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A New Era at the Court of International Trade: Endemic, Executive Orders, and Enforcement

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I. INTRODUCTION

Judicial conferences offer a unique opportunity for the bench and bar to gather and discuss issues that matter to all of a court's stakeholders. That gathering has rarely been more important as courts seek to reestablish a sense of normalcy after COVID-19. The 21st Judicial Conference of the Court of International Trade (CIT or "the Court"), held in October 2022, was thus propitiously timed to allow the members of the Court to interact with members of the bar in a conference setting for the first time since before the pandemic. More than simply a post-Covid exercise, though, the conference also allowed the bench and bar to take stock of the dramatic changes in international trade law and policy that have occurred in the last several years and that seem increasingly entrenched. The increased

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use of executive power to regulate trade and impose duties, potential changes to administrative law doctrines that are foundational to practicing before the Court, and an expanding effort to impose and collect duties on imports for a range of policy goals.

This essay serves as an introduction to the articles published from that conference, as well as a general description of the conference itself. The articles deal with a range of topics of importance to the CIT and the attorneys practicing before it, including administrative law practice at the CIT, rules of origin, the potential use of duties to counteract climate change, and relatively new rules designed to catch the evasion of antidumping and countervailing duties. The essay proceeds in three parts. Part II briefly describes the CIT itself, a unique federal court. Part III describes the Judicial Conference's main themes, while Part IV introduces the articles that fill the remainder of this issue.

II. THE COURT OF INTERNATIONAL TRADE

The Court of International Trade is a specialized court in the United States federal judicial system that handles a wide range of cases related to international trade and customs law. The CIT, which is located in New York City, was established by Congress in 1980 as part of the Customs Courts Act.[1] It has jurisdiction over disputes involving determinations made by government agencies charged with administering the nation's trade laws. As a court that primarily reviews agency action, the Court is thus to a very large extent an administrative law court. Although the jurisdiction of the Court is limited, its powers in law and equity are equivalent to that of a district court of the United States.[2]

The CIT's jurisdiction includes cases raising challenges to the classification, valuation, and admissibility of imported merchandise, as well as cases involving antidumping and countervailing duties, among other issues.[3] For example, when merchandise is imported into the United States, it is assigned a classification code based on its nature, form, and intended use. This classification code determines the rate of duty that must be paid on the merchandise. If a dispute arises over the correct classification of imported merchandise, the importer or other interested party may file a lawsuit with the CIT to challenge the classification assigned by U.S. Customs and Border Protection (CBP). The CIT has the authority to review the classification assigned by CBP and make a determination as to the correct classification.

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1. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727.
2. 28 U.S.C. § 1585.
3. Additional cases within the CIT's jurisdiction include challenges to trade adjustment assistance determinations. 28 U.S.C. § 1581(d).

The CIT also has jurisdiction over cases involving the valuation of imported merchandise. When merchandise is imported into the United States, it must be assigned a value for customs purposes. This value is used to determine the amount of duty that must be paid on the merchandise. If a dispute arises over the correct value of imported merchandise, the importer or other interested party may file a lawsuit with the CIT to challenge the value assigned by CBP.

Many CIT cases involve antidumping and countervailing duties. Antidumping and countervailing duties are special duties that are imposed on imported merchandise that is sold in the United States at less than fair value or that is benefiting from subsidies provided by a foreign government. If a dispute arises over the imposition of antidumping or countervailing duties, the importer or other interested party may file a lawsuit with the CIT challenging the government's decision to impose duties.

Congress empowered the Court to render relief, including monetary judgments and, with exceptions, "any other form of relief that is appropriate in a civil action."[4] The scope of the relief, however, is typically constrained by the nature of the determination being reviewed. For example, common determinations reviewed by the Court are those made by the Department of Commerce (Commerce or Commerce Department) and the International Trade Commission (ITC) when determining whether to impose or review the assessment of antidumping or countervailing duties, or those made by CBP when determining the appropriate tariff rate associated with the classification or valuation of imported merchandise. In those examples, the Court reviews the determinations of Commerce and the ITC under a deferential standard of review and based upon an administrative record.[5] By comparison, the Court reviews the tariff classification and valuation determinations of CBP *de novo* and based upon the evidentiary record developed before the Court during litigation.[6]

The result is a unique federal court—a specialized Article III court of first instance with exclusive jurisdiction over a set of international trade issues that usually involve agencies of the United States as the defendant. Indeed, it is unlikely that any other federal court sees the United States appear as a defendant in a higher percentage of cases than the CIT. As discussed in further detail below, this fact cannot help but color both the set of legal challenges brought and practice before the Court.

