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THE *CONOCO* DECISION: EXCLUSIVE REVIEW OF FOREIGN-TRADE ZONES BOARD DETERMINATIONS BY THE U.S. COURT OF INTERNATIONAL TRADE

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I. INTRODUCTION

The Court of Appeals for the Federal Circuit recently resolved an issue of first impression regarding whether exclusive jurisdiction over appeals of Foreign-Trade Zones Board (FTZ Board) determinations lay with district courts or the Court of International Trade (CIT).[1] In deciding that the CIT possessed exclusive jurisdiction, the Federal Circuit reasoned that foreign trade zones matters have a sufficient nexus with U.S. import laws to be encompassed by the CIT's jurisdictional statute. The decision will serve to eliminate existing uncertainty as to the appropriate venue for challenging actions of the FTZ Board.

II. BACKGROUND ON THE FOREIGN-TRADE ZONES PROGRAM

Pursuant to the Foreign-Trade Zones Act of 1934,[2] as amended (FTZ Act),[3] the FTZ Board is authorized to review and approve applications for the establishment, operation and maintenance of foreign trade zones (FTZs). FTZs are located in designated "ports of entry" within the geographic boundaries of the United States but are not considered part of U.S. territory for formal customs entry purposes.[4] A brief description of the nature and purpose of this FTZ program, and its administration by the FTZ Board, provides useful background for understanding the Federal Circuit's *Conoco* decision.

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1. Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581 (Fed. Cir. 1994).

2. Pub. L. No. 73-397, 48 Stat 998 (1934)

3. 19 U.S.C.A. §§ 81a-u (West Supp. 1994).

4. Customs ports of entry are described at 19 C.F.R. § 101.3 (1994). "Customs territory of the United States" is defined as only the States, the District of Columbia, and Puerto Rico. 19 C.F.R. § 101.1(e) (1994).

A. Foreign Trade Zones

1. Purpose

Created for the purpose of expediting and encouraging foreign commerce, FTZs can provide substantial customs cost savings to international trade-oriented corporations which participate in the FTZ program. These savings have fueled growth in the FTZ program which has been well-documented during the last twenty-five years.

Potential customs savings come in a variety of forms.[5] When foreign merchandise is admitted into an FTZ, it does so without the immediate payment of duties and with a minimum of paperwork by the Customs Service. A firm may elect to hold imported merchandise in an FTZ until needed, realizing a cash flow benefit by deferring duty payment. In certain jurisdictions, payment of state and local taxes can be deferred or avoided altogether.

Moreover, foreign goods that are admitted into an FTZ but subsequently exported are not subject to duties, eliminating the need for costly duty drawback procedures.[6] Also, antidumping and countervailing duties (for which duty drawback is unavailable)[7] are not applied to re-exported merchandise.[8] In addition, merchandise re-exported from a zone will not be charged against any applicable import quotas.

Finally, FTZ status permits the corporate user to reduce its customs duty liability in several circumstances.[9] For example, customs duties can be reduced on foreign goods that are imported into FTZs, subjected to further manufacture and/or processing, and subsequently introduced into the customs territory. These finished goods very often will be dutiable at a lower rate where so-called "inverted tariffs" are involved (i.e., where the tariff on the finished product is lower than the tariff

5. *See generally* Donald E. deKieffer & George W. Thompson, *Political and Policy Dimensions of Foreign Trade Zones: Expansion or the Beginning of the End?*, 18 VAND. J. TRANSNAT'L L. 481, 492-99 (1985).

6. 19 U.S.C.A. § 81c (West Supp. 1994).

7. *Id.* § 1677h.

8. 15 C.F.R. § 400.33(b)(2) (1994) (restrictions on manufacturing and processing activity).

