

PLAYING THE ZONE AND CONTROLLING THE BOARD: THE EMERGING JURISDICTIONAL CONSENSUS AND THE COURT OF INTERNATIONAL TRADE

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TABLE OF CONTENTS

Introduction	2394
I. Historical Background of the Court of International Trade (CIT)	2398
II. Foreign-Trade Zones Program	2402
A. FTZ Benefits	2402
B. Categories of FTZs	2404
C. FTZ Board	2405
III. Jurisdiction of the CIT	2408
A. Statutory Provisions	2409
B. Interpretation of the Residual Jurisdiction Section ..	2410
IV. Redefinition of the Exclusive Jurisdiction of the CIT ..	2412
A. Judicial Review of FTZ Board Decisions	2412
B. <i>Conoco, Inc. v. United States Foreign-Trade Zones Board</i>	2413
1. District Court	2414
2. Court of International Trade	2414
3. Federal Circuit	2416
C. <i>Miami Free Zone Corp. v. Foreign Trade Zones Board</i> ...	2419
V. Implications of the CIT's Jurisdictional Evolution	2421
A. Positive Implications	2421
B. Negative Implications	2425

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C. Precedential Implications	2428
Conclusion	2430

INTRODUCTION

The rough and tumble game of international trade forces its players to choose political and legal sides to maximize their self-interest. One recent example is the effort to negotiate a multilateral trade pact. The recent round of the General Agreement on Tariffs and Trade (GATT), known as the Uruguay Round, expanded the scope of the multilateral trading rules established in 1947 under GATT.¹ The Uruguay Round made great strides in reducing trade barriers, expanding trading rules to other areas, and providing more guidance and accountability through new dispute settlement procedures. Of significant importance, a new World Trade Organization (WTO) was established to implement new dispute settlement rules, including rules that, for the first time, prevent a member nation from unilaterally blocking an adverse decision.² On April 15, 1994, over 110 nations signed the Uruguay Round Agreements,³ and, after a significant number of congressional hearings, the President formally submitted legislation making necessary and appropriate changes to U.S. laws to implement the agreements.⁴ Two days after the House of Representatives approved the Uruguay Round, the Senate also approved the implementing legislation on December 1, 1994, and, through the legislative history, placed the United States further on record as supporting free trade and promoting exports as a central pillar of economic development in the United States.⁵ Then-Senate Majority Leader George Mitchell stated, "Expanded international trade has been the engine of American prosperity since the end of the Second World War. . . . This trade agreement will define the American role

1. See 140 CONG. REC. S15,379 (daily ed. Dec. 1, 1994).

2. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 404, annex 2 (GATT Secretariat ed., 1994) [hereinafter *Dispute Settlement Understanding*].

3. See *Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 316, 103d Cong., 2d Sess., vol. 1, 1324-26 (1994).

4. *Id.* at 656.

5. See Helene Cooper & John Harwood, *Major Shifts in Trade Are Ensured as GATT Wins U.S. Approval*, WALL ST. J., Dec. 2, 1994, at A1, A9 (stating that Senate voted 76 to 24 to approve GATT); Helen Dewar, *Senate Approves GATT on Big Bipartisan Vote*, WASH. POST, Dec. 2, 1994, at A1, A26. GATT is a trade agreement among 124 nations that lowers tariffs by one-third, reduces subsidies for farm products, strengthens protection for patents, inventions, and recorded entertainment, and begins to regulate trade in services and investments. *Id.* at A2; David E. Sanger, *Senate Approves Pact to Ease Trade Curbs; a Victory for Clinton*, N.Y. TIMES, Dec. 2, 1994, at A1 (stating that GATT cuts tariffs around world by more than \$700 billion over next 10 years).

in the global economy and in world affairs well into the 21st century."⁶

One major controversy surrounding the GATT process is the question of which forum has the right, and the institutional competence, to adjudicate disputes among signatory nations or parties.⁷ An unusual alliance of consumer organizations, environmentalists, and certain political conservatives argue that the new WTO, the global trade governing body that replaced the GATT apparatus, will be "an all-powerful bureaucracy, able to undercut American sovereignty by allowing foreign panels of foreign judges to rule on whether Federal and state laws constitute[] impediments to world trade."⁸ The sovereignty concerns raised by the alliance were amplified because the United States will no longer have the ability to veto unilaterally adverse decisions in the WTO.⁹ These criticisms relating to sovereignty concerns with the WTO¹⁰ have been contrasted with the advocacy for uniformity in trade policy. The American Bar Association, for example, in its response to the sovereignty issue, termed the WTO "extremely helpful to U.S. interests" because it "[s]ets up a single, coherent procedural framework for dealing with a trade issue, whether related to goods or services."¹¹

Just as ratification of the Uruguay Round marked a continued commitment to expanded trade on the multilateral level, the domestic foreign-trade zone program, with its exemptions from Customs fees and *ad valorem* taxes,¹² mark an ongoing effort to harmonize domestic U.S. laws in order to make internal commerce more efficient and thus expand trade. In addition to sharing the GATT/WTO commitment to expand trade, however, the domestic foreign-trade program also shares the complex issues surrounding jurisdiction. For instance, similar to arguments made by some commentators that the WTO presents difficult jurisdictional questions in determining which forum

6. Cooper & Harwood, *supra* note 5, at A1.

7. See Ralph Nader, *WTO Means Rule by Unaccountable Tribunals*, WALL ST. J., Aug. 17, 1994, at A12 (arguing that domestic consumer, worker, and environmental safeguards could be undermined if jurisdiction for trade disputes is ceded to WTO dispute settlement panels that can render decisions without protection of U.S. veto power).

8. Sanger, *supra* note 5, at A22.

9. *Dispute Settlement Understanding*, *supra* note 2.

10. See Nader, *supra* note 7, at A12 (stating that WTO tribunals will undermine decisions on trade disputes made by disputing nations).

11. Letter from R. William Ide III, President, American Bar Association, to the Honorable Daniel P. Moynihan and the Honorable Dan Rostenkowski 3 (May 5, 1994) (on file with *The American University Law Review*).

12. *Ad valorem* taxes are "imposed on the value of property." BLACK'S LAW DICTIONARY 51 (6th ed. 1991).

is appropriate to resolve trade disputes,¹³ the foreign-trade zone program¹⁴ also faces thorny judicial review questions within the domestic courts of the United States.¹⁵ Like the debate over the WTO's jurisdiction, the question of the appropriate forum to review decisions regarding the grant of foreign-trade zones and subzones is subject to competing interests of local concerns and uniformity. This debate revolves around the U.S. Court of International Trade (CIT),¹⁶ with its institutional competence in dealing with trade issues, on one hand, and the federal district courts, which are potentially more attuned to important local concerns, on the other hand. Just as Congress has defined U.S. support for the WTO notwithstanding the competing interests voiced during the debate, the U.S. Court of Appeals for the Federal Circuit¹⁷ has recently attempted to resolve the appropriate jurisdiction for foreign-trade zone issues.¹⁸ In general, appeals from Foreign-Trade Zones Board (FTZ Board) actions may be brought: (1) to the court of appeals in the district where the zone is located, in the case of revocation;¹⁹ (2) to the CIT if the requisite jurisdiction can be shown; or (3) to district courts under the Administrative Procedures Act.²⁰

As the significance of international trade in the U.S. economy increases and as the global marketplace becomes more sophisticated, the U.S. court system's role in adjudicating trade disputes will inevitably increase. The evolution of the CIT provides insight into how the U.S. judicial system seeks to provide uniformity in the resolution of trade disputes.²¹ Historically, interpretations of the CIT's jurisdiction have failed to provide parties with guidance in

13. See *supra* notes 7-11 and accompanying text.

14. See *infra* notes 54-77 and accompanying text (explaining operation of foreign-trade zone program).

15. See *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 22 F.3d 1110, 1111 (D.C. Cir. 1994) (holding that Court of International Trade (CIT) has exclusive jurisdiction to review actions of Foreign-Trade Zones Board (FTZ Board), including grant of zone application in particular geographic location); *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1585, 1589 (Fed. Cir. 1994) (finding that statutory grant of exclusive jurisdiction to CIT over civil actions arising out of federal statutes governing revenues from imports provides CIT with jurisdiction to review FTZ Board's imposition of conditions on grants of foreign trade subzones).

16. See 28 U.S.C. § 251 (1988) (establishing CIT).

17. See 28 U.S.C. § 1295(a)(5) (establishing that Federal Circuit has jurisdiction over appeals from final decisions of CIT).

18. See *Conoco*, 18 F.3d at 1590 (concluding that CIT erred in acquiescing to Government's arguments and not exercising jurisdiction over FTZ Board's imposition of conditions on grants of foreign trade subzones).

19. See 19 U.S.C. § 81r(c) (1988).

20. See 5 U.S.C. § 701-53 (1988).

21. See *infra* notes 27-52 and accompanying text (discussing historical development of CIT).

choosing the appropriate forum for seeking judicial relief.²² Both the CIT and the U.S. district courts have been struggling to define the scope of jurisdiction for trade disputes, defining which forum has jurisdiction over which type of dispute.²³ The lack of certainty over the appropriate jurisdictional boundaries has caused considerable confusion and costs as parties attempt to resolve increasingly complex issues that affect trade throughout the United States.²⁴ In recent decisions, however, both U.S. district courts and the CIT have taken significant steps to define the exclusive jurisdiction of the CIT.²⁵ Although these decisions only grant the CIT exclusive jurisdiction in the area of foreign-trade zones, the expansion could logically flow to other trade disputes under revenue and non-revenue raising statutory frameworks designed to facilitate increased trade. Therefore, as international trade disputes increase, parties may find more guidance in choosing the appropriate forum for resolving those disputes, and international trade law jurisprudence may take a step toward greater uniformity.

This Article will provide an overview of the changing jurisdiction of the CIT and discuss possible implications of this change on the wide array of trade disputes. Part I will briefly outline the historic evolution of the CIT and its jurisdictional mandate. Part II will provide background on the foreign-trade zones program. This program represents one of the first areas of trade law in which CIT jurisdictional issues have become more defined.²⁶ Part III will describe the existing jurisdictional statute of the CIT. Part IV will examine recent decisions of the Federal Circuit, the district courts, and the CIT that define the exclusive jurisdiction of the CIT as it relates to foreign-trade zones. Part V will analyze the positive and

22. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3730 [hereinafter COMMITTEE REPORT] (explaining that many suits involving international trade issues were brought in federal district courts rather than CIT because it was difficult to determine in advance whether particular case would fall within jurisdictional scheme of CIT); Gregory W. Carman, *Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992*, 13 NW. J. INT'L L. & BUS. 245, 250 (1992) (stating that CIT's jurisdiction, as interpreted by courts, creates confusing and costly jurisdictional maze denying litigants access to CIT to resolve legitimate customs and international trade disputes).

23. See *infra* notes 44-53 and accompanying text (discussing problems posed by confusing jurisdictional authority of CIT).

24. See *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 790 F. Supp. 279, 288-89 (Ct. Int'l Trade 1992) (stating that individuals and firms spend tremendous amounts of time and money trying to navigate jurisdictional scheme outlined in 28 U.S.C. § 1581), *rev'd*, 18 F.3d 1581 (Fed. Cir. 1994).

25. See *supra* note 15 (discussing holdings in *Conoco*, 18 F.3d 1581 and *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 22 F.3d 1110 (D.C. Cir. 1994)).

26. See *infra* notes 54-77 and accompanying text (discussing foreign-trade zones).

negative implications of this jurisdictional evolution and will evaluate this evolution in the context of the role of specialized courts. Finally, this Article will analyze the possible implications of these decisions on other areas of trade disputes.

I. HISTORICAL BACKGROUND OF THE COURT OF INTERNATIONAL TRADE (CIT)

The CIT originated from the need to provide uniform review of the classification of imported goods and the enforcement of tariffs imposed under Article I of the U.S. Constitution.²⁷ In 1890, Congress established the Board of General Appraisers to review decisions of the Bureau of Customs regarding classification of imported goods and tariff issues.²⁸ The Board of General Appraisers represented the first forum designed for the specialized review of actions of administrative agencies.²⁹ In 1926, the Board of General Appraisers was renamed the United States Customs Court, an Article I court.³⁰ Its powers and jurisdiction remained relatively the same.³¹ Thirty years later, the Customs Court was given Article III status.³² This change converted the Customs Court from functions "directed to the execution of one or more such powers . . . prescribed by Congress"

27. See also Carman, *supra* note 22, at 246 (explaining historical background of CIT). The U.S. Constitution grants Congress the power to regulate commerce with foreign nations and to "lay and collect Taxes, Duties, Imports and Excises." U.S. CONST. art. I, § 8, cl. 1.