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4. 28 U.S.C. § 2643.
5. *See* 19 U.S.C. § 1516(a).
6. 28 U.S.C. § 2640.

III. A CHANGING DOCKET

The last several years have seen an extraordinarily rapid change in international trade policy, and that change has significantly impacted the CIT's docket as well as the manner in which it conducts business. The Conference's theme—"Endemic, Executive Orders, and Enforcement"—reflected the broad categories into which these changes might be grouped. Some of these changes need little explanation. The COVID-19 pandemic disrupted the Court's ability to conduct in-person hearings and created significant logistical challenges, both for the Court itself and for the members of the bar practicing before it. As with so many spheres of life, the end of the more drastic public health measures has required the Court and the bar to readjust their respective expectations about how to conduct business. To that end, the Conference included a "Roundtable on Practice Points" that discussed best practices post-pandemic, as well as a session on practice pitfalls that discussed issues related to practicing law in a virtual environment. The latter in particular emphasized readapting to the formality of in-person hearings. The Conference also featured a "fireside chat" with Chief Judge Mark Barnett, and Judges Miller Baker, Timothy Reif, and Stephen Vaden. The judges reflected on how they approach their roles and offered advice for attorneys appearing before them. For example, one of the judges felt that attorneys had become lax in the kinds of representations they make to the Court. Other members of the Court emphasized the general good faith of the attorneys that appear before them.

While COVID-19 was a general challenge, other changes in the policy environment have been specific to the trade space. The United States' imposition of duties on Chinese imports under Section 301 of the Trade Act of 1974 and on steel and aluminum imports under Section 232 of the Trade Expansion Act of 1962 has generated a substantial workload for the Court.[7] This is perhaps most evident from the number of three-judge panels that the Court has convened. 28 U.S.C. § 255 permits the chief judge to assign a case to a three-judge panel when the chief judge finds that the issue "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws."[8] Prior to 2019, it appears that 1995 was the last time the CIT decided a case as a three-judge panel.[9] Then, the CIT (in a decision ultimately affirmed by the Supreme Court) held the Harbor

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7. *See, e.g.*, *In re* Section 301 Cases, 570 F. Supp. 3d 1306 (Ct. Int'l Trade 2022); Am. Inst. Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019), *aff'd*, 806 F. App'x 982 (Fed. Cir. 2020).

8. 28 U.S.C. § 255.

9. *See* U.S. Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995), *aff'd*, *sub nom.* United States v. U.S. Shoe Corp., 523 U.S. 360 (1998).

Maintenance Tax unconstitutional as applied to exports under the Export Clause of the Constitution.[10] Since 2019, though, the CIT has resolved at least five constitutional and/or statutory challenges to the Section 301 and Section 232 duties via three-judge panels.[11]

These cases resolved challenges to the constitutionality and scope of Congress's delegation of its power to set duties on imports. For example, in *Am. Inst. for Int'l Steel v. United States*, the Court rejected a claim that Section 232 is an unconstitutional delegation of legislative power.[12] In *Transpacific Steel, LLC v. United States*, *PrimeSource Building Prods. v. United States*, and *Oman Fasteners, LLC v. United States*, the Court held that President Trump had exceeded his statutory authority by imposing new duties outside of the time limits in Section 232—although the Federal Circuit later reversed. And in *In Re Section 301 Cases*, the Court ultimately rejected claims that the government had exceeded its statutory authority to modify duties it had imposed.[13] It also, however, found that the Administrative Procedure Act's foreign affairs exception does not cover the United States Trade Representative's issuance of lists of products covered by the Section 301 duties.[14] This latter finding underscores both the CIT's role as an administrative law court and the more general importance of administrative law to practicing trade law in the United States.

