# JURISDICTIONAL QUAGMIRE: THE IMPLICATIONS OF *K-MART CORP. v. CARTIER*

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The Supreme Court's decisions in *K-Mart Corp. v. Cartier, Inc.*[1] represent an important step in deciding at least two critical issues in the field of international trade. First, the Court defined when jurisdiction in certain matters of international trade vests more appropriately in the Court of International Trade [CIT] rather than in the regional district courts.[2] At stake is the interpretation of statutory authority, 28 U.S.C. § 1581, and the reevaluation of a need for specialized knowledge in the area of international trade.

The second issue, decided by the Court in *K-Mart Corp. v. Cartier, Inc.*[3] but not the subject of this article, was the validity of the United States Customs regulations promulgated to implement 19 U.S.C. § 1526(a). In holding the regulations invalid, the Court established the limits to the deference owed an executive agency that develops regulations interpreting statutory language.[4]

The overall importance of the Supreme Court's *K-Mart I* decision cannot be underestimated since the question of jurisdiction remains prevalent in the minds of every litigator and the Supreme Court. The need to resolve intercircuit conflicts, sometimes over jurisdiction, manifests itself in practically every Supreme Court session.[5]

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1. K-Mart Corp. v. Cartier, Inc. [K-Mart I], 108 S. Ct. 950 (1988).

2. *Id.* at 958-60.

3. K-Mart Corp. v. Cartier, Inc. [K-Mart II], 108 S. Ct. 1811 (1988).

4. *Id.* Several commentators have reviewed the impact the *K-Mart II* decision will have on future development of regulations in the international trade area. *See, e.g.*, Comment, *The Gray Market Controversy and the Court: An Analysis of Conflicting Court of Appeals Decisions on the Validity of Customs Regulations Permitting Unauthorized Third Party Importation of Trademarked Goods*, 18 SETON HALL L. REV. 55, 63-64 (1988). Commentators speculated prior to the Supreme Court's decision that the conflict between the D. C. and Federal Circuits indicated the need for the Supreme Court to dispose of the question of the § 526 regulations validity. *Id. See also* Note, *The Greying of American Trademarks: The Genuine Goods Exclusion Act and the Incongruity of Customs Regulation 19 C.F.R. § 133.21*, 54 FORDHAM L. REV. 83 (1985); Takamatsu, *Parallel Importation of Trademarked Goods: A Comparative Analysis*, 57 WASH. L. REV. 433 (1982). That speculation was obviously valid.

5. The Supreme Court grants *certiorari* in those cases evidencing conflicts between the circuits. *See, e.g.*, H.J., Inc. v. Northwestern Bell Tel. Co., 108 S. Ct. 1219 (1988); United

In the *K-Mart I* case, the Supreme Court has focused its attention on the issue of the appropriate jurisdictional forum when specialized knowledge or expertise is involved. In early 1985, the identical substantive issues raised in *K-Mart I* were litigated before the United States Court of Appeals for the Federal Circuit in *Vivitar Corp. v. United States*,[6] a case in which the Supreme Court denied *certiorari*[7] most likely on the grounds that no circuit conflict existed regarding the substantive or jurisdictional issues raised. It was not until late 1986, when the District of Columbia Circuit Court of Appeals contested the jurisdictional interpretation of the Federal Circuit in *Vivitar*, that conflicts arose.

The scope of this article extends solely to reviewing the pressing question of proper jurisdiction as between the CIT and the district courts regarding issues of international trade.[8] Part I will focus on the question of CIT jurisdiction in general. Congress expressed an intent that particular issues requiring skill and expertise in the area of international trade be especially handled by the CIT in order to preserve or create consistency and to prevent forum shopping.[9] But what the limits of this consistency are when juxtaposed against federal question jurisdiction remains open and unanswered.

Part II analyzes CIT and district court case law construing § 1581(i). While the superficial legal interpretation of the jurisdictional statutes appears consistent, a divergence occurs in the appli-

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States v. Hohri, 482 U.S. 64 (1987); Acosti v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251, 253 (1986) ("Because such a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court, we grant the petition for a writ of certiorari"); Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 476 U.S. 1151, 1153 (1986) (certiorari was denied, but Justices White and Brennan dissented, noting the direct conflict between the Fifth and Ninth Circuits requires resolution by the Supreme Court).

6. 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

7. 474 U.S. 1055 (1986).

8. 28 U.S.C. § 1581 (1982).

9. Note that the same concern for continuity and consistency exists in the area of patent law and remains one of the major policy reasons for the formation of the Federal Circuit. As the Senate report for the Judiciary Committee so aptly points out:

> [The purposes of the Federal Courts Improvement Act of 1982 include filling] the void in the judicial systen by creating an appellate forum capable of exercising nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity, to improve the administration of the patent law by centralizing appeals in patent cases, and to provide an upgraded and better organized trial forum for government claims cases.

S. REP. NO. 275, 97th Cong., 2d sess. 2 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 11, 12; *see also* 28 U.S.C. § 1295 (1987 Supp.).

cation of the statute to the particular facts of the cases in question. Some courts conclude that the statute requires cases to be heard originally by the CIT when the issues at hand primarily involve the "regulation of international trade in goods bearing genuine trademarks."[10] Other courts focus on the fact that district courts maintain subject matter jurisdiction over issues involving international trade because it is a species of federal question.[11] Part III then analyzes the inter-relationships between existing lower court cases.

Part IV discusses the Supreme Court's decision in *K-Mart I*. Hinging its opinion on the definition of "embargo," the Supreme Court's majority held that the subject matter of the *K-Mart I* case did not fall squarely within the limits of 28 U.S.C. § 1581(i)(1), and as such, the CIT lacked exclusive jurisdiction both under subsection (i)(1), and the residual clause, § 1581(i)(4).

The language of the *K-Mart I* decision undermines the express Congressional intent of § 1581(i). Although the terms of subsection (i) are not defined within the statute itself, statutory sources exist to provide courts with the proper focus to define terms such as "duties," "tariffs," "embargoes" or "quantitative restrictions." As Justice Scalia, the dissenting author notes, several logistical problems exist with the majority's restrictive view of the term, "embargo." The minority concludes that the foundation for such a narrowing rests on tenuous grounds. In concurrence with Scalia's dissent, this author finds such a tenuous definition is improvident, especially in light of Congress' express attempt to consolidate similar questions of international trade in one forum.