9. *See, e.g.*, Nissan Motor Mfg., U.S.A. v. United States, 12 Ct. Int'l Trade 737, 738 (1988), *aff'd*, 884 F.2d 1375 (Fed. Cir. 1989) ("Among other benefits, [FTZs] often permit an importer to lessen its liability for duties . . . .").

applicable to the components of the finished good). In industries where import penetration is high, FTZ status enables domestic producers to compete in the U.S. market against foreign producers that are able to import the finished product at a lower tariff rate.[10]

2. General-Purpose Zones and Special-Purpose Subzones

There are two categories of FTZ: general-purpose zones and special-purpose subzones. Provided certain technical criteria are met, each port of entry is entitled to a general-purpose zone, typically administered by a public corporation such as a port authority or local economic development agency.[11] Subzones may be established to accommodate individual operations, including manufacturing facilities, that cannot reasonably be accommodated within the general-purpose zone site.[12] Subzones are technically subordinate parts of the general-purpose zone with which they are affiliated, and are usually single manufacturing plants administered by individual corporations under an agreement with the grantee/operator of the general-purpose zone. Subzones are typically used for the assembly or manufacture of imported parts and components into finished goods.

B. Role of the FTZ Board

The FTZ Board is composed of the Secretaries of the Department of Commerce, Treasury, and the Army, or their designated alternates, with the Secretary of Commerce acting as the FTZ Board's chairperson.[13] The FTZ Board operates as an interagency committee with members viewing decisions in light of their respective jurisdictional responsibilities and areas of

10. Indeed, the significance of FTZs in reducing customs costs on *imports* of foreign components used by domestic plants is reflected in statistics compiled by the FTZ Board. For example, the FTZ Board's 1992 Annual Report revealed that a full eighty-eight percent of merchandise received in all FTZs was not exported, but was imported for domestic consumption. FOREIGN-TRADE ZONES BD. 54TH ANN. REP. App. D (1992).

11. 19 U.S.C.A. § 81b(b) (West Supp. 1994).

12. *See* 15 C.F.R. § 400.2(p) (1992) (definition of subzone). References are to the FTZ Board's Regulations as revised in 1991. These regulations codify prior interpretations and decisions of the Board under the FTZ Act and Regulations. *See Final Rule: Foreign-Trade Zones Board*, 56 Fed. Reg. 50,790 (1991).

13. 15 C.F.R. § 400.2(b) (1994).

expertise.[14] Import Administration, within the U.S. Department of Commerce, provides the FTZ Board with support staff.

FTZs are established as a public service and may not conflict with trade and tariff policy.[15] The FTZ Board and Customs share responsibility for monitoring zone activity, with Customs supervising the day-to-day operation of FTZs.[16] In addition, the FTZ program has been the subject of executive and legislative scrutiny as the use of zones and subzones for manufacturing has increased since the early 1980s. Of chief concern has been whether and under what conditions the conduct of manufacturing activity for importation under zone procedures—typically involving the selection of lower duty rates—is in the public interest. Two congressional committees held hearings in the late 1980s.[17] In addition, both the U.S. General Accounting Office (GAO) and the International Trade Commission (ITC) conducted a number of studies on the FTZ program at the request of Congress.[18] As a consequence, the FTZ Board increased its scrutiny of zone operations using "inverted tariffs," and enacted new provisions on monitoring.[19]

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14. The Commerce Department takes the lead on economic and industry impact issues. The Department of the Treasury's main responsibilities involve the enforcement of customs laws and the supervision of zone activity. The Department of the Army is involved through its Corps of Engineers, which advises the FTZ Board on land use and environmental matters when they exist.

15. 15 C.F.R. § 400.31(b)(1) (1994).

16. *See, e.g.*, 19 C.F.R. § 146.3 (1994).

17. *See Operation of the Foreign Trade Zones Program: Hearing before the Subcommittee on Trade of the Committee on Ways and Means*, 101st Cong., 1st Sess. (1989); *Foreign Trade Zones: Hearing before the Commerce, Consumer, and Monetary Affairs Subcommittee of the Committee on Government Operations*, 101st Cong., 1st Sess. (1989).