As this caseload demonstrates, the CIT sits at the crossroads of two significant trends. The first is the increase in the use of executive powers to impose extraordinary duties, as noted above. The second is the rapid shifts currently underway in administrative law, the core of the Court's docket.[15] The conference addressed these twin themes in a panel entitled "Trade Administrative Law and the Separation of Powers." Professor Kathleen Claussen took on the first issue, discussing the issue of executive power to raise tariffs. She described trade's "security exceptionalism," by which she means statutes—such as the suite of three-digit statutes justifying the Trump-era tariffs, namely Section 232 of the Trade Expansion Act of 1962 and Sections 201 and 301 of the Trade Act of 1974—that authorize the executive branch to unilaterally impose tariffs or other trade barriers without

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10. *Id.*

11. *See* Am. Inst. Int'l Steel Inc., 376 F. Supp. 3d 1335; Transpacific Steel LLC v. United States, 481 F. Supp. 3d 1326 (Ct. Int'l Trade 2020), *rev'd,* 4 F.4th 1306 (Fed. Cir. 2021); PrimeSource Bldg. Prod., Inc. v. United States, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021); Oman Fasteners, LLC v. United States, 520 F. Supp. 3d 1332 (Ct. Int'l Trade 2021), *rev'd, sub nom.* PrimeSource Bldg. Prod., Inc. v. United States, 59 F.4th 1255; *In re* Section 301 Cases, 570 F. Supp. 3d 1306.

12. In full disclosure, I was one of the attorneys representing the plaintiffs in that case.

13. *See In re* Section 301 Cases, 570 F.3d 1306.

14. *Id.*

15. *See* 28 U.S.C. § 1581 (describing the Court's jurisdiction); 19 U.S.C. § 1516a(b) (prescribing the standard of review in antidumping and countervailing duty cases as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

subsequent congressional action, a deviation from the norm of delegating to the president authority to negotiate trade reductions.[16]

Other speakers took on the broader changes in administrative law and their potential implications for trade law. Since the conference, the Supreme Court has granted certiorari in *Loper Bright Enterprises v. Raimondo* to consider whether to overrule *Chevron v. Natural Resources Defense Council*.[17] Although *Chevron* deference has been under pressure for a number of years, especially at the Supreme Court, it and the many courts of appeals' decisions applying it have remained binding precedent for the lower courts.[18] The possible overruling of *Chevron* could force the CIT to grapple with what deference it owes administrative agencies under a new or alternative framework. Likewise, if the Supreme Court outright overrules *Chevron*, the courts may have to reconsider the legality of agency policies previously sustained on *Chevron* grounds.[19] But as Professor Kristin Hickman, one of the conference speakers, has argued, some type of deference to agencies seems almost inevitable in light of the broad delegations that Congress regularly enacts. The scope of the possible disruption to the CIT's work from overruling *Chevron* thus is unclear.

Finally, the Conference's third theme was enforcement. The Conference included several panels that addressed this theme in various ways. The day opened with a panel featuring officials from the ITC, CBP, and the Commerce Department's International Trade Administration discussing the work those agencies are doing. Another panel dealt with the 2015 Enforce and Protect Act that created a procedure for catching and penalizing the evasion of antidumping and countervailing duties.[20] Third, and perhaps most innovatively, a panel discussed non-traditional issues in trade law. The panel included discussion of the Uyghur Forced Labor Prevention Act, which creates a presumption that goods imported from the Chinese province of Xinjiang are made with forced labor and thus may not enter the United States; the potential use of Section 232's delegation to the president to "adjust the imports" of products that he deems threaten national security as a tool to impose duties on carbon-intensive imports;[21] and the ways in which climate issues impact the work before the ITC.

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16. Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1128–29 (2020).

17. Loper Bright Enters. v. Raimondo, 45 F.4th 359, 369 (D.C. Cir. 2022).

18. *See generally* Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017).

19. Of course, if the Supreme Court does overrule *Chevron*, the lower courts might well reach the same outcome about the legality of specific policies under whatever standard the Supreme Court announces.

20. *See infra* Part IV.

21. *See infra* Part IV.

IV. THE ARTICLES

This issue includes four articles based on presentations from the Conference. The articles cover a range of topics, from the exceptional structure of adjudication for trade disputes in federal court to the enforcement of trade remedies rules and a defense of the doctrine of substantial transformation.

