or, at the very least, definitely recommended an appropriate rule of court.

Those strongly opposed included the judges of the Customs

---

11. Neither proponents nor opponents of the small claims proposal provided more than anecdotal information and arguments of questionable relevance to the legislative issue.

12. "The ABA as such has no position on that question. We simply believe that it's appropriate for the Congress to ask the court to set up such a type of mechanism. . . ." *House Hearings on H.R. 6394, supra* note 5, at 195 (testimony of J. Kaplan).

13. *Id.* at 148 (ABA Resolution).

14. *Id.*

15. *Id.* at 148-49 (statement of Leonard Lehman).

Court<sup>16</sup> and the Court of Customs and Patent Appeals,<sup>17</sup> the largest other specialized bar association groups, the Association of the Customs Bar in New York City,<sup>18</sup> and the Customs Law Committee of the County Bar Association in Los Angeles.<sup>19</sup> The small claims proposal was thought by some witnesses to merit future attention and study, but they contended that the Customs Courts Act of 1980<sup>20</sup> should not be held up pending full discussion of the issue.<sup>21</sup> One proponent urged that if the small claims procedure was not then incorporated in the 1980 Act, "another bill be speedily enacted which would provide for such a procedure."<sup>22</sup>

---

16. See Judge Re's comments, *infra* note 86.

17. See *House Hearings on H.R. 6394*, *supra* note 5, at 225 (statement of Chief Judge Markey, United States Court of Customs and Patent Appeals, agreeing with Chief Judge Re, *infra* note 86. See *id.* at 230 (supplemental answer of Chief Judge Markey that he was "[u]naware of any true small claims").

18. See *House Hearings on H.R. 6394*, *supra* note 5, at 195.

19. The statement of the Customs Law Comm. of the Los Angeles County Bar Ass'n also rebutted contentions not made by the proponents of the small claims procedure. The statement assumes that the "Small Claims Division [was intended to] be provided for claims of returning tourists and other matters of a unique nature unrelated to the issues regularly coming before the Court." *House Hearings on H.R. 6394*, *supra* note 5, at 348. The first contention was not raised by the importers and brokers trade associations, although it was mentioned in the ABA submission. The second issue (uniqueness) is simply not part of the small claims proposal nor is there any mention of that as a purpose. See *Outline of Principles for a Small Claims Procedure in the Court of International Trade*, *House Hearings on H.R. 6394*, *supra* note 5, at 104-5. See also *id.* at 95-96 (submission of American Importers Ass'n). The aforementioned committee statement attempts to differentiate between small claims proceedings in the Tax Court and other courts as opposed to the procedures discussed for the customs cases. *Id.* at 351. Evidence suggests that small tax cases are routine and largely repetitive. The statement asserts, moreover, that cases in most other small claims courts involve two private parties, each appearing without counsel. *Id.* This is true, however, in only nine states. J. RUHNKA, S. WELLER & J. MARTIN, *SMALL CLAIMS COURT: A NATIONAL EXAMINATION*, app. a (1978). This is not true of the small tax case procedure in which the government is represented. With regard to "private parties," it is true only in the very formal sense that a natural individual of modest means and a large national business firm suing him in a collection case are two *private* parties.

20. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended in scattered sections of titles 19, 26, 28, 44 U.S.C.).

21. See *House Hearings on H.R. 6394*, *supra* note 5, at 126 (statements and testimony of W.E. Melahn). The Administrative Conference of the United States suggested more study of the feasibility of a small claims procedure and, in the interim, endorsed the ABA proposal that the Customs Court be given such authority as it might need to develop low-cost procedures. *Id.* at 256.

22. *Id.* at 260 (statement of A. Tompkins, Counsel to the National Customs Brokers & Forwarders Ass'n of Am.).

## I. A Brief Description of the Antecedent Process<sup>23</sup>

Upon importation, a customs inspector conducts a cursory examination of the cargo. Usually, only a limited sampling is done to avoid the impossible burden of examining each of hundreds or thousands of items and to accommodate and expedite shipment of containerized cargoes. This gross observation may be little more than an examination of the invoice to see whether it agrees with the shipping label. At this first level, the customs inspector ordinarily tries to determine whether the cargo generally appears to conform with the necessary shipping papers.<sup>24</sup> The goods are usually released then because the duties estimated by the customhouse broker<sup>25</sup> will have been paid at entry on the basis of an entry form prepared by the broker.<sup>26</sup>

A bundle of papers called the "entry package,"<sup>27</sup> which includes, among other relevant documents,<sup>28</sup> the invoice<sup>29</sup> and

---

23. The enactment of the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (effective Nov. 1, 1980), expanded the jurisdiction of the Customs Court and the scope of its activities, and changed its name to the United States Court of International Trade. The 1980 Act did not address the problems of "small claims" in the Customs Court and, except for few minor particulars referenced in footnotes, it made no changes that affect the process to be described and the analysis of the data.

24. This is because of the legal requirement that a portion of each cargo shipment must be examined. Examination of Merchandise, 19 C.F.R. § 142.7 (1982).

"Typically, a Customs inspector has time to inspect only the most accessible merchandise—cargo near the doors of the truck or container—or a small portion set aside by the carrier. Quantities and merchandise descriptions are seldom verified." *Customs Cargo Processing—Fewer But More Intensive Inspections Are In Order*, GENERAL ACCOUNTING OFFICE, REPORT No. GGD-78-79, at 8-9 (Sept. 7, 1978). Sampling allows for use of representative samples selected by an authorized customs officer. 19 C.F.R. § 151.10 (1982).

25. The customhouse broker will have a power of attorney to transact customs business on behalf of a principal. Powers of Attorney, 19 C.F.R. §§ 141.31-46 (1982).

26. Deposit of Estimated Duties, Time of Deposit, 19 C.F.R. § 141.101 (1982). Much merchandise is immediately released by means of a prior approval system for which the Customs Service has application forms. Time for Filing Entry, 19 C.F.R. § 142.2(b)(1) (1982). In that procedure the entry form is filed after release of the goods but within ten days thereafter. Time Limit for Filing Documentation after Release, 19 C.F.R. § 142.23 (1982).

27. See Definitions, 19 C.F.R. § 141.0a(a) (1982): "Entry. 'Entry' means that documentation required by § 142.3 of this chapter to be filed with the appropriate customs officer to secure the release of imported merchandise from Customs custody, or the act of filing that documentation." *Id.*

28. See Entry Documentation Required, 19 C.F.R. § 142.3 (1982).

29. Invoice Requirements, 19 C.F.R. § 142.6 (1982) provides that the invoice or other acceptable documentation shall contain:

shipping label, customs forms for entry,<sup>30</sup> and a permit to deliver the imported goods, is then sent to one of the Customs Service import specialists. The import specialist's familiarity with the type or category of goods involved enables him to decide whether the classification<sup>31</sup> of the goods and their stated value<sup>32</sup> are correct. He may decide that there should be, or given additional information, may be, an increase in duty for whatever reason, including disagreement over the quantity stated on the entry and the quantity actually imported. If he does so decide, he will ordinarily send the importer, or the customhouse broker as consignee, a Notice of Action, which advises those firms of the type of action taken and gives a brief explanation.<sup>33</sup> Typically, this initial setting of possible disagreement is not yet final, although it can be, because the Notice of Action states that the Customs Service will take final action by liquidation unless the importer or broker pursues the matter within twenty days of the date of the Notice.<sup>34</sup>

Formally, this final step is termed liquidation,<sup>35</sup> which is the import specialist's determination of the increased duty to be paid. The formal response to liquidation is a protest<sup>36</sup> by the

---

(1) An adequate description of the merchandise.

(2) The quantities of the merchandise.

(3) The values or approximate values of the merchandise.

(4) The appropriate five-digit item number from the Tariff Schedules of the United States. If the importer is uncertain of the appropriate tariff item number, Customs shall assist him at his request. The district director may waive this requirement if he is satisfied that the information is not available at the time release of the merchandise is authorized.

*Id.*

30. Entry Summary Form, 19 C.F.R. § 142.11 (1982).

31. Classification is the procedure by which the Customs Service determines which provision of the Tariff Act applies and what, therefore, is the applicable rate of duty. The import specialist may receive a sample of the imported goods in appropriate cases.

32. Valuation and appraisal follow the requirements of several complicated statutory provisions which go into such arcane matters as foreign value, cost of production, American selling price and also whether discounts and commissions have been properly allowed or taken.

33. Notification to Importer of Increased Duties, 19 C.F.R. § 152.2 (1982).

34. *Id.*

35. Definition of Liquidation, 19 C.F.R. § 159.1 (1982): " 'Liquidation' means the final computation or ascertainment of the duties or drawback accruing on an entry."

36. The statutory basis for protests and the procedural requirements are found in 19 U.S.C. § 1514(b) which is section 1514(c)(1) of the Customs Courts Act of 1980. 19 U.S.C. § 1514(c)(1) (Supp. IV 1980).



importer, usually by its customhouse broker, who acts as consignee and has power of attorney from the importer.<sup>37</sup> There is, however, much informal communication to supplement, or even replace, the formal notice.<sup>38</sup> The Notice of Action often results in meetings and other informal communications between the customhouse broker and the import specialist, sometimes with the latter's immediate supervisor. The broker may be getting information and instructions from the client-importer and from the foreign exporter or manufacturer.

Completion of this process is evidenced by the liquidation, notice of which is given by the Liquidation Bulletin Notice<sup>39</sup> which is posted in the Customs House.<sup>40</sup> The aggrieved party<sup>41</sup> then has ninety days after notice of the liquidation has been posted within which to assert a formal protest.<sup>42</sup> A protest is often a bare statement of disagreement. Sometimes, if there has been no prior communication between the import specialist and

---

37. A licensed customhouse broker named in a customs power of attorney which has been filed and approved has the right to make the entire entry and do whatever else is necessary in dealings with the Customs Service on behalf of the foreign exporter or manufacturer, or on behalf of the domestic importer. All duties are either paid, or payment is covered by an approved surety bond, or the imported goods are not released. Protests may be filed by a variety of interested persons, including customhouse brokers. *Id.*

38. See Gerhart, *Judicial Review of Customs Service Actions*, 9 LAW & POLICY IN INT'L BUS. 1101, 1104 (1977).

39. 19 C.F.R. § 159.9 (1982).

