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Securing Judicial Review in the United States Court of International Trade: Has Conoco, Inc. v. United States Broadened the Jurisdictional Boundaries?

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Securing Judicial Review in the United States Court of International Trade: Has *Conoco, Inc. v. United States* Broadened the Jurisdictional Boundaries?

Lynn S. Baker and Michael E. Roll

Abstract

To understand whether *Conoco* has also broadened the jurisdictional boundaries of Section 1581(i), this Article first discusses the Federal Circuit decision in *Conoco*. It then briefly reviews a sampling of case law on Section 1581(i) prior to *Conoco*. This Article concludes that *Conoco* has not broadened the jurisdiction of the CIT, but rather it has directed courts to give effect to Congress' intent to centralize adjudication of international trade disputes in the CIT. Finally, this Article analyzes several fact patterns, including facts from cases decided prior to *Conoco*, to determine whether the CIT would have jurisdiction under Section 1581(i) in light of *Conoco*.

ARTICLES

SECURING JUDICIAL REVIEW IN THE UNITED STATES COURT OF INTERNATIONAL TRADE: HAS *CONOCO, INC. v. UNITED STATES* BROADENED THE JURISDICTIONAL BOUNDARIES?

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INTRODUCTION

In 1980, the U.S. Congress established the United States Court of International Trade (the "CIT") by enacting the Customs Court Act of 1980.¹ Prior to creation of the CIT much confusion surrounded the jurisdiction of its predecessor, the United States Customs Court.² Some district courts refused to hear actions relating to international trade matters, while others asserted jurisdiction over international trade matters.³

In establishing the CIT, Congress sought to construct a comprehensive system of judicial review of civil actions arising from import transactions.⁴ Congress granted the newly created CIT exclusive jurisdiction over civil actions against the United States arising out of statutes governing import transactions.⁵ The purpose behind granting the CIT such jurisdiction was to eliminate jurisdictional conflicts between federal district courts and the United States Customs Court and to ensure uniformity of interpretation of U.S. international trade law.⁶

The CIT's exclusive jurisdiction over civil actions commenced by private parties against the United States is described in Section 1581 of Title 28. Section 1581 provides that the CIT

1. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified at scattered sections of 19 U.S.C.).

2. H.R. REP. NO. 1235, 96th Cong., 2d Sess., (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3730 [hereinafter H.R. REP. NO. 1235].

3. H.R. REP. NO. 1235, *supra* note 2, at 3741; *see, e.g.*, *SCM Corp. v. United States Int'l Trade Comm'n*, 549 F.2d 812 (D.C. Cir. 1977) (jurisdiction over action to compel U.S. International Trade Commission to set aside negative determination of injury under Antidumping Act of 1921 proper in Customs Court, not federal district court); *Consumers Union of United States, Inc. v. Committee for the Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1978) (Customs Court has exclusive jurisdiction of action seeking declaratory judgment and mandatory injunction against administration of U.S. program regulating by quota importation of textiles and textile products); *Sneaker Circus, Inc. v. Carter*, 566 F.2d 396 (2d Cir. 1977) (federal district court has jurisdiction over action challenging trade agreements); *Timken Co. v. Simon*, 539 F.2d 221 (D.C. Cir. 1976) (federal district court has jurisdiction over action to enjoin Secretary of Treasury from refusing to impose antidumping duty on imported goods).

4. H.R. REP. NO. 1235, *supra* note 2, at 3731.

5. *Id.* at 3732.

6. *Id.* at 3739, 3741.

shall have exclusive jurisdiction over nine different types of civil actions.⁷ The first eight types of civil actions refer to particular

7. 28 U.S.C. § 1581 (1988 & Supp. V 1993). Section 1581 provides:

§ 1581. Civil Actions against the United States and agencies and officers thereof

- (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
- (b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.
- (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.
- (d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review —
 - (1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;
 - (2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and
 - (3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.
- (e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.
- (f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.
- (g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review —
 - (1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;
 - (2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and
 - (3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930.
- (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing

situations over which the CIT has exclusive jurisdiction. For example, the CIT has jurisdiction over the denial of a protest, the refusal to pay drawback, the imposition of antidumping and countervailing duties, the denial, revocation, or suspension of a customs broker's license, and determinations concerning eligibility for trade adjustments under the Trade Act of 1974. As Judge Carman of the CIT has stated, litigants must "slide exactly into a glove of eight jurisdictional fingers, known as 28 U.S.C. § 1581(a)-(h) or [they] are out of court."⁸

If a civil litigant cannot "slide into one of the eight jurisdictional fingers," he or she may try to argue that nevertheless, the CIT has jurisdiction over the action under the so-called "residual" jurisdiction provision of Section 1581. Section 1581(i) provides that the CIT has exclusive jurisdiction over any civil action commenced against the United States that arises out of any law providing for:

- (1) revenue from imports or tonnage;

the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

- (i) 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 —

- (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 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.

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 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

- (j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

Id.

8. Gregory W. Carman, *Remarks Before the Conference on International Business Practice on Practice Before the United States Court of International Trade*, 2 FED. CIR. B. J. 123 (1992).

- (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 public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) and [28 U.S.C. § 1581(a)-(h)].⁹

Accordingly, the residual jurisdiction provision "expands the exclusive jurisdiction of the [CIT]."¹⁰ The legislative history of the residual jurisdiction provision states that the purpose of the provision is 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 . . . [although] the [Judiciary] Committee did not intend to create any new causes of action, but merely to designate definitively the appropriate forum.¹¹

The Customs Court Act of 1980 did not entirely eliminate the confusion for international trade litigants with respect to which court has jurisdiction over matters related to U.S. international trade law. Based in part upon a Supreme Court case involving a challenge to customs regulations governing the importation of articles bearing recorded trademarks and trade names,¹² some federal courts have been hesitant to find the CIT has exclusive jurisdiction over some actions that are arguably related, either directly or indirectly, to U.S. international trade laws.¹³ Fortunately, language in the recent decision of the U.S. Court of Appeals for the Federal Circuit in *Conoco, Inc. v. United States* appears to have clarified the jurisdictional boundaries of the CIT.¹⁴

9. 28 U.S.C. § 1581(i).

10. H.R. REP. NO. 1235, *supra* note 2, at 3758.

11. *Id.* at 3745.

12. *K-Mart Corp. v. Cartier*, 485 U.S. 176, 186 (1988).

13. See, e.g., *International Labor Rights Educ. & Research Fund v. Bush*, 752 F. Supp. 490 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992); *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993); *Conoco, Inc. v. United States*, 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd*, 18 F.3d 1581 (Fed. Cir. 1994).

14. 18 F.3d 1581, 1588 (Fed. Cir. 1994) ("[Section 1581(i)] was intended to give the Court of International Trade broad residual authority over civil actions arising out

To understand whether *Conoco* has also broadened the jurisdictional boundaries of Section 1581(i), this Article first discusses the Federal Circuit decision in *Conoco*. It then briefly reviews a sampling of case law on Section 1581(i) prior to *Conoco*. This Article concludes that *Conoco* has not broadened the jurisdiction of the CIT, but rather it has directed courts to give effect to Congress' intent to centralize adjudication of international trade disputes in the CIT. Finally, this Article analyzes several fact patterns, including facts from cases decided prior to *Conoco*, to determine whether the CIT would have jurisdiction under Section 1581(i) in light of *Conoco*.

I. CONOCO, INC. v. UNITED STATES

In *Conoco*, the Federal Circuit held that the CIT has exclusive jurisdiction over an action challenging a decision of the Foreign Trade Zone Board ("FTZB").¹⁵ The plaintiffs, oil refinery operators and a foreign trade zone¹⁶ operator, applied to the FTZB for a foreign trade zone subzone.¹⁷ The FTZB granted the application subject to certain conditions.¹⁸ Pursuant to the Administrative Procedure Act,¹⁹ one of the oil refinery operators and the foreign trade zone operator sought judicial review of the FTZB's decision in federal district court.²⁰ The government suc-

of federal statutes governing import transactions, and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts.").

15. *Id.* The FTZB is a governmental entity that has the authority to grant to corporations the privilege of establishing, operating, and maintaining a foreign trade zone in the United States. 19 U.S.C. § 81b (1988 & Supp. V 1993). The FTZB consists of the Secretary of Commerce, the Secretary of the Treasury, and the Secretary of the Army. *Id.* § 81a(b). The Secretary of Commerce functions as the chairman and executive officer of the FTZB. *Id.* The regulations governing the FTZB are contained in 15 C.F.R. § 400 (1994).

16. *See* 19 U.S.C. § 81b. A foreign trade zone is a geographical area located adjacent to or in a port of entry into the United States. The grantee of a zone has the authority to permit others to operate within the zone subject to the approval of the FTZB. *Id.* § 81m.

17. 18 F.3d at 1581. A subzone has all the characteristics of a zone except that it is an area separate from an existing zone. 15 C.F.R. § 400.2(q).

18. 18 F.3d at 1583. The conditions imposed by the FTZB were: (1) that duties be paid on foreign crude oil used as fuel (or refined into products used as fuel) in the refineries; and, (2) that Conoco and Citgo elect "privileged foreign status" for foreign crude oil brought into their respective subzones, i.e., elect to pay duties on the value of that crude oil as opposed to the value of the refined products produced therefrom. *Id.*

19. 5 U.S.C. § 701 (1988 & Supp. V 1993).

20. 18 F.3d at 1583.

cessfully sought dismissal of the action, claiming that the CIT had exclusive jurisdiction over the decision of the FTZB.²¹

When the plaintiffs commenced an action for judicial review of the FTZB decision in the CIT, the government again sought dismissal of the action, claiming (1) that no court had jurisdiction to review the action of the FTZB, or, in the alternative, (2) that the plaintiffs did not meet the jurisdictional requirements of Section 1581(i).²² Based on prior precedent²³ that narrowly construed Section 1581(i), Judge Carman agreed with the government that the plaintiffs did not meet the jurisdiction requirements of Section 1581(i) because the plaintiffs failed to file an administrative protest with Customs or to demonstrate why jurisdiction under Section 1581(a) would be "manifestly inadequate."

On appeal, the Federal Circuit held that the CIT has exclusive jurisdiction to review the FTZB decision.²⁴ The Federal Circuit reasoned that the plaintiffs did not have to file a protest with Customs. While plaintiffs generally may not resort to jurisdiction under Section 1581(i) without first exhausting administrative remedies, the Federal Circuit noted that plaintiffs may resort to jurisdiction under Section 1581(i) if jurisdiction under another statute is "manifestly inadequate." The Federal Circuit then concluded that requiring the plaintiffs to file an administrative protest would be "manifestly inadequate" because Customs could not overturn the action of a separate government agency.²⁵

The Federal Circuit stated further that the plaintiffs' claims fell "easily" and "comfortably" within the text of Section 1581(i)(1) and (4).²⁶ The Federal Circuit noted that there was

21. *Id.*

22. 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd*, 18 F.3d 1581 (Fed. Cir. 1994).

