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A New Era for Administration and Judicial Review of Foreign Trade Zones Board Decisions

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I. INTRODUCTION

The Foreign Trade Zones Board (the "Board") and its staff,¹ a small and little known operation within the International Trade Administration of the U.S. Department of Commerce, are responsible for authorizing over 400 foreign trade zones within the United States into which more than \$94 billion worth of goods flow annually.² Specifically, this agency decides which communities and businesses share in the reduced tariff benefits of foreign trade zones. Although formed in the 1930s, the agency became the center of attention during the 1980s when the benefits it administered became economically more significant. Since 1990, the agency has completely revised its operating procedures and has been subjected to a completely new regime of judicial review. This Article examines the role and function of the Board and staff following these changes and notes where progress has been made or problems remain. It concludes with some additional suggestions for continuing the movement of Board operations toward the level required by its responsibilities.

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1. See Donald E. deKieffer & George W. Thompson, *Political and Policy Dimensions of Foreign Trade Zones: Expansion or the Beginning of the End?*, 18 VAND. J. TRANSNAT'L L. 481, 483 (1985) (describing U.S. foreign trade zone policy since 1934).

2. FOREIGN TRADE ZONES BOARD, U.S. DEP'T COMM., 54TH ANNUAL REPORT TO THE CONGRESS OF THE UNITED STATES 1 (1992) [hereinafter BOARD 54TH REPORT].

II. A BRIEF HISTORY OF THE U.S. FOREIGN TRADE ZONES PROGRAM AND ITS ADMINISTRATION

A. FOREIGN TRADE ZONES IN THE UNITED STATES

A foreign trade zone, more commonly referred to as a "free trade zone,"³ is a long-recognized device in international commerce facilitating trans-shipment and processing of foreign goods.⁴ These zones are restricted and controlled areas where foreign goods can come into a country to be re-exported or processed without being subject to that country's import tariffs or quotas. Their historic purpose was to enhance the host country's status as a world trader by serving as processing and distribution centers.⁵ Host countries tightly controlled these free trade areas to prevent foreign goods from slipping into their countries in avoidance of their duties or quotas. This control resulted in free trade zones of narrow geographic areas.

With the adoption of the Foreign Trade Zones Act (FTZ Act) in 1934,⁶ the United States Congress intended to follow historic precedents and advance U.S. participation in global trade through the creation of these re-export and processing centers.⁷ When goods entered a zone, importers had the option of paying the duty at that time (these items becoming "privileged" goods because they could freely enter the United States from the zone) or deferring payment until the goods actually entered U.S. customs territory ("non-privileged" goods).⁸ As originally envisioned, these zones would be located at major ports and primarily involve warehouses. While the U.S. Customs Service

3. See D.L.U. Jayawardena, *Free Trade Zones*, 17 J. WORLD TRADE L. 427, 427 (1983) (listing various synonyms for FTZs).

4. *Id.* at 428. The oldest known free port used for the purpose of promoting free trade was the Aegian island of Delos. *Id.* at 427. It facilitated trade between Egypt, Greece, Syria, North Africa, Asia and Rome by providing a customs free port. *Id.* Other free ports were established in Genoa, Venice and Gibraltar. *Id.* The first "modern" free trade zone was established in Hamburg, Germany in 1888. *Id.* It is the forerunner of the U.S. free trade zone concept because its grant included the authority to engage in manufacturing so long as it would focus its activity on exporting and not on competing with local industry. *Id.*

5. *Id.* at 428.

6. Foreign Trade Zones Act, Pub. L. No. 73-397, ch. 590, § 1, 48 Stat. 998 (1934) (codified as amended at 19 U.S.C. § 81(a)-(u) (1988)).

7. See deKieffer & Thompson, *supra* note 1, at 483-88 (discussing the Foreign Trade Zones Act of 1934).

8. 19 U.S.C. § 81c (1988). See Thomas F. Clasen, Note, *U.S. Foreign-Trade Zone Manufacturing and Assembly: Overview and Update*, 13 LAW & POL'Y INT'L BUS. 339, 345-46 (1981) (discussing the differences between privileged and non-privileged goods).

would be responsible for the policing and security of the zones, a new entity was created to decide where the zones should be located and who should operate them. As a result, Congress established the Board, consisting of the Secretary of Commerce as chair, and the Secretaries of the Treasury (Customs responsibility) and the Army (Army Corps of Engineers, due to the port locations). The Commerce Department provided the staff for the Board.

By 1949, fifteen years after the enactment of the FTZ Act, there were only six foreign trade zones created under the U.S. program.⁹ In 1950, Congress amended the FTZ Act to permit actual manufacturing of products using imported goods within the foreign trade zones, as opposed to the limited re-processing or re-packaging initially allowed.¹⁰ This marked the beginning of the most significant change in the program because it created the possibility of inverted tariff benefits for products manufactured in this country. Inverted tariffs occur when high duty rate components are manufactured into a finished product with a lower duty rate.¹¹ Thus, when the finished product is brought into the United States, the lower rate is paid. By allowing manufacturing in the zones, high duty foreign components are brought into the foreign trade zone duty-free, incorporated into a finished product with a lower duty rate, and then "imported" into U.S. customs territory at the lower rate. Depending on the component\product mix, the savings from inverted tariffs can be substantial.¹²

Two years later, the Board authorized the creation of special purpose foreign trade zones, or subzones, for individual company sites.¹³ This action was taken because of the impracticality of undertaking substantial manufacturing at the port and

9. GENERAL ACCT. OFF., FOREIGN TRADE ZONES PROGRAM NEEDS CLARIFIED CRITERIA 18 (Feb. 1989) [hereinafter 1989 GAO REPORT].

10. Boggs Amendment, Pub. L. No. 81-566, ch. 296, 64 Stat. 246 (codified at 19 U.S.C. § 81c(a) (1988)).

11. ALLAN I. MENDELWITZ, GENERAL ACCT. OFF., FOREIGN TRADE ZONES PROGRAM NEEDS CLARIFIED CRITERIA 2 (Mar. 7, 1989) (testimony before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations).

12. For example, one court noted that the benefit of the inverted tariff to a U.S. shipbuilder importing foreign steel was a reduction in the applicable tariff rate from 7.5% on the raw steel to 0% as part of the completed barge. *Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970), *aff'g* 303 F. Supp. 262 (S.D.N.Y. 1969). *Armco* is the seminal case discussing the authority of the Board. It is discussed at *infra* parts III.B.3 and VI.B.

13. Foreign Trade Zone Board Order No. 29, 15 C.F.R. § 400.11(a)(2) (1994).

warehouse sites of the original general purpose zones.¹⁴ Thus, by 1952 the structure of the current system was in place. There were general purpose zones where multiple companies could operate and subzones for individual manufacturing plants. Goods brought into the zones duty-free could be manufactured into products in other tariff classifications and imported into the United States at significantly lower net tariff rates.

Growth in zones was still negligible through the next two decades. In 1970 there were only seven general purpose zones and three subzones.¹⁵ During the 1970s the popularity of general purpose zones grew as they spread from port areas to airports and industrial parks. This expansion resulted in the authorization of fifty-four general purpose zones and nine subzones by 1980.¹⁶ Despite this growth, only \$2.6 billion of goods came into the zones that year, and over half of the merchandise came into the nine subzones.¹⁷ In 1980 and 1982, the Treasury made decisions that significantly heightened the interest in foreign trade zones and led to the explosive growth registered since that time. Treasury Decision 80-87¹⁸ eliminated the value added to the imports by their processing or manufacturing within the zone from the valuation for the import duty on the finished product.¹⁹ In 1982, other expenses associated with the imported components, such as brokerage, insurance, and transportation charges, were excluded from the final valuation as part of the implementation of the Trade Agreements Act of 1979.²⁰ These changes significantly increased the value of the inverted tariff and made manufacturing with imported components in trade zones very attractive.²¹

14. 1989 GAO REPORT, *supra* note 9, at 18.

15. *Id.* at 14.

16. *Id.*

17. *Id.* at 15.

18. T.D. 80-87, 1980-14 C.B. 174 (April 2, 1980); 45 Fed. Reg. 17,976 (1980).

19. See Clasen, *supra* note 8, at 367-68 (discussing the U.S. change in valuation for import duty in FTZs).

20. 19 U.S.C. § 1401a(b)(4)(A) (1988). The Trade Agreements Act of 1979, implementing the final agreements of the Tokyo Round of GATT negotiations, excluded transaction costs from the dutiable price. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. XI, §§ 1101, 1106(c)(1), 93 Stat. 307, 311, 19 U.S.C. § 2102.

21. For example, while automobile parts imported into the United States are subject to duties ranging from 4% to 11%, the duty rate on finished automobiles is 2.5%. When auto manufacturers elect non-privileged status for parts imported into zones (i.e. they do not pay the duty when they import the parts) and then incorporate them into cars, the duty the manufacturers pay on

Since the early 1980s, interest in zones and subzones, primarily as manufacturing sites, has been explosive. By 1993 there were 188 general purpose and 246 special purpose subzones authorized.²² Between 1980 and 1986, the dollar value of goods received into these zones increased from \$2.6 billion to \$39.7 billion.²³ This increased to almost \$94 billion in 1992.²⁴ During 1992 alone, the Board approved applications for eight new general purpose zones and twenty-nine subzones.²⁵ Over 2500 firms operated in foreign trade zones during 1992, employing over 290,000 people.²⁶ Through numbers alone, foreign trade zones have become a significant factor in U.S. business.

Foreign trade zone significance is enhanced even more when the nature of the manufacturing performed in the zones is taken into account. Products that are extremely sensitive to foreign competition are manufactured in these zones. For example, during 1991 virtually all automobile production in the United States, by both foreign and domestic auto makers, took place in foreign trade zones, accounting for sixty-three percent of all zone activity during that year.²⁷ Other substantial activities in foreign trade zones include petroleum refining, pharmaceutical production, and electronic equipment manufacturing.²⁸

Interest and activity is by no means limited to major manufacturing. Any business which uses imported parts subject to significant import duties or quotas could benefit from operating within a zone. This benefit is due to access to commodities otherwise restricted, inverted tariffs, improved cash flow, and/or re-export of the finished product. These factors also make for-

the parts when the cars come into U.S. customs territory is the 2.5% rate for the finished product. 1989 GAO REPORT, *supra* note 9, at 19.

22. Just because a foreign trade zone is authorized does not necessarily mean it is operational. Once the Board authorizes the zone, the critical part of the approval process, the zone grantee must prepare the site for operation in compliance with Customs standards to assure proper security for the segregation of goods accorded foreign trade zone benefits and those not. During 1992, for example, there were 113 active general purpose zones and 108 active subzones. BOARD 54TH REPORT, *supra* note 2, at 1. Requirements for activation of the zone are set forth at 15 C.F.R. § 400.42 (1994).

23. BOARD 54TH REPORT, *supra* note 2, at 3.

24. 1989 GAO REPORT, *supra* note 9, at 15; BOARD 54TH REPORT, *supra* note 2, at 1.

25. BOARD 54TH REPORT, *supra* note 2, at 1.

26. *Id.* at 2.

27. *Id.*

28. *Id.* During 1992 there were 22 different categories of foreign products imported into foreign trade zones in quantities valued in excess of \$100 billion. *Id.* Imports of auto parts (\$6 billion), crude oil (\$3.2 billion), and autos (\$2.9 billion) led the way. *Id.* at 15.

eign trade zones attractive as economic development incentives for local communities trying to attract manufacturing businesses.

Foreign trade zones are not entirely positive establishments, however. There are, after all, contrary trade policy reasons for the higher tariffs or quotas that are avoided through operation of the zones. Domestic industries and workers protected by these import duties and quotas can be adversely affected by inverted tariffs and quota avoidance. Also, state and local governments lose revenue from ad valorem tax exemptions of zone inventory. Furthermore, current zone holders may feel threatened by new zone applicants, and communities without trade zones may feel disadvantaged in competing for new business. Because of these conflicting interests, Board decisions can be controversial, causing the policies and procedures of the Board and its staff to come under close scrutiny.

B. ADMINISTRATION OF THE FOREIGN TRADE ZONES PROGRAM

Administration of the foreign trade zones program is divided between the Board and its staff at the Department of Commerce and the Customs Service at the Treasury Department. The Board is responsible for actual administration of the zone program, while Customs is responsible for controlling the movement of goods into the customs territory of the United States.²⁹ Customs plays a significant role in determining if the zones are set up and managed to assure control over imported goods and the administration of import restrictions. This role is one of logistical supervision involving operational rather than policy issues. In contrast, the Board awards zone grants, imposes restrictions on zone activity, monitors zone activity, and is empowered to revoke zone status.