28. See Administrative Customs Act, ch. 407, 26 Stat. 131 (1890) (creating Board of General Appraisers and delineating scope of Board's authority). The Board of General Appraisers was established to oversee the appraisal and classification of goods imported into the United States to ensure that the methods of appraisal and classification were applied uniformly. *Id.* at 136.

29. See Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 n.3 (1990).

30. Act of May 28, 1926, ch. 411, 44 Stat. 669. Article I courts are generally designed as specialized courts to review administrative action and only possess those powers conferred on them by statute. See Symposium, *The United States Court of International Trade: Perspectives from the First Annual Judicial Conference* (Preface), 58 ST. JOHN'S L. REV. 685, 688-89 (1984) (discussing important role CIT plays by providing judicial review of administrative actions of government agencies dealing with importations). Article III courts are created as part of the judicial branch of government and have all the powers in law and equity possessed by, or conferred by statute, upon a U.S. district court. *Id.* at 689 (discussing authority of Article III courts). The Customs Courts Act of 1980 "reaffirmed and perfected" the Article III status of the CIT and allowed the Court to provide aggrieved parties with appropriate and complete relief. *Id.* at 688. The CIT is the only national trial court established under Article III of the Constitution. See 28 U.S.C. § 251(a) (1988); see also Carman, *supra* note 22, at 248-49 (explaining that CIT's jurisdiction includes civil suits arising from numerous types of actions by agencies as result of import transactions).

31. See COMMITTEE REPORT, *supra* note 22, at 19, reprinted in 1980 U.S.C.C.A.N. at 3730 (explaining that while 1926 Act sought to provide greater judicial review and uniformity in decisionmaking process, it did not make any essential changes in function, duties, or jurisdiction of new court).

32. See 28 U.S.C. § 251(a) (stating that CIT is established under Article III of Constitution).

with specified tenure³³ to functions integrated into the U.S. court "structure, organization, and procedure."³⁴ The change in status meant that CIT judges were granted life-tenure.³⁵ The permanence that accompanies life-tenure served to enhance institutional competence overall.³⁶

In 1970, Congress made "sweeping procedural reforms,"³⁷ and in the Trade Agreements Act of 1979,³⁸ Congress expanded the Customs Court's jurisdiction to include the granting of "new and increased responsibilities in the field of international trade litigation, particularly with regard to antidumping and countervailing [sic] duty cases."³⁹ Antidumping and countervailing duty cases arise under U.S. laws governing unfair trade practices and generally impose duties on imported goods to remedy unfair or discriminatory pricing and foreign subsidization of production, respectively.⁴⁰ The 1979 Act also authorized the Customs Court to grant, for the first time, injunctive relief in certain customs cases.⁴¹ In 1980, the Customs Court was finally granted the power both to issue monetary judgments and provide equitable relief.⁴²

At this point in the CIT's evolution, significant confusion existed as to the appropriate role of this specialized court in adjudicating increasingly complex international trade disputes.⁴³ The Honorable

33. See generally NATIONAL ARCHIVES & RECORDS ADMINISTRATION, THE UNITED STATES GOVERNMENT MANUAL 74-75 (1989) [hereinafter GOVERNMENT MANUAL].

34. *Id.*

35. See 28 U.S.C. § 252 (1988) (stating that judges are appointed for life and hold office during good behavior).

36. See GOVERNMENT MANUAL, *supra* note 33, at 74-75.

37. COMMITTEE REPORT, *supra* note 22, at 18, reprinted in 1980 U.S.C.C.A.N. at 3730; see also H.R. REP. NO. 267, 91st Cong., 2d Sess. 322 (1970), reprinted in 1970 U.S.C.C.A.N. 3188, 3191 (stating that purpose of bill, which was enacted as Customs Court Act of 1970, was to modernize judicial procedures in Customs Court to enable agencies to cope effectively with expanding workload).

38. 19 U.S.C. § 1516a (1994) (increasing responsibilities of Customs Court in international trade litigation, particularly with regard to antidumping and countervailing duties cases).

39. COMMITTEE REPORT, *supra* note 22, at 18, reprinted in 1980 U.S.C.C.A.N. at 3730. The Customs Court's increased role in deciding antidumping and countervailing duties issues has had a net effect of increasing the number of suits challenging governmental determinations in these areas. *Id.*

40. See 19 U.S.C. §§ 1671-71h, 1673-73h (1994).

41. See COMMITTEE REPORT, *supra* note 22, at 18, reprinted in 1980 U.S.C.C.A.N. at 3730 (explaining how grant of authority to issue injunctive relief significantly broadened CIT's authority).

42. See COMMITTEE REPORT, *supra* note 22, at 18, reprinted in 1980 U.S.C.C.A.N. at 3730 (explaining that prior to receiving authority to issue money judgments and equitable relief, Customs Court could only agree or disagree with decision of administrative agency).

43. See Carman, *supra* note 22, at 247 (discussing fact that many suits involving international trade issues started in federal district court instead of U.S. Customs Court because of difficulty of determining in advance whether particular case fell within Customs Court's jurisdictional scope and because Customs Court's powers were limited).

Gregory W. Carman, a current judge on the CIT, characterized this confusion as "a jigsaw puzzle with so many missing pieces that it was difficult for everyone except the closest observer to discover what the completed puzzle was intended to show."⁴⁴

Such confusion manifested itself in a conflict between the federal district courts and the Customs Court. Because parties were uncertain at the time of filing whether the Customs Court had jurisdiction over a particular matter, parties would file in the district courts.⁴⁵ In an effort to preserve the exclusive jurisdiction of the Customs Court to review only those controversies relating to imports, the district courts would often dismiss these suits, thereby upholding the constitutional requirement that duties be uniform throughout the United States.⁴⁶ As a result, parties seeking relief in international trade disputes were faced with a difficult choice as to the correct forum for judicial review, and the opportunity for relief remained uncertain depending on whether the litigant could persuade a particular court that it had jurisdiction over a particular dispute. Litigants began forum shopping and had to make strategic decisions as to the appropriate court in which to file. They also had difficult hurdles to overcome in convincing a particular court that jurisdiction was proper. These contentious litigation decisions cost the parties and the judicial system time and money.⁴⁷ Even more problematic than parties' confusion over jurisdiction was that judicial decisions originating in district courts and the Customs Court lacked uniformity.⁴⁸ Ironically, the Customs Court which was created, at least in part, to promote uniformity, resulted in even more confusion.⁴⁹

44. Carman, *supra* note 22, at 247; see also *Customs Courts Act of 1980: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 7 (1980) [hereinafter *Hearings*], quoted in COMMITTEE REPORT, *supra* note 22, at 18-19, reprinted in 1980 U.S.C.C.A.N. at 3730 (explaining problems with Customs Courts' authority and jurisdictional limitations prior to Customs Courts Act of 1980).

45. COMMITTEE REPORT, *supra* note 22, at 19, reprinted in 1980 U.S.C.C.A.N. at 3730-31 (explaining that suits involving international trade issues were instituted in federal district court because of greater certainty of court's jurisdiction and better chance for obtaining appropriate relief for alleged injuries).

46. COMMITTEE REPORT, *supra* note 22, at 19, reprinted in 1980 U.S.C.C.A.N. at 3731 (explaining how most district courts refused to entertain international trade suits because of constitutional requirement of uniformity in decisions relating to imports).

47. COMMITTEE REPORT, *supra* note 22, at 19, reprinted in 1980 U.S.C.C.A.N. at 3731 (explaining that Congress responded to jurisdictional uncertainty of Customs Court because it was concerned that persons with real grievances were wasting time and resources and were still not successfully obtaining judicial review of merits of their case).

48. See Carman, *supra* note 22, at 248 (referencing inconsistent judicial decisions emerging from Customs Court and district courts).

49. See Carman, *supra* note 22, at 248 (mentioning Senator Dennis DeConcini's statement that Customs Courts Act of 1980 was intended to eliminate jurisdictional confusion for purpose of gaining more uniformity).

In order to resolve this "jigsaw puzzle" approach to jurisdiction, Congress enacted the Customs Courts Act of 1980.⁵⁰ As a preliminary step, this legislation changed the name of the Customs Court to the Court of International Trade in order to "more accurately describe[] the court's clarified and expanded jurisdiction and its new judicial functions relating to international trade."⁵¹ Congress sought to reemphasize and clarify its intent that the expertise and national jurisdiction of the CIT be used exclusively in resolutions of disputes arising out of tariff and international trade laws. This clarification and expansion of the CIT's jurisdiction was an attempt to "eliminate the considerable jurisdictional confusion" between the federal district courts and the CIT and to "increase the availability of judicial review in the field of international trade in a manner which results in uniformity without sacrificing the expeditious resolution of import-related disputes."⁵² To establish its goal, Congress enacted a catch-all jurisdictional provision to expand the CIT's exclusive jurisdiction through a residual jurisdiction provision.

Although this redefinition of the CIT's jurisdiction did not immediately end the confusion, recent decisions of the CIT in the area of foreign-trade zones suggest that both the CIT and the district courts are now moving in a direction that will provide more clarity in the scope of the CIT's exclusive jurisdiction and more uniformity in the future resolution of international trade disputes.⁵³ The exercise of the CIT's jurisdiction in foreign-trade zones cases provides the most definitive example of the evolution of congressional intent to provide certainty in the forum for resolving trade disputes through the removal of jurisdictional conflict and forum shopping. Foreign-trade zones provide the clearest example because review of FTZ Board actions are not covered by the provisions explicitly granting exclusive jurisdiction to the CIT. Instead, FTZ Board actions, other than revocation, can only fall under the exclusive jurisdiction of the CIT if the catch-all residual jurisdiction provision applies. Thus, the application of the residual provision is the area where the courts can assert additional exclusive jurisdiction.

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

51. COMMITTEE REPORT, *supra* note 22, at 20, reprinted in 1980 U.S.C.C.A.N. at 3732.

52. 126 CONG. REC. 27,063 (1980); see also COMMITTEE REPORT, *supra* note 22, at 20, reprinted in 1980 U.S.C.C.A.N. at 3732 (referring to Senator DeConcini's statement that law would eliminate much jurisdictional confusion and increase access to courts for litigants in international trade).

53. See *supra* note 15 (discussing holdings in *Conoco* and *Miami Free Zone Corp.*).

II. FOREIGN-TRADE ZONES PROGRAM

The Foreign-Trade Zones Act of 1934 (FTZ Act), as amended,⁵⁴ created the FTZ Board in the Department of Commerce and authorized the FTZ Board to establish the foreign-trade zones (FTZ) program to expedite and to encourage foreign commerce through the formation of geographic areas in which corporations engaged in international trade could realize substantial Customs costs savings.⁵⁵ FTZs are "special enclosed area[s] within or adjacent to ports of entry, usually located at industrial parks or in terminal warehouse facilities."⁵⁶ FTZs provide Customs cost benefits because they are not considered part of U.S. territory and are therefore exempt from formal Customs entry procedures and requirements.⁵⁷ The FTZ Act also authorized the FTZ Board to review and approve applications for the establishment, operation, and maintenance of FTZs.⁵⁸ As of February 1995, over 200 foreign-trade zones operated throughout the United States, located primarily near port facilities, airports, or concentrations of manufacturing operations.⁵⁹

A. FTZ Benefits

Any public or private corporation that imports goods can participate in the FTZ program and have access to a wide range of potential Customs savings. Upon entry into a FTZ, foreign merchandise is not subject to the immediate payment of duties,⁶⁰ to formal entry procedures,⁶¹ or to quota requirements⁶² "unless or until it is

54. 19 U.S.C. §§ 81a-81u (1994).

55. See *A.T. Cross Co. v. Sunil Trading Corp.*, 467 F. Supp. 47, 50 (S.D.N.Y. 1979) (stating that legislative intent behind creation of FTZ program was to facilitate export from United States of goods originating in foreign ports without subjecting goods to U.S. taxes upon importation); *Fountain v. New Orleans Pub. Serv., Inc.*, 265 F. Supp. 630, 633 (E.D. La. 1967) (explaining that purpose for enacting FTZ program was to encourage and facilitate foreign commerce by providing areas for storage and reshipment of goods where goods would not be liable for customs duties).

56. HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 48-49 (Comm. Print 1993) [hereinafter OVERVIEW].

57. See 19 C.F.R. § 101.3 (1994) (listing current customs regions, districts, and ports of entry that are foreign-trade zones, and as such are exempt from formal customs entry procedures and requirements).

58. 19 U.S.C. § 81b (1994). The FTZ Board shares responsibility for FTZs with the Customs Service, which is in charge of supervision and enforcement of day-to-day operations. *Id.* §§ 81b-81d; see also OVERVIEW, *supra* note 55, at 49.

59. See FTZ Staff 1994, *U.S. Foreign-Trade Zones* (Feb. 10, 1995) (on file with *The American University Law Review*).

60. See 19 U.S.C. § 81c(a) (1994) (exempting qualified merchandise from U.S. customs laws and regulations until merchandise enters customs territory of United States).

61. *Id.*

62. *Id.*

subsequently imported into the U.S. Customs territory."⁶³ Generally, the importer of the merchandise into the FTZ must meet only minimal paperwork requirements administered by the U.S. Customs Service⁶⁴ and may hold the merchandise in an FTZ until it is needed,⁶⁵ thereby benefiting from increased cash flow based on the deferral of duty payments.⁶⁶ Further, some jurisdictions also allow the deferment or avoidance of state and local taxes.⁶⁷

Firms and corporations participating in the FTZ program also save costs by avoiding duty payments for foreign goods admitted into the FTZ and subsequently exported.⁶⁸ These goods are not subject to duties and escape costly duty drawback procedures.⁶⁹ In addition, reexported merchandise avoids the application of antidumping and countervailing duties and is not charged against any applicable import quotas.⁷⁰

With respect to merchandise imported into the Customs territory of the United States from the FTZ, corporations operating under FTZ status can reduce the amount of Customs duty liability owed in several situations.⁷¹ The most important example of such a reduction in liability is in the case of "inverted tariffs."⁷² Inverted tariffs occur when the tariff on the finished product entering the U.S. Customs territory is less than the tariff on the imported components.⁷³

63. OVERVIEW, *supra* note 56, at 49.

64. See 19 C.F.R. § 146.32 (1994) (explaining that requirements for merchandise to be admitted into zone are filing of application and issuance of permit).

65. See *id.* §§ 146.51 to .71 (explicating rules for transferring merchandise from foreign-trade zone).

66. See Robert J. Heilferty, The *Conoco* Decision: Exclusive Review of Foreign-Trade Zones Board Determinations by the U.S. Court of International Trade 2-3 (Nov. 1994) (unpublished manuscript, on file with *The American University Law Review*) (discussing potential customs savings with foreign-trade zones).

67. See 15 C.F.R. § 400.1(c) (1994) (setting forth regulations of FTZ Board with regard to foreign-trade zones in United States and delineating scope of statute).

68. See 19 U.S.C. § 81c(a) (1994) (outlining rules for handling merchandise in FTZ to qualify for tariff exemption).

69. *Id.* (providing exemption from duty for certain merchandise shipped into FTZ).

70. See 15 C.F.R. § 400.33(b)(2) (1994) (explaining consequences of application of restrictions on admission of items subject to antidumping and countervailing duty orders). Under normal circumstances, duty drawback is not available for antidumping and countervailing duties. 19 U.S.C. § 1677h (1994).

71. See OVERVIEW, *supra* note 56, at 51 (listing inverted tariff, *inter alia*, as way to reduce customs duty liability).

72. An inverted tariff results when unfinished components are subject to higher tariffs in comparison to tariff liability for the final product. Thus, inverted tariffs provide an incentive to manufacture or assemble components outside the United States. Between 1983 and 1987, 66 of 84 subzone applications (almost 80%) reviewed by the General Accounting Office cited avoiding inverted tariffs as one reason for applying for subzone status. U.S. GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: FOREIGN-TRADE ZONES PROGRAM NEEDS CLARIFIED CRITERIA 19 (1989) [hereinafter FTZ PROGRAM NEEDS CLARIFIED CRITERIA].

73. *Id.*

Because the FTZ Act permits importers to elect to pay a duty on either components and raw materials, or on the completed article,⁷⁴ importers may reduce their tariff liability by manufacturing or assembling higher duty components into a lower duty product.⁷⁵ The ability of U.S. firms to benefit from avoiding these inverted tariffs enables them to compete against foreign producers that import finished products at a lower tariff rate.⁷⁶ Obviously, the ability of U.S. industry to compete more readily with foreign producers in this era of enhanced global competition contributes to the preservation of not only the U.S. manufacturing and industrial base, but also of one of its scarcest resources, manufacturing and industrial jobs.⁷⁷

B. Categories of FTZs

The FTZ program provides for two categories of FTZs: general-purpose zones and special-purpose subzones.⁷⁸ A general-purpose zone may be granted to any port of entry that satisfies the requisite criteria.⁷⁹ The factors that the FTZ Board considers include: (1) the need for zone services in the port of entry area; (2) the adequacy of the operational and financial plans and the suitability of the proposed sites and facilities; (3) the extent of state and local government support; (4) the views of persons and firms likely to be affected; and (5) additional criteria relating to public policy and economic effects if the proposal involves manufacturing and production activity.⁸⁰

74. See OVERVIEW, *supra* note 56, at 51.

75. See OVERVIEW, *supra* note 56, at 51.

76. See OVERVIEW, *supra* note 56, at 51 (stating that inverted tariff is responsible for recent growth of FTZs in high technology as well as production of machinery, electronics, chemicals, and assembly of high value products). The number of FTZs grew from 7 general-purpose zones and 3 subzones in 1970 to 138 general purpose zones and 101 subzones in 1987. *Id.*; see also INTERNATIONAL TRADE COMMISSION, PUB. NO. 2059, THE IMPLICATIONS OF FOREIGN-TRADE ZONES FOR U.S. INDUSTRIES AND FOR COMPETITIVE CONDITIONS BETWEEN U.S. AND FOREIGN FIRMS 1-2 (1988) (explaining that most subzone operations are pursued for advantage of inverted tariff situations). Statistics compiled by the FTZ Board reflect the magnitude with which U.S. firms utilize the customs savings of "inverted tariffs" as applied to FTZs. According to the FTZ Board's 1992 Annual Report, 88% of merchandise received in all FTZs was not exported but was imported for domestic consumption. See 1992 FOREIGN-TRADE ZONES BOARD ANNUAL REPORT app. D, at 1-3. The advantages for U.S. industry are especially important in industries where import penetration is high. See HEILFERTY, *supra* note 66, at 4 (explaining that importer of merchandise benefits from increased cash flow based on deferral of duty payments).

77. See OVERVIEW, *supra* note 56, at 51 (explaining that inverted tariff results in increased manufacturing and industrial production and, therefore, increased manufacturing and industrial jobs).

78. See 15 C.F.R. § 400.21 (1994) (establishing two categories of FTZs and acceptable number and location of zones and subzones).

79. See 19 U.S.C. § 81b(b) (1994) (stating that each point of entry shall be entitled to at least one zone, but where point of entry is located within more than one state it shall have an additional zone for each state).

80. See 15 C.F.R. § 400.23(a) (1994).

General-purpose zones are generally administered by public corporations such as port authorities or local economic development agencies.⁸¹ Special-purpose subzones are established "to assist companies which were unable to relocate to or take advantage of an existing general-purpose zone."⁸² Because only a grantee of an approved general zone may apply to establish a subzone,⁸³ each subzone is technically a subordinate part of the general-purpose zone with which it is affiliated.⁸⁴ Subzones normally include single manufacturing plants designed for the assembly or manufacture of imported components into finished goods, and are typically administered by individual corporations under an agreement with the grantee/operator of the general-purpose zone.⁸⁵

C. FTZ Board

Decisions regarding the privilege of participation in the FTZ program are vested in the FTZ Board and administered by the Department of Commerce.⁸⁶ The members of the FTZ Board include the Secretaries of the Departments of Commerce, Treasury, and the Army, or their designated alternates,⁸⁷ with the Secretary of Commerce acting as the FTZ Board's chair.⁸⁸ Generally, the FTZ Board operates as an inter-agency committee with each member considering matters based on their jurisdictional responsibilities and areas of expertise.⁸⁹ The Department of Commerce is responsible for economic and industry impact issues;⁹⁰ the Department of the Treasury oversees the enforcement of Customs laws and the supervision of zone activity;⁹¹ and the Department of the Army, specifically

81. See *id.* § 81b(b) (authorizing preference to public corporations in grant of general-purpose zones); see also OVERVIEW, *supra* note 56, at 49-50 (stating that Port of Houston Authority administers FTZ for Port of Houston and Miami Free Zone Corp. operates FTZ at Miami International Airport).

82. OVERVIEW, *supra* note 56, at 49-50.

83. See OVERVIEW, *supra* note 56, at 50.

84. See OVERVIEW, *supra* note 56, at 50; see also 15 C.F.R. § 400.22(d) (1994) (stating that zone grantee of closest zone project in same state is eligible for grant of subzone).

85. See HEILFERTY, *supra* note 66, at 6.

86. See 15 C.F.R. § 400.11 (1994) (articulating authority of FTZ Board and giving chairman of Board, who is also Secretary of Department of Commerce, authority to appoint Executive Secretary of Board, call meetings of Board, and submit Board's annual report to Congress).

87. See *id.* § 400.2(b).

88. See *id.* (describing scope of Chairperson's authority); *id.* § 400.11(b) (defining authority of Chairman of FTZ Board).

89. HEILFERTY, *supra* note 66, at 5.

90. HEILFERTY, *supra* note 66, at 5 n.11; see also 15 C.F.R. §§ 400.23, 400.31 (1994) (establishing FTZ Board criteria for granting zones and subzones).

91. HEILFERTY, *supra* note 66, at 5 n.11.

the Army Corps of Engineers, advises the FTZ Board on land use and environmental matters.⁹²

The FTZ Board is charged with ensuring that the FTZ program operates "in the public interest"⁹³ and therefore has the power to limit or prohibit zone activity that "in its judgment is detrimental to the public interest."⁹⁴ The FTZ Board must also ensure that the FTZ does not conflict with U.S. trade and tariff policy.⁹⁵ In the 1980s, Congress and the Reagan administration initiated investigations to examine whether, and under what conditions, the conduct of manufacturing activity that resulted in the importation of goods under zone procedures, normally at lower duty rates, was in the "public interest."⁹⁶ In response to these investigations and the subsequent findings, the Department of Commerce in 1991 issued revised regulations designed to improve the administration of the FTZ program.⁹⁷ These revised regulations clarified the requirements for the establishment and review of FTZ operations and included authorization to review zone and subzone operations to determine whether these operations provide a net economic benefit to the United States.⁹⁸

As part of this new emphasis on the benefits of the FTZ program, the Department of Commerce also developed the so-called "public interest" test for the establishment and review of zone activity.⁹⁹ The "public interest" test was based on both "threshold" factors and economic factors.¹⁰⁰ With regard to the "threshold" factors, the regulations state:

92. HEILFERTY, *supra* note 66, at 5 n.11.

93. 15 C.F.R. § 400.31(a) (1994).

94. *Id.* (explaining that determination of public interest is to be made with reference to factors in 15 C.F.R. § 400.31(b) (1994)); see *infra* notes 101-03 and accompanying text (reciting factors enumerated in 15 C.F.R. § 400.31(b)).

95. See 15 C.F.R. § 400.31(b)(1)(i) (1994) (mandating that FTZ Board shall deny or restrict authority for activity if activity is inconsistent with U.S. trade and tariff law).

96. See generally *Operation of the Foreign-Trade Zones Program: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 174-75 (1989) (arguing that zone procedures that encourage importation of items that otherwise would be produced and consumed domestically is major economic incentive); *Foreign-Trade Zones: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 101st Cong., 1st Sess. 51 (1989) (stating that purpose of FTZ is to expedite and encourage foreign commerce consistent with public interest); GENERAL ACCOUNTING OFFICE, FOREIGN-TRADE ZONES PROGRAM NEEDS CLARIFIED CRITERIA 5 (1989) (explaining that subzones are ancillary sites to be authorized when it can be demonstrated that proposed activity will result in significant public benefit).