23. *See, e.g.,* K-Mart Corp. v. Cartier, 485 U.S. 176 (1988).

24. 18 F.3d 1581 (Fed. Cir. 1994).

25. *Id.* at 1590.

26. *Id.* at 1588. Judge Plager stated:

As noted earlier, [Section 1581(i)] was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions, and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts. On its face, subsection (i) is straightforward and comprehensive. The 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

"little ground for dispute" as to what is within the concept of "revenue from imports" and "administration and enforcement" of matters relating to revenue from imports.²⁷ The Federal Circuit rejected the conclusion that the Foreign Trade Zone Act ("FTZA") only governs export transactions, stating that such a narrow view of the FTZA "ignores commercial realities."²⁸ Finally, the Federal Circuit reasoned that the CIT's acknowledged expertise in customs and tariff issues supported its determination that jurisdiction was proper in the CIT.²⁹ Therefore, the Federal Circuit held that the CIT had exclusive jurisdiction to review the decision of the FTZB and remanded the case for adjudication on the merits.³⁰

(i)(1) relating to "revenue from imports or tonnage" would seem easily to embrace the matters appellants raise here. The foreign trade zones arise under laws designed to deal with revenue from imports, and they provide a special mechanism for determining revenue from materials imported into these zones. In addition, paragraph (i)(4) refers to "administration and enforcement" with respect to the matters referred to in the earlier paragraphs, as well as those covered in subsections (a) through (h). Again, a straightforward reading of the statutory language indicates that the kinds of administrative conditions placed on the grant to appellants falls comfortably within the scope of that language.

Id.

27. *Id.* at 1589. Judge Plager continued:

In the case before us, there is little ground for dispute as to what is within the concept of 'revenue from imports,' or what 'administration and enforcement' means with regard to matters relating to revenue from imports. Furthermore, there 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. K Mart directs that in determining the jurisdiction of the Court of International Trade under § 1581 we stay within the parameters of the statute. That of course is unassailable advice; we have no difficulty in finding within the parameters of subsection (i) the precise terms needed to cover the issues here.

Id.

28. *Id.* at 1590 n.24.

29. *Id.*

30. *Id.* at 1590. On remand, the CIT held that the FTZB decision to impose conditions on the granting of the subzone did not contain an "understandable basis" that would permit the CIT to determine whether the FTZB acted within the scope of its authority. *Conoco, Inc. v. United States Foreign Trade Zones Board*, 855 F. Supp. 1306, 1311 (Ct. Int'l Trade 1994). Accordingly, the CIT remanded the case to the FTZB for it to articulate its reasons for imposing the conditions on the granting of the subzone. *Id.* at 1312.

II. JUDICIAL INTERPRETATION OF SECTION 1581(I) PRIOR TO CONOCO

A. The "Manifestly Inadequate" Requirement

Case law interpreting Section 1581(i) establishes that where it is possible for the CIT to have jurisdiction under another statute, civil litigants may not claim that the CIT has jurisdiction under Section 1581(i) unless the other jurisdiction is "manifestly inadequate."³¹ As demonstrated in *Conoco*, the classic example of a situation where jurisdiction under another statute is "manifestly inadequate" is where a plaintiff is required to challenge, through administrative remedies, an action by Customs, over which Customs has no discretion.³²

Where jurisdiction under another subsection is not "manifestly inadequate," jurisdiction under Section 1581(i) is improper.³³ For example, in a dispute with Customs over the classi-

31. See, e.g., *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992); *Miller & Co. v. United States* 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988); *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993); *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428 (Ct. Int'l Trade 1992); *Dennison Mfg. Co. v. United States*, 678 F. Supp. 894 (Ct. Int'l Trade 1988).

32. See, e.g., *Mitsubishi Elec. America, Inc. v. United States*, __ F.3d __ (CAFC 1994) (jurisdiction under Section 1581(i) not Section 1581(a) where customs merely collection agency for antidumping duties imposed by Department of Commerce); *Springfield Indus. Corp. v. United States*, 655 F. Supp. 506 (Ct. Int'l Trade 1987) (requiring plaintiff to file protest with Customs where merchandise sought to be imported was placed on prohibited import list by Secretary of Treasury under Anti-Apartheid Act of 1986 would be manifestly inadequate because Customs had no discretion in prohibiting importation); *United States Cane Sugar Refiners' Ass'n v. Block*, 544 F. Supp. 883 (Ct. Int'l Trade 1982), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982) (CIT had jurisdiction over action challenging Presidential Proclamation that established import quota proper under Section 1581(i) because even though plaintiffs did not file protest requiring plaintiffs to file protest would be "totally unreasonable" and "shocking" since Customs did not have legal authority to grant protest); *Luggage & Leather Goods Mfrs. of America, Inc. v. United States*, 588 F. Supp. 1413 (Ct. Int'l Trade 1984) (requiring plaintiffs to exhaust administrative remedies and obtain jurisdiction under Section 1581(b) would be manifestly inadequate in action challenging President's designation of goods as GSP-eligible because Customs had no authority over authorization of GSP eligibility); *Mast Indus., Inc. v. Regan*, 596 F. Supp. 1567 (Ct. Int'l Trade 1984) (filing of protests in actions challenging requirements for importing textiles and textile products that were subject to quantitative limitations under bilateral trade agreements or pursuant to unilaterally imposed restraints would be manifestly inadequate).

33. See, e.g., *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992); *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960 (Fed. Cir. 1992); *Miller & Co. v. United States* 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041

fication of imported merchandise, an importer may not bypass the administrative review process by asking the CIT to review Customs' classification under Section 1581(i). Rather, the importer must file a protest with Customs, receive a denial of the protest, and then file suit in the CIT under Section 1581(a) to contest the denial of the protest. By interpreting Section 1581(i) narrowly, courts preserve the congressionally mandated procedures and safeguards provided for in Section 1581(a)-(h).³⁴

B. The "Arising Out Of" Requirement

In addition to showing that other jurisdictional provisions are "manifestly inadequate," a litigant must also demonstrate that his or her action "arises out of" a law 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 public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of [Section 1581(i)] and [Section 1581(i)](a)-(h).³⁵

Prior to 1988, the CIT held that civil actions challenging the following acts "arose out of" a law described in Section 1581(i): (1) exclusion of merchandise based on classification of the merchandise in tariff provisions subject to quota,³⁶ (2) calculation by the Committee on the Implementation of Textile Agreements of an import quota and the existence of market disruption,³⁷ (3)

(1988); *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988); *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993); *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428 (Ct. Int'l Trade 1992); *Dennison Mfg. Co. v. United States*, 678 F. Supp. 894 (Ct. Int'l Trade 1988).

34. *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992).

35. 28 U.S.C. § 1581(i) (1988 & Supp. V 1993).

36. *Wear Me Apparel Corp. v. United States*, 511 F. Supp. 814 (Ct. Int'l Trade 1981).

37. *American Ass'n of Exporters & Importers v. United States*, 583 F. Supp. 591 (Ct. Int'l Trade 1984), *aff'd*, 751 F.2d 1239 (Fed. Cir. 1985); *Associated Dry Goods Corp. v. United States*, 521 F. Supp. 473 (Ct. Int'l Trade 1981).

the validity of a presidential proclamation imposing import quotas on sugar,³⁸ (4) the validity of regulations governing importation of textiles and textile products,³⁹ (5) the inclusion of merchandise on a list prohibiting importation of certain products from South Africa,⁴⁰ (6) an Executive Order granting duty-free status to certain goods imported from eligible countries,⁴¹ (7) Customs' revocation of a customhouse cartman's license,⁴² and (8) Customs' denial of an application for a license to operate a container station near an international airport.⁴³

III. K-MART CORP. v. CARTIER, INC.

In *K-Mart Corp. v. Cartier, Inc.*, a five-to-three opinion, the Supreme Court held that the CIT did not have exclusive jurisdiction pursuant to Section 1581(i)(3) over an action challenging the validity of Customs' regulations regarding the importation of articles bearing recorded trademarks and trade names.⁴⁴ The defendants in *K-Mart* argued that jurisdiction in federal district court was improper because the prohibition on unauthorized importation of articles bearing recorded trademarks and trade names amounted to an "embargo" within the meaning of Section 1581(i)(3), a statute granting the CIT exclusive jurisdiction.⁴⁵

38. *United States Cane Sugar Refiners' Ass'n v. Block*, 544 F. Supp. 883 (Ct. Int'l Trade 1982).

39. *Mast Indus. v. Regan*, 596 F. Supp. 1567 (Ct. Int'l Trade 1984).

40. *Springfield Indus. Corp. v. United States*, 655 F. Supp. 506 (Ct. Int'l Trade 1987).

41. *Luggage & Leather Goods Mfrs. of America, Inc. v. United States*, 588 F. Supp. 1413 (Ct. Int'l Trade 1984).

42. *Di Jub Leasing Corp. v. United States*, 505 F. Supp. 1113 (Ct. Int'l Trade 1980).

43. *Air Cargo Servs., Inc. v. United States*, 678 F. Supp. 296, 298 (Ct. Int'l Trade 1988) (quoting *Bar Bea Truck Leasing Co. v. United States*, 4 CIT 104, 105 (1982)) ("Since the primary purpose of licensing . . . is for the protection of the governmental revenue from imports, this action arises out of the administration and enforcement with respect to a law of the United States providing for revenue from imports within the purview of 28 U.S.C. §§ 1581(i)(1) and (4)."); see *National Bonded Warehouse Ass'n, Inc. v. United States*, 706 F. Supp. 904 (Ct. Int'l Trade 1989) (Section 1581(i)(4) gave CIT jurisdiction over action challenging validity of bonded warehouse annual fee rates).

44. 485 U.S. 176 (1988). Justice Kennedy took no part in the consideration or decision of the case. In addition to Justice Brennan, the majority included Justices White, Marshall, Blackmun, and Stevens. The dissent was written by Justice Scalia, and joined by Justice O'Connor and Chief Justice Rehnquist.

45. *Id.* at 182.