While the Board is statutorily composed of the Secretaries of Commerce, the Treasury, and the Army,³⁰ their authorized alternates generally exercise their authority.³¹ Board staff carries out daily work under the direction of the Executive Secretary of the Board, who serves as staff director.³² The staff is located within the International Trade Administration at the

29. "The Secretary of the Treasury shall assign to the zone the necessary customs officers and guards to protect the revenue and to provide for the admission of foreign merchandise into customs territory." 19 U.S.C. § 81d (1988).

30. 19 U.S.C. § 81a(b) (1988).

31. 15 C.F.R. § 400.11(c) (1994); see 1989 GAO REPORT, *supra* note 9, at 9 (outlining how the foreign trade zones program operates).

32. 15 C.F.R. § 400.12 (1994).

Department of Commerce. The Executive Secretary reports to the Assistant Secretary for Import Administration, the Secretary of Commerce's designated alternate chair of the Board. The staff currently consists of the Executive Secretary, five professionals and three clerical members. They are supported by an attorney in the Office of the Assistant General Counsel for Import Administration. This attorney spends approximately twenty percent of his or her time on trade zone matters.

Applications for new zones or subzones and substantial modifications in zone operations are considered by a professional member of the Board staff designated an examiner by the Executive Secretary. Generally, the Regional Commissioner of Customs and the District Engineer of the Army Corps of Engineers for the geographic area in which the zone is to be located prepare technical reports evaluating the application and submit them to the Executive Secretary.³³ The staff at the Commerce Department performs most of the preliminary review work. Under the regulations, the Executive Secretary or the Assistant Secretary for Import Administration resolves a number of minor matters, subject to appeal to the Board.³⁴ The Customs District Director and the Executive Secretary handle certain operational decisions involving start-up and changes in procedure.³⁵

The most contentious decisions regarding foreign trade zones involve the initial application grant, potential restrictions that may be placed upon it, and requests for changes in manufacturing approval.³⁶ Commonly, the Board restricts goods manufactured in the zone to export only. If the finished product is to be sold in the United States, the Board may require the manufacturer to elect privileged status (duty-paid) for the goods it imports into the zone.³⁷ These issues are handled by the staff and the Executive Secretary and raise the most serious ques-

33. 15 C.F.R. § 400.27(d) (1994). This process is new under the 1991 regulations. Prior to those changes, there was an examiners committee composed of representatives from the three agencies that reviewed the applications. See 1989 GAO REPORT, *supra* note 9, at 9 (indicating the composition of the committee at the time).

34. 15 C.F.R. § 400.47 (1994). Since the adoption of the 1991 new regulations there have been no appeals to the Board under this provision.

35. 15 C.F.R. §§ 400.41-42 (1994).

36. The Board's authority for imposing these restrictions is spelled out in 15 C.F.R. § 400.32(b) and § 400.33 (1994).

37. According to the GAO, of the 239 general purpose zones and subzones authorized through 1987, 36 included some kind of restriction on manufacturing activity. 1989 GAO REPORT, *supra* note 9, at 14, 28. During 1992 the Board imposed some kind of restriction on manufacturing activity in 20 of the 64 formal orders it issued. BOARD 54TH REPORT, *supra* note 2, at 1.

tions of process and review. In addition, revocation of zone status or imposition of new manufacturing restrictions on zone grantees would of course be highly contentious. The Board, however, has not taken any such actions.

III. REVIEWS AND REFORMS OF THE FOREIGN TRADE ZONES PROGRAM

A. REVIEWS AND CONCERNS

During the 1980s four studies were done relating to the policies and practices of the Board, two by the International Trade Commission (ITC), and two by the General Accounting Office (GAO).³⁸ The 1983 and 1984 studies by the ITC and GAO generally focused on the economic impact of foreign trade zones and anticipated their continued growth.³⁹ The 1988 ITC study continued the ITC's focus on the economic impact of the trade zones,⁴⁰ but took particular note of several aspects of the administration of the zone program.⁴¹

38. See *supra* note 9 (citing the 1989 GAO REPORT) and *infra* notes 39-40 (citing the 1984 GAO STUDY, 1984 ITC STUDY, and 1988 ITC STUDY).

39. GENERAL ACCT. OFF., FOREIGN TRADE ZONE GROWTH PRIMARILY BENEFITS USERS WHO IMPORT FOR DOMESTIC COMMERCE app. I (Mar. 1984) [hereinafter 1984 GAO STUDY]; INTERNATIONAL TRADE COMM'N, THE IMPLICATIONS OF FOREIGN TRADE ZONES FOR U.S. INDUSTRIES AND FOR COMPETITIVE CONDITIONS BETWEEN U.S. AND FOREIGN FIRMS app. A (Feb. 1984) [hereinafter 1984 ITC STUDY].

40. INTERNATIONAL TRADE COMM'N, THE IMPLICATIONS OF FOREIGN TRADE ZONES FOR U.S. INDUSTRIES AND FOR COMPETITIVE CONDITIONS BETWEEN U.S. AND FOREIGN FIRMS (SUPPLEMENT AND EXPANSION) Preface (Feb. 1988) [hereinafter 1988 ITC STUDY]. A primary focus of the study concerned the impact of foreign trade zones on the petroleum refining industry following the Customs Court decision in *Hawaiian Indep. Refinery v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978). In that case, the plaintiff imported a petroleum product into a foreign trade zone. Some of the plaintiff's petroleum product was used to fuel its refinery. The court held that the petroleum product never physically entered U.S. customs territory, and therefore was not subject while remaining within the trade zone. 460 F. Supp. at 1254. This issue re-emerged in another case after the Board sought to require Conoco to pay the duty on the imported fuel consumed in its refinery. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd and remanded*, 18 F.3d 1581 (Fed. Cir. 1994), *decision on remand*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994). This case is discussed in greater detail at *infra* part VI.

41. The small staff and informal operation of the Board were duly noted, along with criticism received by the ITC of the informality of the process. Some critics suggested that the Board make a more detailed and rigorous examination of the zone and subzone applications and that such applications be considered through formal Administrative Procedure Act hearings. Other critics suggested that the Board do a better job of identifying and notifying parties

The most in-depth study of the four was performed by the GAO in 1989. It identified six key problems with the manner in which the Board administered the foreign trade zones program. Briefly summarized, these were:

1. The Board lacked well-defined criteria for awarding zone status or imposing restrictions on zone activities.⁴² The GAO noted that the Board had begun to develop more specific standards for its decisions.⁴³
2. The Board failed to apply even those standards it had articulated in reaching its decisions.⁴⁴
3. The Board is highly conflict-adverse, and its approach to disputed applications for zone status was to have the applicant and the contending party work out a compromise, or to propose a grant with limitations that would give the applicant some benefit but limit it in the areas objected to by opponents.⁴⁵

who might be adversely affected by the grant of authority for a zone or subzone. 1988 ITC STUDY, *supra* note 40, at xvi-xvii.

42. 1989 GAO REPORT, *supra* note 9, at 22-25. The FTZ Act has scant direction for the Board in making its decisions. *Id.* at 22. The GAO found that the most significant statutory guidance came from the authority given the Board to exclude goods or process of treatment if they were adjudged detrimental to the public interest. *Id.* at 23; see 19 U.S.C. § 810(c) (1988). They found this to be the basis for the Board's decisions to impose restrictions on zone grants. 1989 GAO REPORT, *supra* note 9, at 23. This is probably the most important discretionary judgment the Board makes after the initial grant decision. As the GAO notes, two court cases reviewed the Board's exercise of its broad discretion and upheld the Board's authority and articulated a wide degree of latitude for its action. *Id.* at 23 (referring to *Armco Steel Corp. v. Stans*, 431 F.2d 779 (2d Cir. 1970), *aff'g* 303 F. Supp. 262 (S.D.N.Y. 1969) and *Hawaiian Indep. Refinery v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978)).

43. *Id.* at 23-24. The GAO found that regulations proposed by the Board in 1983 and again in 1986 offered clearer guidance as to the criteria the Board would apply, but these were never finalized. *Id.* at 24.

44. *Id.* at 25-28. The study observed that notwithstanding these better definitions, the Board did not appear to follow the criteria. *Id.* at 25. In particular, the study found that the Board granted applications based on a more general assessment that the benefit to the applicant of establishing the zone or subzone would be greater than its expense. *Id.* Often the Board took the view that absence of opposition to an application was reflective of the absence of adverse impact on affected parties. *Id.* at 26. Applicants were not always required to give evidence of the broader public benefit of their application, and the Board was not in a position to conduct its own research to establish the economic impact due to its small size and increasing workload. *Id.* at 27.

45. *Id.* at 27-28. In particular the study found that the Board was very sensitive to other government agencies' concerns and limited its grants where they might contravene other elements of U.S. trade policy, essentially subordinating foreign trade zone policy to any other conflicting trade policy. *Id.* at 29. Some commentators suggested that the Board used these restrictions to fend off a congressional assault on foreign trade zones in general and preserve as much of the benefit as possible from the program. deKieffer & Thompson, *supra* note

4. The Board prefers to delay acting on applications rather than taking action over the applicant's objections.⁴⁶
5. The increased number of applications, the contentiousness of some of them, and the failure of the Commerce Department to increase staff levels for the Board was contributing to a backlog of applications.⁴⁷
6. There is a growing need to monitor foreign trade zone activities, but demands on the staff make monitoring almost impossible.⁴⁸

While preparing its 1989 study, the GAO contacted the Administrative Conference of the United States (ACUS) and requested its views on the procedures employed by the Board.⁴⁹ These comments are particularly relevant for this assessment of

1, at 506-10. The GAO indicated that the Board procedures were ill-suited to adversarial determinations, quoting a Commerce official as stating that the Board viewed its position in processing applications not as "adversarial," but rather "advisory and bargaining" in nature. 1989 GAO REPORT, *supra* note 9, at 27.

46. 1989 GAO REPORT, *supra* note 9, at 30-31. The GAO tracked a number of controversial applications that had been pending for extended periods of time and concluded that the delays were due to the refusal of the applicants to accept the compromises offered by the Board. *Id.* Interestingly, the study quoted one Commerce official observing that the FTZ Act provided practically no basis for the Board to deny an application, but that the delay or inaction provided a form of denial. *Id.* at 31.

47. *Id.* at 45-48. The study found that the current staff spent increasing amounts of time answering questions and advising applicants about procedures due to the growing interest in foreign trade zones, taking their time away from handling applications. *Id.* at 47.

48. *Id.* at 48-49. One of the Board responsibilities is to monitor the activities taking place in the foreign trade zone to assure that they are consistent with the grant and with current U.S. trade policy. *Id.* at 48. The Board relies on information provided by the grantees through their annual reports, along with supplemental data provided by the Census Bureau. *Id.* The increased number of zones and subzones authorized, as well as the restrictions placed on the grants, require more supervision by Customs than the GAO thought it was capable of or inclined to perform. *Id.* at 51.

49. Letter from Jeffrey S. Lubbers, Research Director, Administrative Conference of the United States, to Michael P. McAtee, Senior Editor, U.S. General Accounting Office (Nov. 3, 1987) (on file with the *Minnesota Journal of Global Trade*) [hereinafter ACUS Letter]. Lubbers noted that the Board is not required to use formal hearing procedures under the Administrative Procedure Act, 5 U.S.C. § 554(a) (1988), in awarding zone or subzone status, and even if it is so required, the Act permits use of written procedures in initial licensing decisions. *Id.* at 2-3 (citing 5 U.S.C. § 556(d)). Lubbers observed that while the substantial economic stakes in foreign trade zone decisions were similar to those in formal adjudicative type situations, the purpose of foreign trade zone hearings is aimed at establishing so-called "legislative facts" about economic circumstances rather than finding "adjudicative facts" concerning individual actions or situations. *Id.* at 3.

the procedures and practices of the agency. The ACUS identified four areas for possible improvement in Board procedures:

1. The Board could clarify some existing ambiguities in its rules.⁵⁰
2. The Board could structure hearings to provide for fuller development of selected issues.⁵¹
3. The Board could make the examiner's report and recommendations public.⁵²
4. The Board could make the final report and order more detailed.⁵³

B. REGULATORY REFORMS BY THE BOARD

As the GAO report indicated, the Board was making efforts to revise its own regulations to address critical issues and make the rules more accurately reflect the practice of the Board. In 1983, the Board published a comprehensive proposed rule "to simplify and update the regulations so that they reflect contemporary zone practice as it has evolved through interpretations and actions by the Board and the Customs Service."⁵⁴ Key provisions in this proposal included a definition of subzones and criteria for their approval,⁵⁵ an expanded definition of the "public interest" element in applications and procedures for making such determinations,⁵⁶ and procedures and criteria for reviewing requests for manufacturing approval.⁵⁷ The proposal contin-

50. *Id.* at 4. These include: On what basis does the Board close a hearing? Are hearings held on subzone applications? From where are examiners drawn? Must the examiner's recommendation and the Board's ultimate order be based on the record of the comment and hearing process? *Id.*

51. *Id.* ACUS suggested that the Board could identify those issues key to resolution of particular matters and issue "scoping" orders to focus the hearing on the most important issues. *Id.* Similarly, the examiner could more closely question witnesses on central issues or even allow limited participation by opposing parties in the questioning process. *Id.*

52. *Id.* ACUS suggested that the parties could have access to the report of the examiner, along with other advisory reports, and a chance to comment on them or correct inaccuracies before they go to the Board. *Id.*

53. *Id.* By making final reports and orders more elaborate and reasoned, the Board could develop a body of precedents that would guide participants in later application proceedings on issues already addressed and resolved. *Id.*

54. 48 Fed. Reg. 7188 (1983).