18. *See* GENERAL ACCOUNTING OFFICE, GAO-NSIAD-89-85, UPDATE TO MARCH 1984 REPORT ON THE ADMINISTRATION AND OPERATION OF THE FOREIGN TRADE ZONES (1989); INT'L TRADE COMM'N, USITC PUB. NO. 2059, THE IMPLICATIONS OF FOREIGH-TRADE ZONES FOR U.S. INDUSTRIES AND FOR COMPETITIVE CONDITIONS BETWEEN U.S. AND FOREIGN FIRMS (1989); GEN. ACCOUNTING OFFICE, GAO/GGD-84-52, REPORT TO THE CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES (1984). These reports have evaluated administration of the program by the FTZ Board and have identified its various effects. For example, the reduction in tariff revenue incurred as a result of subzone grants to the auto industry was cited as a concern in the 1989 GAO report. GENERAL ACCOUNTING OFFICE, GAO-NSIAD-89-85, *supra*, at 4.

19. *See, e.g.*, 15 C.F.R. § 400.31(b), (d) (1994).

III. JURISDICTION OVER FTZ BOARD DETERMINATIONS

A. *Judicial Review of International Trade Issues*

In response to significant confusion as to the demarcation between the jurisdiction of the federal district courts and the U.S. Customs Court, Congress enacted the Customs Court Act of 1980. This legislation sought to expand and clarify the jurisdiction of the newly-designated Court of International Trade (CIT). As interpreted in subsequent cases, however, the Customs Court Act could not dispel many persistent questions regarding jurisdiction.

1. Jurisdictional Issues Prior to the Customs Court Act of 1980

Prior to 1980, there was significant confusion as to the demarcation between jurisdiction of the federal district courts and the U.S. Customs Court.[20] The Customs Court's limited subject matter jurisdiction and lack of equitable powers contributed to this confusion. As a result, Congress moved to enact legislation which would clarify jurisdiction of international trade matters so that plaintiffs could better discern the appropriate jurisdictional path.

2. The Customs Court Act of 1980

Pursuant to the Customs Court Act of 1980,[21] the United States Customs Court was renamed the United States Court of International Trade. As Congress described it, the "major goal" of the Customs Court Act was to:

> re-emphasi[ze] and clarif[y] . . . Congress' intent that the expertise and national jurisdiction of the Court of International Trade and Court of Appeals for International Trade, Patents and Trademarks be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws, thereby eliminating the present jurisdictional conflicts between these courts and the federal

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20. *See generally* Velta Melnbrencis, Remarks at the Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade, 131 F.R.D. 217, 226.

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

district and appellate courts[.][22]

The vehicle for attaining this objective was the residual jurisdictional provision in the Customs Court Act[23] which 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, 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 —
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> (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;
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> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health and 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.[24]

The legislative history of this provision indicates an intent to broaden the exclusive jurisdiction of the former Customs Court:

> Section 201 of H.R. 6394 added a new section 1581(i) to Title 28, United States Code, granting broad residual jurisdiction to the United States 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

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22. H.R. REP. NO. 1235, 96th Cong., 2d Sess. 28 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3739.

23. 28 U.S.C. § 1581(i) (1988).

24. *Id.* Subsections (a) through (h) of 28 U.S.C. § 1581 pertain to the following: (a) and (b) to customs protest; (c) to antidumping and countervailing duty proceedings; (d) to trade adjustment assistance; (e) to the Buy American Act; (f) to confidential information; (g) to customs broker's licenses; and (h) to preimportation rulings by Treasury. Former Chief Judge Edward D. Re has presented a comprehensive review of matters within the CIT's jurisdiction. *See* Hon. Edward D. Re, *Litigation Before the United States Court of International Trade, in* 19 U.S.C.A., at XIII (West Supp. 1994).