97. See OVERVIEW, *supra* note 56, at 52 (explaining that revised regulations in 15 C.F.R. § 400.31 (1994) clarify criteria for establishment and review of FTZ).

98. See OVERVIEW, *supra* note 56, at 52.

99. 15 C.F.R. § 400.31 ("[T]he Board shall determine whether the activity is in the public interest by viewing it in relation to the evaluation criteria . . .").

100. See *id.*

[The FTZ Board] shall deny or restrict authority for proposed or ongoing activity if it determines that:

- (i) The activity is inconsistent with U.S. trade and tariff law, or policy which has been formally adopted by the Executive branch;
- (ii) Board approval of the activity under review would seriously prejudice U.S. tariff and trade negotiations or other initiatives; or
- (iii) The activity involves items subject to quantitative import controls or inverted tariffs, and the use of zone procedures would be the direct and sole cause of imports that, but for such procedures, would not likely otherwise have occurred, taking into account imports both as individual items and as components of imported products.¹⁰¹

After reviewing the "threshold" factors, and if further consideration warrants, the FTZ Board must examine economic factors to determine "the net economic effect of the activity or proposed activity."¹⁰² The eight economic factors include:

- (i) Overall employment impact;
- (ii) Exports and reexports;
- (iii) Retention or creation of manufacturing or processing activity;
- (iv) Extent of value-added activity;
- (v) Overall effect on import levels of relevant products, including import displacement;
- (vi) Extent and nature of foreign competition in relevant products;
- (vii) Impact on related domestic industry, taking into account market conditions; and
- (viii) Other relevant information relating to public interest and net economic impact considerations, including technology transfers and investment effects.¹⁰³

This "public interest" test, together with other regulatory criteria relating to support from state and local authorities, has been the basis of much litigation when certain groups oppose efforts by others to apply for subzone status.¹⁰⁴ Further, opposition to the grant of subzones has originated from some domestic industries and labor organizations that are particularly sensitive to imports, such as

101. *Id.* § 400.31(b)(1).

102. *Id.* § 400.31(b)(2).

103. *Id.*

104. *See generally* Phibro Energy, Inc. v. Franklin, 822 F. Supp. 759 (Ct. Int'l Trade 1993) (noting that denial of subzone application was due to opposition from local taxing authorities who were concerned with losing tax revenue).

automobile parts.¹⁰⁵ Moreover, U.S. parts manufacturers have criticized the FTZ program for reducing their effective tariff protection.¹⁰⁶

III. JURISDICTION OF THE CIT

In general, the U.S. district courts are vested with civil jurisdiction over most disputes by virtue of federal question jurisdiction,¹⁰⁷ diversity jurisdiction,¹⁰⁸ or other specific statutory provisions.¹⁰⁹ The district courts are divested of jurisdiction, however, if the subject matter of the action falls within the exclusive jurisdiction of the CIT.¹¹⁰ As stated above, the parameters of the CIT's jurisdiction were redefined in the Customs Courts Act of 1980 to eliminate the confusion between the jurisdictional mandates of the federal district courts and the then-named Customs Court.¹¹¹ As the Supreme Court stated: "Congress intended, first and foremost, to remedy the confusion over the division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts and to 'ensure . . . uniformity in the judicial decisionmaking process.'"¹¹² Unfortunately, contrary to its intention, Congress effectively created a "jurisdictional gauntlet for litigants" seeking access to the CIT.¹¹³

105. See OVERVIEW, *supra* note 56, at 50 (stating that domestic industries sensitive to imports occasionally oppose subzone application); see also *Armco Steel Corp. v. Stans*, 431 F.2d 779, 783-84 (2d Cir. 1970) (addressing contention whether establishment of shipbuilding subzone with duty exemption for steel imports harms U.S. steel industry).

106. See OVERVIEW, *supra* note 56, at 50 (stating that sharp growth of manufacturing in subzones has led to increased criticism by parts producers for reducing their tariff protection).

107. 28 U.S.C. § 1331 (1988) (stating that U.S. district courts shall have jurisdiction over all matters arising under laws of United States).

108. *Id.* § 1332 (stating that U.S. district courts shall have jurisdiction over all controversies exceeding \$50,000 between citizens of different states, citizen of state and citizen of foreign state, or foreign citizens as parties to suit).

109. See *id.* § 1338 (providing for federal jurisdiction over areas of patents, trademarks, copyrights, and unfair competition).

110. See *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182-83 (1987) (holding that district court had jurisdiction over dispute relating to "gray market" goods because this area is not one over which Congress has expressly granted CIT exclusive jurisdiction and that district court had jurisdiction under both federal question and special jurisdictional provision relating to trademarks).

111. See *supra* notes 50-53 and accompanying text (discussing reorganization under Customs Courts Act of 1980 and identifying elimination of jurisdictional confusion as important goal of reorganization).

112. *K Mart Corp.*, 485 U.S. at 188 (quoting COMMITTEE REPORT, *supra* note 22, at 20, reprinted in 1980 U.S.C.C.A.N. at 3731).

113. Carman, *supra* note 22, at 250 (explaining that interpretations of jurisdiction of CIT have failed to provide parties with guidance in choosing appropriate forum to seek judicial relief).

A. *Statutory Provisions*

The CIT generally functions as a specialized court created to review administrative actions with respect to trade issues. The specific grant of exclusive jurisdiction in the CIT is provided in 28 U.S.C. § 1581 (a)-(h). The provisions provide exclusive jurisdiction for disputes involving: (1) Customs protests under sections 515 and 516 of the Tariff Act of 1930;¹¹⁴ (2) antidumping and countervailing duty proceedings under section 516A of the Tariff Act of 1930;¹¹⁵ (3) review of administrative decisions by the Secretary of Labor pertaining to the granting or denial of "eligibility of workers for adjustment assistance;"¹¹⁶ (4) "final determination[s] of the Secretary of the Treasury" relating to the Buy American Act;¹¹⁷ (5) release of "confidential information;"¹¹⁸ (6) customs brokers' licenses;¹¹⁹ and (7) pre-importation rulings by the Secretary of the Treasury.¹²⁰ If relief is not available under one of the jurisdictional provisions described above, a litigant may seek relief under the residual jurisdiction section set forth in 28 U.S.C. § 1581(i). It states:

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section [prohibiting imports of immoral articles], the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

- (1) revenue from imports or tonnage;
- (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
- (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

114. 28 U.S.C. § 1581(a)-(b) (1988).

115. *Id.* § 1581(c).

116. *Id.* § 1581(d).

117. *Id.* § 1581(e).

118. *Id.* § 1581(f).

119. *Id.* § 1581(g).

120. *Id.* § 1581(h).

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516(A) (a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free Trade Agreement and section 516A(g) of the Tariff Act of 1930.¹²¹

This section marks the heart of the confusion over the scope of the CIT's exclusive jurisdiction. The legislative history of the residual jurisdiction section shows that Congress intended to broaden the exclusive jurisdiction of the CIT in order to eliminate the confusion over the jurisdictional boundaries between the district courts and the CIT.¹²²

The specific grants of exclusive jurisdiction together with the residual jurisdiction section do not encompass every suit against the United States challenging trade-related laws and regulations, such as laws regulating export activity or laws restricting imports of specific products.¹²³ To the contrary, if "Congress had wished to do so it could have expressed an intent much more clearly and simply by, for example, conveying to the specialized court 'exclusive jurisdiction . . . over all civil actions against the [Government] directly affecting imports'"¹²⁴ or other more expansive language. The absence of a clear demarcation as to the exclusive jurisdiction of the CIT through the use of this language created the historic jurisdictional uncertainty.

B. Interpretation of the Residual Jurisdiction Section

In order to bring a claim to the CIT, plaintiffs must first determine whether the subject matter falls within either the seven specific

121. *Id.* § 1581(i).

122. See COMMITTEE REPORT, *supra* note 22, at 33, reprinted in 1980 U.S.C.C.A.N. at 3745. This legislative history described the section as

granting broad residual jurisdiction to the Court of International Trade. This section granted the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws. The purpose of this section was to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court.

Id. According to the House Report, subsection (i) is designed to "expand the jurisdiction of the Court of International Trade" but is "intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law." *Id.* at 47-49, reprinted in 1980 U.S.C.C.A.N. at 3758-60.

123. See 7 U.S.C. § 1854 (1994); 28 U.S.C. § 1581 (1988); 50 U.S.C. app. § 2401 (1988).

124. *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1987) (quoting S. 2857, 95th Cong., 2d Sess. (1978)). The Court explained that by rejecting this approach, Congress opted for a scheme that achieved goals of uniformity and clarity by delineating customs-related matters over which CIT would have exclusive jurisdiction. *Id.*

provisions of the CIT's exclusive jurisdiction or the CIT's residual jurisdiction provision.¹²⁵ If so, they must use the applicable jurisdictional pathway for administrative and judicial relief expressed in the relevant statute for that particular provision.¹²⁶ In most cases, if plaintiffs fail to fit the case within one of these "eight jurisdictional fingers," relief in the CIT will not be available.¹²⁷ This includes those cases where the plaintiff could have sought relief under one of the specific jurisdictional provisions but instead filed under the residual jurisdiction provision.¹²⁸

The Court of Appeals for the Federal Circuit narrowed the reach of the residual jurisdiction by creating a new jurisdictional standard.¹²⁹ In order to proceed under the residual jurisdiction provision, the plaintiff had the burden to show that the remedy available under one of the specific provisions would be "manifestly inadequate."¹³⁰ Further interpretations by the courts have reiterated the belief that the residual jurisdiction section would not be available to create "new causes of action not founded on other provisions of existing law"¹³¹ and was instead created "to reflect existing law and not to expand the Court of International Trade jurisdiction."¹³² As Judge Carman has commented:

The narrow interpretation given to [section] 1581(i) by the courts has contributed to the effect of requiring individuals and firms that have real international trade and customs law grievances to expend

125. See *United States v. Uniroyal, Inc.*, 687 F.2d 467, 472 (C.C.P.A. 1982) (denying judicial review of Customs "internal advice" ruling because plaintiff could have properly invoked CIT's jurisdiction had appropriate Customs protest procedures been followed); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (holding that CIT jurisdiction under 28 U.S.C. § 1581(i) may not be invoked when jurisdiction under another provision of 28 U.S.C. § 1581 is available, unless remedy under provision is clearly inadequate), *cert. denied*, 484 U.S. 1041 (1988).

126. See *Miller*, 824 F.2d at 964 (upholding dismissal of complaint relating to administrative review of countervailing duty because plaintiff failed to follow appropriate jurisdictional pathway).

127. See Carman, *supra* note 22, at 250 (explaining that subject matter jurisdiction of CIT is limited to eight enumerated categories).

128. See *Uniroyal*, 687 F.2d at 472 (ruling that CIT did not have jurisdiction under residual provision, § 1581(i) because plaintiff could have filed protest pursuant to statutory scheme of § 1581(a)); see also Carman, *supra* note 22, at 251 (explaining that jurisdiction under § 1581(i) is not available if jurisdiction is available under other provisions of § 1581).

129. See Carman, *supra* note 22, at 252 (contending that "manifestly inadequate" standard articulated in *Miller* added new "judicially-required prerequisite" absent from statute or legislative history); see also *infra* notes 18-21 and accompanying text.

130. See *Miller*, 824 F.2d at 963; *Uniroyal*, 687 F.2d at 472; Carman, *supra* note 22, at 252 (clarifying standard that plaintiff must meet when remedy is available under other provisions of § 1581).

131. See Carman, *supra* note 22, at 252 (quoting *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556 (Fed. Cir. 1988) (holding that CIT lacked jurisdiction over dispute regarding Customs Court ruling because plaintiff failed to file protest with Customs Court as is procedurally required before appeal may be taken)).