55. 48 Fed. Reg. 7191 (currently codified at 15 C.F.R. § 400.101(b)), 7193 (currently codified at 15 C.F.R. § 400.400(c)).

56. 48 Fed. Reg. 7196 (currently codified at 15 C.F.R. § 400.807).

57. 48 Fed. Reg. 7194-95 (currently codified at 15 C.F.R. § 400.700(a)(1)), 7196 (currently codified at 15 C.F.R. § 400.807(b)), 7199 (currently codified at 15 C.F.R. § 400.1309).

ued by recommending consolidation of the rules setting out the criteria for the approval of zones and subzones,⁵⁸ and the replacement of the examiners committee (which consisted of representatives of the three agencies, all actively participating in the hearing and recommendation process) with a single Commerce Department examiner supported by technical reports from Customs and the Army Corps of Engineers.⁵⁹ These proposals did not contain any significant changes in the informal hearing process used by the Board. They remained as proposed rules until early 1990 when the Board published a comprehensive new proposal.⁶⁰

In the preamble to the 1990 proposal, the Board stated that “[t]he revision involves some new rules, but most of the changes reflect practice which has evolved through interpretations and decisions by the Board and the Customs Service under their respective regulations. The more significant changes include the listing of definitive criteria and procedures for manufacturing activity and subzones.”⁶¹ The Board received numerous comments on this proposal and published a revised proposal for additional comments in November 1990.⁶² In October 1991, the Board published the first comprehensive rule revision of its operating standards and procedures since 1952.⁶³ These rules, as categorized below, established a regulatory framework which more accurately reflected the actual practice of the Board and staff.

1. Application Process for Zones and Subzones

The new regulations made substantial revisions, many of which addressed concerns raised by the various studies and reviews of the 1980s.⁶⁴ For example, the Board established time-lines for processing applications. These time-lines were not binding upon the Board; they did, however, establish a standard by which its performance could be measured.⁶⁵ The rules included detailed criteria for evaluating both zone and subzone ap-

58. 48 Fed. Reg. 7192-93 (currently codified at 15 C.F.R. § 400.400).

59. 48 Fed. Reg. 7192 (currently codified at 15 C.F.R. § 400.109), 7198-99 (currently codified at 15 C.F.R. § 400.1305(a)).

60. 55 Fed. Reg. 2760 (1990).

61. *Id.*

62. 55 Fed. Reg. 48,446 (1990).

63. 56 Fed. Reg. 50,790 (1991) (codified at 15 C.F.R. pt. 400 (1994)).

64. See *supra* part III.A (discussing the 1984 GAO STUDY, 1989 GAO REPORT, 1984 ITC STUDY, and 1988 ITC STUDY).

65. 15 C.F.R. § 400.27(a) (1994).

plications,⁶⁶ as well as a more detailed description of the procedures for the application process. This was especially important because of the detailed procedures for subzones, which had not been a significant part of the program when the last regulations were promulgated. Among the more controversial changes in the application process was the new requirement of application fees.⁶⁷ The single examiner review was also adopted, eliminating the examiner's committee.⁶⁸

2. New Process for Review and Grants of Manufacturing Authority

Like the subzones, manufacturing in foreign trade zones was not a significant part of the Board's function when the previous regulations were adopted, so the section on manufacturing activity was virtually all new.⁶⁹ This revision contained one of the most controversial new rules, the creation of a threshold policy test for evaluating manufacturing requests.⁷⁰ Before the Board considers such economic issues as job creation or business retention presented by the application, it must first determine if the unrestricted importation of goods to be used in the manufacturing contravenes any U.S. trade policy programs or objectives.⁷¹ The rules also established that the burden of proving that the policy and economic criteria had been met was on the applicant for the subzone and the manufacturing authority.⁷² Other revisions included an expedited review process for approval of manufacturing activity in existing zones or subzones, provided it did not raise significant policy issues,⁷³ and a more developed review procedure for approval requests that involved substantial questions.⁷⁴

66. 15 C.F.R. § 400.23 (1994).

67. 15 C.F.R. § 400.29 (1994).

68. 15 C.F.R. § 400.27(c)(1) (1994).

69. 15 C.F.R. §§ 400.31-33 (1994). The purpose of the foreign trade subzone is to accommodate a manufacturing activity that cannot be accommodated within a general purpose zone. Therefore, the procedures and standards for requesting manufacturing authority are an integral part of the subzone application process.

70. 15 C.F.R. § 400.31(b)(1) (1994).

71. *Id.*

72. 15 C.F.R. § 400.31(c)(3) (1994).

73. 15 C.F.R. § 400.32(b)(1) (1994).

74. 15 C.F.R. § 400.32(b)(2) (1994).

3. Board Authority to Restrict Zone and Subzone Activities

The authority of the Board to impose restrictions on the nature and extent of the activities carried on in general purpose zones or in subzones has been recognized as broad in scope since *Armco Steel Corp. v. Stans*⁷⁵ in 1970. The 1991 regulations detailed the nature and extent of the restrictions the Board could place on both the original grants of zone or subzone authority⁷⁶ and the approval of manufacturing authority.⁷⁷ These provisions may be the best example of the new regulations codifying the practices the Board had been following over the years.⁷⁸

4. Board Review of Zone Use and Ongoing Manufacturing Activity

The 1991 regulations added some significant language about the authority of the Board to monitor, review, and restrict or revoke zone authority after an initial grant. The 1989 GAO report had been critical of the Board's failure to engage in meaningful review of the activities taking place in the foreign trade zones once the initial grant of authority was made.⁷⁹ In revising its regulations, the Board modified its rules on authority to revoke zone status to include subzones.⁸⁰ More significantly, the rules added a new provision for the monitoring of authorized manufacturing activity to assure that it remained consistent with the Board's original authorization, or that changed circumstances had not made the activity detrimental to the public interest.⁸¹ Another section was added to clarify that the Board had general authority to restrict or prohibit any zone or subzone activity, not just the manufacturing authorization, if it deter-

75. 431 F.2d 779 (2d Cir. 1970), *aff'g* 303 F. Supp. 262 (S.D.N.Y. 1969).

76. 15 C.F.R. § 400.28 (1994).

77. 15 C.F.R. § 400.33 (1994).

78. For example, the GAO reported that by 1987 the Board had imposed some conditions on manufacturing authority in 36 different zones and subzones. 1989 GAO REPORT, *supra* note 9, at 28.

79. *Id.* at 48-49.

80. 15 C.F.R. § 400.28(c) (1994). In the proposed version of the new rules published in January of 1990 the process for revoking subzone grants was much more summary than that to be used for general purpose zone grants. 55 Fed. Reg. 2767 (1990) (to be codified at 15 C.F.R. § 400.29(d)) (proposed Jan. 26, 1990). For example, there was no provision for granting a hearing for the affected subzone grantee. The final procedures are the same for revocation of both zone and subzone grants. Revocation of grant status is the one Board action that is expressly, statutorily subject to judicial review. 19 U.S.C. § 81r(c) (1988).

81. 15 C.F.R. § 400.31(d) (1994).

mined that such activity was "detrimental to the public interest, health or safety."⁸²

While these changes appear responsive to the GAO study concerns that grants of zone or subzone status go largely unreviewed once made (subject to Customs monitoring of the actual import and export activity as part of its enforcement responsibilities), the Board today still does not engage in any significant monitoring activity. This will be considered below in the context of the Board's procedures for contentious or adversarial proceedings.

5. Third Party Rights to Initiate or Intervene in Proceedings

From an administrative procedure perspective, one of the most significant changes made by the 1991 regulations was the enhanced recognition given to third parties, i.e., those other than the zone grantee or applicant and the government. The public nature of the zone application process has always allowed the participation of other interested parties in the initial grant determination. Under the new rules, however, parties "directly affected" and "showing good cause," other than the zone grantee or applicant, have the right to request: (1) a review of an ongoing manufacturing or processing activity of a grantee,⁸³ (2) a review of any other grantee activity to determine if it is detrimental to the public interest, health or safety,⁸⁴ and (3) a hearing during any Board proceeding or review.⁸⁵ The Board has the authority to grant or deny these requests, although the

82. 15 C.F.R. § 400.43 (1994). In response to concerns raised in several comments that this provision granted too broad authority to the Board, the Board stated that the section reflected current practice (or at least current theory since the Board had never exercised this authority) and reflected its general authority under the statute, 19 U.S.C. § 81(o)(d) (1988). 56 Fed. Reg. 50,798 (1991).

83. 15 C.F.R. § 400.31(d)(2) (1994).

84. 15 C.F.R. § 400.43 (1994). In the original version of the regulations parties "adversely affected" by a zone activity could request such a review. 40 C.F.R. § 400.43. The final regulations adopted the "directly affected" and "showing good cause" language consistent with the manufacturing review and hearing request sections. 15 C.F.R. § 400.43 (1994).

85. 15 C.F.R. § 400.51(b) (1994). The original January 1990 proposal did not include this provision. 55 Fed. Reg. 2770 (1990) (to be codified at 15 C.F.R. § 400.51) (proposed Jan. 26, 1990). It was added, however, in the second version in November 1990 in response to comments about U.S. industries affected by zone grants. 55 Fed. Reg. 48,447, 48,451 (1990) (to be codified at 15 C.F.R. § 400.51) (proposed Nov. 20, 1990). This also reflects some of the criticism of the process reported by the International Trade Commission in their 1988 report. 1988 ITC Study, *supra* note 40, at 315.

basis on which it would do so is not defined.⁸⁶ This formal recognition of the rights of third parties to make such requests may have been an effort by the Board to impose some discipline on itself. This discipline is achieved by establishing a test of merit or substance on comments from third parties on zone applications, given its practice of accepting any comments or complaints at any time before a final decisions was made.

The acknowledgement of the significant interests of third parties may have some implications for judicial review. In *Armco Steel Corp. v. Stans*,⁸⁷ Armco, a domestic producer of the same kind of steel that was to be imported into the subzone, was found to have standing to challenge the grant in court. The new regulations may well define those parties who will likewise have standing to judicially challenge Board decisions.

6. Revised Hearing Procedures

The 1991 Board regulation regarding revised procedures for its hearings had the most ambiguous impact. With the elimination of the examiners committee and its replacement by a single examiner from the Board staff, a significant amount of verbiage in the procedures for the hearings was also eliminated.⁸⁸ However, the earlier regulations provided no more formality or procedural safeguards than the new regulations. The material eliminated was more a reflection of a regulatory style of the 1930s than a detailed description of procedures.⁸⁹ The new rules were consistent with the 1987 ACUS observation that the general purpose of Board hearings was to establish "legislative facts"⁹⁰ in simply providing that "[a]ll participants shall have the opportunity to make a presentation" and that "[a]pplicants and their witnesses shall ordinarily appear first."⁹¹ The hear-

86. 15 C.F.R. § 400.11 (1994).

87. 303 F. Supp. 262 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779 (2d Cir. 1970).

88. Compare 15 C.F.R. §§ 400.1315 - 400.1321 (1987) with 15 C.F.R. § 400.51 (1994).

89. For example, section 400.1318, entitled "Procedure at hearing," provided that "[t]he presiding officer will impress upon all interested parties and will also specifically state at the commencement of the proceedings: first, the special purpose of the hearing; second, that it is desired to have frank and full expression of the views of all interested parties." 15 C.F.R. § 400.1318(c) (1987).

90. See *supra* note 49 (stating that the purpose of foreign trade zone hearings is aimed at establishing so-called "legislative facts" about economic circumstances rather than finding "adjudicative facts" concerning individual actions or situations).

91. 15 C.F.R. § 400.51(c) (1994).

ings under these standards are very informal, consisting primarily of witnesses reading their presentations. The staff has utilized other procedures in individual hearings, such as occasionally providing for questions between participants.