> 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.[25]

In the Customs Court Act, Congress set out to clarify the "considerable confusion by litigants and the courts" over "whether or not a particular case comes within the exclusive jurisdiction of the Customs Court and is, therefore, excluded from the jurisdiction of the district courts."[26] It found that "[t]he dismissal of these actions, after great expenditures of time and resources, has produced frustration on the part of litigants and the courts."[27]

3. CIT Jurisdiction: Lingering Uncertainty

Unfortunately, passage of the Customs Court Act did not clarify judicial review of international trade matters in the way many had anticipated. In a series of cases, culminating in the 1987 Supreme Court decision in *K-Mart v. Cartier*,[28] the jurisdictional statute of the CIT was interpreted quite narrowly.

In *K-Mart*, the Supreme Court noted that "Congress did not commit to the [CIT's] exclusive jurisdiction every suit against the Government challenging custom-related laws and regulations."[29] In the wake of the *K-Mart* decision, the continued uncertainty as to the line of demarcation between federal district courts and the CIT was plainly evident. It became apparent that Congress had failed to meet one of its stated goals, namely to: "[e]liminate much of the difficulty experienced by international trade litigants who in the past commenced suits in district courts only to have those suits dismissed for want of subject matter jurisdiction."[30]

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25. H.R. REP. NO. 1235, *supra* note 22, at 33, *reprinted in* 1980 U.S.C.C.A.N. at 3745. *But see id.* at 47, *reprinted in* 1980 U.S.C.C.A.N. at 3759 ("Subsection (i) 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,").

26. H.R. REP. NO. 1235, *supra* note 22, at 30, *reprinted in* 1980 U.S.C.C.A.N. at 3741.

27. *Id.* at 30, *reprinted in* 1980 U.S.C.C.A.N. at 3741.

28. 485 U.S. 176 (1987).

29. *Id.* at 188.

30. H.R. REP. NO. 1235, *supra* note 22, at 47, *reprinted in* 1980 U.S.C.C.A.N.

Commentators have suggested that the CIT's narrowly interpreted jurisdiction leaves the court ill-prepared to address the increasing complexity of international trade litigation.[31] And as the Honorable Gregory Carman of the CIT has noted, the lingering uncertainty over the CIT jurisdictional mandate extended to many substantive areas, including judicial review of FTZ Board determinations.[32]

B. Judicial Review of FTZ Board Determinations

With the exception of determinations to revoke zone status, the FTZ Act does not specify which court has jurisdiction to review FTZ Board determinations. Prior to 1980, FTZ matters had been reviewed by either the Customs Court, or a federal district court depending on the nature of the action. With the enactment of the Customs Court Act of 1980, it remained unclear whether district courts or the new CIT should review FTZ Board determinations. With the *Conoco* decision, the Federal Circuit has now resolved this jurisdictional question in favor of exclusive jurisdiction by the CIT. Further certainty on this issue was provided by the Court of Appeals for the District of Columbia Circuit's subsequent concurrence in the *Miami Free Zone Corp.* decision.[33]

1. The Judicial Review Provision of the FTZ Act

The FTZ Act provides only limited guidance regarding (1) the actions of the FTZ Board that are reviewable, and (2) the appropriate forum in which those decisions may be reviewed. Specifically, judicial review is referred to only with respect to revocation determinations.[34]

The lack of specificity in the FTZ Act regarding judicial

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at 3759.

31. *See, e.g.*, Andrew P. Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984).

32. Hon. George W. Carman, *Jurisdiction and the Court of International Trade: Remarks at the Conference on International Business Practice*, 13 NW. J. INT'L L. & BUS. 245, 256-57 (1992).

33. Miami Free Zone Corp. v. Foreign Trade Zones Bd., 22 F.3d 1110 (D.C. Cir. 1994).

34. 19 U.S.C. § 81r(c) (1988). Section 81r(c) provides that an FTZ Board order which revokes FTZ status may be appealed to the court of appeals for the circuit in which the relevant zone is located.

review is perhaps understandable when one considers that many provisions of the Act have remained unchanged since they were drafted in 1934. During the early years of the FTZ program, only a handful of zones were in operation and these zones were limited in function. FTZ Board determinations were infrequent and created little controversy.