Part V concludes that the Supreme Court's restrictive interpretation has far-reaching ramifications, not the least of which is forum shopping in light of the CIT's and district courts' shared jurisdiction. The uncertainty this may cause both in interpreting future statutory jurisdictional provisions and the impact on the business community's continued functioning in international markets has yet to be established. But the import will be great as the Court has succeeded in setting a restrictive example of statutory construction in matters relating to the CIT. In this author's opinion, the prudence of this view will be tested often.

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10. Vivitar Corp. v. United States, 585 F. Supp. 1419, 1423 (Ct. Int'l Trade 1984); *see infra* notes 67 to 79 and accompanying text.

11. *See, e.g.*, Coalition to Preserve the Integrity of American Trademarks (COPIAT) v. United States, 598 F. Supp. 844, 847 (D.D.C. 1984), *aff'd in part, rev'd in part*, 790 F.2d 903 (D.C. Cir. 1986).

## I. JURISDICTION OF THE COURT OF INTERNATIONAL TRADE

The Court of International Trade derives its jurisdiction from Chapter 95 of Title 28 in the United States Code. Section 1581[12]

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12. 28 U.S.C. § 1581. *Civil actions against the United States and agencies and officers thereof.*

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review:

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review:

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act; and (2) any decision of the Secretary of the Treasury to revoke or suspend a customs broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or

outlines specifically when suit may be brought in the CIT. Of relevance to this article is the language of § 1581(i)(1)-(4). This section reflects Congress' intent to legislate a catch-all jurisdictional provision.[13] With any broad residual jurisdictional grant, the key question is the breadth of the statute and its impact on federal question jurisdiction. Section 1581(i)(1)-(4) is no exception. Because the statute fails to define several important terms,[14] one must examine and analyze the legislative history of the Customs Courts Act of 1980[15] for guidance on how to interpret the crucial elements.

Subsection (i) represents a residual grant of jurisdiction designed to emphasize the peculiar nature of those questions which properly belong before the CIT for resolution. In addition to a substantive focus on the particular issues over which the CIT could exercise its jurisdiction, Congress clearly, or so it thought, expressed its desire to avoid the jurisdictional conflicts between the former specialized court[16] and the district courts. As the House Report on the Customs Courts Act of 1980 states:

> Over the years complex jurisdictional issues have been raised in cases arising out of our international trade laws due to the ill-defined division of jurisdiction between this Court's predecessor, . . and the federal district courts [citation omitted]. . . . [The] Customs Courts Act of 1980 creates a comprehensive system for the

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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) administrative and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

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

*Id.*

13. *See, e.g.*, H.R. REP. No. 1235, 96th Cong. 2d Sess. 47, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3759. *See also* Cohen, *The "Residual Jurisdiction" of the Court of International Trade Under the Customs Court Act of 1980*, 26 N.Y.L. SCH. L. REV. 471, 472 (1981).

14. The key terms necessary for a completely clear interpretation of the statute include: revenue, imports, tonnage, duties, fees, other taxes, embargoes, quantitative restrictions, administration, and enforcement. Support for the proposition that definitions of these elements are essential derives from the fact that the Supreme Court in *K-Mart I* had to look beyond the statute and legislative history to lexicographic sources in order to interpret the scope of the statute's application. *See K-Mart I*, 108 S. Ct. at 956-57.

15. 28 U.S.C. Ch. 95, discusses the overall jurisdiction of the CIT.

16. H.R. REP. No. 1235, 96th Cong., 2d Sess. 47, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3731.

> judicial review of civil actions arising out of international trade law, and greatly expands the status, jurisdiction and powers of the former [court].[17]

With Congress' attention focused on jurisdictional delineation, the members of both the House and Senate Committees, which drafted, revised, and offered the legislation, acknowledged the depth of difficulty international trade participants experienced each time any one of them chose to challenge some ruling by an executive agency involved in international trade decision-making. The legislative history is replete with emphasises on reform, clarity, and certainty. For example, the House Judiciary Committee commented on the "much-needed reform and clarification of the statutes governing the status, jurisdiction and powers" of the CIT.[18]

In addition, Congress explicitly expressed its motivations behind the legislation as clarifying and consolidating jurisdiction.

> The legislation seeks to accomplish several major goals[:] [including] [t]he reemphasis and clarification of Congress' intent that the expertise and national jurisdiction of the [CIT] . . . be exclusively utilized in the resolution of conflicts and disputes arising out of the tariff and international trade laws, thereby eliminating the present jurisdictional conflicts between [the CIT] and the federal district . . . courts.[19]

Regardless of this clearly expressed intent, difficulties in judicial interpretation of § 1581(i) arose. Since 1981, at least ten court decisions have disagreed on the scope of the residual jurisdictional grant.[20] This failure to establish, with some certainty, the suits that properly belong before the CIT has led to continued confusion among the business world and the government—the precise evil Congress sought to remedy.[21] In accepting *certiorari* in the *K Mart*

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17. DiJub Leasing Corp. v. United States, 505 F. Supp. 1113, 1114-15 (Ct. Int'l Trade 1980)(quoting H.R. REP. No. 1235, 96th Cong., 2d Sess., at 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 3731).

18. H.R. REP. No. 1235, 96th Cong., 2d Sess., at 27-28, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3739.

19. *See id. See also DiJub*, 505 F. Supp. at 1115.

20. *Compare* Allen Sugar Co. v. Brady, 706 F. Supp. 49 (Ct. Int'l Trade 1989) *and COPIAT*, 598 F. Supp. at 844, *with Vivitar*, 585 F. Supp. at 1419 *and DiJub*, 505 F. Supp. at 1113.

21. The House Judiciary Committee wrestled with the confusion the then-existing statutory framework caused. The Committee concluded:

> The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all suits of

*I* case, it appeared that the Supreme Court was finally in a position to correct the vagueness of § 1581(i)'s language.

## II. Existing Case Law

Since 1981, the CIT and the district courts have struggled to interpret the jurisdictional grant in § 1581(i) consistently so as to both satisfy congressional intent and fulfill the expectations of the business community. The following cases represent a cross-section of analyses from the CIT and the district courts: *Allen Sugar Co. v. Brady*,[22] *Schaper Manufacturing Co. v. Regan*,[23] *Manufacture de Machines du Haut-Rhin v. Von Raab*,[24] *Olympus Corp. v. United States*,[25] *Vivitar Corp. v. United States*,[26] and *The Coalition to Preserve the Integrity of American Trademarks v. United States*.[27] Each will be examined to determine where the similarities and differences lie within judicial interpretation.