7. Significant Omissions

The 1991 rule revisions improved and updated the Board's existing regulations and its practice of following procedures outlined in a series of proposed regulations. The regulations, however, did not codify a central aspect of Board practice, one which reflects the pervasive philosophy of the staff toward its goal. Nothing in the regulations describes the process whereby the Board refers the grant applicant to opposing parties for the purpose of working out a compromise. Further, nothing in the rules describes how the Board will wait and not take action until the applicant attempts to placate its opponents by negotiating or conceding some of the authority it originally sought. In fact, the regulations do not provide an effective process for resolving contested questions, reflecting the Board's historic aversion to that role. But other aspects of the new rules, in particular the provisions for review of ongoing activities and authority for third parties to request reviews, will necessarily involve confrontation if they are implemented. The possibility of increasing contention in initial grants, as reflected in three recent court cases,⁹² also indicates the potential for parties choosing confrontation over negotiation and compromise. The failure of current Board regulations to deal with this prospect is the first issue to consider.

IV. CURRENT PRACTICE OF THE BOARD AND STAFF

A. THE APPLICATION PROCESS

Applicants for general purpose foreign trade zones or subzones can receive a great deal of guidance from the Board staff at the Commerce Department. The staff provides a summary instruction sheet to prospective applicants along with a copy of the regulations. This sheet informs the applicants about the basic requirements for establishing a zone or subzone and notes many of the practical issues associated with the process. Applicants are told to make certain that state and local jurisdictions have no objection to the loss of tax revenue that would occur due to the ad valorem tax exemption that accompanies zone status. The regulations detail the application requirements and pro-

92. See *infra* part VI.C.1-3.

cess.⁹³ The staff works closely with applicants to help answer any questions they have about the process, and reviews drafts of their applications to assure consistency with Board requirements. Working with applicants in this fashion is a significant part of staff activity.⁹⁴

At this stage, the staff discourages application for unrealistic zone grants, alerts applicants to issues they are likely to confront, and begins to work with applicants to revise and modify their grant requests to deal with potential problems. For example, communities applying for general purpose zones where there are authorized zones nearby may be encouraged to seek subzone status for their local businesses that would benefit from the program. Subzone applicants in businesses where opposition to inverted tariff benefits is likely will be encouraged to revise their applications to request non-privileged status only for goods that will be exported.

After informal review and discussion, the applicant will formally file the application, at which time it will be subjected to the "official" pre-filing review under the regulations. At this point the application is examined to make certain that it satisfies the requirements detailed in the rules as to, for instance, format, attachments, necessary supporting statements, and authorizations.⁹⁵ When the staff finds the application sufficient, it is formally filed and the public process begins.

Requests for approval of manufacturing authority are invariably included with the application for a new subzone, since subzones are used for single company manufacturing. When new or revised manufacturing authority is sought for an existing zone or subzone, there is a formal proceeding that is very similar to the original application process. This proceeding is used if the applicant is seeking to take advantage of the inverted tariff benefits or otherwise avoid import restrictions.⁹⁶ As the Board and

93. 15 C.F.R. §§ 400.22-400.27 (1994).

94. The GAO noted this in its report when it recommended increased staffing to handle the backlog of applications that existed at the time of its study. 1989 GAO REPORT, *supra* note 9, at 47-48.

95. 15 C.F.R. § 400.27(b) (1994).

96. 15 C.F.R. § 400.32 (1994). The Commerce Department's Assistant Secretary for Import Administration, based on a review by the Board staff and the recommendation from the Executive Secretary, can grant authority for new or significantly changed manufacturing activity within an existing zone or subzone under the following circumstances:

(i) The proposed activity is the same, in terms of products involved, to activity recently approved by the Board and similar in circumstances; or

staff approach to these requests for manufacturing authority is essentially the same as their approach to original zone or subzone applications, all three will be considered together.

B. CONSIDERATION OF THE APPLICATION

The approval process for a zone application proceeds at three different levels. Level one consists of the public comment process. Level two involves the non-public government inquiry and report process. The results of these first two levels contribute toward making up the "official" record which provides the basis for the Board's ultimate decision. The third level can be the most important, yet it is off the record and outside public view. This level represents the negotiation process between the applicant, staff, and third parties.

At the first level, once the application is officially filed, a detailed summary is published in the Federal Register for comment, and for general purpose zone applications, a public hearing is usually set. Hearings for subzone applications and changes in manufacturing authority are generally not held. Such hearings, however, may be held if the staff believes that the issues merit such treatment.⁹⁷ The public notice process is designed to elicit comments from those parties likely to have an interest in the creation of a new zone or subzone. Parties interested in general purpose zone grants would include grantees of nearby zones concerned about competition⁹⁸ and local groups concerned about environmental or developmental effects of enhanced economic activity created by zone status.⁹⁹ Parties con-

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- (ii) The activity is for export only; or
 - (iii) The zone benefits sought do not involve the election of non-privileged foreign status on items involving inverted tariffs; or
 - (iv) The District Director determines that the activity could otherwise be conducted under Customs bonded procedures.

15 C.F.R. § 400.32(1) (1994).

97. 15 C.F.R. § 400.51 (1994). During fiscal 1992 the Board staff conducted no hearings because there was no funding for that function. Budgets since then have included funds for travel and other hearing-related expenses.

98. See *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442 (D.D.C. 1992), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994) (current foreign trade zone operator, Miami Free Zone, challenged the Board's grant of another zone application within the same geographic area). See also *deKieffer & Thompson*, *supra* note 1, at 500 n.81 (discussing the opposition of the Port of Long Beach to a general purpose zone application filed by the City of Santa Ana, California).

99. For example, an application for a general purpose zone at the Mercer County, New Jersey airport was opposed by local environmental groups who were concerned about the impact of increased noise and pollution, as well as the elimination of undeveloped land. 58 Fed. Reg. 19,405-02 (1985).

cerned about new subzones, which will almost always involve requests for authorization of manufacturing, may include local governments concerned about the loss of tax revenues from the ad valorem tax exemption,¹⁰⁰ competitors of the company seeking subzone status, and domestic producers of components that would be imported into the zone, their labor organizations, and their local government and development representatives who perceive trade zone status for the imported components as an economic threat.¹⁰¹ The general position of the staff is that it will review anything submitted in response to these notices, regardless of its timing and substance.

The second level at which zone and subzone applications proceed is the preparation of the technical reports by the Regional Commissioner of Customs and the District Engineer of the Army Corps of Engineers and the compiling of information for the record by the examiner for the Board. The technical reports are not public information and certain information from other agencies may not be included in the public record. Under the regulations, the examiner is given broad powers to develop "information and evidence necessary" for evaluation and analysis of the application and its consistency with statutory and regulatory standards.¹⁰² The rules are less specific on the authority of the examiner to solicit additional information when considering a request for manufacturing authority not associated with a subzone application. The rules, however, make it clear that the party requesting the authority has the burden of proof,¹⁰³ which encourages the fullest cooperation with an examiner's request for additional information. In addition, the rules with regard to hearings provide that the Board may request "any" information "necessary or appropriate to the proceeding."¹⁰⁴ All of the information generated from these inquiries becomes part of the offi-

100. *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993). The Board decision denying the subzone application for Phibro, Inc. was based on opposition from three local taxing entities concerned about the loss of revenue from the creation of the subzone. *Id.* This case is discussed in greater detail at *infra* part VI.C.3.

101. An April 1992 "Foreign-Trade Zones Information Summary" prepared by the Board staff, said that "[o]pponents tend to be companies and trade associations that are protected by special import programs or that are subject to increasing import competition from overseas and foreign-owned plants." Foreign-Trade Zones Information Summary, Foreign Trade Zones Board Staff (Apr. 20, 1992) (on file with the *Minnesota Journal of Global Trade*).

102. 15 C.F.R. § 400.27(d)(2)-(3) (1994).

103. 15 C.F.R. § 400.31(c)(3) (1994).

104. 15 C.F.R. § 400.53(a) (1994).

cial record which will consist of public, business proprietary, privileged, and confidential information.¹⁰⁵

The third level at which applications and requests for manufacturing authority proceed is more problematic. Where the staff recognizes potential conflicts with other U.S. foreign trade interests or policies, it will notify the appropriate government agency. For example, the Office of Textiles within the Commerce Department would be alerted to an application involving the importation of cloth or fibers, while the appropriate agency within the Department of Agriculture would be notified about applications involving the import of certain food products, such as sugar. The purpose of this notice is to allow the other agency to negotiate directly, or in conjunction with the staff, with the applicant to agree on restrictions on the request that will avert opposition from the agency. This process is conducted informally and will not be part of the official record of the matter.

The staff is generally not disposed to evaluate conflicting interests or contested applications when the opposition comes from government agencies or private parties who are the beneficiaries of government trade protection. When such significant private sector opposition surfaces, the staff encourages and frequently participates in a negotiating process between the parties to resolve the disputes.¹⁰⁶ Their approach is to have the applicant and the opposing party work out a compromise whereby the applicant agrees to restrict its use of the goods it seeks to import under zone authority. Usually the restriction will involve limiting the use of the imported product to goods exported from the United States, or agreeing to pay the full import duty on the components, thus giving them "privileged status," rather than taking advantage of the inverted tariff benefits. Once the agreement is reached, the applicant amends

105. 15 C.F.R. § 400.52-53 (1994).

106. For example, in *Miami Free Zone*, the plaintiff alleged that the Board had not treated its opposition appropriately, and had allowed the zone applicant that it was opposing repeated opportunities to address plaintiff's objections without notice to it. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 3, *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442 (D.D.C. 1992) (Civ. A. No. 92-0392), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994). The plaintiff was a zone operator opposing the creation of another nearby general purpose zone. The Board did work out a compromise in another situation like this however when the Long Beach, California Zone operator opposed the application of the City of Santa Ana. The Santa Ana location was included as one of the sites under the Long Beach grant. 52 Fed. Reg. 10,393 (1987), Board Order No. 341, Mar. 25, 1987. See deKieffer & Thompson, *supra* note 1, at 500 n.81 (discussing the Santa Ana case).

its application or request for manufacturing authority and the process proceeds smoothly.¹⁰⁷

These decisions are ultimately left to the Board, not the staff. In practice, however, given the small size of the staff, the close relationship of the Executive Secretary to the Board, and the fact that the Board only receives material through the staff, the Board invariably agrees with the examiner's report and recommendation. As indicated above, the staff will not forward a recommendation until it has resolved the concerns that have been raised by key players and knows that the most significant opposition has been dealt with.¹⁰⁸ The Board's decision is based on the entire "official record,"¹⁰⁹ which would also be the basis for judicial review.¹¹⁰ Because there are no restrictions on communication between the staff and Board prior to a final decision, and given the cautious nature of the staff, there is little chance under current procedures that the Board will disagree with a staff recommendation.

V. PROBLEM AREAS IN BOARD PROCEDURES

A. INTRODUCTION

The regulatory climate in which the Board and its staff operate is a benign and amicable one. In fact, as it currently functions, the Board is not a regulatory body, but merely a licensing agency that grants a privilege or license, and has only perfunctory contact with the licensee unless the grantee wants to expand its license.¹¹¹ Its procedures reflect this role because they are ill-suited to deal with the kind of contentiousness that would accompany adverse regulatory action. The staff's aversion to

107. See 1989 GAO REPORT, *supra* note 9, at 27-30 (discussing the agency practice of encouraging and negotiating restrictions on applications to avoid conflicts between the competing interests).

108. The most extreme example of this caution may be the subzone application for the Hercules Carbon Graphite Materials Plant. Filed initially in 1985 (FTZ Docket No. 28-85), this application has generated both opposition and support from various members of Congress, and shifting positions by the Department of Defense, from opposition, to support, to simply not opposing. The staff has delayed taking a position until it gets a definitive response from the Department of Defense, which is still not forthcoming. 50 Fed. Reg. 33,808 (1985).

109. 15 C.F.R. § 400.52 (1994).

110. *Id.*

111. Zone grantees do have to file annual reports with the Board, and there may be some follow-up from the staff to clarify the data submitted. However, these reports are used for statistical purposes and serve little or no compliance function. See 15 C.F.R. § 400.46(d) (1994).

controversy and the lack of formal procedures suited for contested proceedings are the source of the problems identified.

Before detailing these problems it is important to recognize a crucial point. For the most part, the practices and procedures of the staff work well. Generally, the new regulations reflect actual agency practice and provide sufficient notice and detail to applicants about the process. The majority of applications for both general purpose zones and subzones, as well as for manufacturing and processing authority, are not controversial. Additionally, the cooperative and facilitating approach the staff takes to these applications is a positive example of government administrative practice. Some of the negotiating that the staff engages in while facilitating the resolution of conflicts between other aspects of U.S. trade policy and zone status is also beneficial. Nevertheless, serious issues remain.