132. See Carman, *supra* note 22, at 252 (quoting *National Corn Growers*, 840 F.2d at 1556).

significant amounts of time and money in sometimes futile efforts to obtain judicial review on the merits of the case.¹³³

Moreover, Judge Carman stated that both the statutory scheme itself and the narrow interpretations of the residual jurisdiction provision have "resulted in limiting access by litigants to resolve legitimate cases and controversies pertaining to customs and international trade cases."¹³⁴

IV. REDEFINITION OF THE EXCLUSIVE JURISDICTION OF THE CIT

The confusion over whether the CIT or federal district court is the appropriate forum for resolving relevant trade disputes originates from both the statutory language and the narrow judicial interpretations of this language.¹³⁵ Given the static state of the CIT's statutory jurisdictional grant,¹³⁶ any attempt to ameliorate the jurisdictional confusion must come from a consistent mandate from both the CIT and the district courts. In the area of FTZs, these courts have taken a significant step toward clarifying the jurisdictional demarcation.

A. Judicial Review of FTZ Board Decisions

Aside from decisions to revoke zone status,¹³⁷ the FTZ Act does not specify which court has jurisdiction to review FTZ Board decisions. As stated earlier, either the CIT or federal district court will review FTZ Board decisions depending on the nature of the dispute.¹³⁸ Although the Customs Courts Act of 1980 was intended to delineate the jurisdictional boundaries, it did not clarify where a FTZ case, or any other case, was to be properly heard.

The only explicit provision for judicial review of FTZ decisions applies to orders revoking the grant of an FTZ.¹³⁹ This provision permits the grantee to appeal such a revocation to the court of

133. See Carman, *supra* note 22, at 252.

134. See Carman, *supra* note 22, at 252.

135. See 28 U.S.C. § 1581(a)-(i) (1988) (governing subject matter jurisdiction of CIT).

136. Congress made minor changes to the foreign-trade zones program in the implementing legislation for the North American Free Trade Agreement. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2091 (1993) (codified in 19 U.S.C. § 3301 note).

137. 19 U.S.C. § 81r(c) (1994) (stating that order revoking grant shall be final and conclusive unless grantee appeals to court of appeals for circuit in which zone is located within 90 days).

138. See 28 U.S.C. § 1581(a)-(i) (providing exclusive jurisdiction to CIT over certain disputes); see also *supra* notes 114-24 and accompanying text (discussing explicitly enumerated areas over which CIT has exclusive jurisdiction).

139. 19 U.S.C. § 81r(c) (providing appellate procedures for grantee whose FTZ grant has been revoked).

appeals for the circuit in which the zone is located.¹⁴⁰ Prior to 1980, this limited guidance did not present a problem because court action relating to FTZ Board determinations was rare. In fact, only one court case specifically addressed a FTZ Board decision prior to 1980.¹⁴¹ In the 1980s, the expansion of the FTZ program¹⁴² necessarily increased the probability that FTZ Board decisions would result in increased judicial examination. In the CIT, the first case to review a FTZ Board determination was *Conoco, Inc. v. United States Foreign-Trade Zones Board*.¹⁴³ The *Conoco* case and its judicial history represent the key initial step toward defining the exclusive jurisdiction of the CIT.¹⁴⁴

B. *Conoco, Inc. v. United States Foreign-Trade Zones Board*

In *Conoco*, the FTZ Board approved subzone applications filed by the Lake Charles Harbor and Terminal District (District).¹⁴⁵ The District operated an FTZ in Lake Charles, Louisiana, and it filed subzone applications for Conoco, Inc. and Citgo Petroleum Corp. for their crude oil refineries adjacent to the Port of Lake Charles.¹⁴⁶ In approving the applications, the FTZ Board imposed certain conditions on the applicants, including a requirement that they pay duties on imported crude oil or refined products used as fuel.¹⁴⁷ Also, the FTZ Board eliminated the inverted tariff benefits.¹⁴⁸

140. *Id.* (stating that grantee must file petition with appropriate court of appeals praying that order of FTZ Board be set aside).

141. *See* *Armco Steel Corp. v. Stans*, 303 F. Supp. 262, 272 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779, 781, 790 (2d Cir. 1970) (holding that FTZ Board order granting subzone to shipyard was not improper although it permitted construction of vessels with duty-free foreign steel and area would be used solely by private corporation).

142. *See* FTZ PROGRAM NEEDS CLARIFIED CRITERIA, *supra* note 72, at 13 (stating that "authorized general purpose zones increased from 17 to 138 while subzones increased from 2 to 101 between fiscal years 1975-87").

143. 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd*, 18 F.3d 1581 (Fed. Cir. 1994).

144. *See* *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 790 F. Supp. 279, 282 (Ct. Int'l Trade 1992) (holding that CIT lacked jurisdiction over action by oil companies challenging conditions placed on grants of FTZ), *rev'd*, 18 F.3d 1581, 1590 (Fed. Cir. 1994) (holding that CIT does have jurisdiction to review FTZ Board's imposition of conditions of foreign trade subzones).

145. *Conoco*, 790 F. Supp. at 280.

146. *Id.*

147. *Id.*

148. *See* Resolution and Order Approving the Application of the Lake Charles Harbor and Terminal District for a Subzone at the Conoco, Inc., Refinery in Calcasieu Parish, LA, 53 Fed. Reg. 52,455 (1988); Resolution and Order Approving the Application of the Lake Charles Harbor and Terminal District for a Subzone at the Citgo Petroleum Corp. Refinery in Calcasieu Parish, LA, 54 Fed. Reg. 27,660 (1989), *cited in* *Conoco*, 790 F. Supp. at 280-81.

1. *District Court*

In response to the FTZ Board's decision, Conoco and Citgo filed an action in the U.S. District Court for the Western District of Louisiana.¹⁴⁹ In January 1990, the district court dismissed the suit for lack of subject matter jurisdiction and found that although the residual jurisdiction provision of the CIT did not create any substantive rights, the provision should be applicable to the case whether or not an actual tariff on foreign commerce was presently being imposed.¹⁵⁰

2. *Court of International Trade*

Later that year, Conoco and Citgo refiled their claims in the CIT asserting that the conditions imposed by the FTZ Board were discriminatory, unreasonable, arbitrary and capricious, in excess of statutory authority, and an abuse of discretion.¹⁵¹ In this action, Conoco and Citgo asserted that the CIT had exclusive jurisdiction over this dispute by virtue of the residual provisions of § 1581(i).¹⁵² The Government responded that no court had jurisdiction to review the actions of the FTZ Board in this instance or, in the alternative, that the possible jurisdictional paths otherwise available are inapplicable to the case because the FTZ Board's actions failed to meet the prerequisites for subject matter jurisdiction.¹⁵³

To support its argument that no court had jurisdiction to review FTZ Board actions, the Government contended that Congress only intended for the CIT to review revocations of zone or subzone status—as explicitly provided in the statute—and did not provide for review of FTZ Board actions similar to those involved in the *Conoco* case.¹⁵⁴ Claiming that the plaintiffs had not utilized the appropriate jurisdictional path, the Government argued that the plaintiffs had not followed the Customs protest procedures.¹⁵⁵ As discussed previously,¹⁵⁶ the CIT has required that when another remedy was, or could have been, available under one of the CIT's other jurisdictional

149. *Conoco*, 790 F. Supp. at 280.

150. *Id.*

151. *Id.* at 279.

152. *Id.* at 281.

153. *Id.*

154. *Id.*

155. *See id.* at 287-88 (noting that Government supported position that plaintiffs failed to take advantage of Customs protest procedures by pointing out that Citgo had used its subzone and paid duties on fuel consumed in subzone).

156. *See supra* notes 125-34 and accompanying text.

provisions, the party seeking to assert the residual provision had the burden to meet the threshold requirement of showing that the remedy would be "manifestly inadequate."¹⁵⁷

The CIT held that the plaintiffs failed to follow the necessary prerequisites under the other available provisions providing exclusive jurisdiction and failed to demonstrate that availing themselves of another provision was "manifestly inadequate."¹⁵⁸ Thus, the CIT concluded that the action was premature under § 1581(a)¹⁵⁹ and barred under § 1581(i).¹⁶⁰ The CIT did not address the argument advanced by the Government that no court had jurisdiction to review this particular case.¹⁶¹

Although the CIT ruled against the plaintiffs, Judge Carman substantially addressed, in dicta, the jurisdictional problems facing litigants in trade cases such as *Conoco*.¹⁶² He stated:

Merely because a court perceives what it believes might be a wrong does not give the court the power to right the perceived wrong. This Court is powerless to act where its jurisdiction has not been properly invoked. Our appellate court has held, and we are bound to follow the rule, that subsection (i) cannot generally be used to bypass administrative review where there is an opportunity for meaningful protest.

....

This Court feels compelled to express its sense of exasperation and frustration with the results of this case. Individuals and firms are often required to expend an inordinate amount of time and money to obtain judicial review in this Court. They are required to navigate arcane jurisdictional passages. They waste time and resources fighting over jurisdiction and oftentimes they are denied

157. *Conoco*, 790 F. Supp. at 284 (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988)).

158. *Id.* at 285; see also *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1556-57 (Fed. Cir. 1988) (holding that 28 U.S.C. § 1581(i) was not intended to circumvent process of administrative protest); *United States v. Uniroyal*, 687 F.2d 467, 472 (C.C.P.A. 1982) (same).

159. See *Conoco*, 790 F. Supp. at 285 (holding that § 1581(a) is not available to assert jurisdiction for review of Customs protest and subsequent denial because plaintiffs did not await assessments and liquidations by Customs and did not file protest that resulted in whole or in part in denial of relief).

160. *Id.* at 288. The court held that plaintiffs could not assert jurisdiction under the residual jurisdictional provision, § 1581(i), because they had not "articulated any persuasive reason why waiting to bring an action under § 1581(a) would be a manifestly inadequate remedy or that there is some threat of immediate injury or irreparable harm to an industry." *Id.*

161. See *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1584 (Fed. Cir. 1994) (rejecting Government's argument on appeal that court need not review Government's contention in court below that conditions placed on grant by FTZ Board were unreviewable by any court, even though lower court did not reach that issue), *rev'g* 790 F. Supp. 279 (Ct. Int'l Trade 1992).

162. See *Conoco*, 790 F. Supp. at 288-89.

a chance to be heard on the merits of the case. These obstacles unnecessarily increase cost and hurt the efforts of the United States to be competitive in the international community.¹⁶³

After describing the jurisdictional conflict between the CIT and the district courts and the use of the conflict by the Government to circumvent the review of Board actions, Judge Carman stated that:

The instant case is another example of this kind of jurisdictional ping-pong that continues to subsist. It must be brought under control.

. . . .

Congress needs to re-examine how to implement the broad jurisdictional mandate it sought to confer upon the Court of International Trade with the enactment of § 1581(i) to ensure compliance with the constitutional mandate requiring uniformity of duties throughout the United States.¹⁶⁴

3. *Federal Circuit*

In response to the CIT's decision, the plaintiffs appealed in the United States Court of Appeals for the Federal Circuit.¹⁶⁵ The Federal Circuit first addressed the issue of whether any court had jurisdiction to review the FTZ Board's actions.¹⁶⁶ On this issue, the Federal Circuit stated that "judicial review of agency action is to be presumed, absent clear and convincing evidence of congressional intent to the contrary."¹⁶⁷ The Federal Circuit found that the absence of language in the statute did not amount to clear and convincing evidence for the requisite congressional intention that the FTZ Board's actions are barred from review.¹⁶⁸ The Federal Circuit then held that orders of the FTZ Board, regardless of the issue involved, are "generally subject to judicial review in accordance with established principles of law."¹⁶⁹

Next, the Federal Circuit addressed the issue of which forum was appropriate for reviewing the FTZ Board's actions.¹⁷⁰ Following a discussion of the congressional intent surrounding the jurisdiction issue,¹⁷¹ the court concluded that if jurisdiction resides under the

163. *Id.*

164. *Id.* at 289.

165. *Conoco*, 18 F.3d at 1582.

166. *Id.* at 1584.

167. *Id.* at 1585.

168. *Id.*

169. *Id.*

170. *Id.* at 1586.