### A. *Allen Sugar Co. v. Brady*[28]

Allen Sugar Company challenged the Customs Service's classification of imported sweetener products under the Harmonized Tariff Schedule of the United States [HTSUS]. Customs' letter ruling officially classified the blended sweetener under Item 1701.99.00, HTSUS. Rather than protesting, as was its right, Allen Sugar Company filed in the CIT, pursuant to § 1581(i), for a preliminary injunction to restrain Customs from denying entry. The Government challenged the CIT's jurisdiction under subsection (i), alleging that Allen had not exhausted its administrative remedies, and therefore, was not properly before the court.

The CIT's analysis of jurisdiction began with a review of the exhaustion of remedies doctrine.[29] Although the exhaustion of ad-

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> the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants. . . .

H.R. Rep. No. 1235, 96th Cong., 2d Sess., at 47, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 7118.

22. 706 F. Supp. 49 (Ct. Int'l Trade 1989).
23. 566 F. Supp. 894 (Ct. Int'l Trade 1983).
24. 569 F. Supp. 877 (Ct. Int'l Trade 1983).
25. 627 F. Supp. 911 (E.D.N.Y. 1985), *aff'd*, 792 F.2d 315 (2d Cir. 1986).
26. 8 CIT 109, 593 F. Supp. 420 (1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985).
27. 598 F. Supp. 844 (D.D.C. 1984), *aff'd*, 790 F.2d 903 (D.C. Cir. 1986).
28. 706 F. Supp. 49 (Ct. Int'l Trade 1989).
29. *Id.* at 52. *See also* National Corn Growers Ass'n v. Baker, 840 F.2d 1547 (Fed. Cir. 1988).

ministrative remedies is required to avoid review of "strictly administrative judgments,"[30] the court determined that the process could be bypassed through invocation of residual jurisdiction under § 1581(i).[31] However, this circumvention is not without limits. "Section 1581(i) 'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.' "[32]

In light of these limits, the court held that Allen Sugar Company failed to exercise an existing avenue of review—i.e., the protest. Its failure to do so disqualified it from establishing jurisdiction under another provision of § 1581. The court reasoned that a failure to exercise an existing option renders jurisdiction under other subsections of § 1581 improper.[33] Citing *Miller & Co. v. United States*,[34] the court held that: "[t]he remedy available to plaintiff was not manifestly inadequate; it was simply not sought."[35] As such, no jurisdiction existed under § 1581(i).

Allen Sugar Company also argued that Customs' failure to act timely on its petition rendered its assertion of jurisdiction under § 1581(i) proper.[36] The court's short answer focused on the fact that no matter what actions Customs may or may not have taken, the gist of the challenge was properly handled as a protest under an existing statutory framework.[37]

Finally, Allen Sugar Company alleged that jurisdiction also existed under § 1581(i) because the case really involved a quantitative restriction pursuant to § 1581(i)(3). The court, however, summarily dismissed this argument by acknowledging that Customs' action did involve a quantitative restriction, which arose from the

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30. *Allen Sugar*, 706 F. Supp. at 52.

31. *Id.*

32. *Id.* (quoting Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 773 (1988)). The facts in *Miller* are similar to those in *Allen Sugar*. In both instances, each party, dissatisfied with Customs' rulings, chose not to pursue existing administrative protest remedies. Rather, each sought to establish jurisdiction under § 1581(i). The *Miller* majority was clear and unequivocal that § 1581(i) was not designed to allow circumvention of the administrative framework. *National Corn*, 840 F.2d at 963.

33. *Allen Sugar*, 706 F. Supp. at 53.

34. 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 773 (1988). The *Miller* court held: "No § 1581(i) jurisdiction is found where importers could have taken steps to qualify under § 1581(a), and the remedy under that subsection would have been adequate." *Id.* at 963.

35. *Allen Sugar*, 706 F. Supp. 49 (Ct. Int'l Trade 1989).

36. *Id.*

37. *Id.*

classification of the blended sweetener under the HTSUS rather than the Tariff Schedules of the United States [TSUS]. Thus, a classification, properly protestable, preceded the quantitative restriction.[38] The *Allen Sugar* decision upholds the post-1986 Federal Circuit's view that § 1581(i) is to be narrowly construed.[39]

### *B. Schaper Manuacturing Co. v. Regan*[40]

Schaper Manufacturing owned toy vehicles with registered trademarks, which were recorded, per customs regulations, with the Customs Service.[41] Upon notification from Customs that several cases of suspected pirated copies were being held in the Pittsburgh port, Schaper posted the requisite bond to demand exclusion of the items.[42] The same situation occurred twice more, necessitating two more bonds and two more exclusion requests. Eventually, Customs determined that only some of the items being held were pirated copies. Schaper then requested a return of its bonds and that separate bonds be filed for each infringing toy model, rather than for the entire shipment in question.[43] The request was denied. Pursuant to Customs regulations, Schaper was required to obtain signatures from the importer of the infringing toys holding Customs harmless from any consequences in returning the bonds. The importer refused to sign the agreement and the Secretary of the Treasury was enjoined from releasing the bonds to Schaper.[44]

Schaper brought suit in the CIT and defendant, Secretary Regan on behalf of the United States, moved to have the suit dismissed for lack of subject matter jurisdiction. Judge Boe denied the government's motion, outlining the basis for the CIT's jurisdiction.

The opinion established a test required to assess whether the CIT had jurisdiction under § 1581(i):

> In determining whether a cause of action might be embraced by the jurisdictional grant bestowed upon this court by the Congress, it is necessary that the gravamen of the complaint be determined . . . the thrust of the grievance alleged and the relief sought by the

38. *Id.*
39. *Miller*, 824 F.2d at 963.
40. 566 F. Supp. 894 (Ct. Int'l Trade 1983).
41. *Id.* at 895.
42. *Id.*
43. *Id.* at 895-96.
44. *Id.* at 896.

> plaintiff [must] relate[] to the regulations promulgated by customs and their administration and enforcement by that agency.[45]

The court proceeded to explain that the issue at hand involved customs regulations regarding revenue. Judge Boe accorded "revenue from imports"[46] an expansive definition and held that it encompassed the actions taken by plaintiff Schaper. "Although a regulation may not be specifically designed to collect revenue in the form of a duty upon importation, its purpose, nonetheless, may cause it to be a concomitant part of the function of raising 'revenue from imports.' "[47] Examining the totality of the circumstances, Judge Boe concluded that the provision by which Schaper acted, 19 C.F.R. § 133.43, served

> as a corollary to the acknowledged primary functions of the agency in determining whether merchandise seeking importation should be excluded as well as in determining the proper amount of duty to be assessed upon merchandise granted the right of importation. . . . 19 C.F.R. § 133.43 [is] an integral part of the 'administration and enforcement' of laws and regulations required in connection with the raising of 'revenue from imports' and are embraced within the jurisdictional grant to this court under 28 U.S.C. § 1581(i)(4).[48]

Judge Boe predicated the CIT's jurisdiction on 28 U.S.C. § 1581(i)(1) and integrated its interpretation with subsection (i)(4)'s "administration and enforcement" language. The upshot of Judge Boe's opinion was a finding of jurisdiction based on an analysis of both § 1581(i)(1) and (i)(4).