40. *Id.* § 159.9(d). Sometimes notice of liquidation is also sent to the party in a "Courtesy Notice." Upon request of the importer, with approval of the local customs officials, some few protests are further reviewed by the customs headquarters in Washington. *Id.* § 174.23.

41. The aggrieved party usually acts through a customhouse broker or the broker's employee with a general power of attorney. Power of Attorney to File Protest. 19 C.F.R. § 174.3(a)(2) (1982). Very few protests are filed by lawyers.

42. 19 U.S.C. § 1514(c)(2) (Supp. IV 1980) (formerly codified at 19 U.S.C. § 1514(b)(2) (1976)). "Protests against decisions of a district director shall be filed in quadruplicate on customs form 19 or a form of the same size clearly labeled 'Protest' and setting forth the same content in its entirety. . . ." Filing of Protests, 19 C.F.R. § 174.12(b) (1982). Generally the protest must contain:

- (1) The name and address of the protestant;
- (2) his importer number;
- (3) the number and the date of entry;
- (4) date of liquidation, or date of a decision not involving a liquidation or reliquidation;
- (5) a specific description of the merchandise affected by the decision, and
- (6) the nature of, and justification for the objection.

Contents of Protest. 19 C.F.R. § 174.13(a) (1982).

the customhouse broker and no response to the Notice of Action, the filing of the protest will be the first time the import specialist is aware of the disagreement; he may only then be appraised of the factual and legal basis for the disagreement over the correct amount of duty to be paid.

The import specialists do in fact specialize<sup>43</sup> and are part of a Commodity Specialist Team. When the formal protest is filed within the ninety days after posting of the Liquidation Bulletin Notice, it is returned to that Team, often to the same import specialist, for review. The Liquidation Supervisor will thereafter review the protest and the Team's decision.<sup>44</sup> The import specialist may deny or grant the protest in whole or in part.

This rather laborious review process<sup>45</sup> assures that discretionary decisions will be reconsidered; there appears to be little caprice, personal bias, or individual mistake.<sup>46</sup> The heavy routine throughout tends to avoid idiosyncratic behavior. Yet, from the perspective of the customhouse broker (or importer or lawyer), those protests which are denied may still be considered important enough to appeal,<sup>47</sup> although the protested entry not involve large sums of money, as measured by the differences in

---

43. The import specialists of the customs service become quite expert in many areas and maintain files on the current literature and on the exporters and foreign manufacturers. Some prepare their own manuals.

44. If there is any change made in the duty to be paid, referred to as reliquidation, 19 U.S.C. § 1514(c), (d) (Supp. V 1981), the decision is reviewed again by the Residual Liquidation Office for what is usually a merely formal approval, although there are occasional internal disagreements. The reliquidation is also the subject of a Reliquidation Bulletin Notice. These bulletin notices are computer-generated printouts from the Customs Service in Washington which has been provided with all the information it requires at each step of the process. Sometimes the Bulletin Notice of Reliquidation is manually prepared at the Customs House.

45. See *Matters Subject to Protest*, 19 C.F.R. §§ 174.11-16 (1982).

46. Also, the import specialist provides considerable and detailed information on the liquidation and the protest by filling in Customs Form 6445. This will be used by the Customs Bureau personnel, and in the event of a summons, a copy will go to Counsel for the Treasury Department for use in Customs Court litigation. The notice of denial of the protest "shall include a statement of the reasons for the denial." 19 C.F.R. § 174.30(a) (1982).

47. 28 U.S.C. § 1581(a) (Supp. IV 1980). The Customs Court has exclusive jurisdiction of civil actions by persons whose protests to the Customs Service have been denied in whole or in part and which involve (1) the appraised value of the merchandise or (2) the classification and rate and amount of duties chargeable. *Id.*

An appeal by summons to the Customs Court must be taken within 180 days after the denial of the protest. See 19 C.F.R. § 174.31 (1982).

duty.

The reasons for the decision on review are stated and preserved in the files of protested matters; a sample of these form the basis of the estimates in this study. Some nine-tenths of the protests are of two major types: (a) classification issues<sup>48</sup> (under what dutiable category do these items fall?), and (b) valuation issues<sup>49</sup> (is the appraised value disproportionate to the invoice value? is the invoice correct? was the discount properly allowed and did the importer pay that much? is there a shortage as claimed?, i.e., is the quantity in the actual entry in fact less than what the documents say?). Most protests are based on disagreements about the proper classification of the imported merchandise.<sup>50</sup> For several reasons, it is not feasible to determine how many "protestable disputes"—disagreements between importers and the import specialists—there are by number or by frequency. Attrition takes place throughout the several stages of administrative review. Informal protests or disagreements are often abandoned, for example, by the importer's failure to provide information requested by the import specialist or other re-

48. Classification cases are based on a claim that merchandise was improperly classified by the customs service resulting in a tariff or duty that is higher than it should be. The plaintiff seeks relief in the form of an order of reclassification under another provision of the tariff schedules with a lower duty rate. See *Re, Litigation Before the United States Customs Court*, 19 U.S.C.A. §§ 1-1300, at xix, (West 1978), reprinted in, *Re, Litigation Before the United States Court of International Trade*, 26 N.Y.L. Sch. L. Rev. 437, 444-48 (1981) [hereinafter cited as *Re*].

49. Appraisal cases arise because most duties are based *ad valorem*—on the value of the imported merchandise. There are also some specific duties on given units or quantities of goods, and there are some duties that combine both the specific and the *ad valorem* duties. The percentage of the appraised value of the merchandise is the basis for the determination of the amount of duties to be paid. Appraisal cases are based on claims that the imported merchandise was improperly appraised or valued. The plaintiff must bear the burden of proving that the valuation by the Customs Service is incorrect, and the plaintiff has to prove that its claimed valuation is correct. *Re, supra* note 48, at 449.

50. The denied protest sample group of 200 revealed the following distribution:

Classification matters	=	115	=	57.5%
Valuation matters	=	53	=	26.5%
Other bases*	=	19	=	9.5%
Basis unknown	=	13	=	6.5%

Computer print (CP) 3, p. 19. See *infra* note 56.

\*Mostly simple matters such as invoice and other clerical errors, currency conversion calculations, and the like.

viewers.<sup>51</sup> An unknown number of these disagreements disappear because no formal protest is filed; unless a protest is made, there is not a written record of such disagreements.<sup>52</sup> Thus, it is difficult to get a reliable measure of the attrition prior to formal protest.

Since the initial appeal (the protest) is simple and relatively inexpensive, most "protestable disputes" are probably recorded as protests by the customs officials. A single form,<sup>53</sup> even a letter, is sufficient, and administrative review in the Customs Service usually involves little delay, although there may be an additional fee paid by the importer to the customhouse broker.<sup>54</sup> The formal protests, when denied, become candidates for challenge by an action against the United States, instituted by the filing of a summons in the Customs Court.<sup>55</sup> A subset of these candidate cases would meet the suggested jurisdictional limitations of the proposed small claims part of the Customs Court.

## II. Some Empirical Data on the Process

With the cooperation of the Customs Service, two samples of protests were taken from the New York Customs House files for the eighteen months prior to May 1980. The eighteen-month period was used because those complete files were still available; the older files were not. The 200 files in the eighteen-month pe-

---

51. Record Keeping Inspection, Examination, and Search, 19 C.F.R. §§ 162.1-.7 (1982) (importer or his agent must make complete records, keep them for five years, and make them available for examination).

52. Under the Regulation, Requests for Advice by Field Offices, 19 C.F.R. § 177.11 (1982), there is also the practice of a prior request for internal advice, which is not considered here, even though it may avoid some disagreements that would result in formal protests.

53. Under Filing of Protests, 19 C.F.R. § 174.12(b) (1982), Customs Form 19, usually a single sheet with interleaved carbon paper, is provided for protests. Section I identifies the parties, place and dates. This, with a brief statement of the reasons for protest (Section III), is sufficient in all the files examined. Most of the Form 19's examined had only a sentence or two stating the basis for the protest. If the customs officials need more information for proper administrative review, Form 28 elicits information on the six most common specifics for protest (which support the value or classification issues) and has a place for "other" and space for "remarks" to amplify the common reasons for protest as well as the rather infrequent "other."

54. The additional fee varies; it was listed as \$30 on one fee schedule.

55. See *supra* note 47 and accompanying text. Although only a few protests are formally withdrawn as of record, still many never proceed further.

riod cover several years and were systematically selected (every 25th from a random start) from a few thousand in the New York Customs House. These 200 files are protests which were denied. Some fifteen items of information were taken from most of the files.<sup>56</sup>

The customs process does not seem unstable judging by the small number of protest files, although only limited figures were available for this study on the frequency of protests as a percentage of the total number of import entries. During 1979 and 1980, some 1000 to 1100 protests a month were filed in the New York area; there seems to have been a peak of 13,000 to 15,000 protests a year filed in the New York Custom House. The frequency of protests as a function of individual import entries has been declining.<sup>57</sup> A ten-year<sup>58</sup> Customs Service recapitulation shows 175,767 protests,<sup>59</sup> or approximately 1400 protests a month. The total number of import entries of raw materials and manufactured goods (and, quite likely, the mean dollar value of the entries) appears to have increased substantially over the ten year period covered in the recapitulation.<sup>60</sup> The number of protests, however, appears to have remained relatively constant for

---

56. References to information from the sample files and the statistical calculations based on those data are on computer prints [hereinafter cited as CP\_\_\_\_, p.\_\_\_\_] which are available for inspection at the Federal Judicial Center, Dolley Madison House, Washington, D.C. and at Pace University School of Law Library, White Plains, New York. The Federal Judicial Center provided the computer-generated statistical analyses needed.