Rejecting the defendants' argument, the Supreme Court held that jurisdiction was proper in federal district court.⁴⁶ The Court reasoned that the federal statute prohibiting the unauthorized importation of recorded trademarks and trade names⁴⁷ did not amount to an "embargo" under Section 1581(i)(3).⁴⁸ Writing the majority opinion, Justice Brennan narrowly defined the term "embargo" as a governmentally imposed quantitative restriction of zero on the importation of merchandise.⁴⁹ According to the majority, the regulation at issue was not an "embargo" because a private party, not the government, decided whether a product could enter the United States.⁵⁰

The Court reasoned further that holding jurisdiction to be proper in federal district court was consistent with the legislative history of the Customs Court Act of 1980.⁵¹ According to the majority, Congress did not intend the CIT to have exclusive jurisdiction over every suit against the government involving customs-related laws and regulations.⁵² Finally, the Court added

46. *Id.*; see Giovanna M. Cinelli, *Jurisdictional Quagmire: The Implications of K-Mart Corp. v. Cartier*, 16 SYRACUSE J. INT'L L. & COM. 39 (1989). Prior to *K-Mart Corp.*, federal courts interpreted Section 1581(i) inconsistently with regard to the appropriate forum for an action challenging the customs regulations governing importations of gray market goods. The Second Circuit Court of Appeals held that the Court of International Trade did not have exclusive jurisdiction over an action challenging the Customs Service regulations prohibiting the importation of recorded trademarks and trade names. See *Olympus Corp. v. United States*, 792 F.2d 315 (2d Cir. 1986). The Court of Appeals for the Federal Circuit, by contrast, held that the Court of International Trade *did* have exclusive jurisdiction over such an action. See *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir. 1985).

47. 19 U.S.C. § 1526(a) (1988 & Supp. V 1993).

48. 485 U.S. at 185. Justice Brennan reasoned:

Although we reject the Court of Appeals' analysis, we nevertheless agree with its conclusion that § 526 does not impose an embargo. As the above-quoted definitions suggest, the ordinary meaning of "embargo," and the meaning that Congress apparently adopted in the statutory language "embargoes or other quantitative restrictions," is a governmentally imposed quantitative restriction — of zero — on the importation of merchandise.

An importation prohibition is not an embargo if rather than reflecting a governmental restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.

Id.

49. *Id.*

50. *Id.*

51. *Id.* at 187-88.

52. *Id.* Justice Brennan stated:

that the CIT and its predecessor court did not have expertise in the law at issue in the case — trademark law — and that Congress did not intend the CIT to acquire such expertise.⁵³

A dissent written by Justice Scalia argued that while Section 1581(i) does not define the term “embargo,” the term “embargo” should be construed according to its ordinary meaning.⁵⁴ Citing several dictionaries, Justice Scalia stated that the ordinary meaning of the term “embargo” is “an import regulation that takes the form of a governmental prohibition on imports, regardless of any exceptions it may contain and regardless of its ultimate purpose.”⁵⁵ Justice Scalia concluded that the challenged customs regulations amounted to government imposed restrictions, rather than private restrictions, on imports.⁵⁶ Therefore, the regulations were an “embargo” under Section 1581(i)(3) and jurisdiction was proper in the CIT, not in the federal district court.

Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations. Had Congress wished to do so it could have expressed such 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,” or over “all civil actions against the [Government] which arise directly from import transactions and which arise under the Tariff Act of 1930.”

In rejecting bills that would have implemented such a categorical approach, Congress opted for a scheme that achieved the desired goals of uniformity and clarity by delineating precisely the particular customs-related matters over which the Court of International Trade would have exclusive jurisdiction.

Id. at 188 (citations omitted) (emphasis added).

53. *Id.* at 189.

54. *Id.* at 191.

55. *Id.* at 195.

56. *Id.* at 193. According to Justice Scalia:

But if, despite its privately invocable exception, § 526(a) meets the requirement of being a prohibition, it unquestionably meets the requirement of being a governmentally imposed one. . . . Embargoes are imposed for many different purposes, including sometimes the protection of private rights. Assuredly those which have the latter purpose are *different* from those that do not, but is beyond me why that purpose, any more than any other one, would cause them not to be governmentally imposed import prohibitions.

Id. at 194 (emphasis added).

IV. THE AFTERMATH OF K-MART

A. District Court Interpretation of Section 1581(i) After K-Mart

In the aftermath of *K-Mart*, at least one federal district court interpreted *K-Mart* to mean that courts should construe Section 1581(i) strictly. In *International Labor Rights Education & Research Fund v. Bush*, the federal district court for the District of Columbia held that the CIT did not have exclusive jurisdiction over an action by labor organizations alleging that the President failed to enforce worker rights provisions of the Generalized System of Preferences ("GSP") of the Trade Act of 1974.⁵⁷ The GSP was a program established to foster economic growth in designated developing countries by permitting eligible goods to enter the United States duty-free. Under the Trade Act of 1974, the President was required to deny preferential duty treatment to products originating in beneficiary countries if the beneficiary country did not meet certain worker rights standards.⁵⁸ The plaintiffs filed suit in federal district court alleging that the President failed to investigate worker rights standards and thus improperly granted GSP benefits.

Citing *K-Mart*, the district court reasoned it had jurisdiction over the action because Congress did not give the CIT exclusive jurisdiction over every action challenging customs-related laws, only those described in Section 1581(i).⁵⁹ Characterizing the action as one seeking an order directing the President to adopt certain procedures for investigating worker rights,⁶⁰ and the GSP statute as one providing for conditions under which duties may be lifted, the district court reasoned that the GSP statute did not provide for "tariffs, duties, fees or other taxes" within the meaning of Section 1581(i).⁶¹ Accordingly, it found jurisdiction was proper in the district court.⁶² The court dismissed the plaintiffs' suit after determining that the plaintiffs' claims were nonjusticiable.⁶³

In a two-to-one decision, the Court of Appeals for the Dis-

57. 752 F. Supp. 490 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992).

58. 19 U.S.C. §§ 2462(b), 2464(b) (1988 & Supp. V 1993).

59. 752 F. Supp. at 491.

60. *Id.*

61. *Id.*

62. *Id.* at 492.

63. *Id.* at 495.

trict of Columbia Circuit affirmed the district court.⁶⁴ However, of the two judges voting to affirm the district court's dismissal of the action, only one judge indicated that the district court lacked subject matter jurisdiction.⁶⁵ The other judge voting to affirm the district court agreed with the district court that the CIT did not have exclusive subject matter jurisdiction.⁶⁶ The dissenting judge also agreed with the district court that the CIT did not have subject matter jurisdiction.⁶⁷ Thus the case was not affirmed on jurisdictional grounds.

Nonetheless, a majority of appellate judges reasoned that the GSP statute was not a law described in Section 1581(i).⁶⁸ Judge Sentelle agreed with the district court that the GSP statute did not "provide for" tariffs, duties, or fees.⁶⁹ Rather, tariffs, duties, and fees are "provided for" by other statutes, not by the GSP.⁷⁰ Judge Sentelle explained that federal courts could not interpret the words "providing for" as meaning "relating to."⁷¹

The one appellate judge who reasoned that the CIT had exclusive jurisdiction, Judge Henderson, stated that the phrase used in Section 1581(i)(2), "providing for," could be interpreted to mean "relating to."⁷² Under such an interpretation, the GSP statute was a statute "relating to" tariffs, duties, and fees and the CIT had exclusive jurisdiction. Judge Henderson also asserted that because the plaintiffs effectively sought imposition of duties on goods otherwise eligible for duty-free entry, the GSP statute provided for the "administration and enforcement" of revenue from imports and tariffs, duties and fees.⁷³ Accordingly, the CIT had jurisdiction over the action under Section 1581(i)(4).

Judge Henderson noted that the legislative history of the Customs Court Act of 1980 supported her decision that the CIT

64. 954 F.2d 745 (D.C. Cir. 1992).

65. *Id.* at 746 (Henderson, J., concurring).

66. *Id.* at 749 (Sentelle, J., concurring). Judge Sentelle voted to affirm the district court decision based on the conclusion that the plaintiffs lacked standing. *Id.*

67. *Id.* at 752 (Mikva, J., dissenting). The dissent would have reversed the district court based on the dissent's belief that the claims were justiciable. *Id.*

68. *Id.* at 749, 752.

69. *Id.* at 749. Judge Mikva agreed with Judge Sentelle that the CIT did not have subject matter jurisdiction. Judge Mikva did not address the jurisdictional issue, however, other than by stating that jurisdiction was proper in the district court. *Id.* at 752.

70. *Id.* at 749.

71. *Id.*

72. *Id.* at 747.

73. *Id.*

had jurisdiction.⁷⁴ In light of Congress' desire that the CIT have exclusive jurisdiction over tariff and international trade laws and the fact that the GSP statute was enacted as part of the Trade Act of 1974, jurisdiction was proper in the CIT.⁷⁵ Finally, Judge Henderson cited several CIT cases where the CIT found jurisdiction over disputes arising under the GSP statute.⁷⁶

B. *Ninth Circuit Court of Appeals' Interpretation of Section 1581(i)*
After K-Mart

After *K-Mart*, the Court of Appeals for the Ninth Circuit did not construe Section 1581(i) as narrowly as the federal district court for the District of Columbia.⁷⁷ In *Earth Island Institute v. Christopher*, the Ninth Circuit held that the CIT, not the federal district court, had exclusive jurisdiction over an action brought by an environmental organization to enforce statutory provisions designed to promote the international protection of sea turtles.⁷⁸ The statute at issue in *Earth Island Institute* required the U.S. Secretary of State to negotiate treaties with foreign countries to protect sea turtles from commercial shrimp fishing, to certify that foreign countries have taken steps to protect sea turtles, and to limit the importation of shrimp from non-certified countries that do not protect sea turtles.⁷⁹ The environmental organization alleged that the government (1) did not initiate treaty negotiations with foreign nations to protect sea turtles, (2) did not properly certify foreign nations, and (3) did not ban the importation of products from countries that do not protect sea turtles.⁸⁰

In affirming the district court's dismissal of the action for lack of subject matter jurisdiction, the Ninth Circuit held that the CIT had exclusive jurisdiction over the allegation that the

74. *Id.* at 747-48.

75. *Id.* at 748.

76. *Id.*

77. *Earth Island Inst. v. Brown*, 28 F.3d 76 (9th Cir. 1994); *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993).

78. 6 F.3d at 651-52.

79. The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990 § 609, 103 Stat. 988, 1037-38 (1989) (codified at 16 U.S.C. § 1537 (Supp. V. 1993)). In the United States, federal regulations required commercial shrimp trawl fishers to use "turtle excluder devices" to prevent turtles that are trapped in nets from drowning. See 52 Fed. Reg. 24,244 (June 29, 1987).