### *C. Manufacture de Machines du Haut-Rhin v. Von Raab*[49]

Walther-trademarked pistols were imported from Germany into the United States, carrying with them a reputation for "high quality, reliability, and performance."[50] The trademark was licensed to Maurhin, who continued to manufacture the pistols continuously under certain license agreements. The Customs Service, in 1982, detained two shipments of pistols pursuant to 19 U.S.C. § 1526 that were manufactured, but not imported, by Mauhrin. Customs determined that the name on the pistols qualified as a trade

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45. *Id.*
46. 28 U.S.C. § 1581(i)(1).
47. *Schaper Mfg.*, 566 F. Supp. at 897.
48. *Id.* at 898.
49. 569 F. Supp. 877 (Ct. Int'l Trade 1983).
50. *Id.* at 878.

name rather than a trademark.[51] The U.S. trademark "Walther" was assigned by Carl Walther to importer Interarms, who then duly registered the mark with Customs to trigger the necessary import protection.[52] Customs stated that since Interarms owned and registered the Walther trademark,[53] items bearing the Maurhin trademark would be excluded from entry.[54] Maurhin moved for a preliminary injunction in the CIT and the issue of jurisdiction arose.

Both parties raised the question of whether jurisdiction properly existed under 28 U.S.C. § 1581(i). Defendants contended that judicial review was premature because plaintiff had failed to exhaust its administrative remedies,[55] and the court agreed with the defendants. Judge Carmen stated that:

> The jurisdiction of the Court of International Trade under § 1581(i) is expressly 'in addition to the jurisdiction conferred . . . by subsections (a)-(h),' and . . . the legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest.[56]

Judge Carmen interpreted subsection (i) as independent of subsections (a)-(h) yet held that subsection (i) jurisdiction was not all-encompassing. The court held that required administrative procedures must first be exhausted prior to proper vesting of jurisdiction in the CIT. Nothing in Judge Carmen's opinion, however, restricts the interpretation of subsection (i).

### *D. Olympus Corp. v. United States*[57]

Olympus Corporation imported Olympus-brand products into the United States as exclusive distributor of such goods. Olympus

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51. *Id.* at 879.

52. *Id.*

53. Maurhin's mark, appearing on all guns so produced, was "LIC. EXCL. WALTHER" and "LIC. WALTHER PP."

54. *Manufacture de Machines*, 569 F. Supp. at 879.

55. *Id.* at 880.

56. *Id.* at 882 (quoting United States v. Uniroyal Inc., 687 F.2d 467, 472 (C.C.P.A. 1982)).

57. Olympus Corp. v. United States, 627 F. Supp. 911 (E.D.N.Y. 1985), *aff'd*, 792 F.2d 315 (2d Cir. 1986). Because the district court was not presented with a jurisdictional argument, this subsection will review the analysis of CIT jurisdiction followed in the Second Circuit. The question of subject-matter jurisdiction and appropriate forums did not arise until intervenor, 47th Street Photo, raised the issue. *Olympus*, 792 F.2d at 316. The Second Circuit's views on jurisdiction concur with the D.C. Circuit's decision in *COPIAT*. *See supra* note 11.

filed suit in the District Court challenging the applicable Treasury regulations[58] that permitted the importation of trademarked goods without the American trademark owner's permission, if the American trademark holder was a parent or subsidary of, or had common ownership with, the foreign manufacturer.[59] Olympus argued that the regulations exceeded the scope and intent of the statute, which they were promulgated to implement.[60] The District Court found Olympus' arguments unconvincing and concluded that the regulations were a lawful exercise of Customs' authority to implement the statute in question.[61]

On appeal, the Second Circuit upheld the merits of the district court's decision, but also dealt extensively with the question of conflicting jurisdictional interpretations of § 1581(i). The court reviewed the CIT's decision in *Vivitar*, noting that the references to legislative history, while accurately cited, did not provide an adequate basis for vesting jurisdiction in the CIT.[62]

In short order, the Second Circuit determined that suits arising under 19 U.S.C. § 1526, relating to the importation of grey-market goods, properly vested jurisdiction in the district courts to settle the dispute.[63] The majority disagreed with the CIT's holding in *Vivitar Corp. v. United States*[64] that, where the protest remedy is inappropriate or unavailable, the substantive issues may be reviewed under § 1581(i)(4). In addition, the majority held that the issues at hand involved the standard federal questions of trademark and antitrust law, matters properly outside the scope of the CIT's jurisdiction.[65] The majority stated that the issues still do not belong before the CIT even though they "tangentially relate[] to the protest procedure."[66] In line with this statement the court further noted that: "[s]ection 1581(i)(4) properly gives the CIT jurisdiction only of those matters that arise from protests themselves, not of all issues that conceivably could arise in a protest action

58. 19 C.F.R. § 133 *et seq.*

59. 19 U.S.C. § 1526 (1982); 19 C.F.R. § 133.21(c)(2) (1985). As noted earlier in the text, the validity of the Customs Service's regulations or of § 526 is not analyzed in this article. Any allusion to the regulations, the statute, or both is purely for background purposes.

60. *Olympus*, 792 F.2d at 317.

61. *Olympus*, 627 F. Supp. 911.

62. *Olympus*, 792 F.2d at 318.

63. *Id.* at 316

64. 585 F. Supp. 1419 (Ct. Int'l Trade 1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055.

65. *Olympus*, 792 F.2d at 318.

66. *Id.*

under a hypothetical fact situation."[67] This restrictive view appears to derive from the fact that the transaction in question is held to be a trademark matter first, and a customs or international trade matter second;[68] thus, the court held that jurisdiction properly vested in the district courts.