57. The frequency of protests in New York may be seen in the figures on formal entries (those of more than \$250 in value) and the protests that arise from those entries for the past three fiscal years.

	<u>Formal Entries</u>	<u>Protests</u>	<u>Percentage</u>
FY 1980	907,328	12,469	1.37%
FY 1979	947,165	12,661	1.34%
FY 1978	901,570	14,492	1.61%

The New York Customs House business may not be typical. Other ports have much larger amounts of raw materials and minerals. Presumably, more textiles and finished products pass through the New York Customs House than other points of entry. Raw materials and minerals are apt to generate fewer protests and, therefore, less work for the Customs Court.

58. The ten-year period includes four additional months, and does not include calendar year 1980.

59. This figure does not include 3276 protests which were withdrawn before action.

60. For example, imports of common raw materials and minerals rose from about \$10 billion in 1971 to about \$74 billion in 1978. This was by no means due merely or even largely to price increases in petroleum.

the preceding two fiscal years: for the first ten months in calendar year 1980 there were less than 1100 protests a month.

About four-fifths of all protests are denied. The ten-year recapitulation shows that about 84.5 percent of the protests were denied and 15.5 percent were granted.<sup>61</sup> From that pool, very few are "appealed"<sup>62</sup> to the Customs Court. Of the few that are appealed, many need not be heard because they involve repetitive questions of law and fact. Thus, a large number of appeals are placed in what is variously termed a "suspense" or "test case" file<sup>63</sup> where they may stay until disposition of an appeal that is thought to involve a controlling precedent.<sup>64</sup> In a test case, the importer, by its lawyer, will merely lodge the appeal by filing a summons and then request that the Clerk of the Customs Court hold the matter in abeyance pending the final adjudication in a case which the importer thinks will be dispositive

---

61. Of 165,498 dispositions, 139,647 protests were denied and 25,851 protests were granted.

The ratios bandied about in the trade among brokers and customs officials are that about 80 percent are denied and 20 percent are granted.

62. Actually, these cases are brought by an action against the United States initiated by summons. Notwithstanding, functionally these actions are appeals from denied protests.

The Customs Court has jurisdiction in such matters only if the protest has been filed and rejected in whole or in part. *See supra* note 47.

63. The term "test case" is a term of art, there being no such type of decision as a matter of law.

64. This practice is described in the House Judiciary Committee Report:

The suspension of proceedings in a number of cases under a test case is one of the unique practices in customs litigation. This is due to the fact the imported merchandise similar in all material respects to that in the test case may be involved in shipments to various importers and the same claims are made as to the valuation or classification of the goods. Because of the statute of limitations, importers file a protest and may commence a civil action as to all entries which have been liquidated or are liquidated during the pendency of the test case.

The suspension process is a method by which the court has avoided a multiplicity of trials. It provides that the other actions may be suspended pending a final decision in the test case. After a final decision in the test case, if the importer's claims are sustained, in whole or in part, the suspended actions are then submitted to the court on the basis of an agreed statement of facts. If the importer's claims are overruled, the suspended action is tried on its merits or abandoned.

H.R. REP. NO. 96-1235, 96th Cong., 2d Sess. 35 n.20, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3747 (House Judiciary Committee Report on the Customs Courts Act of 1980).

of its suspended action.<sup>65</sup> Placing these cases in the so-called suspense file does not bind the court or the parties. The Clerk of the Customs Court maintains a "List of Pending Test Cases." For the calendar year ending December 31, 1979, cases on the "List" were in the usual broad categories of classification and valuation matters.<sup>66</sup> Although the amount in controversy may be small for any specific entry (the particular import), the amount of duty involved is better viewed as a multiple. From the standpoint of the parties, "test cases" should not be considered either discrete or small as measured by the particular protest which has been denied and appealed.<sup>67</sup>

Ordinarily the summons and the pleadings do not reveal the amount in controversy.<sup>68</sup> Furthermore, the judges, it is said, do not know how many other important entries are being delayed or held in the suspense file pending the outcome of the case before the Court. Hence, they do not know the full magnitude of a particular case, although they can often speculate that large amounts of duty may be at issue and will depend upon the decision and opinion. With regard to some types of imports, judges

---

65. In the Customs Service process, there is a roughly similar practice, mostly as regards classification issues. "[S]eparate protests filed by different authorized persons with respect to any one category of merchandise that is the subject of a protest are deemed to be part of a single protest." 19 U.S.C. § 1514(b)(1) (1976) (current version at 19 U.S.C. § 1514(c)(1) (1976 & Supp. V 1981)).

66. The breakdown is as follows:

92 Classification issues	(71%)
24 Valuation matters	(18%)
14 All other issues	(10%)

(Percentages are rounded off and do not equal 100%.)

67. Although the data on the size of cases in the Customs Court make it seem unlikely, there could be problems with the "test case" not involving enough money for proper representation. This procedure presents an impediment to participation by others with similar interests or those who will be affected by the adjudication. There is no rule similar to FED. R. CIV. P. 24 to permit intervention by a nonparty. The nearest that the Customs Court comes to it is joinder (with joint trials), which is in the discretion of the court. The most important consideration to the court is whether the petitioning party seeking joinder is a competitor or has interests adverse to the "appellant" in the case with which joinder is sought.

68. That may change under the 1980 Act which permits the court to render money judgments. See 28 U.S.C. § 2643(a) (Supp. IV 1980). The section provides that:

The Court of International Trade may enter a money judgment—

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

*Id.*

can reasonably suppose that the decision will apply only to that import, for example, in questions such as whether an entry is a work of art, or is old enough to be an antique.

Of the forty cases in which opinions were rendered by the Customs Court during the first eight months of 1980, Office of Counsel for the Treasury Department made estimates of magnitude, including the precedential effect on other imports, in thirty-one cases. These estimates are made as part of "litigation reports" for trial counsel, who will be assigned by the Department of Justice. The estimates are sometimes made twice: once after receipt of the initial pleading seeking to reverse a denied protest;<sup>69</sup> some few again if the action is to be tried. Most cases are abandoned or merely dropped by purging after two years of inaction. In the thirty-one cases where estimates of the dollar impact could be made (when the case was to be tried before the Customs Court) the amounts at issue were much larger than the mean amount of the duty differences in the sample of denied protests.<sup>70</sup>

While the differences in duty in the sample of denied protests are small (a mean of about \$1,666 based on 188 files),<sup>71</sup> the mean amount in the "appealed" cases—those that come before the Customs Court—is much larger even as regards the particular cases and especially when the "fallout" is estimated. The mean amount estimated to be in controversy overall in these thirty-one cases is some \$85,576 with a range from two cases in-

---

69. The import specialist provides much valuable and important information on the protest and the grounds for the summons recapitulated in Form 6445. See *supra* note 46 and accompanying text.

70. Office of Counsel for the Treasury Department was also helpful in providing typical estimates and copies of those portions of unidentified files that illustrate how the information on particular cases is gathered for purposes of gauging the overall impact. In one case counsel for the plaintiff-importer asked that the matter be designated as a test case and advised the government that other entries were suspended pending the outcome of the claimed test case. Counsel for the Treasury Department made findings that all these entries involved about \$8000 differences in duty and also that the classification issue had been in doubt and should be clarified by a Customs Court ruling. In three other files, the differences in duty were estimated at \$2100, \$5800, and \$20,000 but Counsel's Office could find no evidence that any of these cases was apt to have any widespread impact. Two other files reflect the results of widespread investigation that showed similar cases were or would be raised elsewhere, and the particular matter should be fully litigated because of its larger potential impact.

71. CP 3, p. 4.



volving \$600 and \$800 to three cases of \$350,000, \$360,000 and \$370,000.<sup>72</sup>

A difference in duty of only \$500 covers more than half the sample of denied protests in the Customs House.<sup>73</sup> For the "appealed" case sample, the estimates from the "litigation reports" suggest a median of some \$80,000 duty difference in these cases *and* their fallout. Note that these figures are not quite comparable. They are not so disparate when one considers that the duty difference as a percentage of the gross value of the imports is at a mean of 5.5 percent and a median of 3.7 percent for all 183 known files in the sample of protests denied.<sup>74</sup> Also, there is no reason to suppose that what is true of most civil cases—that the most salient difference between those that go to trial and the settled civil cases is that the former involve larger claims—is not also true in this context.

The expense of "appeals" in the Customs Court is much greater than the filing of protests. Delay creates a considerable indirect cost because the importer has to pay the duty claimed by the customs service in order to have its merchandise released, and also because there is no interest paid on the judgment to the prevailing plaintiff, who had been delayed two to four years from the initial importation.<sup>75</sup> Hence, one would suppose that the set of suits against the United States in the Customs Court involve much larger differences in duty both in the particular case, and in terms of the impact on other actual and anticipated imports.

---

72. See *supra* text accompanying notes 69-70.

73. The median difference in duty is \$466. CP 4, pp. 71-72.

74. CP 4, p. 158.

75. See *House Hearings on H.R. 6394*, *supra* note 5, at 121 (written statement of W.E. Melahn in support of the Customs Courts Act of 1980). To some extent the burdens and costs of delay have been ameliorated by the Customs Courts Act of 1980. The delay in the customs service can now be limited to six months with interest accruing thereafter. 28 U.S.C. § 2636 (Supp. IV 1980). The Economic Recovery Tax Act of 1981, Pub. L. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.), interest was set at 20 percent on February 1, 1982; it will be reset annually at the average prime interest rate each preceding September. As of February 1, 1983, this rate was reduced to 16 percent. Wall St. J., Dec. 29, 1982, at 1, col. 5.