80. 6 F.3d at 650.

government improperly certified foreign nations, and the allegation that the government failed to ban the importation of products from foreign countries that do not protect sea turtles.⁸¹ The Ninth Circuit rejected the argument that the CIT did not have exclusive jurisdiction because the ban on shrimp imports was an environmental, rather than a trade, matter.⁸² The Ninth Circuit noted that the Supreme Court stated in *K-Mart* that the CIT's exclusive jurisdiction over embargoes is not limited to trade-related embargoes.⁸³ Moreover, the Ninth Circuit found that the importation ban amounted to an "embargo" within Section 1581(i)(3) as defined in *K-Mart*: the importation ban at issue was a governmentally imposed quantitative restriction.⁸⁴ Finally, the Ninth Circuit noted that in conflicts between the jurisdiction of the CIT and the district courts, courts should uphold the exclusive jurisdiction of the CIT.⁸⁵

One year later, the Ninth Circuit revisited the scope of the CIT's exclusive jurisdiction. In *Earth Island Institute v. Brown*,⁸⁶ the Ninth Circuit again held that the CIT had exclusive jurisdiction over an action brought by the same environmental organization to require the government to enforce certain provisions of the Marine Mammal Protection Act ("MMPA").⁸⁷ The MMPA required the Secretary of the Treasury to ban importation of commercial fish and products of fish that have been caught with commercial fishing technology that results in excessive incidental killing or serious injury of ocean mammals.⁸⁸ Earth Island Institute obtained a preliminary injunction in federal district court based on its claim that the government failed to implement the importation ban.⁸⁹

81. *Id.* at 648. The Ninth Circuit held that it *did* have jurisdiction over the allegation that the government failed to negotiate protective measures with foreign countries. *Id.* at 652-54. It then found that that claim was non-justiciable. *Id.* at 653. A dissent criticized the majority for "parsing" apart the statute to address an issue not within the jurisdiction of the CIT. *Id.* at 654 (Brunetti, J., dissenting). Judge Brunetti would have held that the CIT also had exclusive jurisdiction over the claim that the government failed to negotiate protective measures for sea turtles with foreign countries. *Id.*

82. *Id.* at 651-52.

83. *Id.*

84. *Id.*

85. *Id.*

86. 28 F.3d 76 (9th Cir.), *cert. denied*, 115 S. Ct. 509 (1994).

87. *Id.* at 79; *see* 16 U.S.C. § 1371 (a)(2)(C) (1988 & Supp. V 1994).

88. 16 U.S.C. § 1371(a)(2)(C).

89. *Earth Island Inst. v. Brown*, 28 F.3d at 77.

The Ninth Circuit held that the district court lacked jurisdiction to grant the preliminary injunction.⁹⁰ Citing its decision in *Earth Island Institute v. Christopher*,⁹¹ the Ninth Circuit found that the importation ban was an embargo within the meaning of Section 1581(i)(3).⁹² The Ninth Circuit again rejected Earth Island Institute's argument that Congress never intended to expand the CIT's jurisdiction beyond adjudicating trade matters and other traditional areas in which it has expertise.⁹³

C. CIT Interpretation of Section 1581(i) After K-Mart

After *K-Mart*, the CIT interpreted the text of Section 1581(i) narrowly in the context of actions arising out of the Foreign Trade Zone Act. In *Phibro Energy, Inc. v. Franklin*,⁹⁴ a case decided prior to *Conoco*, the CIT held that it lacked jurisdiction over an action seeking judicial review of the FTZB's denial of an application for a foreign trade zone subzone.⁹⁵ The plaintiffs in *Phibro* argued that the CIT had jurisdiction over the action. According to the plaintiffs, the Free Trade Zone Act ("FTZA") related to tariffs and duties within the meaning of Section 1581(i)(1)-(2), (4) because the FTZA determined whether and when imports brought into Free Trade Zones are subject to customs liability.⁹⁶

The CIT rejected that argument and held that it lacked jurisdiction under Section 1581(i). The CIT interpreted *K-Mart* to mean that the CIT must scrutinize closely all allegations that it has jurisdiction under Section 1581(i) and to adhere strictly to the precise language of Section 1581(i).⁹⁷ Judge Carman reasoned that the CIT did not have jurisdiction because the FTZA does not authorize or provide for revenues or tariffs, or for the administration and enforcement thereof.⁹⁸ Rather, the FTZA establishes standards for the Free Trade Zone Board to apply in the Free Trade Zone application process.⁹⁹ Additionally, Judge

90. *Id.* at 79.

91. 6 F.3d 648 (9th Cir. 1993).

92. *Earth Island Inst. v. Brown*, 28 F.3d at 78.

93. *Id.*

94. 822 F. Supp. 759 (Ct. Int'l Trade 1993).

95. *Id.* at 761.

96. *Id.* at 760.

97. *Id.* at 763.

98. *Id.* at 763-64.

99. *Id.* at 764.

Carman reasoned that jurisdiction under Section 1581(i) is improper because the purpose of Free Trade Zones is to promote exports, while the thrust of Section 1581(i) is to grant the CIT jurisdiction over import-related matters.¹⁰⁰

The CIT, however, did not interpret *K-Mart* to preclude it from finding that it had jurisdiction over an action brought to require the Department of Treasury and the Commissioner of Customs to promulgate regulations affecting the hierarchy of brokers entitled to enter goods.¹⁰¹ In *National Customs Brokers & Forwarders Ass'n of America v. United States* ("NCBFAA"), the plaintiff alleged that Customs incorrectly implemented a statute requiring courier services to employ licensed brokers when entering consolidated shipments.¹⁰² Customs permitted couriers to enter merchandise by reference to a master bill of lading on which individual entries were logged.¹⁰³ Thus, the couriers' brokers entered merchandise without necessarily following the instructions on individual bills of lading. The NCBFAA asserted that Customs should require couriers to deconsolidate shipments and enter merchandise according to specific instructions on individual bills of lading, where an individual bill of lading designates a port of entry or broker other than that used by the courier.¹⁰⁴ In finding that it had jurisdiction, the CIT held that the plaintiff's action was "not only intertwined with the administration and enforcement of the laws dealing with tariffs . . . but raises issues related to subsidiary areas clearly within the court's jurisdiction."¹⁰⁵ Further, the CIT noted that such areas are within the expertise of the CIT, not the expertise of federal district courts.¹⁰⁶

In *Sharp Electronics Corp. v. United States*,¹⁰⁷ the CIT held that Section 1581(i) also gave it jurisdiction over an action seeking a declaratory judgment that a settlement agreement reached as

100. *Id.*

101. See *National Customs Brokers and Forwarders Ass'n of America v. United States*, 723 F. Supp. 1511 (Ct. Int'l Trade 1989), 731 F. Supp. 1076 (Ct. Int'l Trade 1990).

102. 723 F. Supp. at 1513.

103. *Id.*

104. *Id.*

105. *Id.* at 1514.

106. *Id.*

107. 720 F. Supp. 1014 (Ct. Int'l Trade 1989).

part of an antidumping proceeding was valid and enforceable.¹⁰⁸ In the settlement agreement at issue, the plaintiff and the Department of Commerce agreed to methods used to calculate the value of imported merchandise for purposes of an antidumping duty order.¹⁰⁹ The plaintiffs brought an action in the CIT asking the court to declare the agreement valid and to require the government to adhere to the agreement.¹¹⁰ The government argued that the action involved contract interpretation and that a federal district court, not the CIT, had jurisdiction over the action.¹¹¹ The CIT disagreed.¹¹² Acknowledging the Supreme Court's statement in *K-Mart* that the CIT does not have jurisdiction over every suit involving customs-related laws, the CIT reasoned that contract claims that "directly challenge" the administration and enforcement of customs laws are within the jurisdiction of the CIT.¹¹³ As the Court would have to analyze and apply antidumping duty law in interpreting the contract, the CIT held that jurisdiction was proper under Section 1581(i).¹¹⁴

The CIT also found that it had jurisdiction pursuant to Section 1581(i) over an action challenging the validity of annual fee rates for bonded warehouses.¹¹⁵ In *National Bonded Warehouse Ass'n v. United States*, several warehouse owners brought an action challenging the validity of bonded warehouse annual fee rates.¹¹⁶ The government argued that the CIT lacked jurisdiction because the warehouse owners failed to exhaust their administrative remedies by filing a protest with Customs.¹¹⁷ After determining that the plaintiffs were not required to file a protest because the fees were non-protestable, the CIT held that it had jurisdiction under Section 1581(i)(4) because the action arose out of a law providing for the "administration and enforcement" of import matters.¹¹⁸

108. *Id.* at 1016.

109. *Id.* at 1015.

110. *Id.*

111. *Id.*

112. *Id.* at 1016.

113. *Id.*

114. *Id.*

115. *National Bonded Warehouse Ass'n v. United States*, 706 F. Supp. 904 (Ct. Int'l Trade 1989).

116. *Id.*

117. *Id.* at 907.

118. *Id.* at 907-08.

In *Milin Industries, Inc. v. United States*,¹¹⁹ the CIT found it had jurisdiction pursuant to Section 1581(i) over an action alleging that Customs improperly excluded the plaintiff's merchandise by classifying the merchandise under a tariff item subject to quota.¹²⁰ Although Customs denied the plaintiff's protest and the CIT ultimately held it had jurisdiction under Section 1581(a), the CIT stated that it also had jurisdiction under Section 1581(i).¹²¹ Judge (now Chief Judge) DiCarlo reasoned that Customs' exclusion of the merchandise was based on its belief that a quota violation existed.¹²² Review of Customs' action would require the CIT to use its expertise to determine the proper classification of the merchandise.¹²³ As a result, the CIT found that the action arose out of the administration and enforcement of a quantitative restriction on imported goods.¹²⁴

V. CONOCO HAS RE-EMPHASIZED THE ROLE OF THE CIT IN DECIDING INTERNATIONAL TRADE DISPUTES

The case law on Section 1581(i) discussed above consistently demonstrates that courts analyzing jurisdiction under Section 1581(i) will consider: (1) whether other possible avenues of jurisdiction are "manifestly inadequate," and (2) whether the text of Section 1581(i) describes the plaintiff's action (e.g., the plaintiff's action arose out of a law providing for revenue from imports). Courts will also consider whether resolution of the dispute will require the CIT to apply its expertise in international trade law issues. However, as the *Earth Island Institute* cases make clear, the CIT's jurisdiction is not limited to actions involving its traditional expertise in international trade cases.

In *Conoco*, the Federal Circuit applied these principles

119. 691 F. Supp. 1454 (Ct. Int'l Trade 1988).

120. *Id.* The plaintiff and the government disagreed on whether the merchandise was "excluded" or "seized." The government argued that the merchandise was "seized" when Customs refused to admit it into the United States and "seized" the merchandise for failure to present the proper quota visas. *Id.* If found to be a "seizure," then jurisdiction would be proper only in federal district court. 28 U.S.C. § 1356 (1988). The CIT ultimately found that the merchandise was excluded, and then seized, and that the importer properly filed a protest of the exclusion. 691 F. Supp. at 1454. Therefore, the CIT had jurisdiction under Section 1581(a). *Id.*

121. 691 F. Supp. at 1458.