### *E. Vivitar Corp. v. United States*[69]

The CIT elaborately and thoroughly examined the issue of jurisdiction under § 1581(i) in the *Vivitar* case. Plaintiff, Vivitar Corp., brought suit to exclude merchandise bearing a valid Vivitar trademark because it was imported without Vivitar's consent. The Government moved to dismiss the suit, alleging that the CIT lacked jurisdiction to hear the matter because it involved a trademark rather than customs issue. In denying the government's motion, Judge Restani decided that the issue at hand involved a question of international trade over which the CIT had exclusive jurisdiction.[70] Citing the legislative history, Judge Restani found that the case "ar[o]se out of circumstances where an international trade dispute involve[d] trademark issues."[71] With this presumption in mind, the court proceeded to analyze the validity of jurisdiction in the CIT.

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67. *Id.*

68. Upon closer analysis, the dangers inherent in the Second Circuit's approach surface. By determining jurisdiction simply as a matter of what "issue" is dealt with first or which issue appears to be the underlying concern of the parties, the court has injected an undue amount of uncertainty and instability into the jurisdictional process. Determining that a case is "more one of trademark law than customs law," as was done in the D.C. Circuit's decision in *COPIAT*, 790 F.2d at 906 n.3 (D.C. Cir. 1986), renders the process of determining jurisdiction too subjective. Assessing whether one issue precedes another, or underlies another is analogous to the situation outlined by the Supreme Court in the *Liberty Oil* case where whether one presents an equitable or legal issue first can determine whether one is entitled to a jury trial. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922). Applied in these circumstances, different jurisdictional fora are appropriate depending on whether a litigant presents a customs law or trademark law issue first. Congress hardly had this type of possible forum shopping in mind when it chose to inject certainty into the process of bringing suits in the international trade area. *See supra* notes 16-18 and accompanying text.

69. 585 F. Supp. 1419 (Ct. Int'l Trade 1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985).

70. *Vivitar*, 585 F. Supp. at 1422. In assessing the type of problem before the Court, Judge Restani focused on the overall question, rather than the one or two discrete issues raised by both parties. Based on this broad overview, the Court found the government's argument, that the real issue was one of trademark law, unpersuasive. *Id.* "Litigation of issues such as those presented in *Vivitar* or *COPIAT* cannot be handled in a piecemeal fashion. Dissecting each allegation or claim so that one can attempt to determine which court has jurisdiction is both counterproductive and fruitless. It usually leads to confusion and/or uncertainty." *Id. See supra* note 68.

71. *Vivitar*, 585 F. Supp. at 1422.

Jurisdiction in the CIT is not necessarily defeated because the statute upon which CIT jurisdiction is predicated may serve more than one goal, Judge Restani concluded.[72] The statutory provision of subsection (i) provides the CIT with a broad range of issues with which it can deal whenever questions of international trade arise. In assisting litigants to decide whether an issue is properly before the CIT, the *Vivitar* court established a jurisdictional test. The court must determine the "gravamen of the complaint" by reviewing all the circumstances surrounding the complaint. The court shall examine "the allegations contained in the complaint as well as . . . all the proceedings . . . before . . . [the] court."[73] The gravamen of the complaint involves a subject matter properly before the CIT if "the thrust of the grievance alleged and the relief sought [relates] to the regulations promulgated by customs and their administration and enforcement."[74] Pursuant to this test, Judge Restani held that the case was properly before the CIT. Under her analysis:

> The central issue in this case is the regulation of international trade in goods bearing genuine trademarks, rather than trademark law.
>
> The right to regulate the use of a trademark on genuine goods arises only in international trade transactions. No other use of a genuine trademark on goods entitled to bear the mark is restricted. The Customs Service's regulation of imports of genuine trademark goods is uniquely a concern of international trade law.[75]

Thus the gravamen of the complaint was determined within the context of international trade, not in a vacuum.

Judge Restani, however, did not end her inquiry there. Once she established jurisdiction on one basis, she proceeded to buttress her position further with public policy arguments and references to legislative history. The CIT should retain jurisdiction under § 1581(i), she said, because the court was designed to create and

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72. Cornet Stores v. Morton, 632 F.2d 96, 99 (9th Cir. 1980) ("Customs Court jurisdiction is not defeated because a statute or regulation serves other ends in addition to recognized customs purposes, so long as there exists 'a substantial relation to traditional customs purposes. . . .' "); *see also* Jerlian Watch Co. v. United States Dep't of Comm., 597 F.2d 687, 691 (9th Cir. 1979). Although both of these cases precede the Customs Courts Act of 1980, the underlying philosophy of specialized courts is the same, as is the view toward determining jurisdiction in a specialized court.

73. *Vivitar*, 585 F. Supp. at 1423 (quoting Schaper Manufacturing Co. v. Regan, 566 F. Supp. 894, 896 (Ct. Int'l Trade 1983)).

74. *Id.*

75. *Id.* at 1423.

maintain a uniform interpretation of the law.[76]

> This Court's basic purpose is to provide "a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the [CIT] . . . [to] ensure . . . uniformity in the judicial decisionmaking process." [Citation omitted]. International trade law and Customs Service regulations must have a uniform national interpretation to provide a degree of certainty to those involved in complex international trade transactions. . . . [This] helps avoid conflicting interpretations of international trade law.[77]

In a nutshell, the CIT's jurisdiction was supported by statutory, regulatory and public policy grounds. The court ultimately concluded that it had jurisdiction over the case pursuant to § 1581(i)(4).[78]

One final argument involved the unique *expressio unius est exclusio alterius* doctrine. This doctrine provides that the "expression of one thing is the exclusion of another."[79] When certain items are specified in a statute, the exclusion of all others from its operation may be inferred.[80] Based on this statutory construction doctrine, Judge Restani also held that:

> [S]ince Congress needed to explicitly exclude from this court's jurisdiction statutes outlawing certain imports, Congress obviously intended § 1581(i) to give this court jurisdiction generally over statutes prohibiting importation of merchandise. . . . Since, in

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76. *Id.*

77. *Id.*

78. Judge Restani quotes some convincing language supporting her conclusion that the jurisdictional grant is broad. The CIT has held that: "[u]nless these preceding jursdictional subsections [1581(a)-(h)] express or contain in their manifest legislative history a limitation on jurisdiction of other related actions, they do not operate to diminish the broad grant of jurisdiction contained in section 1581(i)." Sacilor, Acieries et Laminoirs de Lorraine v. United States, 542 F. Supp. 1020, 1020 (Ct. Int'l Trade 1982). Under the terms of this quote, without an express limitation on subsection 1581(i), the grant of authority should include all issues relating to international trade. *See also* Cohen, *supra* note 13.