### III. The Expenses of Administrative Review (Protest) and Appeal (Summons)

The expenses of administrative review and appeal appear to vary greatly in the New York area, with an important factor being the frequency of business between the importer and the customhouse broker.<sup>76</sup> The usual charge for a new business customer is thought to range from \$75 to \$85 for filing the entry form, and another \$25 to \$35 in "service charges" for obtaining bonds, making arrangements with truckers and the like. For a regular customer, generally thought to mean those receiving fifty or more shipments a year, the charge will be less, approximately \$65 to \$75 per entry plus the same service charges. Many customhouse brokers charge their steady customers a set fee of \$35 to \$50 for completion of the initial entry form. Thereafter, for negotiations during the administrative review, including the filing of a formal protest and up to the summons to start suit in the Customs Court, the broker's fee for dealing with the customs officials is based on an hourly rate or, if a large entry is involved, the broker may take a percentage fee, up to approximately fifteen percent of the difference between the importer's claim and the government's liquidated amount of duty.

For nonbusiness imports by travelers, most customhouse broker firms seem to use a sliding scale of charges based on the entered value of the shipment. These charges vary from \$30 to \$60 for shipments valued at approximately \$500. Commercial imports are larger and cost more, but are calculated at lower percentages of the value of the shipment. An import of \$43,058, which is the mean gross value in the sample of denied protests,<sup>77</sup> would cost only \$76 more than the \$85 charge for a \$5000 shipment, making no allowances for the other charges such as insurance, storage, warehousing and transshipment.<sup>78</sup> Miscellaneous other services are provided to importers; about twenty of these are listed in the fee schedules prepared by the customhouse broker firms.

---

76. Much of the following information is based on informal survey research by the author.

77. This figure covers about three-fourths of all denied protests in the sample. CP 4, pp. 50, 54.

78. These charges will be greater for first-time and for one-time business clients.

Until the formal protest is filed, very few lawyers, at least as of record,<sup>79</sup> are involved in disputes between the importer and import specialist. In customs court practice, much of the work of customs practitioners is conducted, in whole or in part, on a contingent fee basis. These contingent fees range from 25 percent to 40 percent of the total difference in duty to that importer. Fees may, therefore, be based on more than the particular denied protest for which the summons is filed. The fees may also include imports "suspended" by delay in the Customs Service, and cases in the Customs Court "suspense file."<sup>80</sup> In appropriate cases, there are fee agreements based not only on the present aggregate, but also on some measure of the potential savings in duty if the case is won. Customs practitioners are sometimes able to bring together several importers who have entries with similar litigable issues. Thus, their contingent fee is based on a much larger total duty difference. This situation may be viewed as analogous to a class action although, unlike Rule 23 class actions,<sup>81</sup> there is no control over the fee arrangements by the Customs Court.

In the New York area, the minimum threshold case for which a fully contingent fee will be used is a difference duty of approximately \$5000,<sup>82</sup> with some practitioners setting the minimum duty difference as high as \$10,000. From this, it could be inferred that very few denied protests will be "appealed," which is in fact the case.<sup>83</sup> Exceptions arise, however, when the particu-

---

79. In 35 of 199 cases, about 17 percent of the sample, lawyers were of record either alone (18 files) or with customhouse brokers (17 files). CP 4, p. 100.

80. See *supra* note 64.

81. FED. R. CIV. P. 23.

82. "Attorneys wouldn't; my office today [Feb. 1980] will not handle a case that is under \$5000. You can't afford to do it . . . [y]ou just lose money." *House Hearings on H.R. 6394, supra* note 5, at 261 (statement of A. Tompkins, Customs Counsel to the National Customs Brokers & Forwarders Ass'n of Am.)

Mr. Tompkins testified that before the procedural complexities which grew out of the Customs Court Act of 1970 he was able to handle small cases involving \$300 or \$400 with few motions and much less questioning and cross-examination in a relatively informal procedure. *Id.* at 260.

He further testified that hundreds of these small cases still exist and are brought to his attention by broker members of the trade association all over the country. He concluded: "We drop these small cases, because I advise them [the brokers] and other attorneys advise them we can't handle these little cases. They are too small." *Id.*

83. Nationally, less than one percent of all denied protests are challenged by the

lar import entry represents many more imports of the same type. In the sample of denied protests examined, a \$5000 duty difference covered some 96 percent of files.<sup>84</sup> Only three files showed more than \$1000 difference in duty at issue, and five more files ranged from \$4999 to \$8117.<sup>85</sup> Thus, there appears to be a good basis in fact for the importers' and customhouse brokers' contention that many possibly meritorious claims against the government cannot be taken to the Customs Court because the cost, largely of retaining counsel, would exceed the amounts at issue.

Only natural persons can appear *pro se* in the Customs Court; business firms, even small close corporations, can appear only by counsel admitted to practice before the Court.<sup>86</sup> To the extent that the appeal process is made less costly<sup>87</sup> by a small claims procedure in which customhouse brokers can file a summons and appear as parties as consignees for importer-clients

---

filing of a summons. That figure is slightly higher in the New York area, perhaps because of the differences in imports, the large specialized bar and the convenient location of the Customs Court.

84. The sample consisted of 180 of 188 files of the most common types, classification and valuation matters.

85. CP 4, p. 74.

86. CUSTOMS CT. R. 3.2(c). The Chief Judge of the Customs Court carefully avoided this issue, testifying that any person could present his case personally. Judge Re also spoke of indigents who could be heard in chambers with assigned counsel. *Senate Hearings on S. 1654, supra* note 3, at 7. But the data indicate that indigency is not a problem; nor was indigency raised as a reason for the small claims procedure such as that proposed by the AIA and the National Customs Brokers & Forwarders Ass'n of Am. All the importers in our sample and, one would suppose virtually all those who challenge rulings of the Customs Service, are business firms. Judge Re's testimony was also unresponsive to the contentions of the importers and customhouse brokers, that the cost of retaining counsel often exceeds the gain even if the plaintiff-importer gets a favorable verdict in the Customs Court.

Before the House Subcommittee on Monopolies and Commercial Law, Judge Re testified that he "would not want a double track type of justice with some cases having full consideration, while in others we just become a super administrative agency to take care of a particular small claims dispute." *House Hearing on H.R. 6394, supra* note 5, at 10.

It is the aggrieved parties who want the option which Judge Re denigrates. The reference to "a particular small claims dispute" turns matters around. The data suggest that some nine-tenths of all protests might fall under the proposed small claims procedure.

87. Despite the testimony regarding escalating costs of appeals by summons to the Customs Court, none of the submissions to the Congressional subcommittees that the author reviewed provide any documents or detailed information by testimony on those costs.

(or directly on behalf of importer-clients) the change is desirable. It could reduce costs and afford more freedom of choice to the importers who can retain a lawyer at a higher price or a non-lawyer customhouse broker at a lower cost. There should be more discretion here for small business firms and close corporations whose proprietors prefer to save money by filing the summons themselves. Since most such appeals are abandoned, estimated at 70 percent to 80 percent, or disposed of by other rulings or adjudicated on the basis of documents or by submission to the court upon an agreed statement of facts, there seems to be no urgent need in most cases for representation by counsel admitted to practice before the Customs Court. Indeed, so few go to actual trial (some 60 to 70 a year)<sup>88</sup> that at least the summons could be filed by the importer or its broker.

There are, however, likely to be "spillover costs" if the customhouse brokers are permitted to represent their clients in a small claims part of the Customs Court. Although these effects upon others are difficult to quantify, they may impinge on other noneconomic values. Some of these conjectures are part of the lore of the customhouse brokers and the relatively small group of lawyers engaged in this type of work. There is apt to be less control over nonlawyers by the formal mechanisms of the court rules and the Code of Professional Responsibility, and also less formal peer pressure to conform to professional standards.<sup>89</sup> It is

---

88. UNITED STATES CUSTOMS COURT, REPORT FOR FISCAL YEAR ENDING SEPTEMBER 30, 1978, at 9; UNITED STATES CUSTOMS COURT, REPORT FOR FISCAL YEAR ENDING SEPTEMBER 30, 1979, at 9.

89. The Secretary of the Treasury licenses customhouse brokers. The Customs Service "determines the qualifications and responsibilities of brokers, administers examinations, and issues, revokes, and suspends licenses." S. REP. NO. 778, 95th Cong., 2d Sess. 22 (1978) (Customs Procedural Reform and Simplification Act of 1978). The three-and-one-half hour examination, prepared and administered by the Customs Service, does seem to test knowledge of the customs regulations and the various tariff schedules. Over the eight years (from 1972-1979) the pass rate has ranged from 27 percent to 57 percent for the roughly 300 to 500 who take the examination. The number of persons taking the Customhouse Brokers License Examinations has steadily increased (from 262 in 1972 to 636 in 1979).

In addition to the lack of applicable formal controls there may also be less informal peer pressure to conform to professional standards. Over the past several years, there have been approximately 40 indictments charging corruption in the New York (and Newark) Customs Service regions and most have involved customhouse brokers. *See, e.g.,* N.Y. Times, Jan. 2, 1983, at 30 (where a former official of the customs service was indicted on federal charges of conducting his office "through a pattern of racketeering

difficult to assess the possible effects upon nonparties and the public's perception of the Customs Court, although one gets the impression that resistance to the small claims procedure with customhouse brokers acting in a representative capacity stems from considerations of status (by judges and lawyers) as well as the loss of some legal fees.