122. *Id.* at 1457.

123. *Id.*

124. *Id.* at 1458.

straightforwardly. First, the Federal Circuit concluded that requiring the plaintiffs to obtain jurisdiction by filing a protest was "manifestly inadequate" because Customs had no discretion to grant the protest.¹²⁵ Second, the Federal Circuit stated that the plaintiffs' claims in *Conoco* fell squarely within the language of Section 1581(i).¹²⁶ The Federal Circuit reasoned that the FTZA was a law that provided for "revenue from imports" because the FTZA "provide[s] a special mechanism for determining revenue from materials imported into" a free trade zone.¹²⁷ Additionally, the FTZA provided for "administration and enforcement" of laws providing for "revenue from imports" because of "the kinds of administrative conditions placed upon the grant" to the plaintiffs.¹²⁸ Finally, the Federal Circuit bolstered its conclusion by reasoning that the CIT's expertise in customs and tariff issues was relevant to reviewing the decision of the FTZB.¹²⁹ Thus, *Conoco* simply followed prior case law on Section 1581(i).

In deciding the question of jurisdiction, *Conoco* instructs courts to weigh heavily Congress' intent to create a national court for adjudication of international trade law disputes:

It is thus apparent from the legislative history of § 1581 and from the broad grant of exclusive jurisdiction given to the Court of International Trade that 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.¹³⁰

Case law interpreting the text of Section 1581(i) prior to *Conoco* often relied on the statement by the Supreme Court in *K-Mart* that Congress did not intend to give the CIT exclusive jurisdiction over every suit involving U.S. international trade laws. While that is true, cases holding that the CIT did not have jurisdiction ignored equally persuasive legislative history that demon-

125. 18 F.3d 1581, 1587 (Fed. Cir. 1994).

126. *Id.* at 1588.

127. *Id.*

128. *Id.*

129. *Id.* at 1589.

130. *Id.* at 1586.

strated Congress' desire to centralize disputes over U.S. international trade law in one forum and to broaden the CIT's jurisdiction. Additionally, the holding in *K-Mart* was limited to whether the customs regulations governing the importation of articles bearing recorded trademarks and trade names constitute an "embargo" within the meaning of Section 1581(i)(3).¹³¹ *Conoco* has broadened the CIT's residual jurisdiction only to the extent that *Conoco* re-emphasizes Congress' intent to centralize adjudication of international trade disputes in one national forum.

Conoco's instruction that courts should focus on Congress' intent to centralize adjudication of disputes arising out of international trade laws has been followed in post-*Conoco* cases. In *Miami Free Trade Zone Corp. v. Foreign Trade Zones Board*,¹³² the plaintiff-foreign trade zone operator brought an action in federal district court for judicial review of a decision of the FTZB which granted a foreign trade zone application within the plaintiff's geographic district.¹³³ The district court dismissed the action, stating that jurisdiction was proper in the CIT.¹³⁴ On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the action.¹³⁵ The D.C. Circuit rejected the Federal Circuit's conclusion that the FTZA is a law "providing for revenue from imports" under Section 1581(i)(1) or "providing for tariffs or duties" under Section 1581(i)(2).¹³⁶ The D.C. Circuit found however, that the CIT had jurisdiction over the plaintiff's action under Section 1581(i)(4) since the FTZA prescribes when duties may be lowered and promotes international trade.¹³⁷ Accordingly, the FTZA may be described as a law "providing for administration with respect to tariffs . . . for reasons other than the raising of revenue."¹³⁸ Significantly, the D.C. Circuit stated:

131. In fact, one may speculate whether *K-Mart* would be decided differently today. Of the five justice majority, only Justice Stevens remains on the Court. All three dissenting justices, by contrast, are still on the Court. It is unclear how Justices Thomas, Souter, Kennedy, Bader-Ginsburg, and Breyer would have decided the jurisdictional issue in *K-Mart*.

132. 803 F. Supp. 442 (D.D.C. 1992), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994).

133. 803 F. Supp. at 443.

134. *Id.* at 444.

135. 22 F.3d 1110.

136. *Id.* at 1112.

137. *Id.*

138. *Id.*

[N]ow that the Federal Circuit has decided [in *Conoco*] that exclusive jurisdiction lies in the CIT and given the value of uniformity in judicial review of these matters, we think the better course is to follow our sister circuit and not create a circuit conflict.¹³⁹

Therefore, it is apparent that *Conoco* has re-emphasized the CIT's role in adjudicating international trade disputes. Of course, as evidenced in the Harbor Maintenance Fee litigation (discussed below), plaintiffs and the government will continue to disagree over whether jurisdictional avenues to the CIT are "manifestly inadequate" and whether a plaintiff's action arises out of a law described in Section 1581(i).

VI. APPLICATION OF CONOCO TO FUTURE ACTIONS BROUGHT IN THE CIT

A. Action Challenging Constitutionality of Harbor Maintenance Fee

On July 1, 1994, an action was filed in federal district court in Baltimore, Maryland challenging the constitutionality of the Harbor Maintenance Fee ("HMF").¹⁴⁰ The HMF is an *ad valorem* tax of 0.125% that is levied on the value of commercial cargo each time the cargo is loaded or unloaded on a commercial vessel in a specified port of the United States.¹⁴¹ Companies exporting goods by ship through a specified port must pay the HMF.¹⁴² Congress enacted the HMF as part of the Water Resources Development Act of 1986 for the purpose of creating a trust fund that will be used to maintain U.S. harbors.¹⁴³ At the time of this writing, the government has moved to dismiss the action, claiming that jurisdiction is proper in the CIT.¹⁴⁴ Approximately one hundred actions, including two class actions, have also been commenced in the CIT asserting jurisdiction is

139. *Id.* at 1113.

140. American Ass'n of Exporters & Importers, Inc. v. Bentsen, No. L94-1839, (D. Md. filed July 1, 1994).

141. 26 U.S.C. §§ 4461-4462 (1988 & Supp. V. 1993).

142. *Id.* The HMF is also assessed on imports and on some domestic shipments.

143. S. REP. NO. 126, 99th Cong., 2d Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6709.

144. Government's Motion to Dismiss, filed Sept. 20, 1994, American Association of Exporters & Importers v. Bentsen, No. L94-1839, (D. Md. July 1, 1994).

proper under Section 1581(i)(1),(2), and (4).¹⁴⁵ These actions

145. Itochu Int'l, No. 94-09-00525; U.S. Shoe Corp., No. 94-09-00526; Agrevo USA Co., No. 94-09-00527; Celebrity Cruise, No. 94-09-00535; A&A Int'l, No. 94-10-00578; Eastman Kodak, No. 94-10-00581; Etonic, Inc., No. 94-10-00615; IBM Corp., No. 94-10-00625; General Chemical, No. 94-10-00635; Sumitomo Corp., No. 94-10-00636; Thomaston Mills, No. 94-10-00637; Avon Products, No. 94-10-00638; Ingersoll-Rand, No. 94-10-00650; Baxter Healthcare, No. 94-10-00650; Hewlett-Packard, No. 94-10-00651; Xerox Corp., No. 94-10-00653; Xerox, Amer. Opns., No. 94-10-00654; Xerox, So. Cal. Mfg., No. 94-10-00655; Zexco Int'l Partners, No. 94-10-00656; General Glass Int'l, No. 94-10-00657; Fieldstone Clothes, No. 94-10-00658; Firmenich, Inc., No. 94-11-00660; Outboard Marine, No. 94-11-00665; U.S. Shoe Corp., No. 94-11-00668; Itochu Int'l, No. 94-11-00669; Isuzu Motors Amer., No. 94-11-00670; Agrevo USA, Co., No. 94-11-00671; Mondial Int'l, No. 94-11-00682; United Grain Corp., No. 94-11-00691; Nissho Iwai Amer., No. 94-11-00701; The Heil Co., No. 94-11-00704; Berwich Indus., No. 94-11-00719; Uniroyal Chemical, No. 94-11-00720; Bunge Corp., No. 94-11-00726; Newell Int'l, No. 94-12-00731; Siemens Energy, No. 94-12-00732; Int'l Veneer, No. 94-12-00749; Liberty Gold Fruit, No. 94-12-00752; Polaroid Corp., No. 94-12-00756; Amer. Soda Ash, No. 94-12-00783; United Export, No. 94-12-00784; ABRO Indus., No. 94-12-00785; GSI Exim America, No. 94-12-00786; Vitol S.A., Inc, No. 94-12-00787; MC Int'l, No. 94-12-00788; Bridgestone/Firestone, No. 94-12-792; Siemens Solar, No. 94-12-00793; Armstrong Indus., No. 94-12-00802; Fisher Controls, No. 94-12-00803; Alpert & Alpert Int'l, No. 95-01-00013; Sunkist Growers, No. 95-01-00017; Alum. Co. of America, No. 95-01-00033; Astra Oil Co., No. 95-01-00034; Westport Petroleum, No. 95-01-00035; Dorland management, No. 95-01-00039; Unisys Corp., No. 95-01-00045; Amoco Chemical, No. 95-01-00048; Bartlett & Co. No. 95-01-00054; FAI Trading Co., No. 95-01-00056; Star Enterprise, No. 95-01-00057; Vista Chemical Co., No. 95-01-00058; Champion Int'l, No. 95-01-00059; Champion Export, No. 95-01-00060; Seagate Technology, No. 95-01-00061; Marubeni America, No. 95-01-00062; New Holand No. Am., No. 95-01-00065; IBM Corp., No. 95-01-00069; E.I. Dupont, No. 95-01-00070; Atlantic Richfield, No. 95-01-00075; Otis Elevator, No. 95-01-00076; Carrier Corp., No. 95-01-00077; Sikorsky Aircraft, No. 95-01-00078; Turbo Power/Marine, No. 95-01-00079; ISP Technologies, No. 95-01-00080; Titan Textile, No. 95-01-00083; Dillon Yarn Co., No. 95-01-00084; Elcom, Inc., No. 95-01-00085; Zen-Noh Grain, No. 95-01-00086; Texaco Refining, No. 95-01-00087; Dresser Pump, No. 95-01-00088; Goodyear Tire, No. 95-01-00089; Goodyear Int'l, No. 95-01-00090; Kelly-Spfld Tire, No. 95-01-00091; Ford Motor Co., No. 95-01-00092; Fel-Pro, Inc., No. 95-01-00093; Germain-Webber, No. 95-01-00094; Boise-Cascade, No. 95-01-00095; Glencore Ltd., No. 95-01-00098; FMC Corp., No. 95-01-00103; FMC Wyoming Corp., No. 95-01-00104; Sofec, Inc., No. 95-01-00105; Inco Alloys Int'l, No. 95-01-00106; ACX Trading, No. 95-01-00107; 3M Co., No. 95-01-00111; Aris-Isotoner, No. 95-01-00114; Chevron USA, No. 95-01-00115; Chevron Chemical, No. 95-01-00116; Chevron Chemical Int'l, No. 95-01-00117; Chevron Int'l Oil, No. 95-01-00118; Chevron Overseas, No. 95-01-00119; Microsoft Corp., No. 95-01-00120; Pillsbury Co., No. 95-01-00121; Rhone-Poulenc, No. 95-01-00122; Brown-Forman Corp., No. 95-01-00123; FMC Corp., No. 95-01-00124; Itochu Int'l, No. 95-02-00131; Allied Textiles, No. 95-02-00145; Sheftel Int'l, No. 95-01-00146; Fab-Tech, Inc., No. 95-01-00147; Sirex, Ltd., No. 95-02-00148; Debois Textiles, No. 95-02-00149; Bollag Int'l, No. 95-02-00150; Capital Textiles, No. 95-02-00151; M. Koppel Co., No. 95-02-00152; Dumont Export, No. 95-02-00153; United Overseas, No. 95-02-00154; Regent Corp. No. 95-02-00155; Muran Universal, No. 95-02-00156; Texport Oil Co., No. 95-02-00159; Alum. Co. of America, No. 95-02-00163.