B. NO AVAILABLE, EFFECTIVE PROCESS FOR RESOLUTION OF CONTESTED ISSUES

The Board makes its own rules without significant outside scrutiny.¹¹² When the Board tells an applicant that it must mollify an opposing federal agency or outside group before its application will be considered or granted, the applicant has little recourse. There is no vehicle for forcing the Board to hold an adversarial-style hearing or make a valuative judgment about the merits of the applicant's position. The Board simply declines to make decisions, delaying resolution of the application until the applicant accepts a more restricted grant than it desired or felt entitled to receive.

This problem stems in great part from the nature of the Board and the program it administers. Under the FTZ Act and regulations, the Board has its own criteria to apply to applications, ascertaining their consistency with the objectives of the program. In that sense, the Board and an applicant may be in a somewhat adversarial relationship themselves. The applicant must convince the staff examiner of the merits of the applicant's position and, as the 1991 regulations made clear, the applicant has the burden of proof in cases of requests for manufacturing or processing authority.¹¹³ If the examiner disagrees with the applicant, the applicant has ample opportunity to present evidence and information, albeit informally, to convince the examiner to

112. 15 C.F.R. § 400.11 (1994).

113. 15 C.F.R. § 400.31(c)(3) (1994).

the contrary.¹¹⁴ If the applicant disagrees with the final decision of the agency, judicial review provides an avenue of recourse. The expense of judicial review, as well as the deference the agency is likely to receive, however, places great pressure on the applicant to accept whatever deal the agency is willing to offer. In any event, the dispute is between the applicant and the agency over the application of the agency's standards. Applicants face a much greater dilemma in three-way disagreements.

When the staff suggests that the applicant negotiate with an opposing agency or party, the applicant is not provided the opportunity to challenge the positions or assertions of the opponent in a meaningful way. The examiner is not in the position of a neutral fact finder, but is an agent of the Board. The hearing, which is optional, may or may not include a detailed treatment of the issue in controversy. If the hearing is held, and the issue is treated, it will not be in an adversarial proceeding where the applicant has the opportunity to challenge the assertions of the opposing party.¹¹⁵ By forcing negotiation and compromise on the applicant, the Board is spared from taking a position on the issue raised by the opposing party, which may involve competing trade policy issues. The applicant, however, is deprived of the opportunity of getting an adjudication of the merits of the competing issues. Judicial review of this kind of decision is problematic because of deficiencies in the Board's record and explanation.

C. THE AGENCY DOES NOT ALWAYS EVALUATE THE MERITS OF OBJECTIONS IN ENCOURAGING ACCOMMODATION

In its aversion to conflict, the Board makes a limited effort to evaluate the concerns raised by government agencies or private parties about applications or requests for authority. The legitimacy of the complaint is tested through the reaction of the applicant. The agency's position is that if the objection raises a point that might change the way the agency viewed the case, it will pass it along to the applicant for comment. Applicants may compromise over claims that have little merit because there is no effective way to resolve them.

114. 15 C.F.R. § 400.27(d)(3)(B)(vii)(A) (1994).

115. A constitutional challenge to the way the Board conducted a hearing in 1968 was rejected by the federal district court, which found that the failure to administer oaths to witnesses, the denial of an offer of proof on one of the issues, and the restriction on cross examination were not denials of due process in the context of an administrative hearing. *Sinclair Oil Corp. v. Smith*, 293 F. Supp. 1111, 1115 (S.D.N.Y. 1968).

The National Association of Foreign Trade Zones (NAFTZ)¹¹⁶ reflected this concern in its January 31, 1991 comments to the proposed foreign trade zone regulations. The comments suggested language that would expressly authorize the staff to require additional information from parties opposing applications so that the staff could effectively evaluate their opposition.¹¹⁷ This suggestion, however, was not adopted by the Board in the final rules.

D. INFORMAL TREATMENT OF APPLICATIONS EXTENDS TO KEEPING THE RECORD OPEN FOR COMMENTS AND OBJECTIONS BEYOND A REASONABLE TIME

According to the regulations, the official record for a proceeding opens when the Executive Secretary files the application, or receives a request for some other procedure, and is closed only when there is a final determination by the Board.¹¹⁸ This assures a complete record for review of what the Board has received should there be judicial scrutiny of the agency's action. What is not set out in the rules is when the agency will stop accepting and considering information on a particular application prior to making its decision. In practice, there appears to be no fixed closing point for the agency's record. The staff will accept and consider, indeed may even solicit, material for purposes of making a decision after the applicant has submitted what it believed was its final response.

Because the staff is so conflict averse, it will react to statements of opposition it receives regardless of the stage in the application process. Its deadlines for submission are not strictly enforced and applicants can never be sure if the process is complete. In some cases, the examiner may actually solicit information from opponents after the matter has been committed for formal review. The staff has had no complaints for failing to notify applicants of any significant opposition that was received after the public comment period was supposed to be closed. Rather, the concern expressed was that there was no cutoff for

116. The NAFTZ consists of over 300 members, including numerous zone grantees, operators, applicants and consultants. The association works closely with the Board and Customs Service on general procedural issues, although it avoids specific trade policy questions because of the diversity of its membership.

117. Memorandum from the National Association of Foreign-Trade Zones (Jan. 31, 1991) (on file with the *Minnesota Journal of Global Trade*).

118. 15 C.F.R. § 400.52(b) (1994).

parties filing in opposition, and applicants were subjected to delays while they responded to these late concerns.¹¹⁹

This problem is directly related to the informality and negotiation-like process for Board approvals. While in most circumstances the rather vague closing of the record is not a problem, in matters of contention or sensitivity it makes it difficult to define issues sharply, accumulate evidence, allow appropriate responses, and render a decision.

E. EXAMINER'S REPORTS AND RECOMMENDATIONS ARE NOT PUBLIC, WHILE BOARD DETERMINATIONS ARE TOO SUMMARY, DEPRIVING INTERESTED AND SIMILARLY SITUATED PARTIES OF IMPORTANT INFORMATION ABOUT AGENCY VIEWS

The decisions of the Board are summary in nature, merely reciting the approval or authorization granted without substantive explanation of the issues considered.¹²⁰ The substantive discussion of trade policy and economic issues is generally included in the examiner's report.¹²¹ Applicants receive notice of the issue if it is unfavorable,¹²² although this notice is usually via a telephone call from the staff. An unfavorable report includes one placing restrictions on the grant as well as denying it. If it is unfavorable, the applicant has a chance to respond.¹²³ The examiner's report, however, is not available to them or any other party. It is not a part of the public record that can be inspected. The staff will respond to Freedom of Information Act

119. *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759, 760 (Ct. Int'l Trade 1993). Late opposition can be quite devastating in some cases. In *Phibro Energy*, the staff had already recommended that the subzone application be granted when three local government jurisdictions entered their opposition and asked that the matter be reopened to consider their objections. The staff ultimately reversed its position, and the Board denied the application. *Id.*

120. This deficiency was the basis for the CIT's remand to the Board of its decision in *Conoco*. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 855 F. Supp 1306 (Ct. Int'l Trade 1994), *on remand from* 18 F.3d 1581 (Fed. Cir. 1994), *rev'g* 790 F. Supp. 279 (Ct. Int'l Trade 1992). The CIT found that neither the decision of the Board nor the record provided sufficient information for the court to perform the appropriate review of the Board's determination. *Id.* *Conoco* is discussed in greater detail at *infra* part VI.C.1.

121. In remanding *Conoco*, the CIT noted the absence of an explanation or justification for the Board's position in any of the documentation in the record. *Id.* at 1312. Thus, in that case, even the examiner's report was insufficient to explain the basis for the agency's action.

122. 15 C.F.R. § 400.27(d)(3)(vii)(A) (1994).

123. *Id.*

(FOIA)¹²⁴ requests for reports, although it generally will resist disclosing as much as it can justify. This nondisclosure was criticized by the informal review of foreign trade zone procedures made by the ACUS in 1987,¹²⁵ and the practice has not changed, although staff is apparently reconsidering its general reluctance to respond to FOIA requests for these reports.

The unavailability of detailed discussion of Board decisions makes it difficult for applicants to evaluate their chances for a successful application. With regard to subzone applications, companies can generally anticipate that once a company within an industry that uses imported parts has successfully obtained subzone status, similarly situated firms will also be successful. It is also true that the staff will communicate Board positions to prospective applicants and encourage or discourage applications accordingly. Of course, the applicant only has the word of the staff for these positions in many instances, and while the staff is well regarded by those involved in foreign trade zones, reliance on informal agency attitudes rather than an established written record poses some risks.

F. INFORMALITY AND CONFLICT-AVERSION MAKE SERIOUS REVIEW OF ZONE USERS AND ZONE ACTIVITY UNLIKELY AND PROCEDURALLY UNWIELDY

The most glaring omission in current Board functions is the oversight and monitoring of zone activity. The Board currently does not have the resources to monitor zone activities to adequately assure compliance with zone grants and trade policy.¹²⁶ This is one area in which the changes made in the 1991 regulations, while directly responsive to the criticism levelled at the Board in the 1989 GAO study, still do not reflect agency practice. There simply is no substantive review of zone activity by the Board staff. The required annual reports provide the staff with information about activity within the zone or subzone, but are not used for any compliance purposes. Trade zone grant holders do not object to this, of course, since once they receive approval they have nothing more to fear from the Board. Yet, the oversight activity is clearly within the contemplation of the agency. The agency's procedures are singularly ill-suited for this role,

124. Freedom of Information Act, 5 U.S.C. § 552 (1988 & Supp. 1993).

125. ACUS Letter, *supra* note 49, at 4.

126. According to the Executive Secretary of the Board, approximately one-half of one staff year equivalent is allocated to compliance activity.

however, and would need to be revised before any significant oversight activity could begin.

The Board has the power to revoke a zone or subzone grant if a party has "repeatedly and willfully" violated the FTZ Act.¹²⁷ In addition, the Board has the authority to restrict zone activity if it determines that such activity is inconsistent with the statute or regulations, or with the Board's authorization, or if changed circumstances indicate that the activity is detrimental to the public interest.¹²⁸ Restrictions on zone activity would include eliminating the use of inverted tariffs, requiring certain imports to be privileged status only, or restricting use of non-privileged imports to goods ultimately exported.

The Board's informality and style of administration are not well-suited to these kinds of enforcement or regulatory actions. Taking away agency-bestowed economic benefits from a party creates confrontation and an adversarial situation. Given the small size of the staff and its close relationship with the Board, if the agency undertook such an action, separation of the prosecutor and judge function would be extremely difficult. The staff would make the determination that the action or activity was inconsistent with the statute and regulations, or not in the public interest due to changed circumstances. While the staff might hold a hearing,¹²⁹ it could only be for the purpose of justifying the party's actions to the staff. A zone grantee faced with such a loss, however, would want a complete hearing before such action was taken. This hearing should include ample opportunities to challenge the adverse assertions of the agency and some kind of neutral hearing officer.

Because decisions to revoke zone or subzone status are reviewable in the federal court of appeals of the circuit wherein the zone is located,¹³⁰ the agency would know that its action would be closely scrutinized. It seems likely that the agency would also want the protection of more formal procedures in this context.

127. 15 C.F.R. § 400.28(c) (1994).

128. 15 C.F.R. § 400.31(d) (1994).

129. The FTZ Act requires that a grantee be afforded an opportunity to be heard before a zone grant is revoked. The statute also spells out some minimal procedural rules. 19 U.S.C. § 81r (1988).

130. 19 U.S.C. § 81r(c) (1988).

VI. JUDICIAL REVIEW OF BOARD DECISIONS

A. INTRODUCTION

The FTZ Act contains only one reference to judicial review, providing for review of Board decisions revoking foreign trade zone status before the federal court of appeals for the circuit in which the zone is located.¹³¹ While this provision has never been used, other courts have infrequently considered Board actions in other contexts.¹³² Three recent efforts to secure direct judicial review of Board decisions raised serious questions about where, how, and indeed whether any action of the Board besides revocation was subject to judicial review.¹³³ These questions were answered in 1994, when both the Court of Appeals for the Federal Circuit, followed by the Court of Appeals for the District of Columbia, held that the Court of International Trade (CIT) had jurisdiction to review Board decisions.¹³⁴ The CIT responded quickly to this new charge, remanding the first matter it reviewed to the Board based on deficiencies in the decision and the content of the agency record.¹³⁵

B. JUDICIAL REVIEW PRIOR TO 1992

The seminal case interpreting the FTZ Act is *Armco Steel Corporation v. Stans*.¹³⁶ Armco sought a declaratory judgment

131. *Id.*

132. *See, e.g., Armco Steel Corp. v. Stans*, 303 F. Supp. 262 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779 (2d Cir. 1970) (reviewing Board decision to set up foreign trade subzone); *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 693 F. Supp. 1183 (Ct. Int'l Trade 1988) (holding that contrary to Board decision, foreign manufactured machinery imported to manufacture goods was subject to duty); *Hawaiian Indep. Refinery v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978) (discussing the extent of judicial review of Board actions).