It is important to distinguish the proposed Customs Court small claims procedure from the conventional notion of a small claims court. The latter usually involves a suit between a natural person of limited means and a business firm, which is apt to be better able to afford litigation. In the customs setting, the importers, usually business firms, have the means to challenge denied protests involving small differences in duty. It would be imprudent for them to challenge such small differences given the present level of legal fees charged by customs practitioners. This is certainly true for the nearly 70 percent of denied protests involving duty differences of \$1000 or less, and would probably hold true for the 96 percent of denied protests involving duty differences of \$5000 or less.<sup>90</sup>

The proposal leaves unsettled the question of how to calculate the difference in duty, so as to be able to determine whether a case is eligible for the small claims procedure. There is some reluctance to assume that the sum involved in the particular entry is in fact the amount at issue. This stems from the present practice of using "test cases" to determine other similar pending claims.<sup>91</sup> In a significant number of cases where the duty difference in a particular entry is small, the case might have precedential effect despite the contrary mandate of the proposed legislation that the small claims decisions will not be precedents.<sup>92</sup> There is also concern that larger importers will bring in many more single entries, each less than \$5000, so as to be able to challenge denied protests in summary small claims trials.<sup>93</sup>

---

activity.' ").

90. CP 4, pp. 74-75.

91. See *supra* notes 63-67 and accompanying text.

92. See *infra* note 149 and accompanying text.

93. See *Senate Hearings on S. 1654, supra* note 3, at 40-41. Mr. Vance stated that: [I]n effect, many entries, single entries, are under \$5000 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

#### IV. The Role of the Customhouse Broker

Customhouse brokers and lawyers may both specialize within the customs field.<sup>94</sup> In classification cases, for example, the brokers may know as much or as little as the lawyers. The "substantive" factual questions in most classification cases are decisive, and the legal doctrines often easily fall into place once the factual determinations are made. Thus, for the largest number of protests and protestable matters, a customhouse broker should be able to perform as well as a customs lawyer.<sup>95</sup> Since the client-importers, unlike the usual small claims plaintiff in a non-customs setting,<sup>96</sup> have some experience, knowledge, and understanding of their alternatives and are able to pay the higher legal fees if the case warrants the expense. This limited, but expanded freedom of choice and allocation of money in litigating claims through brokers or lawyers would be desirable.

Most of the valuation issues appear simple, and could be handled on appeal by a customhouse broker as competently as by a lawyer.<sup>97</sup> Nearly one-tenth of the sample of all denied pro-

---

very summary nature, cases of concern to the government and to the public at large.

*Id.*

94. Some of the customhouse brokers, who merely act as expeditors, handle the process (including protests) by getting the necessary information from their client-importers and sometimes from the exporters or foreign manufacturers.

95. This is particularly true of cases that are destined for the Customs Court suspense file. Furthermore, "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions. . . ." Ct. of Int'l Trade R. 42(a) (U.S.C.S. Supp. 1982). See 28 U.S.C. § 2633(b) (Supp. IV 1980) (authorizing the court to prescribe such rules concerning consolidation).

96. See *infra* note 116 and accompanying text.

97. There are, however, suggestions that most classification issues are simpler matters, more easily determined than valuation issues.

Prior to the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 202, there were, by changes over many years, nine different valuation standards. The Tariff Act of 1930, Pub. L. No. 361, 46 Stat. 590 (codified as amended in scattered sections of Title 19 U.S.C.) contained five standards for valuation and to this four more valuation standards were added by the Customs Simplification Act of 1956, 19 U.S.C. § 1401a (1976 & Supp. V 1981). The standards were widely thought to be overly complex and often difficult to apply. The new valuation law covers, at this time, only imports from "developed" countries; the developing nations have not yet accepted the new system. See Lehman, *New Valuation Concepts Under the Trade Agreements Act of 1979*, 26 N.Y.L. SCH. L. REV. 505 (1981). Even the recent simplification leaves two sets of valuation criteria and rules in effect for an indefinite time. The new rules are still complex and, during the first few

tests involved clerical and calculation errors. It seems unnecessary to have fully qualified counsel to properly challenge these denials of protests.<sup>98</sup>

The overall convenience of having the many steps in the importing process taken care of in one location<sup>99</sup> by the customhouse broker who is an expert in the field and, alone, able to accomplish all that is necessary to complete the importer's business, is an important factor in the decision whether to use customhouse brokers. The Senate Finance Committee suggested that the use of the customhouse brokers is in part due to the intricacies of the entry process.<sup>100</sup> That, however, seems less important from the importer's standpoint than the considerable time and effort saved by having an experienced customhouse broker make the arrangements not only for entry, but also for warehousing, insurance, inland shipment, and many other contingencies. This seems true for all except the very large importers for whom, presumably, it could be less costly per import to attend to all aspects of the entry process on an in-house basis. Customhouse brokers do far more than "advise" their client-importers; they often attend to the entire process from foreign exporter to ultimate destination.

---

years, may generate as much disagreement as the statutory accretions of the old standards. Also, the Customs Service regulations have been substantially modified to be in accord with the Trade Agreements Act of 1979.

Under the 1979 Act, there remains a primary basis for customs valuation: "transaction value" of the imported merchandise, which is also complex and not susceptible to quick determination. If that basis cannot be used, four secondary bases for valuation are given in order of preference. See U.S. Customs Service, Customs Valuation, Trade Agreements Act of 1979 (1980). See Lehman, *supra*, at 508-09. In short, valuation matters are still likely to be more complicated than classification issues and more difficult to determine unambiguously. Valuation issues may increase the frequency and the proportion of protests over the next several years.

98. CP 4, p. 102.

99. In the 200-case sample used in this study, 186 importers are located in New York, New Jersey, and Connecticut. Of these 186 importers, 133, or 71.5 percent, are located in the New York City Metropolitan area, which includes New York City and its suburbs. CP 4, p. 184. Thus, the distance from the Customs House does not appear to be a relevant consideration in choosing a customhouse broker, for most of the importers were arguably within sufficient proximity to be able to handle the entries alone.

100. COMM. ON FINANCE, CUSTOMS PROCEDURAL REFORM AND SIMPLIFICATION ACT OF 1978, S. REP. NO. 95-778, 95th Cong., 2d Sess. 22 (1978) (submitted by Mr. Long to accompany H.R. 8149).



## V. Nonpublication; Nonappealable; Nonprecedent

Under 28 U.S.C. § 2638(a),<sup>101</sup> a decision of the judge in a contested case before the Customs Court shall be supported by either (1) a statement of findings of fact and conclusions of law, or (2) an opinion stating the reasons and facts upon which the decision is based.<sup>102</sup> This does not require publication of the statement or opinion in the conventional manner of a reported case. It does imply, however, that there must be a writing given to the parties which satisfies the statutory demand. A written statement or opinion that is not given to the parties probably would not meet the legislative intent of section 2638(a). At least to this extent, a small claims procedure created by rule of court could not dispense with the requirement that a written statement or opinion be given to the parties.<sup>103</sup> For that, legislation would be required.

Absent the statutory requirement of section 2638(a), there would seem to be no barrier to a court rule dispensing with the required writing. Various practices of nonpublication and selective publication are well established by local rule in several federal circuits and in some state appellate courts. Summary affirmation of civil appeals without any opinion is permitted by Local Rule 21 of the Fifth Circuit Court of Appeals.<sup>104</sup> The appellant has no choice in these matters and cannot of right require that an opinion be written or that a written opinion be published. To date, the constitutionality of these rule-created practices has not been successfully challenged. It is reasonable to assume, therefore, that the nonwriting and nonpublication (including selective publication) of opinions in the Customs Court would not be held unconstitutional. Nevertheless, this

---

101. 28 U.S.C. § 2638(a) (Supp. IV 1980).

102. This same language appears in the 1980 Act. 28 U.S.C. § 2645(a)(1)-(2) (Supp. V 1981). See *supra* note 12 and accompanying text.

103. If the opinion or statement must be given to the parties it is likely that it could and probably would be published by the brokers' trade associations and the organizations of customs practitioners. But see *Senate Hearings on S. 1654, supra* note 3, at 6 (testimony of Re, C. J.).

104. See Shuchman & Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value"?*, 29 EMORY L. J. 195 (1980) (hereinafter cited as Shuchman & Gelfand). (The Fifth Circuit has since been divided into the fifth and the eleventh circuits. 1980 U.S. CODE CONG. & ADMIN. NEWS 4236-37.).

practice in the Customs Court would require amending legislation.

A rule that the decisions would not be appealable under the proposed small claims procedure would probably not be constitutionally offensive. The proposed small claims procedure does not preclude the conventional "appeal" by summons, but permits the Customs Court to render a nonappealable decision only if the importer selects the small claims procedure in certain cases that are defined by court rule or by statute. There is at present a statutory right of appeal to the Court of Customs and Patent Appeals,<sup>105</sup> although an appellant can knowingly waive such a right in a civil case.<sup>106</sup>

Opinions on classification issues (which make up two-thirds of the sample files of denied protests)<sup>107</sup> are likely to have some precedential effect. This may be less true of opinions in which the disagreement is about value. Thus, for classification issues, the largest category of denied protests, the nonopinion, nonprecedent small claims decision procedure may be less appropriate.

The parties involved are in small and well-organized groups. The customhouse brokers and the importer-businesses are organized in their respective trade associations. The lawyers have specialized committees in several bar associations, including the ABA. Government lawyers involved in the Customs practice are few in number, but also constitute an experienced and specialized group. Such interested and concerned members of these respective groups will surely know the rulings of the Customs Court judges on small claims matters. Even if the decision is not written or not explained, the participation at trial by such per-

---

105. 28 U.S.C. § 2601(a) (Supp. V 1981).

A party may appeal to the Court of Customs and Patent Appeals from a final judgment or order of the Court of International Trade within sixty days after entry of the judgment or order. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed.

*Id.*

106. "[A]n appellate review is not essential to due process of law, but is a matter of grace." *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 536 (1926).