171. *Id.* Quoting from the legislative history behind the enactment of § 1581(i), the court reiterated that the purpose of the residual jurisdictional provision was to eliminate confusion over the jurisdictional demarcation between the district courts and the CIT, to eliminate the

provisions of § 1581, the CIT would have sole responsibility for judicial review of the substantive issues appellant raises.¹⁷² If no grant of jurisdiction can be found, the district courts may invoke their general administrative review function.¹⁷³ The court stated:

Congress had in mind consolidating this area of administrative law in one place, and giving to the Court of International Trade, with an already developed expertise in international trade and tariff matters, the opportunity to bring to it a degree of uniformity and consistency. Obviously that would not be possible if jurisdiction were spread among the district courts throughout the land.¹⁷⁴

In determining whether the CIT had exclusive jurisdiction, the Federal Circuit concluded that the plaintiffs were not required to proceed with a Customs protest under § 1581 (a) because Customs did not have authority to review, reverse, or modify FTZ Board actions in a Customs protest proceeding.¹⁷⁵ Thus, the court held that "subsection (a) is not intended to provide an effective jurisdictional vehicle."¹⁷⁶ In rendering this conclusion, the court relied on both case law¹⁷⁷ and legislative history.¹⁷⁸

Finally, the Federal Circuit addressed the issue of whether the residual jurisdictional provision, § 1581(i), applied in this in-

difficulties that this confusion caused for trade litigants, and to ensure that this type of suit was heard on the merits. *Id.* (citing COMMITTEE REPORT, *supra* note 22, at 47, reprinted in 1980 U.S.C.C.A.N. at 3759).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1587. In essence, the court found that relief under Customs protest proceedings would be manifestly inadequate because the protest proceedings do not apply to the actions of a separate agency, the FTZ Board, which is not under the jurisdiction of the Treasury Department. *Id.* The court also detailed the extensive steps that Conoco and Citgo would be required to undertake to effectuate a Customs protest. The protest would require:

Conoco and Citgo to activate their respective subzones, import crude oil therein, have Customs assess duties on that oil, pay those duties, file a protest with Customs, and then await the decision of Customs to deny the protest—all before filing suit to challenge the conditions the FTZ Board imposed on the grant of the subzone.

Id. at 1584.

176. *Id.* at 1587.

177. *Id.* at 1587-88. The court discussed *Luggage & Leather Goods Mfrs. of Am. v. United States*, 588 F. Supp. 1413, 1420-22 (Ct. Int'l Trade 1984) (holding that CIT could exercise jurisdiction under § 1581(i) for challenge to presidential order designating certain articles eligible for duty-free treatment because requiring initial recourse under other jurisdictional provisions would have been "futile and inappropriate") and *United States Sugar Refiners' Ass'n v. Block*, 544 F. Supp. 883, 887 (Ct. Int'l Trade) (holding that CIT could exercise jurisdiction under § 1581(i) for challenge to presidential proclamation imposing import quotas on sugar because requiring initial recourse to other jurisdictional provisions would have been "inequitable and an insistence of a useless formality"), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982). See *Conoco*, 18 F.3d at 1587-88.

178. *Id.* at 1588 (noting that Congress removed language in § 1581(a) in response to concerns that litigants may use section to collaterally attack Customs' actions).

stance.¹⁷⁹ First, the Federal Circuit declared that, based on a straightforward reading, the sweep of subsection (i) appeared to cover the issues that the appellants raised.¹⁸⁰ According to the court, the FTZ program arose under laws designed to deal with revenue from imports, and the purpose of the program was to provide special rules for determining and assessing duty rates for merchandise imported into these zones.¹⁸¹ Thus, the FTZ action would fall squarely under subsection (i) (1), which covered civil actions arising out of any law of the United States providing "for revenues from imports or tonnage."¹⁸² Second, the court distinguished the facts in *Conoco* from the cases cited by the Government.¹⁸³ Third, the court found that relief under another jurisdictional provision, subsection (h), was "manifestly inadequate" for the same reasons that relief under subsection (a) was inadequate—because it provided relief from an action by the Department of Treasury, the provision would not provide effective review of an action of the FTZ Board because it was an agency independent of Treasury.¹⁸⁴

179. *Id.*

180. *Id.*

181. *Id.*

182. *See id.* (quoting 28 U.S.C. § 1581(i)(1) (1988)).

183. *Id.* at 1588-89. In *K Mart Corp. v. Cartier, Inc.*, the Supreme Court held that the term "embargoes" used in § 1581(i)(3) did not give the CIT jurisdiction over certain gray-market goods. As described by the Supreme Court, "[a] 'gray market' good is a foreign-manufactured good bearing a valid United States trademark, which is imported without the consent of the United States trademark owner." *Id.* at 179. The Court viewed the case as essentially private enforcement on behalf of trademark owners. *Id.* The Court found that the CIT's jurisdictional lines were narrowly drawn and that the CIT did not have any "specialized expertise" in general trademark law. *Id.* at 189. The *Conoco* court distinguished *K Mart Corp.* by stating that:

[T]here can be no question that we are here dealing with issues of governmental law and policy regarding customs and tariffs, the type of issues with which the Court of International Trade is acknowledged to have expertise. . . . [W]e have no difficulty finding within the parameters of subsection (i) the precise terms needed to cover the issues here.

Conoco, 18 F.3d at 1589. The Federal Circuit also distinguished *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988), a case in which it ruled against a producer who argued that relief under § 1581(i)(b) was manifestly inadequate because the decision under review in *National Corn Growers* was one that Customs had the authority to correct. *Conoco*, 18 F.3d at 1589. The remaining cases cited by the Government were distinguished because relief could be found under other subsections of § 1581. *See id.* (distinguishing *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 360 (Fed. Cir. 1992) (involving Customs protest proceeding that could have been challenged under subsection (b)); *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987) (focusing on administrative review of countervailing duty order where plaintiff could have invoked subsection (c)), *cert. denied*, 484 U.S. 1041 (1988); *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1550-51 (Fed. Cir. 1983) (appealing Customs protest proceeding where subsection (a) was available), *cert. denied*, 466 U.S. 937 (1984); *United States v. Uniroyal*, 687 F.2d 467, 472 (C.C.P.A. 1982) (involving protest proceeding followed by judicial review under subsection (a)).

184. *Conoco*, 18 F.3d at 1590.

Thus, the court held that the CIT erred by not exercising jurisdiction under § 1581(i) because the protest procedure under § 1581(a) was "manifestly inadequate" and because the action was explicitly covered under § 1581(i)(1).¹⁸⁵ The court further stated that it was time to end the "unproductive jurisdictional ping-pong games," and instead to provide litigants with the right to expeditious and timely decisions on the merits.¹⁸⁶

The Federal Circuit then remanded the case back to the CIT for an adjudication on the merits.¹⁸⁷ The CIT subsequently remanded the case to the FTZ Board to explain more fully the rationale underlying its decision to condition the subzone grant, including an explanation as to how the conditions imposed on Conoco's and Citgo's subzone grants were intended to serve the public interest.¹⁸⁸

C. Miami Free Zone Corp. v. Foreign Trade Zones Board

Notwithstanding the *Conoco* decision, the move toward consistent application of the CIT's jurisdictional mandate in FTZ cases was still contingent on the response of the district courts and their appellate courts. This response was critical because the receptiveness of the CIT to exercising exclusive jurisdiction in FTZ cases would be undermined if district courts did not deny jurisdiction in relevant cases. In *Miami Free Zone Corp. v. Foreign Trade Zones Board*, the U.S. Court of Appeals for the District of Columbia Circuit followed *Conoco* and held that the residual jurisdiction provision was sufficiently broad to cover FTZ Board determinations.¹⁸⁹

185. *Id.*

186. *Id.* In *Phibro Energy, Inc. v. Franklin*, the CIT held that it lacked subject matter jurisdiction to review the case based on similar grounds as to the CIT's holding in *Conoco*. 822 F. Supp. 759, 765-66 (Ct. Int'l Trade 1993), *rev'd sub nom. without op.*, *Phibro Energy, Inc. v. Brown*, 33 F.3d 65 (Fed. Cir. 1994). In *Phibro*, the Port of Houston Authority applied for special-purpose subzone status on behalf of Phibro Energy, Inc. for two petroleum refineries in Houston and Texas City. *Id.* at 759. In response to opposition from local taxing authority based on lost revenue, the FTZ Board denied the application. *Id.* at 760. In response to Phibro's appeal to the CIT, the court concluded that it lacked subject matter jurisdiction for two reasons: (1) the statutory guidelines underlying the FTZ Board's decision did not correspond to § 1581(i); and (2) the CIT's authority under § 1581(i) relates only to imports whereas the FTZ program "seeks to facilitate export transactions." *Id.* at 763-64. Judge Carman again expressed his concern over the "jurisdictional ping-pong" existing in these cases and advocated a re-examination of the CIT's jurisdictional mandate. *Id.* at 765. On appeal to the Federal Circuit, the *Phibro* case was remanded to the CIT based on the Federal Circuit's decision in *Conoco*. See *Phibro Energy, Inc. v. Brown*, 33 F.3d 65 (Fed. Cir. 1994).

187. *Id.*

188. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 855 F. Supp. 1306, 1312-13 (Ct. Int'l Trade 1994).

189. *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 22 F.3d 1110, 1112-13 (D.C. Cir. 1994), *aff'd* 803 F. Supp. 442 (D.D.C. 1992).

The plaintiff in *Miami Free Zone Corp.*, Wynwood Community Economic Development Corporation (Wynwood), filed for an additional foreign-trade zone in the Miami area.¹⁹⁰ Miami Free Zone Corp. already operated a general-purpose foreign-trade zone at Miami International Airport, and Wynwood was seeking zone status at the Port of Miami to service ocean shippers not served by the airport location.¹⁹¹ The FTZ Board approved Wynwood's application, and the Miami Free Zone Corp. filed an action in the U.S. District Court for the District of Columbia under the Administrative Procedures Act (APA) to challenge the FTZ Board's approval of Wynwood's application—in effect attempting to prevent any decrease in commerce through the only FTZ in the area.¹⁹² The plaintiffs argued that section 701 of the APA provides jurisdiction in district court for persons wronged by agency action, unless review is precluded by statute.¹⁹³ The district court dismissed the case for lack of subject matter jurisdiction and held that the CIT had exclusive jurisdiction under the residual provision, § 1581(i).¹⁹⁴ Thus, the district court found that the exclusive jurisdiction of the CIT relieved the district court from ruling on APA challenges to agency actions pursuant to its jurisdiction under 28 U.S.C. § 1331.¹⁹⁵

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit found that § 1581(i)(1)-(2) would not provide a basis for exclusive jurisdiction because these provisions related to laws providing for revenue from imports or for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than raising of revenue."¹⁹⁶ Conversely, the FTZ program created exemptions from the collection of revenues or tariffs imposed by other statutes.¹⁹⁷ The D.C. Circuit, however, held that § 1581(i)(4), which relates to laws providing for "administration and enforcement with respect to matters referred to in paragraph (1)-(3) of this subsection,"¹⁹⁸ was sufficiently expansive and "seem[ed] to sweep more broadly and literally to encompass statutes, such as the Foreign-Trade

190. *Id.* at 1111.

191. *Id.*

192. *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442, 442-43 (D.D.C. 1992) (stating that plaintiff filed suit under APA, 5 U.S.C. §§ 701-706, seeking remedy against administrative action that is arbitrary and capricious or otherwise abuse of discretion under applicable statutory language), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994).

193. *Id.* at 443.

194. *Id.* at 444.

195. *Miami Free Zone Corp.*, 22 F.3d at 1111-12.

196. *See id.* at 1112 (quoting 28 U.S.C. § 1581(i)(2) (1988)).

197. *Id.*

198. *Id.* (quoting 28 U.S.C. § 1581(i)(4) (1988)).

Zones Act, that contemplate[d] relaxation of tariffs and duties in order to achieve non-revenue goals such as the promotion of international commerce."¹⁹⁹ The D.C. Circuit acknowledged that the issue raised was "a close one,"²⁰⁰ but, emphasizing the value of uniformity in judicial review, the court ruled consistently with the Federal Circuit in *Conoco* and held that the CIT had exclusive jurisdiction.²⁰¹

Both *Conoco* and *Miami Free Zone Corp.* resulted in an expansion of the CIT's exclusive jurisdiction in the FTZ arena. More importantly, these decisions may represent the beginning of the end to the confusing demarcation over the jurisdiction in FTZ cases between the CIT and the district courts.

V. IMPLICATIONS OF THE CIT'S JURISDICTIONAL EVOLUTION

Given the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit, it would seem that the CIT has acquired important and exclusive jurisdiction regarding FTZ issues. As a result, FTZs have been added to the list of international trade issues committed to CIT jurisdiction for purposes of review of decisions made by domestic administrative agencies.²⁰² Thus, the Federal Circuit has consolidated CIT jurisdiction as Congress had intended.²⁰³ The result of greater specialization for consideration of international trade issues, however, has both positive and negative implications.