As discussed above, one of the key features of the CIT is that it is largely an administrative law court, but one with a highly specialized docket. Moreover, because the CIT's jurisdictional statute provides for exclusive jurisdiction,[22] circuit splits on issues specifically related to the claims before the CIT (rather than background issues of administrative law) are rare. Moreover, appeals run to the Federal Circuit, another court with specialized subject matter jurisdiction, a factor that insulates the Federal Circuit to some extent from dialogue with its sister circuits and also limits circuit splits, a key factor in whether the Supreme Court decides to grant review of cases. The result is that administrative law precedent in the CIT (and the Federal Circuit) does not necessarily evolve in the same fashion as in other circuits.

Dean Aram Gavoor takes on the exceptional nature of this adjudicatory structure in his piece, *The Unintended Consequences of International Trade Law Adjudicatory Exceptionalism*.[23] He starts from the fact that, while the Constitution gives the president significant responsibilities in the foreign affairs context, the regulation of international trade is listed among Congress's enumerated powers. As part of giving effect to the nation's trade laws, Congress created the CIT but stopped short of declaring the CIT a district court (instead granting it "all the powers . . . [of] a district court,").[24] Nevertheless, Congress aimed to give litigants "the same access to judicial review and judicial remedies" as litigants injured by the actions of any agency.[25] As such, and looking at the high percentage of the CIT's orders that involve the Administrative Procedure Act (roughly 69 percent in 2022), Dean Gavoor concludes that the CIT is "primarily" an administrative law court.[26]

Despite its role as an administrative law court, however, Dean Gavoor argues that the CIT's specialized jurisdiction leads to siloing across several dimensions. First, the international trade bar may not frame their arguments to the CIT in light of similar statutes or administrative law issues before other federal courts. Second, the bar

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22. 28 U.S.C. § 1581.

23. *See* Aram Gavoor, *The Unintended Consequences of International Trade Law Adjudicatory Exceptionalism*, 57 VAND. J. TRANSNAT'L L. 995, 995 (2023).

24. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727; 28 U.S.C. § 1585.

25. Gavoor, *supra* note 23, at 996.

26. *Id.*

may be tempted to layer its briefs with technical jargon, and both the Court and the bar may take shortcuts in applying generally-applicable administrative standards of review. Third, the bench and bar may not be exposed to or as familiar with the methods of challenging the development of an administrative record in fields such to similar administrative processes, such as intellectual property, immigration, and securities law.[27]

While these costs may be partially offset by the benefits of specialist judges interpreting a technical area of the law, they lead to additional costs in terms of appellate review. Neither the Federal Circuit nor the Supreme Court are specialists in international trade, creating a potentially sharp disjunction between the approaches taken in the court of first instance and the courts rendering appellate decisions. In particular, Dean Gavoor highlights how the standards for specialization at the CIT can make it difficult to satisfy the standards for a grant of certiorari by the Supreme Court.[28] He thus argues for the international trade bar to immerse itself in general administrative law practices. Furthermore, he argues that this approach should begin at the agency level, with advocates using applications, briefs, and comments on rulemaking directed to agencies as a method of setting up subsequent litigation over administrative law issues.

Two other papers take on new frontiers within international trade law. Stephen Tosini looks at how two international trade laws—Section 232 of the Trade Expansion Act of 1962 and the antidumping provisions of the Tariff Act of 1930—might be used to impose duties on carbon intensive imports.[29] The goal of such a maneuver would be to reduce the extent to which U.S. consumption supports carbon-intensive production overseas.

Following other commentators, as well as public officials such as Congressman Bill Pascrell of New Jersey,[30] Tosini argues that Section 232 appears to be the "best option" among existing statutory authorities for putting a duty on carbon-intensive imports in place.[31] As I have argued in other work with Todd Tucker, Section 232 would allow the president to impose such duties because of the expansive grant of authority to the president to craft remedies aimed at imports that he deems to threaten the national security, the limited judicial

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27. *Id.* at 998.

28. *Id.*

29. *See* Stephen C. Tosini, *Trade Remedies and Climate Change*, 57 VAND. J. TRANSNAT'L L. 1005, 1005 (2023).

30. *See Pascrell Calls for National Security Investigation of Carbon Pollution*, BILL PASCRELL: PRESS RELEASE (Mar. 12, 2019), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=3855 [https://perma.cc/ND5N-KVHH] (archived July 20, 2023); Timothy Meyer & Todd N. Tucker, *A Pragmatic Approach to Carbon Border Measures*, 21 WORLD TRADE REV. 109, 114 (2022).