107. 115 of 168 (69 percent) are classification cases; 53 of 168 (31 percent) are value differences. The remaining 32 are clerical and calculation disagreements. CP 3, pp. 19, 20.

sons will give them advantageous insights into the judge's perceptions of fact and legal reasoning. Whether or not they can cite a small claims decision as precedent, knowledge of the decision can be extremely useful in many other important ways, and can influence the tactics of presentation in the Customs Court, whether in the conventional setting or in a small claims proceeding.

Few importers act without representation. They use customhouse brokers at the protest level and retain customs practitioners before the Customs Court. Thus, the only persons at a disadvantage will be those very few importers who choose to proceed *pro se*. That group will diminish further if customhouse brokers can appear for them in the small claims part of the Customs Court because the cost will be less than it would be with customs practitioners.<sup>108</sup> The cost may be further reduced because the same person or firm who handled the import entry and the protest will also file the summons and litigate the matter before the Customs Court in what will be a simpler procedure.

Judges sitting in the small claims part are not likely to ignore past rulings. It is, after all, their usual practice to investigate past decisions and either follow precedent or distinguish apparent precedent. Thus, there may be created a body of unpublished, nonprecedential law which, however, may be considered to be the law for many purposes. To the extent that unrepresented "outsiders" are involved, such law would be bad law and expensive law because it would be unknown and not discoverable by conventional research. Such law, although unknown to some *pro se* litigants, will be known to the customhouse brokers, the Customs Court practitioners, and counsel for the Treasury Department, as well as the Customs Service personnel. The disadvantage to *pro se* litigants can be minimized. For example, those judges who adjudicate small claims matters need not sit on the Customs Court. Senior judges, permanent masters, or customs law clerks could sit on small claims matters.<sup>109</sup> Many forms

---

108. See *supra* notes 86 and 87 and accompanying text.

109. This practice would be analogous to that of the Tax Court and other federal courts, where commissioners, masters, and clerks are used to ease the burdens on the system. See, e.g., I.R.C. §§ 7456(c), (d) (1981) (authorizing the chief judge to appoint commissioners to sit on small tax case matters under I.R.C. § 7463 (1981)).

of separation between those persons ruling on small claims matters and the judges of the Customs Court might be workable, and would tend to ease the problems of nonprecedential rulings. Such separation of the different adjudicatory practices may ease the workload of Customs Court judges.<sup>110</sup> If there were a large number of small claims cases generated, this separation would result in less congestion in the Customs Court while providing a quicker and less costly procedure for small claims.

Alternatively, small claims could be placed within the jurisdiction of the Customs Service.<sup>111</sup> That would probably require more formalized administrative review within the agency by persons who would function in a manner similar to administrative law judges. These persons could constitute a separate and insulated tier of senior import specialists with appropriately limited jurisdiction.

## VI. Relevance of Small Tax Cases: Other Inferences from the Data

During the Congressional hearings on the proposed small claims part of the Customs Court, repeated references were made to the small tax case procedure in the United States Tax Court, as a model for the small claims part of the Customs Court.<sup>112</sup> Particularly noted were the discretion to remove a case to the regular Tax Court, the informality, the limited pleadings,<sup>113</sup> and the simple discovery procedures. One impetus for the small tax case procedure in the Tax Court was the disproportionately high cost of obtaining judicial review of small defi-

---

110. The workload of the Customs Court judges before the effective date of the 1980 Act, however, seemed not to preclude their sitting on small claims matters. Although the expanded jurisdiction of the Court may have increased the judges' workloads, it is and was generally accepted that the judges have enough time to sit by special designation in other federal courts, often for periods of several weeks and more than once during the year.

111. In general terms this was recommended by the Administrative Conference of the United States. See *House Hearings on H.R. 6394*, *supra* note 5, at 239, 242.

112. See, e.g., *Senate Hearings on S. 1654*, *supra* note 3, at 6, 40, 74; *House Hearings on H.R. 6394*, *supra* note 5, at 104.

113. The small tax case practice usually involves only a petition; the judges have dispensed with an answer, feeling that some taxpayer petitioners were being confused by another formal paper. Common to both courts is that much of the adjudication is based on agreed statements of fact so that no trial is needed.

ciency disputes. This is also the basis for a similar concern as regards the Customs Court. Another significant reason was the heavy workload of the Tax Court and the consequent delays. This does not seem to be true of the Customs Court.<sup>114</sup>

There are some significant differences between the Tax Court practices and the Customs Court practices which suggest that the small tax case procedure is not as good or complete a model for the proposed small claims procedure as it might appear.<sup>115</sup> The crucial consideration of who may appear as a representative for a petitioner or a plaintiff for a small claim in the Customs Court is not settled by looking to the Tax Court. All persons who represent taxpayers in the small tax case procedure must be admitted to practice before the Tax Court.<sup>116</sup> Rule 200(a)(3) of the Tax Court<sup>117</sup> allows persons who are not lawyers to qualify for admission to practice before the Tax Court and also in the small tax cases of the Tax Court. For nonlawyers, this requires passing an examination prepared by the Internal Revenue Service and monitored by the judges of the Tax Court. Such persons must be individuals; they cannot be corporations or

---

114. See *supra* note 110.

115. The small tax cases are heard at more than 100 locations. These cases are not heard by the judges of the Tax Court. Commissioners, called Special Trial Judges, are appointed by the Tax Court. They have no permanent tenure and serve at the pleasure of the Tax Court. They are all experienced tax practitioners with about equal representation from public and private practice backgrounds, and all have practiced before the Tax Court. The Special Trial Judges who decide the small tax cases are paid \$51,167.50 a year. Wall St. J., Apr. 14, 1980 at 1, col. 1. They make findings of fact and write at least a summary "opinion." The report of the Special Trial Judge is reviewed by one of the Tax Court judges, although that may be perfunctory because, it is said, nearly all the small tax case decisions present simple legal questions.

116. Tax Court Rule 174 provides that "[a] petitioner in a small tax case may appear for himself without representation or may be represented by any person admitted to practice before the Court." TAX CT. R. 174.

117. Tax Ct. R. 200(a)(3) provides that:

(3) Other Applicants. An applicant, not an attorney at law, must file with the Admissions Clerk a completed application accompanied by a fee of \$10. In addition, such an applicant, as a condition of being admitted to practice, must give evidence of his qualifications satisfactory to the Court by means of a written examination given by the Court, and the Court may require such person, in addition, to give similar evidence by means of an oral examination. Any person who has thrice failed to give such evidence by means of such written examination shall not thereafter be eligible to take another examination for admission.

*Id.*

firms,<sup>118</sup> and are usually accountants.

The customhouse brokers are more like what the I.R.S. calls "enrolled agents." These are individuals who also must pass an examination to be able to act on behalf of a taxpayer.<sup>119</sup> The activity of enrolled agents, however, is limited to the preparation and signing of another's tax return and representation in administrative proceedings before the IRS. This does not include the right to practice before the Tax Court in small tax cases under 28 U.S.C. § 7463.<sup>120</sup> An enrolled agent or any nonlawyer could qualify to practice before the Tax Court under Tax Court Rule 200(a)(3) but would have to pass an additional examination for "other applicants" under Tax Court Rule 200(d).<sup>121</sup> Thus, the customhouse brokers, to be in an analogous situation and appear before the Customs Court in small claims matters, would have to pass a second examination prepared by the Treasury Department and supervised or monitored by the judges of the Customs Court.

It is likely that customhouse brokers would realize whatever economies of scale that result from handling many similar and largely repetitive matters before the Customs Court. The customhouse brokers, acting alone or with a lawyer, now file more

---

118. "Corporations and firms will not be admitted to practice or recognized before the Court." Tax Ct. R. 200(h).

119. Enrollees who may practice before the I.R.S. are of two classes: (1) Persons who have passed an examination which demonstrates competency in tax matters; (2) Former I.R.S. personnel whose duties gave them sufficient experience in interpreting and applying the Internal Revenue Code and regulations. They must have had at least five years of continuous employment with the I.R.S. See L. REDMAN & J. QUIGGLE, *PROCEDURE BEFORE THE INTERNAL REVENUE SERVICE* 53 (5th ed. 1974); Practice before the I.R.S., TAX MGMT. (BNA) 147-4 § 104, at 230 (1980).

Customhouse brokers are, incidentally, permitted a limited practice as representatives before the I.R.S. "in respect to any matters relating specifically to the importation . . . of merchandise under the customs or internal revenue laws, for any person for whom he has acted as a customhouse broker." Practice before the I.R.S., TAX MGMT. (BNA) 147-4, § 10.8, at 230 (1980).

120. I.R.C. § 7463 (1981).

121. Tax Ct. R. 200(a)(3), 200(d). In fact, the very few persons (about 40 per year) who take the examination to qualify for practice before the Tax Court are mostly accountants, both CPAs and Public Accountants; and only two or three a year pass the examination. Those who want to practice in the Tax Court get law degrees. In calendar year 1980 (to the end of October) there were only 61 non-lawyer representatives in more than 20,000 case filings.. Telephone conversation with Charles S. Casazza, Clerk of the U.S. Tax Court.

than nine-tenths of all protests.<sup>122</sup> Given that the customhouse brokers alone now represent importers before the Customs Service (in what is an administrative review) in four-fifths of denied protests, they are likely to file more appeals because of less duplication of effort (a lawyer has to become familiar with the file) and because of the lower cost to the importers.

There are other reasons why the Tax Court small-tax-case analogy may not be appropriate. More than nine-tenths of all petitioner-litigants represent themselves *pro se* in the small tax case situation.<sup>123</sup> There is rarely any question who is the real party in interest: it is the taxpayer. In the customs situation, the importers are almost always represented by customhouse brokers, often earlier, at the level of administrative review in the Customs Service.<sup>124</sup> The small claims proposal includes the important provision that "[C]orporations must be allowed to appear through an authorized agent."<sup>125</sup> Tax Court Rule 24,<sup>126</sup>

---

122. The brokers acted alone in 164 of 199 (82 percent) of the cases in the sample; they acted with an attorney in 17 of 199 (8.5 percent). See CP 4, p. 100.