On February 15, 1995, the CIT selected *United States Shoe Corp. v. United States* as the

argue that the HMF violates Article I, Section 9, Clause 5 of the United States Constitution, which provides that "no tax or duty shall be laid on articles exported from any state." Thus, the federal district court and the CIT again confront the issue of the scope of the CIT's jurisdiction.

The legislative history of the Water Resources Development Act of 1986 states that Congress intended the CIT to have jurisdiction over HMF disputes.¹⁴⁶ This intent, when combined with Congress' intent to centralize adjudication of international trade disputes in one forum, strongly suggests that the CIT is the appropriate forum for resolution of these actions. However, in indicating that it intended the CIT to have jurisdiction over HMF disputes, Congress failed to specify which statute grants the CIT jurisdiction. In its motion to dismiss the action filed in district court in Baltimore, and in its communications to the CIT Clerk's office in connection with the HMF litigation commenced in the CIT, the government has argued that jurisdiction under Section 1581(i) is improper and that plaintiffs must obtain jurisdiction under Section 1581(a).¹⁴⁷

While plaintiffs who are challenging the HMF may protest payments of the HMF and, upon receiving a denial of the protest, file suit in the CIT under Section 1581(a), there are several problems with requiring plaintiffs to obtain jurisdiction under Section 1581(a). One problem is that Customs has no authority or discretion to grant the protests and has stated that it will deny *all* protests challenging the constitutionality of the HMF.¹⁴⁸

case to decide the jurisdictional and constitutional issues and stayed proceedings in all other actions filed in the CIT contesting the constitutionality of the HMF as applied to exports. *United States Shoe Corp. v. United States*, slip op. 95-23, No. 94-11-00668 (Ct. Int'l Trade Feb. 15, 1995) (scheduling order).

146. S. REP. NO. 126, *supra* note 143, 99th Cong., 2d Sess. 10 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6715.

147. Government's Motion to Dismiss, filed Sept. 20, 1994, *American Association of Exporters Importers v. Bentsen*, No. L94-1839 (D. Md. filed July 1, 1994); Government's Response to Notice of the Clerk of the Court [CIT] Regarding Special Case Management Procedures, Dec. 14, 1994, *Bentsen* (No. L94-1839).

148. Affidavit of David Kahne (Program Manager, User Fee Task Force, Customs Headquarters Office of Inspection and Control), Submitted in Support of Government's Motion to Dismiss, *American Association of Exporters Importers v. Bentsen*, No. L94-1839 (D. Md. July 1, 1994).

It is my understanding that the Customs Service has received more than 100 protests contesting payment of the [HMF] on constitutional grounds and that more protests are being received daily. It is also my understanding that the

Thus, filing a protest is "manifestly inadequate." *Conoco* instructs that plaintiffs are not required to obtain jurisdiction in the CIT under Section 1581(a) where filing a protest would be futile.

Another problem is the short statute of limitations associated with the filing of protests. A protest must be filed within ninety days of the date U.S. Customs demands payment of the HMF.¹⁴⁹ In the case of an HMF levied on exports, this would be ninety days from the date of the quarterly HMF payment.¹⁵⁰ Therefore, an exporter wishing to challenge the constitutionality of HMF payments by protest must act within ninety days of the date of the HMF payment or the constitutional challenge by protest will be barred by the statute of limitations.¹⁵¹

Even assuming a protest is timely filed and a denial received, a further time restriction is that an action in the CIT challenging the denial of the protest must be commenced within 180 days after (1) the date of mailing of notice of denial of a protest, or (2) the date of denial of the protest by operation of law.¹⁵² The exporter must also be sure to file a summons for each and every denied protest it receives within the 180 day period. In sum, the protest route is purely prospective in nature and plaintiffs should not be required to establish jurisdiction in the CIT by filing a protest of the HMF levied on exports.¹⁵³

Customs Service intends to deny all timely protests it receives contesting payment of the [HMF] on constitutional grounds

Id. The critical flaw in the government's position is that because Customs merely collects the HMF for the U.S. Army Corp of Engineers there is no protestable "decision" under 19 U.S.C. § 1514. In such cases, the Court of Appeals for the Federal Circuit has held that jurisdiction is only under 28 U.S.C. § 1581(i). *Mitsubishi Elecs. America, Inc. v. United States*, __ F3d. __ (1994).

149. 19 C.F.R. § 174.12(e)(2) (1994); see Stephanie Hall, *Court to Decide on Legality of Harbor Maintenance Fees*, J. COM., Feb. 22, 1995, at 1A (discussing Harbor Maintenance Fee litigation and Slip Op. 95-23).

150. Pursuant to 19 C.F.R. § 24.24(e)(1)(ii), exporters must pay the HMF on a quarterly basis. The quarters end on the last days of March, June, September, and December, and payments are due 31 days after the close of each quarter. Therefore, quarterly payments are due on May 1, July 31, October 31, and January 31.

151. In the case where a company has not paid the HMF until after receiving a demand notice from U.S. Customs pursuant to an audit, the protest period should arguably run from the date the "exaction" is made in accordance with 19 C.F.R. § 174.12(e)(2) (1994).

152. 28 U.S.C. § 2636(a) (1988 & Supp. V 1993).

153. In fact, the CIT recently exerted its jurisdiction to hear a case regarding the overpayment of HMF on passenger cruise lines. *Carnival Cruise Lines, Inc. v. United States*, 94-169 (Ct. Int'l Trade Oct. 21, 1994). In that case, the CIT held that the claimant did not have to file a protest:

Rather, Section 1581(i) grants the CIT jurisdiction over an action challenging the constitutionality of the HMF. First, as demonstrated above, jurisdiction under another statute is "manifestly inadequate." Second, the Water Resources Development Act of 1986 falls within the text of Section 1581(i). The Water Resources Development Act of 1986 is a law providing for "revenue from imports" within the meaning of Section 1581(i)(1) because the HMF is levied, at least in part, on imports. It should not matter that the action challenging the HMF challenges the HMF as applied to exports, rather than imports.¹⁵⁴ All that Section 1581(i)(1) requires is that the law provide for revenue from imports. That the law also provides for revenue from exports should be immaterial under *Conoco*. For example, in *Conoco*, the government argued that Section 1581(i) did not apply to an action arising out of the FTZA because the thrust of a FTZ is to promote exports, while Section 1581(i) deals with imports. The Federal Circuit rejected this argument because it did not reflect

[A]s plaintiffs correctly point out, there was no decision of Customs which the [plaintiffs] could protest. The [plaintiffs] simply filed payments with quarterly summary reports as required by regulation. Moreover, while the [plaintiffs] seek a refund, they do not seek a refund on the basis of a change, error, or omission of the type contemplated by the Amended Quarterly Summary Report described in 19 C.F.R. § 24.24(5). Rather they seek to challenge Customs' interpretation of the statute as it pertains to the charge paid for transportation. Hence, not only is there no decision of Customs from which the [plaintiffs] may protest, were there such a decision, protesting it would be futile given the remedy the [plaintiffs] seek.

Id. at 10.

154. In *Carnival Cruise Lines*, the CIT stated:

While it is true that [Section 1581(i)(2)], on its face deals with merchandise, the overwhelming subject matter with which this court has jurisdiction deals with merchandise. This should not be interpreted to mean that when Congress designated harbor fees to be treated as customs duties for the purpose of determining the jurisdiction of a given court, it meant only to grant jurisdiction over commercial cargo when that phrase means merchandise — to the exclusion of passengers for hire. No, by the plain language of the statute Congress intended for harbor fees to be applied to commercial cargo, whether that term contemplates merchandise or passengers for hire. Furthermore, Congress intended that such fees be treated as customs duties with all of the attendant administrative, enforcement and judicial processes concerning such duties. That such processes most often deal with goods and not services is of little moment when applying this Court's jurisdictional provisions to the Harbor Maintenance Revenue Act.

Id. at 11 (citations omitted). Accordingly, the CIT's jurisdiction is not limited to import transactions.

"commercial realities."¹⁵⁵

The Water Resources Development Act of 1986 is also a law providing for "tariffs, duties, or fees from importations for reasons other than the raising of revenue" because it is a duty and/or fee levied, at least in part, on importations for the purpose of creating a trust fund for the maintenance of harbors. Finally, the Water Resources Development Act of 1986 also provides for "administration and enforcement" of the HMF within the meaning of Section 1581(i)(4). When combined with clear Congressional intent that the CIT exercise jurisdiction over HMF disputes, the fact that jurisdiction under Section 1581(a) is "manifestly inadequate," and *Conoco's* reemphasis on Congress' intent to centralize adjudication over disputes arising under U.S. international trade laws, the CIT should find that it has jurisdiction pursuant to Section 1581(i) over a constitutional challenge to the HMF as applied to exports.

B. Action Challenging Method Used to Make GSP Beneficiary Country Determination

As noted previously, in *International Labor Rights Education & Research Fund v. Bush*, the district court for the District of Columbia held that it had jurisdiction over an action alleging that the President did not conduct a "meaningful" investigation of whether GSP beneficiary countries adhered to workers' rights standards.¹⁵⁶ On appeal, two of three federal appellate judges agreed with the district court that the CIT did not have exclusive jurisdiction.¹⁵⁷ Under the GSP statute at issue, the United States provided duty-free treatment to certain products of eligible beneficiary countries.¹⁵⁸ To be eligible for GSP treatment, however, beneficiary countries were required to provide workers with internationally recognized workers' rights.¹⁵⁹ The GSP statute also required the President to conduct a "general review" of beneficiary country status not later than January 4, 1987 and "periodically thereafter."¹⁶⁰

155. 18 F.3d at 1590 n.24.