133. *Conoco, Inc. v. Foreign Trade Zones Bd.*, 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd and remanded*, 18 F.3d 1581 (Fed. Cir. 1994), *decision on remand*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994); *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442 (D.D.C. 1992), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994); *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993) (appeal to the Court of Appeals for the Federal Circuit withdrawn by plaintiff pending outcome of *Conoco*). These three cases are discussed *infra* part VI.C.

134. *Conoco, Inc. v. Foreign Trade Zones Bd.*, 18 F.3d 1581 (Fed. Cir. 1994), *rev'g and remanding* 790 F. Supp. 279 (Ct. Int'l Trade 1992), *decision on remand*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994); *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 22 F.3d 1110 (D.C. Cir. 1994), *aff'g* 803 F. Supp. 442 (D.D.C. 1992).

135. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994), *on remand from* 18 F.3d 1581 (Fed. Cir. 1994), *rev'g* 790 F. Supp. 279 (Ct. Int'l Trade 1992).

136. 303 F. Supp. 262 (S.D.N.Y. 1969), *aff'd*, 431 F.2d 779 (2d Cir. 1970).

holding unlawful and setting aside an order issued by the Board granting the Board of Commissioners of the Port of New Orleans the right to set up a foreign trade subzone. The initial purpose of this subzone grant was to permit Equitable-Higgins Shipyard, Inc., a shipbuilder, to construct, with duty-free steel from Japan, steel barge vessels at a shipyard located within the subzone. This grant enabled Equitable to take advantage of inverted tariffs. Armco, a domestic producer of the kind of steel Equitable sought to use in its shipbuilding operation, mounted a broad challenge to the Board's decision, attacking it for being inconsistent with requirements of the statute and not supported by substantial evidence.¹³⁷ The government defended the Board's action, and further argued that Armco lacked standing to seek review of the Board's decision.¹³⁸ The court found that Armco had standing as a company that would suffer competitive harm as a result of the decision of the Board and was among those sought to be protected by the statute.¹³⁹ Equally significant, the court gave little credence to the government's argument that actions of the Board were outside judicial scrutiny.¹⁴⁰

The court declined to grant the government's motion for summary judgment based on lack of standing, but did grant the motion based on the merits of the government's defense of the Board's action. In reaching that conclusion, the court found, in part, that the Board's action was supported by substantial evidence and satisfied the requirements of the statute and regulations.¹⁴¹

On appeal, the Second Circuit affirmed the lower court's decision. First, however, the court noted that the effect of the inverted tariff in this case was so favorable that it reduced the seven and one-half percent duty on the steel to zero when the

137. *Id.* at 268.

138. *Id.* at 265-66.

139. *Id.* at 266-68. The court found that the drafters of the FTZ Act had intended to protect domestic steel producers from unfair foreign competition. Thus, Armco was in a position to challenge an action under the statute that could harm it. This approach to standing under the Act would allow any domestic producer to appeal to the CIT to challenge any Board decision granting zone benefits to importers of competitive foreign goods. This has ramifications for how the Board deals with interested parties who are objecting to applications before the agency.

140. *Id.* at 266. The court stated that "[n]othing in the legislative history of the [Administrative Procedure] Act indicates that Congress intended to preclude judicial review of Zones Board orders; and while the action of the Zones Board, in establishing the sub-zone, involved some degree of discretion, it is not the type of agency action which a court is precluded from reviewing." *Id.*

141. *Id.* at 271.

barges were brought out of the subzone into U.S. customs territory.¹⁴² Second, the court found that Armco not only had standing due to potential direct economic injury, but also as a representative of a class of domestic producers which the tariff laws were designed to protect from foreign competition.¹⁴³ The *Armco* decision did not give serious attention to the notion that such grants of authority by the Board might be outside judicial review.

Armco is most often cited for the very categorical statement made about Board discretion in rendering decisions. While the court entertained the review of the Board's decision, it held that:

The Act gives the Trade Zones Board wide discretion to determine what activity may be pursued by trade zone manufacturers subject only to the legislative standard that a zone serve this country's interests in foreign trade, both export and import. Because of the nature and complexity of the problem the factors entering into a Board determination are necessarily numerous, and it would seem incontrovertible that the Board must not be unduly hampered by judicial policy judgments that might cast doubt upon the wisdom of a particular Board decision.¹⁴⁴

Since *Armco*, there has been little doubt about the deference the courts would show the Board in rendering its decisions. As a result, there have been few judicial appeals.¹⁴⁵ Until 1992 there seemed little question that the courts would at least entertain these appeals. Three decisions decided within a year called that proposition into question.

C. QUESTIONING JUDICIAL REVIEW

The three cases in controversy display the wide range of issues which can arise under the FTZ Act and demonstrate the importance of adequate procedures and a well-developed record. A close look at these cases and the reasoning of the courts illus-

142. *Armco Steel Corp. v. Stans*, 431 F.2d 779, 782 (2d Cir. 1970), *aff'g* 303 F. Supp. 262 (S.D.N.Y. 1969).

143. *Id.*

144. *Id.* at 785.

145. In both *Hawaiian Independent Refinery* and *Nissan Motor*, plaintiffs sought review through appeal of Customs decisions based on Board actions, and did not directly seek review of the Board decisions. *Hawaiian Indep. Refinery v. United States*, 460 F. Supp. 1249 (Cust. Ct. 1978); *Nissan Motor Mfg. Corp., U.S.A. v. United States*, 693 F. Supp. 1183 (Ct. Int'l Trade 1988). In *Hawaiian Independent Refinery*, the Customs Court observed *sua sponte* that "determinations by the Board are judicially reviewable at the request of the parties affected to determine their reasonableness and consonance with the purposes of the [FTZ] Act." 460 F. Supp. at 1257.

trates the significance of judicial review and the context it provides for Board operations.

1. *Conoco, Inc. v. Foreign Trade Zones Board*¹⁴⁶

In 1986, Conoco applied for a special purpose subzone for its oil refinery in Louisiana in order to bring in foreign crude oil duty free.¹⁴⁷ The Board granted the subzone status, but placed the following conditions on it: (1) foreign crude oil used as fuel for the refinery shall be dutiable; (2) Conoco shall elect privileged foreign status on foreign crude oil and other foreign merchandise brought into the subzone (i.e., paying duty at the rate for crude oil and eliminating any inverted tariff advantage); and (3) the Customs Service must certify to the Board that Conoco has a satisfactory control system for identifying different duty categories of oil and product to protect tariff revenues, or the subzone authority would lapse.¹⁴⁸ The net effect of the conditions was to render the benefits of subzone status minimal. At trial, the CIT pointed out that the conditions were also a marked departure from Board policy between 1970 and 1985, when refiners were granted subzone status without these conditions.¹⁴⁹

Conoco initially filed the appeal in U.S. District Court. The appeal was dismissed based on the government's motion that proper jurisdiction was with the CIT.¹⁵⁰ The government's arguments before the CIT were that: (1) decisions of the Board under the FTZ Act with regard to granting zone status or attaching conditions were not subject to judicial review; and (2) none of the decisions of the Board were reviewable before the CIT under that court's jurisdictional statute.¹⁵¹ The first argument reiterated the government's argument in *Armco Steel* that the statutory provision for judicial review of grant revocations precluded judicial review of any other decision of the Board.¹⁵² The CIT declined to address this argument because it agreed with the government's lack of statutory jurisdiction argument.

146. 790 F. Supp. 279 (Ct. Int'l Trade 1992), *rev'd and remanded*, 18 F.3d 1581 (Fed. Cir. 1994), *decision on remand*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994).

147. *Id.* at 280. Board treatment of petroleum refineries was a special focus of the International Trade Commission's review of the agency. See 1988 ITC STUDY, *supra* note 40, at xv-xvi.

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

149. *Id.* at 281.

150. *Id.* at 280, 289.

151. *Id.* at 281.

152. See *supra* note 141 and accompanying text (discounting the government's argument).

The CIT is a statutory court with express jurisdiction legislatively defined by the Customs Court Act of 1980.¹⁵³ Conoco asserted jurisdiction under section 1581(i) of the Act, the residual jurisdiction provision.¹⁵⁴ While the court acknowledged that the language of the statute indicated the intent to create a broad jurisdictional grant to assure that the CIT heard all tariff-related cases,¹⁵⁵ the legislative history was more ambiguous, and the Court of Appeals for the Federal Circuit and the Supreme Court have narrowly read the provision.¹⁵⁶ Because the court found that Conoco had the option of appealing the conditions imposed by the Board through a protest of the Customs duty levy under section 1581(a) of the statute, the assertion of jurisdiction under the broader grant was improper.¹⁵⁷ In reaching its conclusion, the court reluctantly rejected Conoco's argument that it was ineffective and improper to mount a collateral attack on a final agency action by the Board through an appeal of an action taken by the Customs Service administering that decision. The court declared that Conoco had not shown that such an approach was manifestly inadequate in the circum-

153. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended at 28 U.S.C. §§ 1581-84 (1994)).

154. Section 1581(i) provides:

(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 the public health or safety; or
- (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This subsection shall not confer jurisdiction over an anti-dumping 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 United States Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

28 U.S.C. § 1581(i).

155. *Conoco*, 790 F. Supp. at 282-84.

156. *Id.* at 284-86.

157. *Id.* at 288. The court noted that two FTZ Act appeal cases Conoco relied upon were, in fact, brought as protests of customs duty impositions. *Id.* at 286 (citing *Hawaiian Independent Refinery*, 460 F. Supp. at 1252; *Nissan Motor*, 693 F. Supp. at 1184-85).

stances of the case.¹⁵⁸ In the next two cases concerning Board actions, the decisions of the Board would never lead to a protestable action by Customs, but the courts still found no jurisdiction to entertain the appeal.¹⁵⁹

2. Miami Free Zone Corporation v. Foreign Trade Zones Board¹⁶⁰

The plaintiff in this case was the operator of Foreign Trade Zone Number 32 in Dade County, Florida. It opposed the application of another party for a second general purpose zone in the Miami area, an application that was granted in November of 1991 to create Zone Number 180. Miami Free Zone filed an appeal in the Federal District Court for the District of Columbia asserting jurisdiction under the judicial review provisions of the Administrative Procedure Act.¹⁶¹ The government moved to dismiss for lack of jurisdiction, arguing that decisions of the Board were unreviewable, and that proper jurisdiction for review was with the CIT under Title 28 of the United States Code, section 1581(i).¹⁶² The district court did not address the first argument, but instead focused on the second argument that appropriate jurisdiction was with the CIT.¹⁶³

Judge Gesell agreed with the government that the CIT was the appropriate court to hear the appeal of the foreign trade zone order creating the second Miami area zone. He cited the residual jurisdiction provision of section 1581 and the purpose of the legislation to consolidate appeals of matters affecting tariffs

158. *Id.* at 286-88. Judge Carman of the CIT expressed great dissatisfaction with the government's approach to questions of judicial review of Board decisions:

The proceedings underlying the instant cause of action are a case in point. In the district court, the government argued the district court did not have jurisdiction and the exclusive jurisdiction was in the CIT. The district court dismissed the case. Plaintiffs subsequently brought suit in the CIT. Here, the government argues that neither the CIT nor any court has subject matter jurisdiction. It is small wonder that the public does not understand such a system.

Id. at 289.

159. *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442 (D.D.C. 1992), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994); *Phibro Energy, Inc. v. Franklin*, 822 F. Supp. 759 (Ct. Int'l Trade 1993).

160. 803 F. Supp. 442 (D.D.C. 1992), *aff'd*, 22 F.3d 1110 (D.C. Cir. 1994).

161. *Id.* at 443. The judicial review provisions of the APA can be found at 5 U.S.C. § 701 (1992).

162. Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss at 4-5, *Miami Free Zone Corp. v. Foreign Trade Zones Bd.*, 803 F. Supp. 442 (D.D.C. 1992) (Civ. A. No. 92-0392).