31. Tosini, *supra* note 29 at 1016.

review of action taken pursuant to Section 232, and the extremely broad definition of national security included in Section 232.[32]

With respect to this last element, Section 232 directs the president to consider a wide range of economic factors in assessing whether imports present a threat to national security. Those factors include: "[T]he impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports . . . without excluding other factors . . . ."[33]

This broad definition does not really track a military-industrial definition of "national security." Instead, it is a broad definition of economic security. As Tosini points out, the threat posed by climate change, and thus by imports that fuel climate change, would certainly threaten domestic industries that produce relatively cleaner but potentially more expensive products that compete with carbon-intensive imports.[34] Cheap carbon-intensive imports could also lead to increases in unemployment and the loss of investment, especially in green sectors of the economy. Carbon-intensive imports could thus plausibly satisfy Section 232's standards.

Tosini does point out some logistical challenges associated with Section 232. Because an investigation under Section 232 requires the identification of specific imported products, for example, it might make sense to focus on imports that are especially carbon intensive to produce, such as steel, aluminum, iron, and fertilizer.[35] Indeed, this coverage would track that of the European Union's Carbon Border Adjustment Mechanism. Moreover, the United States and the European Union are already negotiating over Section 232 measures as applied to steel and aluminum in the context of the Global Arrangement on Sustainable Steel and Aluminum. As Tosini points out, the president could delegate to the Commerce Department (the agency designated by Section 232) the details of crafting an import duty scheme to address further complexities.[36]

With respect to the antidumping laws, the Tariff Act of 1930 requires the Commerce Department to make a determination as to whether an imported product is being sold at less than "fair value."[37] Commerce must make that determination via "fair comparison . . . between the export price or constructed export price [i.e., the price at which the good is sold in the United States] and normal value."[38] Tosini

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32. *See* Meyer & Tucker, *supra* note 30, at 114.
33. 19 U.S.C. § 1862(d).
34. Tosini, *supra* note 29, at 1005.
35. *Id.* at 1005.
36. *Id.* at 1011.
37. 19 U.S.C. § 1671(h).
38. 19 U.S.C. § 1677b.

points out that the Commerce Department has some discretion in how it determines what constitutes "normal value" in the case of nonmarket economies, where the prices in the exporting countries (e.g., China) are deemed unreliable.[39] In such cases, Commerce must merely make use of the "best available information."[40] In so doing, Tosini argues, Commerce could in essence base prices on clean technologies, rather than dirty technologies, resulting in higher antidumping duties on dirty products from nonmarket economies.[41]

As Tosini notes, this approach is not without drawbacks, especially as compared to Section 232. First, unlike Section 232, the antidumping laws are not so flexible as to allow the crafting of a broad scheme for duties on carbon-intensive imports. Indeed, this particular tactic is only available if the technical dumping methodology is satisfied, and only for nonmarket economies (although, significantly, that would include China). Second, whereas the courts have held that the president's decisions under Section 232 are all but unreviewable, Commerce's dumping determinations under the Tariff Act are administrative determinations reviewable by courts. Tosini notes that precedent affords Commerce significant discretion, especially under *Chevron*.[42] But, as noted above, the Supreme Court is reconsidering *Chevron*, meaning that the degree of deference Commerce enjoys may be less in the future than it has been in the past.

Michael Rolls and Ashley Akers take on another new issue in international trade: the Enforce and Protect Act (EAPA).[43] As Rolls and Akers explain, U.S. law requires importers to exercise reasonable care in determining whether an imported product is subject to an existing antidumping or countervailing duty order.[44] CBP can then enforce that requirement through civil penalties and, in extreme cases, criminal prosecution.[45] This requirement is necessary because the importer of record is the party subject to the United States' jurisdiction and thus legally responsible for paying any duties. But the importer of record may not be the producer of the goods in question and thus might not have been involved in any antidumping or countervailing duty investigation. The requirement to exercise reasonable care in determining whether imports are subject to an antidumping or countervailing duty order thus incentivizes importers to monitor their foreign suppliers, as well as simply to be honest in stating the nature and origin of their goods.