156. *Id.* 752 F. Supp. 495, 497 (Ct. Int'l Trade 1990).

157. 954 F. 2d 745 (D.C. Cir. 1992).

158. 19 U.S.C. § 2461 (1988).

159. 19 U.S.C. § 2462(b)(7) (1988 & Supp. V 1993). Other requirements also apply. *See id.* § 2462(b)(1)-(6), (c).

160. *Id.* § 2464(c)(2)(A) (1988).

The plaintiffs in *International Labor Rights Education & Research Fund* alleged that the President had failed to comply with the requirements of the GSP law because the President had not conducted a meaningful investigation since 1985.¹⁶¹ On the issue of jurisdiction, the district court and two judges of the D.C. Circuit concluded that the GSP statute was not described in Section 1581(i) because other statutes, not the GSP, "provided for" tariffs, duties, and fees.¹⁶² According to the district court, the GSP statute merely created conditions under which duties were lifted and/or reimposed.¹⁶³ The district court also reasoned that the CIT did not have exclusive jurisdiction because the action did not involve application of the CIT's expertise in trade matters.¹⁶⁴

The result reached on the jurisdictional issue by the district court and Judges Sentelle and Mikva of the D.C. Circuit is wrong. First, prior to *International Labor Rights Education & Research Fund*, the CIT had held that it has jurisdiction over an action arising out of the GSP statute.¹⁶⁵ In *Luggage & Leather Goods Manufacturers of America, Inc. v. United States*, the plaintiffs claimed that the President's designation of man-made fiber goods as GSP-eligible violated the GSP statute because that statute prohibited the President from designating certain textile and apparel articles for GSP eligibility.¹⁶⁶ In deciding that it had jurisdiction over the action pursuant to Section 1581(i), the CIT reasoned that because the GSP statute permitted duty-free entry for products normally subject to duty, it fell within the text of Section 1581(i)(1) and (4).¹⁶⁷ While one may criticize the CIT's

161. 752 F. Supp. at 497.

162. *Id.* at 491.

163. *Id.* at 491-92.

164. *Id.* at 491. On the merits, the district court noted that the GSP statute did not specify that the President was to make any finding of fact and that the President implicitly has discretion and separate authority in foreign policy. *Id.* at 497-99. Accordingly, the district court stated that it could not interfere with the President's discretionary judgment. *Id.*

165. *Luggage & Leather Goods Mfgs. of America v. United States*, 588 F. Supp. 1413 (Ct. Int'l Trade 1984).

166. *Id.* at 1415; see 19 U.S.C. § 2463 (c)(1)(A) (1998 & Supp. V 1993) (explaining that President may not designate article as eligible article if article is textile and apparel article subject to textile agreements).

167. 588 F. Supp. at 1419. The CIT reasoned:

The Trade Act of 1974 (which includes the GSP) provides for tariffs and duties although the GSP program authorizes duty-free entry under certain circum-

conclusion that a statute providing for the removal of duties is a law "providing for" duties within Section 1581(i)(1),¹⁶⁸ the CIT's conclusion that the GSP statute is a law providing for the "administration and enforcement" of a law providing for duties pursuant to Section 1581(i)(4) is sound because the GSP sets the conditions under which duties will be lifted and/or levied. Therefore, in light of *Luggage & Leather Goods Manufacturers*, the district court and the D.C. Circuit in *International Labor Rights Education & Research Fund* should have dismissed the action for lack of subject matter jurisdiction.¹⁶⁹

Second, the determination that the CIT has jurisdiction pursuant to Section 1581(i) over an action arising out of the GSP statute is supported fully by the reasoning of *Conoco* and *Miami Free Trade Zone Corp.*¹⁷⁰ In *Conoco* and *Miami Free Trade Zone*, the Federal Circuit and D.C. Circuit, respectively, held that the Free Trade Zone Act provided for the "administration and enforcement" of a law providing for duties. The GSP statute is similar to the Free Trade Zone Act in that it also sets the conditions for lifting and levying duties. Moreover, as Judge Henderson noted in *International Labor Rights Education & Research Fund*, the GSP is an international trade law and the CIT has expertise in interpreting trade laws. Accordingly, *Conoco* and *Miami Free Trade Zone Corp.* establish that jurisdiction in the CIT would be proper if the same or a similar action were brought today.

stances. Defendants also ignore the fact that the TSUS provision claimed by plaintiffs to be applicable to the subject merchandise . . . normally imposes a duty of 20% ad valorem . . . and thus provides for "revenue from imports". Since the issue in this case is whether merchandise, normally dutiable . . . , is duty-free . . . , the Court plainly possesses subject matter jurisdiction under 28 U.S.C. § 1581(i)(1) and (4).

Id.

168. See *Miami Free Trade Zone Corp. v. United States*, 22 F.3d 1110, 1112 (D.C. Cir. 1994) (criticizing *Conoco's* conclusion that Free Trade Zone Act provided for duties because Free Trade Zone Act lifted, rather than imposed, duties, but agreeing that Free Trade Zone Act is law providing for administration and enforcement of law providing for duties).

169. While a decision of the CIT is not clearly binding on the D.C. Circuit, the D.C. Circuit should have dismissed the action because the GSP statute is clearly described by Section 1581(1)(4).

170. Of course, these cases were decided subsequent to *International Labor Rights*.

C. Actions Involving Penalties Under 19 U.S.C. § 1592

In *Conoco*, the Federal Circuit set forth a clear admonishment: "It is time to bring to an end the unproductive jurisdictional ping-pong games, and to give litigants their right to expeditious and timely decisions on the merits of their claims."¹⁷¹ Unfortunately, in the area of civil penalties, these ping-pong games continue and, at the present time, it remains a point of speculation whether the CIT would ever exercise jurisdiction under 28 U.S.C. § 1581(i) in a penalty case.¹⁷²

Under Section 592 of the Tariff Act of 1930, as amended, U.S. Customs may assess a civil penalty for statements or material omissions made in relation to the importation of goods.¹⁷³ Penalties are either a multiple of the loss of duties or a percentage of the value of the goods, depending on the level of culpability.¹⁷⁴

171. 18 F.3d at 1590.

172. *Shiepe & Colwell v. United States*, 866 F. Supp. 1430 (Ct. Int'l Trade 1994).

173. 19 U.S.C. § 1592(a) (1988 & Supp. V 1993).

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence-

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of-

(i) any document or electronically transmitted data or information written or oral statement, or act which is material, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

Id.

174. *Id.* § 1592(c). Section 1592 provides for the following maximum penalties:

(1) Fraud - A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.

(2) Gross negligence - A grossly negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed -

(A) the lesser of -

(i) the domestic value of the merchandise, or

(ii) four times the lawful duties of which the United States is or may be deprived, or

(B) if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise.

(3) Negligence - A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed -

There is also an elaborate pre-penalty and penalty notice process with accompanying administrative proceedings, whereby the importer can petition U.S. Customs for remission or mitigation of the penalty.¹⁷⁵ Potential penalties may also be severely limited if Customs finds the importer has made a valid prior disclosure.¹⁷⁶

The CIT has jurisdiction of the suits by the government to collect the penalty.¹⁷⁷ Recently, however, the Federal Circuit has found a "gap in the jurisdiction" of the CIT in those cases where litigants seek a refund of penalties paid during the administrative process.¹⁷⁸ In that situation, the U.S. district court may be the only avenue open for litigants.¹⁷⁹ In addition, litigants have fared poorly in their quest to invoke the CIT's jurisdiction to review the legality of Customs' action during the pendency of administrative proceedings, *Conoco* notwithstanding.¹⁸⁰

For example, in *Dennison Manufacturing Co. v. United States*,¹⁸¹ the importer brought suit in the CIT to challenge Customs' decision to issue a penalty notice while its penalty mitigation petition was pending. The CIT declined to exercise jurisdiction under 28 U.S.C. § 1581(i) because, as the administrative process was pending, the government might ultimately decide not to collect a penalty.¹⁸² The court also found the importer

-
- (A) the lesser of -
 - (i) the domestic value of the merchandise, or
 - (ii) two times the lawful duties of which the United States is or may be deprived, or
 - (B) if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

Id.

175. 19 U.S.C. § 1592(b). Customs authority to mitigate claims can be found in 19 U.S.C. § 1618. See 19 C.F.R. § 171 app. B (1994) (describing Customs' Mitigation Guidelines).

176. 19 U.S.C. § 1592(c)(4). A prior disclosure is a mechanism to encourage voluntary reporting of violations prior to discovery by Customs, whereby penalties are limited to 100 percent of the lost duties in the case of fraud and interest on the back duties in negligence and gross negligence cases.

177. 28 U.S.C. § 1582. Pursuant to 19 U.S.C. § 1592(e), trial in the CIT is *de novo* and the government bears the burden of proof.

178. *Trayco, Inc. v. United States*, 994 F.2d 832, 836 (Fed. Cir. 1993).

179. *Id.*; *Shiepe & Colwell v. United States*, 866 F. Supp. 1430 (Ct. Int'l Trade 1994).

180. *Playhouse Import & Export, Inc. v. United States*, 843 F. Supp. 716 (Ct. Int'l Trade), *rehearing denied*, No. 92-08-00587, 1994 WL 194096 (Ct. Int'l Trade May 13, 1994).

181. 678 F. Supp. 894 (Ct. Int'l Trade 1988).

182. *Id.* at 897.

had failed to show irreparable harm, so it could not invoke the CIT's residual jurisdiction.¹⁸³ The court specifically stated it lacked jurisdiction, "to the extent the government has not moved to collect any penalty assessed."¹⁸⁴ Thus, in *Dennison Manufacturing*, the CIT seemed to imply that an importer may never be able to mount a court challenge to the validity of Customs' decision to issue the penalty until *after* the importer has gone through the administrative process, refused to pay the penalty and then sat back and waited for the U.S. government to sue the importer.¹⁸⁵

Moreover, in other CIT cases, importers invoked the prior disclosure mechanism or paid mitigated penalties at their peril, because the court found that penalties paid voluntarily are not "charges or exactions" for which the court can assert jurisdiction under 28 U.S.C. § 1581(a).¹⁸⁶ In *Trayco, Inc. v. United States*, however, the importer was able to demonstrate facts indicating that the penalty was not paid willingly, and was thus able to sue for a refund, albeit in federal district court.¹⁸⁷ In *Trayco*, U.S. Customs at the Port of Charleston had seized a shipment of shower heads for improper country of origin marking and later released them to the importer for marking on the importer's premises.¹⁸⁸ The importer then certified to Customs in writing that the products had been properly marked, but when Customs reinspected, it erroneously concluded that the shipment was still in violation of the marking law.¹⁸⁹ Consequently, Customs issued a prepenalty and a subsequent penalty notice, alleging the importer had made a false statement in certifying the merchandise was properly marked.¹⁹⁰

Trayco filed petitions in response to both notices and after Customs failed to mitigate the penalty in its entirety, it paid the penalty as required by the customs regulations and filed a sec-

183. *Id.*

184. *Id.*

185. *Id.*

186. *Carlingswitch, Inc. v. United States*, 500 F. Supp. 223 (Cust. Ct. 1980), *aff'd*, 651 F. 2d 768 (C.C.P.A. 1981); *ITT Semiconductors v. United States*, 576 F. Supp. 641 (Ct. Int'l Trade 1983); *Jose G. Flores, Inc. v. United States*, 676 F. Supp. 1223 (Ct. Int'l Trade 1987).