Nevertheless, the failure of the Act to address judicial review more specifically eventually caught up with the FTZ Board. During the last thirty years, more and more FTZs were activated with increasingly sophisticated operations. Inevitably, disputes arose which resulted in litigation.

2. Judicial Review of FTZ Board Determinations Prior to 1980

During the life of the FTZ program, legal challenges to FTZ Board determinations have been quite infrequent. Prior to 1980, only one court action—in federal district court—specifically reviewed a FTZ Board determination. In *Armco Steel Corp. v. Stans*,[35] the plaintiff, a domestic steel producer, sought reversal of an FTZ Board order granting subzone status for a shipyard. In affirming the district court's approval of the FTZ Board determination, the Court of Appeals noted that

> Congress has delegated wide latitude of judgment to the Foreign-Trade Zones Board to respond to and resolve the changing needs of domestic and foreign commerce through the trade zones concept. Because of the complexity and vagaries of our highly developed systems of trade . . . it is imperative that the Board be permitted to experiment at the fringes of the tariff laws.[36]

Thus, there was early recognition of the FTZ Board's role in the administration of the tariff laws.

Prior to 1980, the Customs Court did review the effect of an FTZ determination upon duty liability of an oil refiner.[37] The plaintiff in that case styled its action as a protest of the

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35. 303 F. Supp. 262 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779 (2d Cir. 1970).

36. 431 F.2d at 788.

37. Hawaiian Independent Refinery v. United States, 460 F. Supp. 1249 (Cust. Ct. 1978).

assessed duties, thereby securing jurisdiction by the Customs Court based on the denial of the protest.

The *Conoco* case is the first FTZ Board determination to be specifically reviewed by the CIT since its creation in 1980. It was clear, however, that the CIT—as the Customs Court's successor—had already developed a familiarity with the FTZ concept[38] and found itself required to interpret the FTZ Act.[39] Nevertheless, in the evolving demarcation between the jurisdiction of the district courts and the CIT, the *Conoco* case was a long anticipated ruling as to where FTZ Board determinations belonged.

3. *Conoco, Inc. v. United States Foreign-Trade Zones Board*[40]

a. Background

In 1986 and 1987, the Lake Charles Harbor and Terminal District (Lake Charles), grantee of general-purpose FTZ 87, filed applications on behalf of Conoco, Inc. and Citgo Petroleum Corporation for special-purpose subzones. Both Conoco and Citgo sought foreign trade subzone status for their oil refinery operations.

The FTZ Board ultimately concluded that approval of the applications was in the public interest only if certain conditions were imposed.[41] First, the so-called "fuel consumed" con-

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38. *See, e.g.*, Miami Free Zone Corp. v. United States, 826 F. Supp. 526 (Ct. Int'l Trade 1993) (challenging Customs assessment of liquidated damages for violating FTZ operator conditions); Torrington v. United States, 826 F. Supp. 492 (Ct. Int'l Trade 1993) (applicability of antidumping duties to merchandise within FTZ); Torrington v. United States, 823 F. Supp. 945 (Ct. Int'l Trade 1993) (applicability of antidumping duties to merchandise within FTZ); Wear Me Apparel Co. v. United States, 636 F. Supp. 481 (Ct. Int'l Trade 1986) (exclusion claim on merchandise transferred to FTZ); Arbor Foods, Inc. v. United States, 607 F. Supp. 1474 (Ct. Int'l Trade 1985) (action involving blended sugar operation within FTZ).

39. *See, e.g.*, Chrysler Motors Corp. v. United States, 755 F. Supp. 388 (Ct. Int'l Trade 1990), *aff'd*, 945 F.2d 1187 (Fed. Cir. 1991) (drawback claim on merchandise within FTZ); *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 12 Ct. Int'l Trade 737 (1988), *aff'd*, 884 F.2d 1375 (Fed. Cir. 1989) (FTZ benefits do not apply to capital goods and equipment used or "consumed" within the zone because goods were not being imported into the subzone for the purpose of being used in one of the ways prescribed by the FTZ Act, but were instead to be consumed for the production of other merchandise).