163. *Miami Free Zone*, 803 F. Supp. at 443-44.

and foreign trade within one court.¹⁶⁴ Judge Gesell found the legislative history of the jurisdictional statute supportive of the view that the CIT enjoyed exclusive jurisdiction in trade-related cases.¹⁶⁵ Judge Gesell did not address the position of the CIT in *Conoco*, decided only five months earlier, that section 1581(i) did not give the court jurisdiction over trade zone appeals.¹⁶⁶ Since Judge Gesell indicated his belief that jurisdiction was proper based on that section, he did not have to consider the fact that Miami Free Zone would never be in a position to invoke the CIT's jurisdiction through a Customs duty protest. He simply dismissed the case on the assumption that it would be heard before the CIT.¹⁶⁷

Within a six-month period the Board successfully argued that the CIT's jurisdiction over the Board under section 1581(i) ousted other federal district courts from jurisdiction, and that the CIT did not have jurisdiction over the Board under section 1581(i). While unable to convince any court that actions of the Board were exempt from judicial review, the government accomplished very nearly the same thing through the courts' decisions finding that they lacked statutory authority necessary to assert jurisdiction.

3. *Phibro Energy, Inc. v. Franklin*¹⁶⁸

The CIT took another look at the question of the scope of its authority under section 1581(i) when *Phibro* appealed the denial of its application for a special purpose subzone for its refinery site. In this case the Board denied the application based on the opposition of local taxing authorities who objected to the loss of revenues from the ad valorem tax exemption accorded products in the trade zone.¹⁶⁹ *Phibro* sought review of the Board's decision under section 1581(i). Judge Carman, who had decided *Conoco*, decided *Phibro* as well. He reiterated his view that the Supreme Court and Court of Appeals for the Federal Circuit had narrowly circumscribed the reach of section 1581(i), and that unless some express reference in the FTZ Act brings it within the precise language of the section 1581 provisions, the CIT has no

164. *Id.*

165. *Id.*

166. *See supra* text accompanying notes 153-59.

167. *Conoco's* appeal from this decision is discussed *infra* part VI.D.

168. 822 F. Supp. 759 (Ct. Int'l Trade 1993) (appeal to the Court of Appeals for the Federal Circuit withdrawn by plaintiff pending outcome of *Conoco*).

169. *Id.* at 760.

basis for its jurisdiction.¹⁷⁰ Disagreeing with Judge Gesell's view of the statute as set forth in *Miami Free Zone*,¹⁷¹ Judge Carman stated that "[t]he CIT can not exercise jurisdiction over all matters simply because they may somehow be related to imports."¹⁷² While Carman did refer to his earlier decision in *Conoco*,¹⁷³ he did not focus on the alternative avenue to the CIT's jurisdiction through the Customs protest that was the primary reason given for not finding jurisdiction under Section 1581(i) in *Conoco*.

Judge Carman continued to express his frustration with the government's position that Board actions are outside judicial scrutiny, and his preference for CIT jurisdiction. He, however, stated that only Congress could extend the purview of the CIT to those matters decided by the Board.¹⁷⁴

D. DECISIONS ON APPEAL

Conoco appealed the CIT decision to the Court of Appeals for the Federal Circuit,¹⁷⁵ while Miami Free Zone appealed to the D.C. Circuit.¹⁷⁶ Both courts agreed that judicial review of Board decisions was properly before the CIT under section 1581(i) of the Customs Courts Act of 1980.¹⁷⁷ The two courts reached their conclusions from different routes, with the Circuit Court for the District of Columbia in *Miami Free Zone* deciding, in large part, out of deference to the *Conoco* decision reached by the Federal Circuit thirty days earlier.¹⁷⁸

In *Conoco*, the Federal Circuit squarely confronted the government's position that the decisions of the Board, with the exception of zone revocations, were not subject to judicial review. The government argued that the court did not have to decide that issue, since the CIT had not reached it below. The court, however, stated that the question had to be addressed since it was a predicate for the court's ultimate conclusion about where

170. *Id.* at 763.

171. See *supra* text accompanying notes 164-67.

172. *Phibro Energy*, 822 F. Supp. at 764-65.

173. *Id.* at 765.

174. *Id.*

175. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1582 (Fed. Cir. 1994), *rev'g and remanding* 790 F. Supp. 279 (Ct. Int'l Trade 1992), *decision on remand*, 855 F. Supp. 1306 (Ct. Int'l Trade 1994).

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

177. *Conoco*, 18 F.3d at 1590; *Miami Free Zone*, 22 F.3d at 1112-13.

178. *Miami Free Zone*, 22 F.3d at 1113.

judicial review appropriately lay.¹⁷⁹ The court held that the provision of the FTZ Act providing for judicial review of zone revocations in the circuit court of appeals in which the zone is located¹⁸⁰ did not indicate congressional intent to preclude judicial review of all other decisions under the FTZ Act. The court concluded that, absent clear congressional intent to preclude judicial review, the actions of the Board were "subject to judicial review in accordance with established principles of law."¹⁸¹

The court then had to determine if review was under the general Administrative Procedure Act jurisdiction, or under the exclusive jurisdiction of the CIT pursuant to its statutory mandates. The court then reviewed the CIT's reasoning in *Conoco*: that the Supreme Court's narrow reading of the jurisdictional statute in *K Mart Corp. v. Cartier*¹⁸² precluded inclusion of actions under the FTZ Act, and that only through the ordinary Customs protest process could the CIT examine the Board decision. The Federal Circuit disagreed with the CIT on both of these points. First, the court held that a Customs protest under section 1514(a) of the Customs Courts Act¹⁸³ was not an adequate means of review because it only provided for review of actions subject to the jurisdiction of the Treasury Department.¹⁸⁴ As the court pointed out, the Board is an independent agency. While the CIT could review Customs decisions regarding tariffs imposed on *Conoco* under that section, it could not reach the Board determination that led to those tariff levels.¹⁸⁵

The Federal Circuit held that the CIT could reach Board decisions under the residual jurisdiction provision of the Customs Courts Act. It disagreed with the CIT's cautious reading of that section, and found that decisions reached under the FTZ Act readily fell into section 1581(i), "any law of the United States providing for . . . (1) revenue from imports or tonnage."¹⁸⁶ According to the court, "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."¹⁸⁷ The court held that the language of

179. *Conoco*, 18 F.3d at 1584.

180. 19 U.S.C. § 81r(c) (1992).

181. *Conoco*, 18 F.3d at 1585.

182. *K Mart Corp. v. Cartier*, 485 U.S. 176 (1988).

183. 19 U.S.C. § 1514(a) (1994).

184. *Conoco*, 18 F.3d at 1587.

185. *Id.*

186. 19 U.S.C. § 1581(i)(1) (1994).

187. *Conoco*, 18 F.3d at 1588.

section 1581(i)(4) ("administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection . . .") also encompassed Board actions.¹⁸⁸ Thus, the court remanded the case to the CIT to hear Conoco's appeal.¹⁸⁹

One month later, the Court of Appeals for the District of Columbia Circuit announced its decision in *Miami Free Zone*,¹⁹⁰ agreeing with the Federal Circuit that proper appellate jurisdiction was with the CIT. In that case, the government was arguing for jurisdiction in the CIT rather than in other federal district or appeals courts. Although it did raise its argument that the FTZ Act zone revocation review provision precluded judicial review of any other Board decision under the Act, the Court dismissed the argument in a footnote.¹⁹¹ *Miami Free Zone* was urging the court to find jurisdiction in federal district court under the general review provisions of the Administrative Procedure Act. The D.C. Circuit was not as sanguine about the application of section 1581(i) as the Federal Circuit, but ultimately concluded that it was better for the CIT to have exclusive jurisdiction over Board actions.¹⁹²

The problem the D.C. Circuit had with section 1581(i) was similar to the concern the CIT had with it in *Conoco*. The court found that the jurisdictional language of the section mandating review of laws "providing for . . . revenue from imports"¹⁹³ was really too narrow to cover the provisions of the FTZ Act, which actually resulted in reducing or eliminating "revenues from imports."¹⁹⁴ The court noted the prior cases narrowly construing the jurisdictional provisions of the Customs Courts Act and found the question a close one.¹⁹⁵ The court went on to find, however, that in combination, sections 1581(i)(2) and (4) of that provision could be read to give jurisdiction to the CIT, and that to avoid a split in the circuits, it would so read them.¹⁹⁶ Section 1581(i)(2) applies to laws providing for "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," while section 1581(i)(4) applies to

188. *Id.*

189. *Id.* at 1590. The decision on remand to the CIT is discussed *infra* text accompanying notes 207-11.

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

191. *Id.* at 1112 n.2.

192. *Id.* at 1113.

193. 19 U.S.C. § 1581(i)(1) (1992).

194. *Miami Free Zone*, 22 F.3d at 1112-13.

195. *Id.* at 1112.

196. *Id.*

the "administration and enforcement with respect to" such matters.¹⁹⁷ Thus, the D.C. Circuit held that the applications of the FTZ Act by the Board were subject to review in the CIT as "providing for administration with respect to tariffs . . . for reasons other than the raising of revenues."¹⁹⁸

While the Federal Circuit and the D.C. Circuit did not agree on the precise combination of sections in 1581(i) of the Customs Courts Act that applied to the FTZ Act, they agreed that the decisions of the Board were subject to judicial review, and that such review would be in the CIT. The CIT quickly considered the Board decision in *Conoco* and remanded the action back to the Board for explanations of the Board's decisions,¹⁹⁹ confirming some of the concerns raised in this study.

E. REVIEW OF BOARD ACTIONS BY THE CIT

In creating the CIT in 1980, the Customs Court Act described in great detail the jurisdiction of the new court and the procedures it was to follow in reviewing the actions of federal agencies.²⁰⁰ The CIT assumed the prior jurisdiction of the Customs Court, and new authority over U.S. trade laws, especially the anti-dumping and countervailing duty laws after the passage of the Trade Agreements Act of 1979.²⁰¹ Section 2640 of the Customs Court Act²⁰² sets out the standard of review for all of the various judicial review functions assigned to the CIT. A number of actions under the Tariff Act of 1930 and the Trade Agreements Act of 1979 are to be reviewed on a *de novo* basis in the CIT.²⁰³ Other specific statutory standards are prescribed,²⁰⁴ while all remaining actions, including those under the residual jurisdiction provisions of section 1581(i), are to be reviewed in

197. 19 U.S.C. § 1581(i)(2), (3) (1994).

198. *Miami Free Zone*, 22 F.3d at 1112.

199. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 855 F. Supp 1306 (Ct. Int'l Trade 1994), *on remand from* 18 F.3d 1581 (Fed. Cir. 1994), *rev'g* 790 F. Supp. 279 (Ct. Int'l Trade 1992). This opinion was delivered June 30, 1994, approximately two weeks after the Judicial Review Committee of the Administrative Conference met for the second time to consider this study and report on the operations of the Board. Chief among the concerns focused on by the committee was the inadequacy of the explanation provided by the Board for its decisions.

200. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 727 (codified as amended at 28 U.S.C. §§ 2631-80 (1994)).

201. See H.R. REP. No. 1235, 96th Cong., 2d Sess. 18-20, *reprinted in* 1980 U.S.C.C.A.N. 3729-31.

202. 28 U.S.C. § 2640 (1994).

203. 28 U.S.C. § 2640(a) (1994).

204. 28 U.S.C. § 2640(b)-(d) (1994).

the Administrative Procedure Act²⁰⁵ “as provided in section 706 of Title 5.”²⁰⁶

This was the approach the CIT took on remand in *Conoco*.²⁰⁷ After discussing the standard of review provided for by the Customs Court Act and concluding that Board decisions would be considered under section 2640(e), the CIT, through Judge Carman, examined the decision issued by the Board in *Conoco*.²⁰⁸ The court found that the decision was inadequate on two fundamental bases:

- (1) . . . the court finds the Board's decision to impose the disputed conditions on Conoco's and Citgo's subzone grants does not contain an understandable basis that would permit the court to determine whether the Board acted within the scope of its authority,²⁰⁹ and
- (2) [t]he court also finds the deficiencies in the Board's explanation of its action precludes the court from determining whether the Board's action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” under 5 U.S.C. § 706(2)(A).²¹⁰

Perhaps the most telling of Judge Carman's concerns about the Board's decision is his observation that during the oral arguments before him, counsel for the trade zone “was unable to point to anything in the record which indicates upon what

205. APA, 5 U.S.C. § 706 (1994).

206. 28 U.S.C. § 2860(e) (1994). Review of Board actions by the CIT under the Administrative Procedure Act illustrates one of the unfortunate redundancies in U.S. trade law. As the path of *Conoco* illustrates, judicial review is a two step process, first to the CIT and then to the Court of Appeals for the Federal Circuit (CAFC). Given that CIT review is the traditional review of the agency record and not an evidentiary hearing, CAFC review simply repeats what the CIT has already done. The Administrative Conference addressed this issue generally in Recommendation No. 75-3, “The Choice of Forum for Judicial Review of Administrative Action,” 1 C.F.R. 305.75-3 (1994).