Just as the CIT supported its conclusions on jurisdiction with reference to the statute and legislative history, so does the United States Court of Appeals for the Federal Circuit, a similarly specialized court. *See* 28 U.S.C. § 1295 (1989 Supp.). In several cases the Court of Appeals has struggled to define the question of when issues "arise under" 28 U.S.C. § 1338 patent law. *See* Schwarzkopf Development Corp. v. Ti-Coating, Inc., 800 F.2d 240, 243-44 (Fed. Cir. 1986); USM Corp. v. SPS Technologies, Inc., 770 F.2d 1035, 1037 (Fed. Cir. 1985); American Hoist & Derrick Co. v. Sowa & Sons, 725 F.2d 1350, 1352 (Fed. Cir.), *cert. denied,* 469 U.S. 821 (1984). The Court of Appeals has referred extensively to the legislative history of the Federal Courts Improvement Act of 1982 to establish when proper patent issues vest appellate jurisdiction. *Id.*

79. BLACK'S LAW DICTIONARY 692 (4th ed. 1951).

80. *Id.*

§ 1583(i)(3), Congress expressly eliminated one type of statute outlawing imports, *by inference* Congress intended other statutes barring imports to be included within § 1581(i)(3).[81]

On all the above-enumerated grounds, the *Vivitar* court held it had jurisdiction over the issues presented.

### *F. Coalition to Preserve the Integrity of American Trademarks v. United States*[82]

The district court's approach to the question of jurisdiction in *COPIAT* was just as well-reasoned as the *Vivitar* court's opinion. In *COPIAT*, the Coalition alleged that the Customs regulations implementing § 526 contradicted certain provisions of the Tariff Act of 1930 and the Lanham Act of 1946. The argument included a contention by COPIAT that the trademarks of its members were not protected to the fullest extent permissible under the law. This lack of protection, resulting from the allowed importation of grey-market goods,[83] injured COPIAT's members both financially and commercially. Imported grey-market goods did not carry the same warranty and service protections of the genuinely trademarked, properly imported goods. Failure to warrant the quality, condition and merchantability of the goods resulted in damage to the owners of the goods whose trademark they bore. Consumers are not in a position to distinguish between properly and improperly imported items. On this basis, COPIAT sued in the district court alleging that the issue was a question of trademark law first and customs law second.

The district court noted at the outset that the threshold question was one of appropriate subject matter jurisdiction.[84] Acknowledging the similarity in suit and issues to the *Vivitar* case,[85] Judge Johnson rejected the *Vivitar* rationale, predicating district court jurisdiction on one of three possible grounds:

1) general federal question jurisdiction,[86]

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81. *Vivitar*, 585 F. Supp. at 1427.

82. 598 F. Supp. 844 (D.D.C. 1984), *aff'd in part, rev'd in part*, 790 F.2d 903 (D.C. Cir. 1986).

83. A grey-market good is defined as "a foreign-manufactured good bearing a valid United States trademark, which is imported without the consent of the U.S. trademark owner." *K-Mart I*, 108 S. Ct. at 954.

84. *COPIAT*, 598 F. Supp. at 847.

85. *Vivitar*, 585 F. Supp. at 1419.

86. 28 U.S.C. § 1331.

2) trademark question jurisdiction,[87] or
3) Lanham Act jurisdiction.[88]

While dismissing jurisdiction under the Lanham Act,[89] Judge Johnson held that federal question jurisdiction vested jurisdiction in the district courts. The court focused its inquiry on "the pivotal question . . .[;] whether the construction by the Customs Service, as embodied in the challenged regulations, is sufficiently reasonable."[90] The court's characterization of the question led to the conclusion that the issues involved the executive's authority in promulgating these regulations vis-a-vis imported trademarked goods rather than the enforcement and administration of the regulations.[91] In spite of this conclusion, Judge Johnson still noted that the issue related to the "Customs Service as the agency charged with the *administration* of the laws pertaining to entry of imports."[92]

Lastly, Judge Johnson acknowledged the actions in the case involved issues of international trade. However, the precepts and guidance of the legislative history, she inferred, should not be misconstrued to the point of divesting district courts of *all* jurisdiction in international trade matters. Such issues are still species of federal questions. In closing the jurisdictional section of her opinion, Judge Johnson found that the case involved both international trade disputes and trademark problems. The existence of the trademark problems vests jurisdiction in the district courts.[93] The Court of Appeals for the District of Columbia upheld the trial court's jurisdictional decision.[94]

## III. Analysis of Lower Court Case Law

Not surprisingly, at least one consistency exists in each case

87. 28 U.S.C. § 1338(a).

88. 15 U.S.C. §1211. *See COPIAT*, 598 F. Supp. at 847.

89. The court held that Lanham Act jurisdiction, a species of federal question, may be invoked solely when the imported goods bear counterfeit or spurious trademarks. Such was not the case here. Both parties, and intervenor, acknowledged that the goods imported in this suit bore valid trademarks. *COPIAT*, 598 F. Supp. at 848.

90. *Id.* at 851.

91. *Id.*

92. *Id.* at 852 (emphasis added). The inherent contradiction in phraseology is hardly dispositive or determinative of how an issue is properly characterized for jurisdictional purposes. It is worthy of note, however, that Judge Johnson's phrasing may indicate an undercurrent of either doubt or confusion as to whether the case really is properly before the district court.

93. *Id.* at 847.

94. *COPIAT*, 790 F.2d 903 (D.C. Cir. 1986).

discussing § 1581(i), whether jurisdiction is invoked or not, the cases all involve some aspect of international trade.[95] The differences arise in the application of fairly consistent principles to the facts of each case and in the determination of the amount of credence the legislative history of the Customs Courts Act is to be given. These differences and uncertainty led to the conflicting results that ultimately necessitated Supreme Court review,[96] a review which has not necessarily laid the uncertainty to rest.

In carefully examining the reasoning of several lower court decisions, several logical flaws leap to the eye. This flawed logic is best evidenced in the district court's decision in *COPIAT* and the Second Circuit's approach in *Olympus Corp.* These decisions provide insight into how the lower courts have had difficulty in assessing the existence, or lack thereof, of jurisdiction over international trade matters.

No court is willing to give up jurisdiction, especially when cases in a particular area prove interesting, challenging, or groundbreaking. The international trade arena is no exception. The amount of controversy that greeted the formation of the Customs Courts Act in 1980 exemplifies the diametrically opposed attitudes governing the carving out of specialized jurisdiction from general federal question jurisdiction.[97] This controversy carried over into the judiciary whenever a member of the bench attempted to interpret the carved out portion of federal question jurisdiction.[98] Rather than solve the controversy, courts have perpetuated the problems by seeking to exercise jurisdiction through a slanted or

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95. *See, e.g., Olympus*, 792 F.2d at 315 (suit involved Customs seizures of grey-market goods); *Allen Sugar*, 706 F. Supp. 49 (question of Customs classification of sugar sweetener); *DiJub*, 505 F. Supp. 1113 (revocation of corporation's customhouse cartman's license).