40. 18 F.3d 1581 (Fed. Cir. 1994).

41. Order Approving Application of Lake Charles Harbor and Terminal District for Conoco Refinery at the Port of Lake Charles, in Calcasieu Parish, Louisiana, 53 Fed. Reg. 52,455 (1988); Order Approving Application for Citgo Refinery at

dition required that both Conoco and Citgo pay duties on foreign crude used as fuel (or refined as products used as fuel) in their refineries. Second, the "no inverted tariff benefit" condition required that both zone operations elect "privileged foreign status" for imported foreign crude oil. By electing privileged foreign status, Conoco and Citgo would be foregoing any "inverted tariff" benefits that stem from lower duty rates applicable to refined products.[42]

b. The District Court Decision

In July 1989, Conoco, Citgo, and Lake Charles filed a complaint in the United States District Court for the Western District of Louisiana. In their complaint, the parties argued that the conditions imposed by the FTZ Board were arbitrary and capricious. The Government moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that jurisdiction of such matters rested exclusively with the CIT pursuant to 28 U.S.C. § 1581(i) (1988). The district court agreed that the CIT possessed exclusive jurisdiction and dismissed the complaint without prejudice.[43]

c. The CIT Decision

In June 1990, plaintiffs commenced an action before the CIT, containing allegations identical to those made in district court. Plaintiffs claimed that the CIT had exclusive jurisdiction to review the FTZ Board determination based on the residual jurisdiction provision.[44] The Government defended on the merits, and raised the additional claim that the FTZ Act did not provide for judicial review of FTZ Board determinations. In 1992, the CIT, per Judge Carman, ultimately ruled that § 1581(i) of the CIT's jurisdictional statute did not provide for review of FTZ Board determinations.[45] The Court ruled that plaintiffs could not rely on the residual jurisdiction provision

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the Port of Lake Charles, in Calcasieu Parish, Louisiana 54 Fed. Reg. 27,660 (1989).

42. *See* discussion of the inverted tariff concept *supra* Section II.A.1.

43. Conoco, Inc. v. United States Foreign-Trade Zones Bd., Civil Action No. 89-1717-LC (W.D. La. 1990).

44. 28 U.S.C. § 1581(i)(1), (4) (1988).

45. Conoco, Inc. v. United States Foreign-Trade Zones Bd., 790 F. Supp. 279 (Ct. Int'l Trade 1992).

because they had not demonstrated that the remedy provided under a specific jurisdictional grant—specifically, the filing of a customs protest—was manifestly inadequate.[46]

d. The Federal Circuit Decision

Conoco's subsequent appeal provided the Federal Circuit with an opportunity to resolve an issue of first impression and, at the same time, resolve the lingering uncertainty over judicial review of FTZ Board determinations. In its March 1994 decision, the Federal Circuit rejected the Government's argument that judicial review was precluded and ruled that the CIT did possess exclusive jurisdiction over FTZ Board determinations.

The Federal Circuit's analysis of the CIT's jurisdictional statute made reference to the relevant legislative history. Congress, the court noted, sought to provide the CIT with broad jurisdiction "over any civil action against the United States arising out of the federal statutes governing import transactions."[47] The Federal Circuit also noted Congress' intent that existing confusion as to the subject matter jurisdiction of district courts and the CIT be eliminated, so that litigants could avoid having actions dismissed for lack of jurisdiction.[48]

The Federal Circuit identified two provisions of 28 U.S.C. § 1581 as potential sources of jurisdiction: subsection (a), which provides for review of a denial of a customs protest, and subsection (i), which provides for a residual grant of jurisdiction. In the Court's view, however, plaintiff's remedy under subsection (a) was manifestly inadequate, insofar as it required plaintiff to initiate a customs protest proceeding in order to collaterally attack a determination of the FTZ Board.[49]

By analyzing the plain language of subsection (i) of the statute, the Federal Circuit concluded that

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46. *Id.* at 282, 285-88. The Court did express its sense of frustration with this result and stated that the "restrictive statutory scheme of § 1581(a)-(h) and its relationship to § 1581(i) should be re-examined." *Id.* at 289.