123. For the fiscal years 1976 through 1980, the frequency of counsel filing small tax cases varied between 6 and 8 percent.

124. Many of the importers could handle their imports from entry, through all the processes in the Customs Service, to their ultimate destinations. They choose not to do that even though most of the importers in our sample are located within the New York metropolitan area. It is probably more efficient (although that need not be the case) for most importers to pay the customhouse brokers to handle all these matters. It does seem that there are economies resulting from routine and the expertise resulting from high volumes of similar transactions.

125. *Senate Hearings on S. 1654, supra* note 3, at 81; see *supra* note 10 and accompanying text.

126. TAX CT. R. 24.

RULE 24. Appearance and Representation.—(a) Appearance. (1) General. Counsel may enter an appearance either by subscribing the petition or other initial pleading or document in accordance with subparagraph (2) hereof, or thereafter by filing an entry of appearance in accordance with subparagraph (3) hereof.

(4) Counsel Not Admitted to Practice. No entry of appearance by counsel not admitted to practice before this Court will be effective until he shall have been admitted, but he may be recognized as counsel in a pending case to the extent permitted by the Court and then only where it appears that he can and will be promptly admitted. For the procedure for admission to practice before the Court, see Rule 200.

(b) Personal Representation Without Counsel. In the absence of appearance by counsel, a party will be deemed to appear for himself. An individual party may represent himself. A corporation or an unincorporated association may be represented by an authorized officer of the corporation or by an authorized member of the association. An estate or trust may be represented by a fiduciary thereof. Any

however, does not permit an authorized agent to represent a taxpayer except if that agent is admitted to practice before the Tax Court. Otherwise, the Tax Court does not permit agents to represent corporations. Only "authorized officers" can represent corporations in *pro se* appearances. Perhaps in the Customs Court setting, the importer could make a customhouse broker an authorized officer; this might, however, entail undesirable and unforeseen responsibilities on both sides.

In the small tax cases the matter of nonprecedential decisions has not been thought to present any problems.<sup>127</sup> Petitioners only occasionally raise the matter of precedents. That is to be expected. They appear *pro se* and the small tax case decisions are not published.<sup>128</sup> Indeed, it was said to be the government lawyers who, in some small tax cases, raised arguments at least in part based on prior small tax case rulings. Although it is far more likely that customhouse brokers would know of prior similar rulings than would the *pro se* petitioners in the small tax cases, government lawyers who might be involved in the Customs Court small claims cases do not anticipate problems with nonprecedential decisions.

When the small tax case procedure began in 1969, there was a surge of small tax case filings. Despite increases in the jurisdictional limits in 1976 and 1978, however, there have been no dramatic increases since then.<sup>129</sup> If the customhouse brokers are

---

such person shall state, in the initial pleading or other paper filed by or for the party, his name, address, and telephone number, and thereafter shall promptly notify the Clerk in writing, in duplicate for each docket number involving that party, of any change in that information.

*Id.*

127. The Special Trial Judges are familiar with the Tax Court rulings. They try to bring about settlements during trial and even after trial. See Comment, *The Small Tax Case Procedure: How it Works—Does it Work*, 4 FORDHAM URB. L.J. 385, 389 n. 40, 390 nn. 52-55, 392 (1975-1976).

128. Under I.R.C. § 7463 (1981), "[a] decision, together with a brief summary of the reasons therefor, in any such case shall satisfy the requirements of sections 7459(b), 7460." I.R.C. §§ 7459(b), 7460 (1981) deal with reports and decisions, and provisions of special application to divisions respectively.

129. The jurisdictional limit was raised from \$1,000 to \$1,500 in 1972 and to \$5,000 in 1978. See Pub. L. 92-512 § 203(b)(2) (1972) and Pub. L. 95-600 § 502(a)(2)(A) (1978).

The frequency of small tax cases has steadily increased over the past six years. In fiscal year (FY) 1975 about 29 percent of all Tax Court filings were small tax cases; by FY 1980, about 40 percent were small tax cases. Of course, during that time, the jurisdictional limit has more than tripled. Letter from Charles S. Casazza (Clerk of the United



permitted to represent importers as agents in small claims arising out of denied protests, there are likely to be many more such actions because of the reduced costs. If, in addition, there are no legal impediments to contingent fee arrangements, the frequency of appeals by summons to the small claims part of the Customs Court will probably increase even more. The workload of the small claims division might be considerable, at least by number of cases, if not by complexity, which may be inferred from the data that some 96 percent of all denied protests involved duty differences of less than \$5000.<sup>130</sup>

The client-importers who file protests, usually through customhouse brokers, are, for the most part, business firms continually engaged in importing as part of their business activities. Therefore, there need be less concern whether the client is adequately represented and informed of its rights. The adequacy of representation would be further assured by the limited and specialized nature of the court and the work of the customhouse brokers who are experienced in dealing with the Customs Service personnel regarding their clients' rights, sometimes negotiating settlements.

Although the small tax case procedure and the proposed small claims procedure both require the dispute to be \$5000 or less, the meaning of the same dollar limitations in these two contexts is quite different. The \$5000 difference in the Customs Court setting may well represent twenty to forty times that much in the value of imported goods. Some examples of this multiplier function may be illustrative.<sup>131</sup> The first five examples are classification cases, and the next two are valuation cases. These, and most of the sample files of denied protests, describe

---

States Tax Court) to Philip Shuchman (Oct. 31, 1980).

	<u>Total Filings</u>	<u>Regular</u>	<u>Small Tax Cases "S"</u>	<u>Percent "S" With Counsel</u>
FY 1975	11,213	7,923	3,290	N.A.
FY 1976	11,483	7,951	3,532	7%
FY 1977	12,339	8,452	3,887	6%
FY 1978	13,740	9,424	4,316	6%
FY 1979	17,126	11,098	6,028	7%
FY 1980	22,009	13,206	8,803	8%

*Id.*

130. CP 4, p. 74; see *supra* text accompanying note 84.

131. Individual files were chosen from this study to illustrate this multiplier effect.

business transactions involving manufacturers, wholesalers, and some retail merchants.

Classification cases:

<u>Sample File Number</u>	<u>Import</u>	<u>Gross Value</u>	<u>Duty Difference</u>
171	Machine Parts	\$ 16,767	\$ 261
179	Wool Sweaters	66,400	4,999
164	Chemicals/Chemical Apparatus	64,975	3,447
168	Enzymes and Acids	30,733	187
152	Lighters	70,596	4,809

Valuation cases:

	<u>Import</u>	<u>Assessed Value/ Claimed Value</u>	<u>Duty Difference</u>
154	Metals	\$150,331/132,761	\$1,605
143	Foreign-made automobiles	332,738/245,117	2,329

These examples suggest the possibility that, in addition to the difference in duty, the value of the imported goods should be considered as another limitation on the jurisdiction of a small claims procedure. A major trade association, the National Customs Brokers & Forwarders Association of America, suggested a \$2500 limitation on duty differences and a \$5000 limitation on gross value of the merchandise.<sup>132</sup>

Applying such limitations, however, is not as simple or unambiguous as might appear. In the sample files of denied protests, the gross value of the property ranged from less than \$100 to the largest seven files of 197 known cases which range from \$205,000 to nearly \$757,000. About half of all the protested liquidations involve gross values of \$17,000 or less. The proposed \$5000 cut-off point in gross value of imported merchandise as a jurisdictional limitation would cover less than fifteen percent of all the denied protests in this sample.<sup>133</sup>

Limitations on gross value for determining small claims jurisdiction, however, should not be the same for different protest bases. The gross values of the goods in valuation issues are relatively large. It would take a gross value of nearly \$23,000 to

132. The group later suggested that these limits be doubled to a \$5,000 duty difference and a \$10,000 limitation on the gross value of the merchandise. *House Hearings on H.R. 6394*, *supra* note 5, at 271.

133. CP 4, pp. 31-38.

cover half of the fifty-three denied protests based on valuation disagreements.<sup>134</sup> At the proposed \$5000 limitation, only about five percent of the denied protests based on valuation issues would be within the small claims jurisdiction.<sup>135</sup> Classification issues are fairly small by comparison, with a median gross value of \$15,235.<sup>136</sup> Approximately twenty percent of those 115 denied protests would be covered by the proposed small claims jurisdiction at the \$5000 cut-off point,<sup>137</sup> four times as many as valuation cases.

One might consider, therefore, raising the gross value jurisdictional limitation for denied protests based on valuation issues in the small claims part. To achieve the same proportion of valuation and classification issues in the small claims part, the gross value limitation of goods in valuation issues would have to be increased to approximately \$11,000,<sup>138</sup> thus covering the equivalent twenty percent of denied protests for such cases. Alternatively, since the classification issues constitute twice as many denied protests as valuation issues and comprise four times as many cases within the \$5000 gross value jurisdictional limit, an effective means of utilizing the proposed small claims procedure may be to focus on or to limit those appeals to denied protests dealing with classification issues.

## VII. Nonbusiness Protests and Appeals

The small claims procedure would serve the needs of tourists, travelers, and other persons not in the business of importing goods,<sup>139</sup> who would, under the current system, forego pro-

---

134. The median is \$22,995 which comprises (50.9) percent of the 53 sample cases in this category. CP 4, pp. 191, 197.

135. \$5,769 equals 5.7 percent of the 53 cases. CP 4, p. 190.

136. CP 4, p. 253.

137. CP 4, pp. 239-40.

138. CP 4, p. 190.

139. The A.B.A. stated in testimony on H.R. 6394 (the then proposed Customs Courts Act of 1980), that the small claims procedure would be utilized by tourists, traders, and other persons who are not regular commercial importers. *House Hearings on H.R. 6394*, *supra* note 5, at 140.