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39. Tosini, *supra* note 29, at 1014–15.
40. 19 U.S.C. § 1677b(c)(1).
41. *Id.*
42. *Id.*
43. *See* Michael E. Roll & Ashley Akers, *The Enforce and Protect Act ("EAPA"): A Primer on the Administrative CBP Process and Summary of Judicial Decisions*, 56 VAND. J. TRANSNAT'L L. 1025, 1026 (2023).
44. 19 U.S.C. § 1484.
45. 19 U.S.C. § 1592; 18 U.S.C. § 545.

Congress passed the EAPA in 2015 out of a concern that this existing framework inadequately deterred importers from evading antidumping and countervailing duties. Rolls and Akers present data showing that in the previous five fiscal years, CBP has identified $670 million in underpaid duties. They then describe the process through which the EAPA works. In brief, an investigation begins when an "interested party" files an allegation with the CBP alleging that an importer is evading duties.[46] Perhaps unusually, the target of the allegation is not notified unless and until CBP decides to initiate an investigation, and even then CBP has ninety-five days after initiation before it is required to serve notice on the importer.[47] CBP then has the power to impose interim measures if it determines that there is a reasonable suspicion that the importer is in fact evading duties.

Rolls and Akers then review the nascent jurisprudence on the EAPA. They note that these provisions have generally led to two kinds of claims. First, parties have raised due process claims to the lack of notice in the EAPA process. Second, they have raised questions about how the EAPA (administered by CBP within the Department of Homeland Security regarding the collection of antidumping and countervailing duties) interacts with Commerce's scheme for assessing the scope of an antidumping or countervailing duty order in the context of a circumvention inquiry.[48] Although results on specific issues have been mixed, Rolls and Akers recount a litigation record generally favorable to the government, albeit one that again resolves ambiguities via deference doctrines that are under stress.[49]

Finally, John Peterson takes on one of the most important—but understudied and underdocumented—doctrines in international trade: rules of origin.[50] As Peterson describes it, "[a] product's country of origin is its 'passport.'"[51] Put differently, the country of origin of a product is akin to a product's citizenship. It determines how a product is treated under trade agreements and the domestic legislation that implements those rules. For example, if a product is Mexican in origin, it would presumably be entitled to duty-free entry into the United States pursuant to NAFTA's successor agreement, the USMCA. But if the same product is Chinese in origin, it would be subject to the applicable duty rate for such a product from China imported into the United States.

Rules of origin are a bit of a puzzle in international trade law. Despite years of negotiating trade agreements that have reduced trade

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46. Rolls & Akers, *supra* note 43, at 1028.
47. *Id.* at 1025.
48. *Id.* at 1026.
49. *Id.* at 1026–27.
50. *See* John M. Peterson, *"Substantial Transformation": The Worst Rule for Determining Origin of Goods — Except for All the Rest*, 56 VAND. J. TRANSNAT'L L. 1065, 1065 (2023).
51. *Id.* at 1066.

barriers and achieved substantial harmonization across countries, nations have never agreed on a single set of origin rules.[52] As Peterson notes, such rules may not even be clear within a single country. The US Congress, for instance, has legislated a rule of origin for textiles and apparel but has otherwise allowed rules of origin to be developed via judicial decisions, what Peterson characterizes as a form of federal common law.[53] The test that courts have adopted is "substantial transformation," under which a court asks whether there has been a change to the "name, character, or use" of a product within a country.[54] If there has, the product then takes on that country's origin.

The difficulty Peterson identifies is that, while continuing to pay lip service to this test, CBP has moved away from applying it in practice.[55] As a result, Peterson argues, origin determinations—and thus the resulting duties owed on importing a product—have become unpredictable, with consequences for businesses attempting to manage their costs.[56] Peterson provides a clear and concise description of alternative origin rules, as well as the factors that CBP has begun considering instead of the factors traditionally required by the substantial transformation test. He then evaluates these alternatives before concluding that the substantial transformation test remains the best option for determining country of origin.[57]

V. CONCLUSION

The Court of International Trade is a remarkable institution—an Article III court charged with overseeing the government's own administration of the nation's trade laws. The challenges of fulfilling that task have increased with the changes to the world in recent years, but if the Judicial Conference is any indication, the Court and its bar are adapting to these new conditions.

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52. *Id.*
53. *Id.*
54. *See* Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908).
55. *See* Peterson, *supra* note 50.
56. *See id.*
57. *Id.* at 1067.