47. Conoco, Inc. v. United States Foreign-Trade Zones Bd., 18 F.3d 1581, 1586, (citing H.R. REP. NO. 1235, *supra* note 22, at 21, *reprinted in* 1980 U.S.C.C.A.N. at 3732).

48. *Id.* (citing H.R. REP. NO. 1235, *supra* note 22, at 47, *reprinted in* 1980 U.S.C.C.A.N. at 3759).

49. *Id.* at 1587-88.

> [t]he language of subsection (i) granting to the Court of International Trade "exclusive jurisdiction of any civil action . . . that arises out of any law of the United States providing for—," when coupled with the phrases in paragraph (i)(1) relating to "revenue from imports or tonnage" would seem easily to embrace the matters appellants raise here.[50]

Thus, the Federal Circuit was able to establish a sufficient nexus between FTZ Board determinations and the specific language of 28 U.S.C. § 1581(i).

The Federal Circuit's opinion in the *Conoco* decision answered the question as to whether the CIT was vested with exclusive jurisdiction to review FTZ Board determinations. But in truth, the *Conoco* decision addressed only one side of the question. How would federal district courts rule when faced with a FTZ Board determination? More importantly, would federal appellate courts disagree with the Federal Circuit and cause a split among the circuits? It was the D.C. Circuit's *Miami Free Zone Corp.* decision—which concurred with the *Conoco* decision—which effectively resolved these questions.

4. *Miami Free Zone Corp. v. United States Foreign Trade Zones Board*[51]

a. Background

At the center of this dispute was the FTZ Board's ability to authorize more than one general-purpose zone in a port of entry if it determines that the existing zone(s) do not adequately serve the convenience of commerce.[52] In 1991, the FTZ Board approved the application of the Wynwood Community Economic Development Corporation (Wynwood) for an additional zone in the Miami port of entry. Plaintiff Miami Free Zone Corp., the private operator of the original FTZ in Miami, challenged the grant of authority in federal district court. The district court subsequently granted the government's motion to dismiss for lack of subject matter jurisdiction, ruling that the CIT had exclusive jurisdiction under § 1581(i).[53]

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50. *Id.* at 1588.
51. 803 F. Supp. 42 (D.D.C. 1994).
52. 19 U.S.C. § 81b(b) (1988).
53. Miami Free Zone Corp. v. Foreign Trade Zones Bd., 803 F. Supp. 442

b. The D.C. Circuit Decision

In its ruling on the appeal, the D.C. Circuit ultimately concurred with the Federal Circuit's *Conoco* decision, though differing slightly in its emphasis.[54] The D.C. Circuit found it necessary to rely upon § 1581(i)(4), concluding that the FTZ Act—by granting an exemption from tariffs and duties on foreign merchandise—provides for the administration of such tariffs and duties.[55] As a result, the residual jurisdiction provision was found to contain a jurisdictional grant which was sufficiently broad to encompass review of FTZ Board determinations. The court admitted that the question was a close one but emphasized the value of uniform judicial review of FTZ Board matters and its preference that a circuit conflict be avoided.[56]

IV. CONCLUSION

The full implications of the *Conoco* and the *Miami Free Zone Corp.* decisions for other areas of international trade litigation are beyond the scope of this paper. Nevertheless, the decisions have resolved the lingering question regarding judicial review of FTZ Board determinations. In this sense, the decisions have interpreted the CIT's jurisdictional statute in a way that eliminates the confusion which existed for litigants seeking to challenge FTZ Board determinations.

(D.D.C. 1994).

54. Miami Free Zone Corp. v. Foreign Trade Zones Bd., 22 F.3d 1110 (D.C. Cir. 1994).

55. *Id.* at 1112-13.

56. *Id.* at 1113.