A. Positive Implications

As previously discussed in the World Trade Organization context, international trade issues often involve competing interests: promoting uniformity versus accommodating local needs.²⁰⁴ In the case of specialized federal courts, uniformity is often desirable as a function of eliminating multiple, and potentially inconsistent, review among the various judicial circuits.²⁰⁵ Independent circuit decisions are

199. *Id.* at 1112-13.

200. *Id.* at 1112.

201. *Id.* at 1113.

202. *See id.* (reviewing decisions of Court of Appeals for the Federal Circuit and holding that CIT has exclusive jurisdiction regarding FTZs).

203. *See* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, 1728-30 (codified as amended in scattered sections of 28 U.S.C.) (detailing jurisdiction of CIT); *see also* 28 U.S.C. § 1581 (1988) (specifying CIT subject matter jurisdiction).

204. *See supra* notes 7-18 and accompanying text (discussing concerns regarding balancing of local interests with desire for uniformity under WTO).

205. *See* Revesz, *supra* note 29, at 1116 (explaining that supporters of judicial specialization believe that specialized courts will promote uniformity of decisions by eliminating review in

especially troubling in the realm of international trade law, which is, in essence, an expression of national policy and leads to inconsistent stare decisis and forum shopping.²⁰⁶ With respect to accommodating local needs in the context of FTZ policy, it seems clear that the use of an FTZ structure was designed to enhance the ability of localized industry to gain benefits from participation in export promotion activities and from improved access to imported materials. As a result, trade policy would appear to have benefitted from uniform applications. For example, forty U.S. Governors recently wrote the following to President Clinton:

Moreover, as Governors, each of us has a vital obligation to create well-paying jobs for the citizens of our states. Indeed, our commitment to our states' economic prosperity is the primary reason each of us was elected to office. International trade has an increasingly large impact on our states' economic vitality, as witnessed by the rapid growth in exports over the past several years.²⁰⁷

Central to realizing a principled and effective approach to the liberalization of international trade is a system of trade law that is uniform throughout the United States itself. Commenting on the need for uniformity, one economist stated that economic progress combined with the uniformity of laws facilitated the importance of inter-regional trade in the United States.²⁰⁸ Thus, GATT's principles of discouraging discriminatory trading rules among member nations holds the same importance as uniform laws within the United States—preventing individual states from imposing individual barriers.²⁰⁹ Only with such uniformity can the international trading system realize the same benefits that contributed to the U.S. emergence as a world economic leader.²¹⁰

multiple circuits where intercircuit stare decisis is absent).

206. See *id.* at 1116-17 (explaining that lack of uniformity results from absence of intercircuit stare decisis, which in turn leads to forum shopping); see also Rochelle C. Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6-25 (1989) (reviewing benefits of establishing Court of Appeals for the Federal Circuit); Hon. Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1006-09 (1991) (citing legislative history of Federal Circuit establishment, including statement by Sen. Strom Thurmond that, "[t]he creation of this appellate structure will eventually lead to uniformity in this very important and specialized field of law").

207. Letter from the Hon. Mike Lowry, Governor of Washington et al., to the Hon. William J. Clinton, President of the United States 1 (Aug. 4, 1994) (on file with *The American University Law Review*) (supporting legislation to implement the Uruguay Round of GATT).

208. JOE COBB, HERITAGE FOUNDATION MEMORANDUM, THE ISSUE OF U.S. SOVEREIGNTY UNDER THE NEW GATT AGREEMENT 4 (Apr. 13, 1994) (crediting Interstate Commerce Clause of U.S. Constitution as direct cause of rise of U.S. economic dominance in 20th century).

209. *Id.*

210. *Id.* In Joe Cobb's own words:

By strengthening the jurisdiction of the CIT, the uniformity by which trade law is applied is also strengthened in several ways: precision, coherence, and accuracy. First, centralization of trade cases in the CIT enhances the *precision* of judicial review.²¹¹ This means that courts dealing with the same subject matter will reach the same decisions so that "horizontal equity" is achieved.²¹² Without sufficient precision, the result can, and will, be forum shopping for relief consistent with the economic self-interest of the appellant.²¹³ For example, in patent law, significant distortions arose before the establishment of a specialized appeal procedure for patent claims, such as when a patent was four times as likely to be held valid in the Seventh Circuit than in the Second Circuit.²¹⁴

The interest in avoiding forum shopping on trade issues is equally compelling. Some have argued that uniformity in Customs issues arises directly from the constitutional command that "all Duties, Imposts, and Excises shall be uniform throughout the United States."²¹⁵

Aside from mere precision, it is likely that the results of an enhanced role for the CIT will improve the *coherence* of trade decisionmaking.²¹⁶ Coherence in this context means that decisions

As important to the United States' economic progress as free trade was the uniform rule of law that made inter-regional trade possible. Similarly, GATT's most important benefit has been to discourage trade practices by its member governments that discriminate against foreign producers The United States could never have realized its potential for world economic leadership if the individual States had been allowed to impose the barriers that already were beginning to appear in 1787.

Id.

211. See Dreyfuss, *supra* note 206, at 8 (defining precision, when applied in patent law context, as "[t]he extent to which the law produces horizontal equity").

212. See Dreyfuss, *supra* note 206, at 8 (explaining that best measure of precision is "whether two courts deciding the same case reach the same result").

213. See Revesz, *supra* note 29, at 1116-17 (explaining that lack of uniformity among circuits could produce rampant forum shopping); see also Dreyfuss, *supra* note 206, at 7 (citing conditions in patent context in which "forum shopping was rampant").

214. See Dreyfuss, *supra* note 206, at 7 (indicating that from 1945 to 1957, patents were more likely to be held valid in Fifth Circuit than in Seventh Circuit, and more likely to be held valid in Seventh Circuit than in Second Circuit).

215. U.S. CONST. art. I, § 8, cl. 2; see Revesz, *supra* note 29, at 1117 (indicating that one commentator has argued that enhanced need for uniformity flows from constitutional dictate (citing Paul P. Rao, 40 BROOK. L. REV. 581, 585 (1974))); see also OVERVIEW, *supra* note 56, at v (stating that House Ways and Means Committee views Article I, § 8 of the U.S. Constitution as establishing "the role of Congress in formulating international economic policy and regulating international trade"); Paul P. Rao, *A Primer on Customs Court Practice*, 40 BROOK. L. REV. 581, 585 (1974) (indicating that Congress created Board of General Appraisers in Tariff Act of 1890 in order to establish uniformity in customs law and comply with constitutional dictates). Judge Carman of the CIT likewise has underscored the constitutional importance of national trade policy. See Carman, *supra* note 22, at 246 (mentioning constitutional requirement that all duties, imports, and excises be uniform throughout United States).

216. Cf. Dreyfuss, *supra* note 206, at 66-67 (discussing lack of coherence in patent law prior to creation of Court of Appeals for Federal Circuit).

are not only consistently applied, but that they spring from a common conception of the statutory scheme that underlies the dispute.²¹⁷ In the absence of the CIT, the only institution that could potentially bring coherence to trade law would be the U.S. Supreme Court, but infrequent review by the Supreme Court undermines its capacity in this regard.²¹⁸ In addition, depending on the FTZ Board itself to produce a uniform vision may be problematic because the FTZ Board is not engaged in an adversarial proceeding; the party establishing the lionshare of the record and actually appearing before the FTZ Board—the zone applicant—seeks a lenient interpretation of the criteria for granting an FTZ and the standards under which FTZs are governed.

Both precision and coherence deal with the capacity of the CIT to replicate decisions in a uniform fashion. Centralizing international trade decisions within the CIT also fosters development of expertise at the CIT, thereby enhancing the *accuracy* of the actual decisions.²¹⁹ It has long been observed that the growing complexity of the issues before courts confounds the generalist underpinnings of the judicial system.²²⁰ Judge Friendly has written that complex issues are often “quite beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort by counsel and of attempted self-education by the judge, and in many instances, even with it.”²²¹

Even if the facts presented in the review of an FTZ determination are relatively simple—a balance of equities between public and corporate interest—the specific policy objective that underlies the foreign trade law may create a complex set of competing interests that requires specialized expertise for accurate decisionmaking.²²² Both

217. See Revesz, *supra* note 29, at 1117 (explaining that coherence demands that legal rules of statutory scheme reflect unitary vision and be consistent).

218. But see Revesz, *supra* note 29, at 1161 (suggesting that small number of cases denied review by Supreme Court undermines view that docket incapacity prevents Court from resolving conflicts among circuits).

219. Cf. Dreyfuss, *supra* note 206, at 14 (indicating that Court of Appeals for Federal Circuit will not have attained congressional goals without development of accurate as well as uniform law).

220. See Revesz, *supra* note 29, at 1117-18 (explaining that courts today deal with increasingly technical cases involving levels of knowledge and expertise beyond average judge (citing HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 156-57 (1973))); see also Sheila Jasanoff & Dorothy Nelkin, *Science, Technology, and the Limits of Judicial Competence*, 68 A.B.A. J. 1094, 1094 (1982) (noting that “surge” of technical disputes “into the judicial arena has produced different and highly visible problems for the courts, and it is widely believed that the traditional processes of adjudication are no longer capable of handling many of these disputes”).

221. FRIENDLY, *supra* note 220, at 156-57, cited in Revesz, *supra* note 29, at 1117-18.

222. A narrow application of law and economics theory may also support this application of judicial specialization. To wit, certain areas of the law may be so complex or so specialized that

the special tax²²³ and patent²²⁴ courts exemplify this need for the development of substantive expertise as a function of complex organic law.

That international trade issues present unique complexities should go without saying. Judge Carman of the CIT attributes the establishment of the CIT itself to the inability of the United States Customs Court to keep "pace with increasing complexities of international trade litigation."²²⁵ While the policy and practice underlying the FTZ program may be relatively straightforward by comparison to the balance of foreign trade law, the underlying complexity and national implications of the statutory regime nevertheless remain. Thus, clarifying the CIT's exclusive jurisdiction over FTZ cases ensures that the complexities and nationwide scope are considered in interpretations of the FTZ statutory scheme.

B. Negative Implications

Because of its impact on the local tax base and its potential benefits to local companies and their workers, the FTZ program is one of the rare instances in which the national policy of export promotion and trade liberalization may be in direct conflict with the particularized needs of the local community.²²⁶ In one case before the CIT, *Phibro Energy, Inc. v. Franklin*,²²⁷ the FTZ Board denied the subzone application of appellant because of the adverse impact on municipal and county entities that would stand to lose *ad valorem* taxes.²²⁸ The *Amici* in the *Phibro* case, including Texas City, Texas, the County of

the inefficiencies of judicial generalism in regard to those areas undermines the administration of the judicial system as a whole. See Revesz, *supra* note 29, at 1118 n.32 (explaining that broad application of law and economics argument would suggest no use of generalist judges); see also Richard A. Posner, *Will the Federal Courts of Appeal Survive Until 1984?: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 776 (1983) (indicating that survival of generalist federal courts is perhaps tenuous in light of age of specialization that has developed as forecasted by Adam Smith).

223. See Revesz, *supra* note 29, at 1117 (using tax law as example of legally complex field that may require specialized courts to make current decisions); see also Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 750 (1981) (arguing that "[w]hat makes tax law unique is the intricacy and complexity of the scheme embodied in the Internal Revenue Code").

224. See Dreyfuss, *supra* note 206, at 14-20 (discussing necessity for "sensitivity" to imperatives of invention in respect to patent law and its successful application in Court of Appeals for Federal Circuit policy).

225. See Carman, *supra* note 22, at 247 (citing H.R. REP. NO. 1235, 96th Cong., 2d Sess. 18 (1980), reprinted in 1980 U.S.C.A.N. 3729, 3730).

226. See *supra* notes 61-77 and accompanying text (discussing benefits of Foreign-Trade Zones program, including avoidance or deferment of state and local taxes).

227. 822 F. Supp. 759 (Ct. Int'l Trade 1993), *rev'd sub nom. without op.*, *Phibro Energy, Inc. v. Brown*, 33 F.3d 65 (Fed. Cir. 1994).

228. *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759, 759-60 (Ct. Int'l Trade 1993), *rev'd sub nom. without op.*, *Phibro Energy, Inc. v. Brown*, 33 F.3d 65 (Fed. Cir. 1994).