96. *K-Mart I*, 108 S. Ct. 950 (1988).

97. *See* Cohen, *supra* note 13. Professor Cohen thoroughly outlines the battle over the wording of the jurisdictional clauses of the Customs Courts Act of 1980. Congress acknowledged its intention to expand existing Customs Court jurisdiction while carving out species of federal questions which would be handled exclusively by a specialized court. *Id.* at 472-74, 498-99. Unquestionably, the jurisdiction of the district courts would always exceed that of the specialized courts, except in those areas where Congress specifically designated issues as falling within the purview of the specialized court. The entire focus of the Customs Courts Act of 1980 was to bring uniformity to the field of international trade and to divest the district courts of their general federal question jurisdiction in international trade matters. *Id.* at 474.

98. *Compare Uniroyal*, 687 F.2d 467 (C.C.P.A 1982) *and Allen Sugar*, 1989 Ct. Int'l Trade LEXIS 15 (February 9, 1989) *with Miller*, 824 F.2d 961 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 773 (1988) *and* American Ass'n of Exporters and Importers-Textile and Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985) *and DiJub*, 505 F. Supp. 1113 (Ct. Int'l Trade 1980).

stretched reading of legislation or selective legislative history. Such an attitude does not do litigants, or the judiciary, justice.

In the district court *COPIAT* decision, Judge Johnson examined the issues involved as matters of trademark law first, rather than customs.[99] Her view was supported by the District of Columbia Circuit.[100] Based on her decision, that the crux or gravamen of the complaints rested in the general federal question domain, the district court exercised its jurisdiction. The court, however, failed to explain under what circumstances district courts, under her analysis, would ever be divested of jurisdiction. Any statute passed by Congress and disputed by litigants presents federal questions. As applicable to the *COPIAT* case, Congress specifically carved out an exception to federal question jurisdiction, which the court chose to circumvent by re-analyzing the type of case before it. It can hardly be said that Congress intended the courts to be able to play with issue presentation to the extent of reinstituting forum shopping after Congress expressly chose to avoid that result.[101] Yet that is precisely the result achieved in the *COPIAT* decision.

Even the Circuit Court of the District of Columbia endorsed this view by holding that the issues presented to the district court were more issues of trademark than customs laws.[102] The flaw in this subjective approach is self-evident. How is one court to determine which issue is subsidiary to which other issue when multi-issue litigation is at hand? The Supreme Court effectively rejected this approach in its *Liberty Oil*[103] and *Dairy Queen*[104] decisions when it held that it was inappropriate for litigants to argue that the presentation of one issue prior to another was proper in order to restrict the access of a litigant to his right to a jury trial. The same holds true for the *COPIAT* decision. It is manifestly improper for the district court to deny both congressional intent and to endorse a forum shopping practice simply on the basis of whether an issue is presented "more as one of trademark than customs law." Such subjectivity renders certainty in litigation

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99. *COPIAT*, 598 F. Supp. at 847.

100. *COPIAT*, 790 F.2d at 906 n.3.

101. H.R. REP. No. 1235, 96th Cong., 2nd Sess., 47, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 7118.

102. *COPIAT*, 790 F.2d at 906 n.3.

103. *Liberty Oil*, 260 U.S. at 235 (1922).

104. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

unlikely.[105]

In addition, the *COPIAT* court's approach calls into question the proper deference due both Congress and the statutes at hand. While courts are co-equal branches to the executive and legislative, each branch has its own purpose. That of the judiciary is to interpret the laws passed by Congress. A serious question arises as to how and upon what the courts must rely in rendering an interpretation of laws. As with the *COPIAT* decision, the court has apparently determined that Congress was incorrect in its determination that cases or issues relating to international trade and customs law belonged before a specialized court. In ignoring Congress' intent, the court's interpretation obviously exceeds the scope of judicial authority.

The *COPIAT* courts, however, are not alone in their interpretation. The Second Circuit in *Olympus* agreed, in theory, with the D.C. Circuit's approach. In addition, the *Olympus* court made short shrift of what legislative history existed supporting the interpretation of jurisdiction in the CIT when the issue involved an embargo.[106] The court stated:

> The reference by Senator Kellogg . . . to that section in the 1922 Senate debate as a proposal "to enforce the trademark laws by a prohibition and an embargo against shipments," (cites omitted), is entitled to little weight. To treat section 526 as an "embargo" would be to give that term a construction far broader than its ordinary meaning without an indication of such congressional intent.[107]

The ability of the court in the same breath to make references to legislative history, discount those references, and then decide that Congress could not have authorized such broad definitions because the courts deem it so, is clearly the height of judicial activism. Although the legislative history is not accorded the same weight as the statutory language itself, in cases where the language is ambiguous, the history is the primary source examined to determine either meaning or legislative intent.[108] To so summarily dismiss existing legislative history, sparse though it may be, on the grounds that such a broad definition is not what the court believes, is an impermissibly broad extension of judicial interpretation.

Both of these cases, therefore, illustrate the three major flaws

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105. *See supra* note 9.

106. *Olympus Corp.*, 792 F.2d at 319.

107. *Id.*

108. *See, e.g.*, Rubin v. United States, 449 U.S. 424, 430 (1981); Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 542 (Fed. Cir. 1988).

of lower court opinions which preclude the CIT's exercise of jurisdiction under § 1581(i): (1) the cases premise jurisdiction on general federal question jurisdiction; (2) the cases either ignore, or acknowledge and then ignore, existing legislative history defining Congress' intent; and (3) the cases demonstrate an activism designed to preserve federal question jurisdiction in the district court at the expense of specialized courts. The Supreme Court's opinion in *K-Mart I* was squarely presented with exemplars of these flaws and the majority chose to contribute to, rather than clarify, the confusion.

## IV. The Supreme Court Decision

### *A. The Majority*

In a five to three majority,[109] the Court affirmed the *COPIAT* appellate court's decision upholding jurisdiction in the district court, but not the appellate court's reasoning. The focus of the majority rested on the view that if § 1526(a) did not constitute an "embargo" on goods, then § 1581(i) did not vest exclusive jurisdiction in the CIT. Justice Brennan, writing for the majority, held that § 1526(a) did not qualify as an "embargo", and therefore, could not vest exclusive jurisdiction in the CIT. Noting, as did the dissent, that the statute is silent regarding the definition of embargo, Justice Brennan turned to a standard lexicographic source to define the term.