187. *Trayco, Inc. v. United States*, 994 F. 2d 832 (Fed. Cir. 1993).

188. *Id.* at 834.

189. *Id.*

190. *Id.*

ond supplemental petition for release.¹⁹¹ Specifically, Trayco sent a check and cover letter along with its second supplemental petition, noting payment was made, "under protest reserving all rights to judicial review following the exhaustion of administrative remedies."¹⁹² When Customs failed to grant further mitigation, Trayco sought refunds under the Little Tucker Act in the U.S. District Court for South Carolina.¹⁹³ The district court found for Trayco and the government appealed, asserting that Congress intended to give exclusive jurisdiction to the CIT in disputes regarding penalties.¹⁹⁴

The Court of Appeals for the Federal Circuit, however, rejected the government's position that the CIT had exclusive jurisdiction. The Federal Circuit concluded that a "gap" exists in the CIT's exclusive jurisdiction in cases where the importer seeks a refund of an improperly assessed penalty under 19 U.S.C. § 1592.¹⁹⁵ In reaching this conclusion, the court refused to go beyond the plain language of 28 U.S.C. § 1581 by stating: "[W]e . . . conclude that if Congress had intended all import-related matters to come within the exclusive jurisdiction of the Court of International Trade it would have specifically said so."¹⁹⁶ The CIT has since dismissed at least one importer's suit for penalty refund on the basis of the *Trayco* decision, while at the same time questioning the continuing jurisdictional uncertainty that would necessarily result from its decision.¹⁹⁷

Further, *Conoco* appears to have had a limited impact on importer initiated suits in penalty cases. In *Playhouse Import & Export v. United States*, the importer brought suit in the CIT to challenge Customs' decision not to recognize its written submissions as a valid prior disclosure, asserting various jurisdictional bases, including 28 U.S.C. § 1581(i).¹⁹⁸ In a decision issued shortly before the Federal Circuit's decision in *Conoco*, the CIT strictly

191. *Id.*

192. *Id.*

193. *Id.* at 834 nn.5, 6.

194. *Id.* at 835-36.

195. *Id.* at 836.

196. *Id.*

197. *Shiepe & Colwell v. U.S.*, 866 F.Supp. 1430 (Ct. Int'l Trade 1994) (penalty proceeding involving EPA/DOT regulations for imported vehicles, not one initiated under 19 U.S.C. § 1592).

198. *Playhouse Import & Export, Inc. v. United States*, 843 F. Supp. 716 (Ct. Int'l Trade), *rehearing denied*, No. 92-08-00587 (Ct. Int'l Trade May 13, 1994).

followed the rationale of *Dennison Manufacturing*¹⁹⁹ by declining to invoke its residual jurisdiction where Customs had not yet sought to collect a penalty.²⁰⁰ The Court found a remedy was available, because the importer could challenge Customs' decision in its defense to any action brought by the government under 28 U.S.C. § 1582 to collect a penalty.²⁰¹

Subsequent to *Conoco*, however, the plaintiff in *Playhouse* moved for a rehearing, alleging that in light of *Conoco*, the court had incorrectly concluded that jurisdiction did not exist under 28 U.S.C. § 1581(i).²⁰² In denying the motion, the CIT found the importer's reliance on *Conoco* was misplaced because *Conoco* simply recognized that § 1581(i) jurisdiction "is appropriate only when no other remedy is available or when other remedies that may be available are shown to be manifestly inadequate."²⁰³

The court reasoned that the importer failed to show that the remedy was inadequate, in spite of allegations of damage to the importer's credit rating, because as the administrative proceeding was not yet even at the prepenalty stage, any potential civil penalties were not yet contingent liabilities that needed to be reported in the company's financial statements.²⁰⁴ The court found "no clear evidence of injury," because the importer continued to operate his business and engage in import transactions.²⁰⁵ However, by finding that the importer in this case failed to establish that it would suffer "irremediable adverse consequences," the CIT presented importers in general with an intriguing question: whether there is a case where the CIT would find jurisdiction for it to review Customs' decision to issue a penalty notice, given that the administrative proceeding was still pending.²⁰⁶

Hypothetically, a fact-pattern can be created where the CIT should exercise its residual jurisdiction. It is interesting to note that the legislative history to 19 U.S.C. § 1592 unequivocally explains that the statute was redrafted to include levels of culpabil-

199. 678 F. Supp. 894 (Ct. Int'l Trade 1988).

200. *Id.* at 897.

201. *Playhouse Import & Export, Inc.*, 843 F. Supp at 720.

202. No. 92-08-00587 (Ct. Int'l Trade May 13, 1994).

203. *Id.* at 1.

204. *Id.* at 2.

205. *Id.*

206. *Id.*

ity and an expanded administrative process, because of the documented damage caused by the huge contingent liabilities created under the prior statute.²⁰⁷ Ironically, the length of the administrative proceeding may cause the damage Congress sought to alleviate.

It is not uncommon for administrative proceedings to last several years.²⁰⁸ As noted above, once a penalty notice is issued, the amount of penalty becomes a contingent liability that must be reported in a company financial statement. A reserve account must also be set aside to cover any eventual liability.²⁰⁹ In addition, because the company is an alleged violator of the customs laws, its shipments may be subject to intensive inspections at the border, causing delays in deliveries to the company's customers. The company must also carefully weigh the risks of adverse publicity in waiting to simply defend its honor in a suit filed by the government in the CIT.²¹⁰

Such factors can combine to cause a severe strain on an importer's ability to remain in business long enough to survive the administrative process and to defend a suit in the CIT. In the area of antidumping administrative proceedings, the CIT has allowed companies to challenge the legality of the proceeding rather than waiting for later court review.²¹¹ However, when at-

207. S. REP. NO. 778, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.A.N. 2211, 2113-14.

208. For example, in *United States v. N.S. International*, No. 92-11-00770 (Ct. Int'l Trade), the court documents show the prepenalty notice was issued by Customs on June 10, 1988, and the penalty notice was issued on November 14, 1989. The government did not file suit in the CIT until three years later on November 20, 1992. The importer's Motion to Dismiss, filed on June 10, 1993, was undecided by the CIT when the parties filed a Stipulation of Dismissal based on a Settlement Agreement in 1994, over six years after the Prepenalty Notice was first issued.

209. FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT NO. 5; *see* Barnickol et al., *Accounting for Litigation and Claims*, J. ACCT., June 1985, at 56 (explaining that under FASB Statement No. 5, loss must be recorded for litigation or claims if it is probable that liability has been incurred at financial statement date and amount of loss can be reasonably estimated).

210. Although involving alleged criminal customs violations, the example of the collapse of Gitano following the loss of its major customer, Wal-mart (following a decision by some Gitano executives to enter guilty pleas), cannot be lightly ignored. *See* Phyllis Furman & Miriam Leuchter, *Ripped at the Seams*, CRAIN'S N.Y. BUS., May 16, 1994, at 17.

211. *See, e.g.,* *Techsnabexport, Ltd. v. United States*, 795 F. Supp. 428 (Ct. Int'l Trade 1992) (CIT has jurisdiction under Section 1581(i) over action challenging legality of antidumping procedures); *Associacao Dos Industriais de Cordoaria e Redes v. United States*, 828 F. Supp. 978 (Ct. Int'l Trade 1993) (CIT has jurisdiction over an

tempting to seek judicial relief under 28 U.S.C. § 1581(i) during a penalty administrative process, the importer gambles that he or she will be able to meet a sufficient evidentiary threshold to show "irremediable adverse consequences," short of the death of the company. For a small importer, documented warnings from its largest customer to discontinue new business if shipment delays continue may be sufficient in some circumstances for the CIT to invoke jurisdiction, decide the validity of the penalty notice and perhaps spare the importer the "considerable time, effort and money the administrative proceeding would entail."²¹²

Similarly, a letter from the same importer's bank informing the company that it will be unable to extend the company's line of borrowing credit if a prepenalty notice (with a resulting contingent liability) is issued by Customs, may demonstrate sufficient potential for irreparable harm for the CIT to intervene and decide whether Customs' position is valid.²¹³ Without clear guidance from Congress, however, it is unclear whether a higher threshold, such as actual loss of customers and/or lost jobs or lower stock prices would be required for those larger importers who possess greater resources. Thus, these "gaps in jurisdiction" lead to absurd results, whereby the CIT can hear a suit concerning the protection of sea turtles but cannot hear an importer's suit involving such cornerstones of import law as the civil penalty statute.²¹⁴ In the area of penalties, *Conoco* does nothing to free the CIT's hands and the jurisdictional ping-pong games will continue until Congress decides to act.

CONCLUSION

Plaintiffs bringing actions under Section 1581(i) in the fu-

action seeking mandamus ordering government agencies to terminate antidumping investigations with prejudice).

212. *See, e.g.*, *Asociacion Colombiana de Exportadores de Flores v. United States*, 717 F. Supp. 847 (Ct. Int'l Trade 1992) (numerous small agricultural companies should not be required to first participate in antidumping review).

213. *See, e.g.*, *Pistachio Group v. United States*, 639 F. Supp. 1340 (Ct. Int'l Trade 1986) (postponed review was inadequate, partly based on affidavit submitted showing one company could not obtain customs bond from bond company without letter of credit).

214. *See, e.g.*, *U.S. Cane Sugar Refiners Ass'n v. United States*, 544 F. Supp. 883 (Ct. Int'l Trade 1988) (drawing distinction between injuries incurred due to manifest inadequacies of process versus those that arise because process in question was intended to have prospective effect).

ture should demonstrate that other jurisdictional statutes are "manifestly inadequate" and that their action arises out of a law described in Section 1581(i). No doubt, courts will continue to wrestle with the determination of whether a particular law "provides for revenue from imports" or "provides for tariffs" as demonstrated by the *Conoco* and *Miami Free Trade Zone* decisions. When analyzing jurisdiction, courts should be mindful of Congress' desire to have international trade disputes adjudicated in one national forum, namely, the Court of International Trade.