207. That the CIT reacted to the Board decision in *Conoco* the way it did was not surprising. In 1982, shortly after its creation, the Court of International Trade was confronted with one of its first petitions for review under § 1581(i), in which the party asked for a *de novo* review. In *Bar Bea Truck Leasing v. United States*, 4 Ct. Int'l Trade 159 (1982), the plaintiff sought review of a Customs Service denial of its application for a cartage license. Plaintiff had sought discovery against Customs, and Customs moved for a protective order before the CIT. Indicating that it was a case of first impression, the Court reviewed the three basis for judicial review of agency action, *de novo*, substantial evidence, and arbitrary and capricious. The CIT applied the arbitrary and capricious standard and remanded the matter to Customs for further development of the record. See also *Duty Free Int'l, Inc. v. United States*, 1993 Ct. Int'l Trade LEXIS 246 at 4.

208. *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 855 F. Supp. 1306, 1309-11 (Ct. Int'l Trade 1994), *on remand from* 18 F.3d 1581 (Fed. Cir. 1994), *rev'g* 790 F. Supp. 279 (Ct. Int'l Trade 1992).

209. *Id.* at 1311.

210. *Id.* at 1312.

grounds *the Board* decided to impose the disputed conditions."²¹¹ Thus, it was not just the opinion of the Board that failed to explain its reasoning, but the record as a whole yielded no insight into the basis for the limitations on Conoco's subzone grant. This illustrates some of the deficiencies in the decision-making process of the staff and Board.

The essential logic of CIT review of Board decisions on the record seems so apparent that it is difficult to understand the tortured path the judicial review determination in *Conoco* took. The efforts of the government to escape from judicial review completely do little credit to the Board and its counsel. The matter has been resolved, however, and the agency must now prepare to confront substantive judicial review of its determinations. The recommendations that follow will better prepare the Board to deal with judicial review, in addition to providing those regulated by the Board with a more equitable process at the agency level.

VII. RECOMMENDATIONS

A. INTRODUCTION

The newly clarified procedure for judicial review of decisions of the Board by the CIT presents a significant challenge to the current administration of the foreign trade zones program. First, judicial review is more likely due to the well-developed judicial review process before the CIT and the existence of a relatively large and knowledgeable CIT bar. Second, the CIT is a highly specialized court with significant expertise in the types of issues the Board deals with and will provide informed, substantive scrutiny of the Board decision-making process. Third, as demonstrated by the court's decision in *Conoco*, CIT review will require a complete and well-developed record, including written explanations of the agency decisions accessible to all interested parties.

This new context will have little impact on the vast majority of the Board's activities. The staff of the Board and the new procedures are generally well regarded by the constituents of the agency. The regulatory culture is one of compromise and negotiation, which is well suited for most of the Board's grantees. However, the recurrence of occasional, highly contested proceedings, the significance of some of the trade policy issues involved in Board determinations, and the possibility of the Board taking

211. *Id.*

on a more extensive regulatory role involving the imposition of restrictions on current grantees, highlight the challenges presented by greater judicial review. The creation of internal agency options for resolving some cases through more formal, adversarial proceedings, a more detailed public explanation of significant decisions, and a general awareness of the importance of the agency record, would effectively address these problems without disrupting the current informal process that has been largely successful.

B. THE BOARD AND STAFF SHOULD CONSIDER THE USE OF MORE FORMAL, ADVERSARIAL PROCEDURES FOR HIGHLY CONTENTIOUS CASES WHERE THE DEVELOPMENT OF A DETAILED RECORD ON DISPUTED ISSUES IS IMPORTANT

There is no question that the current practice of the Board staff is effective for the majority of matters that come before the Board. There are situations that arise, however, that may not be dealt with as effectively through this process. Frequently, these situations will involve applicants for subzone status and/or manufacturing or processing authority bringing in import sensitive components, wanting to take advantage of inverted tariff benefits, or desiring to avoid quantitative restrictions.²¹² Generally, the greater the potential benefit to the applicant (i.e., the higher the tariff or smaller the quota), the greater the protection for the domestic industry and stronger the opposition to the grant or approval of the zone. Opposition could come from competitors, domestic producers of the components, or other government agencies administering the duty or quota programs protecting the impacted domestic industry. The issues may involve choosing between competing U.S. trade policies, disputes about the economic impact of the zone grant, or disagreements about the consistency of the grant with FTZ Act policies and objectives. The disputing parties may actively oppose the application themselves, or such opposition may be reflected in the position the staff takes.

The Board should seriously consider the creation of a more formal, adjudicative process for disputes of this nature, especially those with sufficiently high stakes that are likely to end up

212. Opposition to a general purpose zone is more unusual, although it might come from another zone operator fearful of the competition, as in *Miami Free Zone*. Where there was opposition of this nature, the more formal procedure could also be employed.

before the CIT.²¹³ There is sufficient flexibility built into the current procedures to allow for a more formal process. Simple rules governing presentation of evidence, use of witnesses, permitting questions and cross-examination, and preparation of a transcript could be developed.

Two key issues would have to be addressed, however, in establishing such a procedural alternative. The first is the selection of the hearing officer in such a process. In truly contentious matters, the staff examiner may frequently be too adversarial to take on a presiding role in such hearings. This would be especially true if the staff begins to review zone activities, and as a result, seeks restrictions or grants revocations for either failure to comply with regulations or changes in circumstances or policies. To provide applicants a fair hearing, this more formal hearing should be held before a neutral officer, with the staff participating as a party in the proceeding. The hearing officer could be an administrative law judge, or perhaps another Board staff member not directly involved in the process, or an official from another part of the International Trade Administration. The hearing officer would make a decision based on the record and the hearing and forward a recommendation to the Board. The Board would be free to accept, reject, or revise the recommendation, but should be required to explain in some detail the reasons, based on the record, for a rejection or revision.

The second issue is the standard the agency will use to determine when to use the formal process. There should be relatively few of these more formal proceedings in matters currently handled by the Board, and some general standards for when they would be available should be developed. For example, a minimum dollar impact or import volume might be established, or certain industries might be designated for this process. The Executive Secretary could have the authority to invoke the procedure and make determinations concerning requests for the procedure as presented by affected parties. Decisions not to use the procedure should not be separately reviewable; they should,

213. The National Association of Foreign Trade Zones (NAFTZ), *see supra* note 116, initially responded to this study by opposing greater formality within the Board process, but suggested that opportunities for discovery, cross-examination, etc. in a *de novo* proceeding before the CIT would be beneficial. Since *de novo* review by the CIT has now been eliminated as a possibility under *Conoco*, the only access to these traditional adversarial procedures would be at the agency level. On remand, the CIT in *Conoco* adopted an "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review. 855 F. Supp. at 1311.

however, be subject to review by the CIT as part of the "arbitrary and capricious" review of the entire Board record in disposition of the matter.

If and when the Board begins taking adverse actions against grantees by revoking their grants or limiting the activities they can engage in within the zone, this process should be made readily available to the grantees. These compliance or regulatory actions are likely to be highly contentious and strongly adversarial in nature. While compromise should be encouraged, an affected applicant ought to have ready access to the more formal process.

By using this more formal process in cases that are likely to be considered on appeal to the CIT, the Board will assure a well developed record of its decision-making process, avoiding time consuming remand for additional information. Additionally, such a process may provide something of a hedge against a determination by the court that the agency reached its decision in an arbitrary and capricious manner. Through limiting the availability of the process to these special circumstances, the Board could preserve its informal approach to the vast majority of its actions, while protecting its constituents and itself in the most difficult cases.

C. MORE FULLY DEVELOPED BOARD DECISIONS, INCLUDING PRELIMINARY DECISIONS, SHOULD BE MADE AVAILABLE TO INTERESTED PARTIES AND THE PUBLIC

This recommendation addresses the flaw in the decision-making process identified by the CIT in *Conoco*,²¹⁴ and reiterates two suggestions in the ACUS letter to the GAO for its 1989 study.²¹⁵ The recommendation goes beyond the Board's fundamental problem of explaining its decision, however, and treats the nature and availability of the examiner's report as well. In its 1989 letter, ACUS suggested that the Board either make its decisions more detailed, or make the examiner's reports public to create a body of precedent to inform other grantees or applicants about Board positions.²¹⁶ The Board staff is presently re-examining its position on how readily and to what extent it will make examiner's reports available in response to FOIA requests. This recommendation goes further, calling for: (1) published decisions that reflect the factual and policy

214. See *supra* text accompanying notes 207-10.

215. See *supra* text accompanying notes 49-53.

216. ACUS Letter, *supra* note 49, at 4.

determinations made by the Board in reaching its decisions, and (2) release of the text of preliminary decisions to adversely affected parties. This would be especially important for decisions of hearing examiners if the agency implemented occasional, more formal proceedings. It will be inevitable for those matters proceeding to the CIT.

The value of a publicly available body of decisions should be self-evident, even apart from the necessity for judicial review. Published decisions would provide a readily accessible description of the standards the Board applies to trade zone decisions, thereby assuring broader knowledge of its actions and a basis for measuring consistency in its policies. The existence of published policies would also save time for the staff because applicants and other interested parties would not have to rely on the staff for descriptions of positions and policies.

For any party seeking judicial review of a Board decision, all of the written agency reports and recommendations will be available as part of the record for review.²¹⁷ Since the Board will not automatically know which parties may appeal decisions, the Board and staff might wish to prepare every recommendation and decision for public consumption. Limiting the availability of such decision documents to parties seeking judicial review might encourage some to appeal just for the purpose of gaining access to the written determinations.

The suggestion that the agency provide written preliminary decisions to parties when the decision is an adverse one may prompt a different set of issues. Current rules require applicants to be notified of preliminary adverse recommendations²¹⁸ by telephone or in writing. Although there is no access to the report or detail of the reasoning behind the report, current practice involves notification of the fact of the adverse recommendation. In addition, other interested parties have no right to notification, nor is there any practice of providing notice. Indeed, if a party has opposed an application during the process, the granting of the application, while adverse to the opponent party, would not be adverse to the applicant. Thus, no notice of the preliminary decision would be provided to anyone.

217. Current regulations provide for a full record to be maintained for judicial review, including "all factual information, written argument, and other material developed by, presented to, or obtained by the Board in connection with the proceeding." 15 C.F.R. § 400.52 (1993). A party on appeal will have access to this information, subject to limitations set by the CIT on access to and disclosure of confidential information. 28 U.S.C. § 2635 (1994).

218. 15 C.F.R. § 400.27(d)(2)(v)(A), (3)(vii)(A) (1994).

It seems certain that a large number of interested parties, other than applicants, will have standing to seek judicial review of Board determinations.²¹⁹ If these parties are systematically excluded from critical preliminary notices of staff recommendations, their claims of arbitrary and capricious treatment by the Board will take on greater weight.

The Board should consider providing the preliminary recommendation and report to any adversely affected party who has participated in the proceeding and to those favorably affected when adverse notice is given. Permitting these parties to respond to the preliminary decision would permit the Board to fully consider their position set out against the initial staff position. This would enhance the quality of the record before the Board, and before the CIT should the matter be appealed. It would also permit the correction of any staff mistakes or misconceptions. In addition, it may discourage an adversely affected party from seeking judicial review by giving them an opportunity to respond to the staff at the Board level.

VIII. CONCLUSION

As commercial activity in foreign trade zones approaches the \$100 billion level, the regulatory apparatus is entering a new era. The improved procedures adopted by the Board in 1991 have been largely implemented and the ambiguous status of judicial review has been resolved. Decisions of the Board will now face heightened scrutiny through a well-defined judicial review process, including a court thoroughly knowledgeable of international trade matters. The informality and bargaining atmosphere that has served foreign trade zone grantees well in the past will continue to prevail for most matters before the agency. All parties, however, are now on notice that when the stakes are high enough there is substantive recourse beyond the Board's decision.

The Board and its staff will need to adjust to the demands of judicial review, as the CIT remand in *Conoco* quickly demonstrated. A better, more detailed record, ample opportunities for interested parties to respond, and fuller explanations of decisions will give the CIT a solid basis for upholding agency decisions. The suggestions contained herein can significantly assist

219. See *Armco Steel Corp. v. Stans*, 431 F.2d 779, 784 (2d Cir. 1970), *aff'g* 303 F. Supp. 262 (S.D.N.Y. 1969) (holding that Armco had standing to sue based not only on economic injury to itself, but also as a representative of a class that the tariff laws were intended to protect).

the agency in making these changes without sacrificing the effectiveness of the general informality employed by the staff. Without making some adjustments along the lines suggested, however, the agency is inviting more frequent judicial review, accompanied by greater court scrutiny of its actions. The traditional responsiveness of the agency to its constituents should help it implement the reforms necessary to avoid spending its resources defending itself before the CIT.