Galveston, and others, described the local nature of the FTZ dispute as follows:

The evaluation of "public interest" has followed a consistent pattern that is constituted of an "evaluation of policy and economic factors, which included a consideration of local community impact as well as the effect on other domestic plants producing like products or the components of the products." Because goods arriving in a zone for a bona fide Customs reason are exempt from state and local *ad valorem* taxes, the effect on local tax bases is obviously one consideration in the economic impact analysis.²²⁹

In the FTZ context, therefore, an implicit weighing of local and national interests is present. One could argue that because differing values may result in outcomes that account for these competing interests, a decentralized approach is justified.²³⁰ The fact that local interests must be considered, however, does not necessarily justify a less than uniform approach. Indeed, one of the reasons to avoid forum shopping in this context is to prevent potential FTZ applicants from using the international trade jurisprudence of particular federal circuits as the basis for site selection for industrial enterprises. Such a result, in the extreme, would be a capitulation to the "clear dangers that local interests in each state would erect trade barriers" at variance with the constitutionally mandated "vast free trade zone" of the United States.²³¹

The notion that trade law should be centralized has both its proponents as well as its opponents. In the case of centralizing authority for international trade issues in a specialized tribunal, trade law purists might applaud the precision, coherence, and accuracy that results. Critics of the prevailing structure of the trade system, however, might oppose centralization on much the same grounds. For example, the environmental community opposed the passage of the North American Free Trade Agreement in part because the cloistered community of trade "experts" seemed to place inadequate emphasis on public participation and overarching environmental principles.²³² The Associate Attorney General for International

229. Brief for Amicus at 4, *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993) (No. 92-06-00394) (on file with *The American University Law Review*), *rev'd sub nom. without op.*, *Phibro Energy, Inc. v. Brown*, 33 F.3d 65 (Fed. Cir. 1994).

230. See Rader, *supra* note 206, at 1004-05 (citing statement of Sen. Alan Simpson that specialized courts sacrifice "diversity of opinion stemming from divergent points of view and sometimes differing strains of geographical philosophy and thought").

231. COBB, *supra* note 208, at 4.

232. See Dan Magraw, *Environment and Trade: Talking Across Cultures*, 36 ENV'T, Mar. 1994, at 14, 19 (mentioning that "[e]nvironmentalists . . . advocate active public participation in all stages of lawmaking and enforcement" whereas trade community does not encourage such

Activities of the U.S. Environmental Protection Agency, Dan Magraw, recently described the difference in viewpoints as the following:

The two communities have different cultures. Environmentalists, for example, advocate active public participation in all stages of lawmaking and enforcement. In contrast, the trade community generally does not encourage such involvement as strongly. Each community has different values and sacred cows.²³³

While environmentalists' discomfort with centralizing international trade review in an "expert court" is understandable, it would also be hypocritical without similarly criticizing the current federal decision to centralize review of certain U.S. Environmental Protection Agency decisions in one court—the U.S. Court of Appeals for the District of Columbia Circuit.²³⁴ In addition, it seems reasonable to expect the consistent application of existing law by a competent CIT to be fully realized, and then for Congress to make any necessary adjustments to the trade law accordingly in order to make sure that all interests are fairly represented before tribunals. Anything less than statutory direction from Congress would be "passing the buck."²³⁵

Legal purists and opponents of particular trade policies may fear an international trade jurisprudence that results from "a legal system fractured into substantive areas with a set of special judges for each area."²³⁶ There is, however, little guarantee that courts of general expertise will function any better in handling FTZ cases, and there is some reason to suspect that they would be handicapped.²³⁷

involvement).

233. *Id.* For a recent example, see Scott H. Segal, *Reconciling Trade and the Environment (Again): Venezuela, GATT, and the Refining of Gasoline*, 24 STATE B. TEX. ENV'T L.J. 193, 196 (1994) (reaching decisions "without public participation" chooses "the closed trade paradigm over the open environmental paradigm").

234. See Rader, *supra* note 206, at 1010 n.30 (indicating that Court of Appeals for District of Columbia Circuit has exclusive jurisdiction for certain Environmental Protection Agency orders under Clean Air Act); see also Clean Air Act, 42 U.S.C. § 7607(b)(1) (1988) (limiting forum in which certain petitions for review under this Act may be brought to Court of Appeals for District of Columbia).

235. See Rader, *supra* note 206, at 1004 (quoting Sen. Max Baucus' (D-Mont.) statement regarding creation of new judicial forum without Congress clarifying law).

236. 127 CONG. REC. 29,862 (1981) (statement of Sen. Max Baucus) (arguing against creation of specialized courts, specifically Court of Appeals for Federal Circuit).

237. Aside from the inadequate expertise of general courts, diversion of complex but coherent areas of law to specialized courts may allow general courts the resources to assure litigants the "fresh outlook and broad viewpoint" they deserve. See Revesz, *supra* note 29, at 1120 (quoting Justice Scalia). Justice Scalia further noted that, "if, through such specialized courts, a substantial amount of business could be diverted from the regular federal courts, the latter would have a chance of remaining in the future what they have been in the past." *Id.*

C. *Precedential Implications*

The general history of specialized federal courts is not a particularly pleasant one. Indeed, Congress has already abolished a substantial number of specialized courts.²³⁸ And, as the history of the establishment of the Federal Circuit itself indicates, broad institutional opposition exists to establishing more specialized courts.²³⁹ In the case of current specialized federal courts, including the CIT, however, Congress has been tempted to lead by historical example. Professor Kenneth R. Redden, at the conclusion of his exhaustive work on federal special court litigation, remarked that there are "no immediate plans" for implementation of recommended new special courts because of noted historic failures, such as the short-lived Commerce Court (1910-1913).²⁴⁰

Unifying the jurisdiction of the CIT to include FTZs, along with other ancillary issues, may give the CIT the opportunity to demonstrate the precision, coherence, and accuracy of a paradigmatic case of federal court of special jurisdiction—joining with the successes previously experienced in the tax and patent areas. By further resolving the "confusing and costly jurisdictional maze which is seemingly designed to deny litigants easy access" to the CIT,²⁴¹ the Court of Appeals for the Federal Circuit has demonstrated that it is possible for a federal specialized court like the CIT, that deals with complex policy issues, to confront successfully a complicated and rapidly changing field like international trade.²⁴² While jurisdictional confusion was present, "the goals of national uniformity and expeditious resolution of conflicts" remained "evanescent."²⁴³

With the jurisdiction of the CIT becoming increasingly clear, it bears reviewing some of the specialized courts that may be waiting in the wings. Proposals have been made for the establishment of a federal science court, a special labor court, a court for tax appeals,

238. See KENNETH R. REDDEN, *FEDERAL SPECIAL COURT LITIGATION* 498 (1982) (listing specialized courts that have been abolished, including Commerce Court, Court of Indian Claims, Court of Private Land Claims, Chickasaw Indian Court, and Indian Reservation Court).

239. Indeed, Senator Baucus and others argued that the establishment of a Court of Appeals for the Federal Circuit could undermine existing regional circuits and could lead to the establishment of more courts of specialized jurisdiction. For a discussion of congressional debate on this issue, see Rader, *supra* note 206, at 1004-09.

240. REDDEN, *supra* note 238, at 498.

241. Carman, *supra* note 22, at 250.

242. See *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1590 (Fed. Cir. 1994) (holding that CIT had jurisdiction to review decisions of FTZ Board).

243. Carman, *supra* note 22, at 250.

and various other administrative courts.²⁴⁴ The Federal Water Pollution Control Act of 1972 even directed the President to study the feasibility of an Environmental Court.²⁴⁵ The concept of a court to specialize in scientifically technical matters, such as the environment, has a lengthy pedigree. Judge Learned Hand once remarked:

[T]he extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.²⁴⁶

Just as the centralization of federal government appeals in the Federal Circuit prompted much skepticism in Congress,²⁴⁷ the compelling equities at play in an environmental court would be difficult—if not impossible—to reconcile.²⁴⁸ Determining a competent and consistent approach to judicial resolution of environmental disputes, however, may itself be important to emerging international trade policy.²⁴⁹ Regardless, the emergence of the CIT as a specialized

244. See REDDEN, *supra* note 239, at 498 (listing several types of specialized courts that have been considered for implementation, including Environmental Court, Federal Science Court, Labor Court, Patent Court, Court of Tax Appeals, Administrative Appellate Court, and Intermediate Appellate Court).

245. Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, 899 (codified as amended in scattered sections of 33 U.S.C.); see also REDDEN, *supra* note 239, at 498 (stating that Federal Water Pollution Control Act directed President to consider Environmental Court).

246. *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (S.D.N.Y. 1911), *modified*, 196 F. 496 (2d Cir. 1912). Judge Hand has been joined by a number of recent writers, including Judge David Bazelon and legal scholar Gary Ahrens. See Jasanoff & Nelkin, *supra* note 220, at 1094 (citing Gary Ahrens' remarks that traditional legal institutions and structures were in danger of becoming outdated in new science and technology based era and Judge Bazelon's comments that many scientific and technical disputes fall outside competence of present courts and therefore involvement in settling disputes arising from them should be limited).

247. See 127 CONG. REC. 29,862 (1981) (statement of Sen. Max Baucus) (arguing against creation of Court of Appeals for Federal Circuit as specialized court).

248. For a spirited exchange regarding the propriety of an environmental court, see Albert R. Matheny & Bruce A. Williams, *Scientific Disputes and Adversary Procedures in Policy-Making: An Evaluation of the Science Court*, 3 LAW & POL'Y Q. 341, 341-64 (1981); see also Arthur Kantrowitz, *A Response to Matheny and Williams*, 3 LAW & POL'Y Q. 365, 365-68 (1981) (defending proposal for science court); Albert R. Matheny & Bruce A. Williams, *A Reply*, 3 LAW & POL'Y Q. 369, 369-70 (1981) (responding to Dr. Kantrowitz's criticisms of their article and his defense of science court proposal).

249. See TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY xv (Durwood Zaelke et al. eds., 1993) ("Far from a level playing field, the widely divergent systems of environmental laws, rules, and regulations around the globe can create an unnavigable obstacle course for trade. Without some degree of mutually acceptable discipline, haphazard environmental protections are ripe for protectionist picking."); U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, TRADE AND THE ENVIRONMENT: CONFLICTS AND OPPORTUNITIES 3 (1993) (indicating

court with more defined jurisdictional boundaries should enhance the prospects of more efficient and competitive international trade relations and transactions.

CONCLUSION

The historical evolution of a specialized forum for reviewing trade disputes has taken a small step toward realizing some of the goals that Congress envisioned when it enacted the Customs Courts Act of 1980. With the recent decisions in *Conoco* and *Miami Free Zone Corp.*, the courts finally are providing a degree of certainty and uniformity for trade litigants in choosing the appropriate forum for judicial relief. Although these decisions only address disputes relating to foreign-trade zones, both decisions represent an important precedent in defining whether relief is properly sought in either the district courts or under the exclusive jurisdiction of the CIT.

Conoco and *Miami Free Zone Corp.* foreshadow further demarcation of the jurisdictional boundaries of the CIT. The district courts appear ready to cede jurisdiction to the CIT over a wide range of trade disputes, relating not only to the collection of revenue, but also to situations involving non-revenue raising statutes designed to facilitate international commerce. Similarly, the CIT and the Court of Appeals for the Federal Circuit have expressed their willingness to assert exclusive jurisdiction over cases based on the CIT's residual jurisdictional provision, especially in those instances where relief under other provisions is unavailable, inequitable, inefficient, or otherwise a waste of litigants' and the courts' time and resources.

Clarifying the CIT's exclusive jurisdiction and consolidating the review of FTZ cases, and perhaps other trade cases in the future, has the potential to further several principles of jurisprudence. The precision of judicial review could be enhanced thereby fostering horizontal equity. The coherence of decisionmaking could be improved by insuring that decisions are consistently applied based on common interpretations of the underlying statute. Also, the accuracy of the decisions could be increased as the CIT utilizes its experience and expertise on increasingly complex trade disputes. Successes in specialized courts also may embolden innovators to fashion appropriate judicial responses for other complex, technical policy areas. In any event, if the pattern of court decisions continues, the end result should be that trade litigants—especially in FTZ cases—will have more

confidence that cases will now be decided on the merits rather than decided on jurisdictional grounds.