Despite the recommendation of the A.B.A. Standing Committee on Customs Law (adopted by the Board of Governors in October, 1979) favoring the establishment of a small claims procedure, there may be substantial dissent by lawyers practicing in the general area of customs law, some of whom have, in the recent past, opposed such plans.

testing a claim to the Customs Court because of the expense, delay, and technical legal aspects involved.<sup>140</sup> The sample of customs files contained no such protests.<sup>141</sup> Two explanations are given for this phenomenon. First, customs agents dealing with such nonbusiness disputes tend to be lenient in such matters. They want to avoid complaints to members of Congress, and the amounts involved are usually too small for concern. Second, the ordinary traveler, and especially the tourist, is frightened, uninformed, and often hurrying to make travel connections. He mistakenly thinks that to seek a refund of the imposed duty already paid, he must return to the place of entry. Despite the lack of protests in these nonbusiness situations, the claims often involve legitimate grounds for protest and appeal.<sup>142</sup>

There should be a simplified and relatively informal *pro se* procedure available to tourists, travelers, and those similarly situated. At least the following measures seem desirable. A traveler should be permitted to file a protest by mail and to appeal a denial of the protest by mail. The government should bear the burden of proof that the liquidation is correct.<sup>143</sup> A traveler should be provided with a statement of the applicable law which should be in plain language with legal references in footnotes to the statutes and regulations. The traveler cannot be presumed to know the sometimes complicated and arcane corpus of the customs and tariff laws. A traveler should be given a writing with all the necessary information on customs practice and small

---

*See, e.g., House Hearings on H.R. 6394, supra* note 5, at 332, 348-52 (statement submitted on behalf of the Customs Law Comm. of the Los Angeles County Bar Ass'n).

140. Here too, there might be more access to the administrative review process if customhouse brokers were able to prosecute appeals on behalf of individual travelers. The brokers who are on the scene, given the incentive that they could represent individual travelers and tourists on appeal in a small claims division of the Customs Court, might well find it marginally profitable to solicit such business.

141. Not one of the sample of 200 protests, plus 50 more examined but not tabulated, appears to involve a non-business import.

142. *See, e.g., The Customs Reception: Relatively Few Complaints But They Could Be Handled Better*, GENERAL ACCOUNTING OFFICE REPORT NO. GGD 77-59 (July 26, 1977) (survey of kinds of problems encountered by tourists and other occasional travelers).

143. Currently, when the denied protest is before the Customs Court, the final administrative decision (the Customs Service liquidation) is presumed to be correct. The burden on a plaintiff-importer is to prove that the liquidation is incorrect *and* to establish that its claim is correct. 28 U.S.C. § 2639(a)(1) (Supp. IV 1980) (formerly codified at 28 U.S.C. § 2635(a) (1976)).

claims procedure,<sup>144</sup> including matters of venue.

A small claims trial could be arranged in any of fifteen major ports where the Customs Court routinely sits; several more ports and places of entry could become sites for such trials. The judges of the Customs Court should not be passive adjudicators in these matters; instead, they should insist on full compliance with the present requirement that customs officials provide all the necessary evidence for an adjudication with an explanation.<sup>145</sup> The decision should be a brief written explanation, perhaps in letter form, depending upon what the judge deems appropriate in the particular circumstance. The jurisdictional limit for these nonbusiness small claims could be much less than the proposed \$5000; at a guess a \$1000 duty difference would cover nearly all such disagreements were they to be protested.<sup>146</sup> The Customs Court judge should be empowered to award interest on the duty to the date of decision, if the money was paid at liquidation.<sup>147</sup>

### VIII. Prevention of Abuse of the Proposed Small Claims Procedure

One criticism of the proposed procedure is that importers and their customhouse brokers could use it to avoid full trial and formal adjudication with opinion in the Customs Court, by breaking up their potentially controversial imports into single entries of less than the small claims jurisdictional amount (whether \$2500 difference in duty or \$5000 in gross value of the goods). Each small claim has the potential to determine the out-

---

144. Such a writing is common in state small claims procedures. For a discussion of such a procedure, see Evans & Bulman, *Small Claims and Arbitration—Parallel Alternative Methods of Dispute Resolution*, 3 PACE L. REV. 183 (1983).

145. See 28 U.S.C. § 2635(a)(1)(A)-(H) (Supp. IV 1980) (enumerating the documents to be forwarded to the Customs Court. The requirements enumerated coincide with 28 U.S.C. § 2632(f)(1)-(9) of the Customs Court Act of 1970).

146. Perhaps the limitation should be even less; in 1978, the duty-free exemption for returning tourists was increased to \$300 with duty normally assessed at 10 percent on the next \$600. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888 (codified as amended at 19 U.S.C. §§ 1202, 1402 (Supp. V 1981)).

147. Interest could be set at the prevailing rate of thrift institutions where the traveler resides. This seems more appropriate than using the IRS interest rate although if the prevailing rate proves difficult to apply, the IRS rate for that year could be substituted. See *supra* note 75 and accompanying text.

come of many similar imports. By characterizing import shipments as single entries, an importer or customhouse broker could test the duty difference for a single small claim, and, if successful, then submit each entry as a similar small claim.<sup>148</sup> These concerns, it is feared, could be significant matters to government and to the public.

It is unlikely that any importer could improperly invoke the small claims process repeatedly with regard to any potentially precedent-setting adjudication. The proposed small claims procedure prohibits any decision under its jurisdiction from serving as precedent.<sup>149</sup> Even assuming that some advantages may accrue to those who regularly present claims before the small claims court,<sup>150</sup> those persons trying to use those advantages to circumvent the proper procedures of the Customs Court will probably be thwarted by the closeness of practitioners and judges in the area. Peer pressure and the judges' memory of prior claims and those who presented such claims would probably be sufficient to keep the small claims procedure working as it was intended: to be a forum for claims that were too small to offset the costs of litigation in the regular Customs Court.

Other requirements, either by court rule or legislative enact-

---

148. See generally *Senate Hearings on S. 1654*, *supra* note 3, at 41.

A.P. Vance, testifying for the Association of the Customs Bar, provided an example from his experience in government: A man bought a fur coat for his wife and claimed a \$1,200 exemption instead of the \$400 he obtained. The man lost his case in the Customs Court.

He went up to the Court of Customs and Patent Appeals . . . A few years later I heard . . . he had let word out that . . . had he succeeded, he had 3,000 claims he was ready to file. We thought we were fighting one fur coat. We should have been smarter to know we weren't.

*House Hearings on H.R. 6394*, *supra* note 5, at 195.

L. Lehman, testifying as Chairman of the A.B.A. Standing Committee on Customs Law agreed in principle: "The fur coat's value, if it's an isolated transaction, may be a small claim. If it's just a leader for a series of what are really commercial transactions, then I think is not a small claim." *Id.* at 200.

Consider another example of a recent valuation where some 1,300 separate entries of freshcut flowers were imported. Each entry had a separate import value which was less than approximately \$250. The duty difference based on the value of each entry was approximately \$25, a relatively high percentage difference. The government, however, perceived the duty difference as \$25 multiplied by 1,300 (\$32,000) and the gross value of all 1,300 similar imports was \$300,000 or more.

149. See generally Shuchman & Gelfand *supra* note 104.

150. See *supra* notes 108-110 and accompanying text.

ment, can prevent the abuses of the small claims procedure that informal peer pressure and judicial administration may not reach. Importers and customhouse brokers could be required to provide a sworn statement that no other similar entries had been recently received and none were anticipated. In some circumstances, a similar statement could be required from the foreign exporter or manufacturer. Since the customhouse brokers are licensed by the United States, their livelihood could depend on a finding that they carelessly or negligently made a false or misleading statement.

The court could further prevent abuse by relying on the government's information in the present case and in former similar actions. Past records of the Customs Court small claims part, records maintained by the Customs Service, and records maintained by the Counsel for the Treasury Department for prior cases, although not formally published, could be used by the court to ferret out abuses. The litigation report, or its equivalent, prepared by counsel for the Treasury Department for the particular claim in question would provide the court with further information on the legitimacy of the claim. If counsel for the Treasury Department can provide some threshold evidence that the potential duty difference may be large, this could be sufficient basis for precluding a small claims option in that particular case.

The small claims procedure need not be of right. Only properly supported claims would be considered. Failure to provide necessary information or to satisfactorily explain the lack of such information could be grounds to deny access to the small claims procedure. Requests to initiate the proceeding could take the form of a pleading to which counsel for the government could respond. There could be a rebuttable presumption in favor of the government's contention that small claims jurisdiction is not appropriate because of the potential importance of the decision or the need for a precedential ruling.

Another possible approach already suggested is to identify the types of disagreements (the several common bases for protests) that are not likely to create significant precedents. Valuation cases and claimed mistakes in calculation, nearly 40 percent

of the 187 cases where the basis for protests are known,<sup>151</sup> might be far less likely to establish precedents. The burden might then be shifted to the government to say why this entry which created a value based protest might result in a significant precedent.

The small claims process could be a simple one-step procedure. The form of summons for the small claims option could contain all the necessary information for the threshold decision on jurisdiction and the information on the merits of the case upon which the aggrieved party relies for its challenge to the denial of its protest.

### IX. Conclusion

The present full and formal procedure in the Customs Court appears unnecessary for many potential appeals. For claims which qualify, the proposed small claims procedure would involve less cost and delay. Thus, a small claims procedure seems a desirable proposal unless its existence acts to generate many more appeals of marginal merit.

The specific proposal for a small claims option should be amended to prevent abuse and accommodate the different common types of appeals which would probably arise. Some could be processed by administrative judges and different treatment could be given to classification and valuation cases with regard to small claims jurisdiction.

---

151. Of the 187 cases, 56 concerned valuation and 19 concerned claimed mistakes in calculation. CP 19, p. 20. *See supra* note 107.