An embargo is a "[g]overnment order prohibiting commercial trade with individuals or businesses of other nations."[110] The majority states that embargoes are found not only in the trade area as tools for implementing trade policy. Rather, trade represents only one aspect of the multifaceted purposes for embargoes.[111] With this definition and policy framework, the majority holds that Congress adopted a "common sense" meaning of the term embargo. Without any reference to legislative history or the statute, Justice Brennan cavalierly states: "[a]s the . . . definitions suggest, the or-

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109. Justice Anthony Kennedy took no part in the consideration or decision of this suit, although ironically, he was the author of the *K-Mart II* opinion on the substantive issue of the validity of the Customs Service regulations. *See K-Mart II*, 108 S. Ct. 1811.

It is interesting to note that in the *K-Mart I* decision resolving the jurisdictional interpretation of § 1581(i)(1) and (4), Justice Brennan does not cite to a single case either from the district courts, the CIT, or the circuit courts, although certainly not for lack of precedent. *See supra* notes 28 to 91 and accompanying text.

110. Black's Law Dictionary 468 (5th ed. 1979).

111. *K-Mart I*, 108 S. Ct. at 956.

dinary meaning of 'embargo,' and the meaning that Congress apparently adopted in the statutory language . . . is a governmentally imposed quantitative restriction—of zero—on the importation of merchandise."[112]

The Court then proceeds to distinguish "import prohibitions," which the parties to the suit utilized as synonymous to "embargo," from the term "embargo." The majority hangs its hat on this distinction, noting that a true embargo, while not necessarily an absolute government action, must not have as one of its purposes the protection of a private right.

> An importation prohibition is not an embargo if rather than reflecting a *governmental* restriction on the quantity of a particular product that will enter, it merely provides a mechanism by which a private party might, at its own option, enlist the Government's aid in restricting the quantity of imports in order to enforce a private right.[113]

On this basis, Justice Brennan writes that Congress could have committed itself to granting the CIT exclusive jurisdiction of all embargoes or import prohibitions, if it so chose. The Court, however, is not free to depart from congressional language. To do so, "would infect the courts with the same jurisdictional confusion that Congress intended to cure."[114] And, Justice Brennan continues, although the Court does not necessarily understand why the fine distinctions were so drawn by Congress, it is not in a position to argue that congressional wording is inconsistent with congressional intent.

### *B. The Dissent*

The dissent is as succinct and straightforward as the majority. As noted earlier, the term embargo is not defined in the statute. However, Justice Scalia seeks assistance in both lexicographic sources and the legislative history. The dissent's most forceful argument revolves around the legislative history of § 1526(a)'s reference to the section as an "embargo."[115] Senator Kellogg, during the

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112. *Id.* at 957.

113. *Id.* (emphasis in original).

114. *Id.* at 959. The majority appears to exercise an unusual form of judicial restraint, which results in a judicial determination exceeding the scope of interpreting the statute in question. While arguing that the Court is bound by the intent of Congress, the majority proceeds to develop its own definition of embargo—neither of which derives from Congressional sources.

115. 62 CONG. REC. 11,603 (1922) (statement of Senator Kellogg during floor debate on

debate on the bill, urged that § 1526(a) was "an embargo against any foreign country shipping goods here, where an American claims he has a trade-mark upon them."[116] Interestingly enough, the majority fails to comment upon, let alone dispute, the dissent's legislative history reference. Rather, the majority simply focuses on its chosen dictionary definition and the logical extensions of that definition.[117]

The dissent formulates a simple test, applicable to all transactions to determine whether an embargo exists:

> an "embargo" is an import regulation that takes the form of a governmental prohibition on imports, regardless of any exceptions it may contain and regardless of its ultimate purpose. . . . Under [this] analysis, when a provision has been identified as an import prohibition (however difficult that may be—and it is neither difficult nor contested here) that is an end of the matter.[118]

Justice Scalia also acknowledges, unlike the majority, the inherent dislike of the Court's failure to find jurisdiction over substantive issues presented to the Court. But in assessing the Court's jurisdiction, Scalia is quick to note that it is more important to make a correct jurisdictional decision, than to be result-oriented and seek to decide a substantive issue without adequate jurisdictional foundation.[119]

## V. Analysis

In assessing the impact of this Supreme Court decision and lower court case law, the focus rests on the outcome as well as the rationale. The District of Columbia district and appellate court *COPIAT* decisions and the *K-Mart I* majority both explicitly and implicitly determine that, regardless of congressional intent, statutory language is to be construed in favor of not granting exclusive jurisdiction to specialized courts.[120] Judge Johnson, in the district court's *COPIAT* opinion, invokes general federal jurisdiction as the basis for jurisdiction in the district court as opposed to the CIT. Under her logic, there would be no force given to any statute im-

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the provisions of § 1526(a)). The sparseness of some of the later legislative history is notable. *See also Olympus Corp.*, 792 F.2d at 319 (wherein the Second Circuit summarily dismisses legislative history).

116. 62 Cong. Rec. 11,603 (1922).

117. *See supra* notes 110-13 and accompanying text.

118. *K-Mart I*, 108 S.Ct. at 962.

119. *Id.*

120. *Cf.* Christianson v. Colt Indus. Operating Corp., 108 S. Ct. 2166 (1988).

parting jurisdiction to specialized courts because any question dealing with a federal statute is a general federal question. At the least, district courts could then claim concurrent, if not exclusive, jurisdiction on any matter. The claim of concurrent jurisdiction is precisely what Judge Johnson, and the Brennan majority, implicitly approve in both the *COPIAT* and *K-Mart I* decisions. Without doubt, such an interpretation flies in the face of and finds no ready support in the legislative history accompanying both the Customs Courts Act of 1980 and § 1526(a).

In addition, both the *COPIAT* and *K-Mart I* decisions have successfully blurred the lines of distinction concerning when customs matters are subject to district court jurisdiction. The cases analyzed in this article apply to issues affecting the administration and enforcement of regulations and laws dealing with customs and trade matters in some form. This statement, in and of itself, is not contested by the *COPIAT* decisions nor the *K-Mart I* majority. Rather, the *COPIAT* courts acknowledge that each decided the validity of a customs regulation interpreting and construing § 1526, clearly the domain of the CIT, yet determined and succeeded in invoking federal question jurisdiction rather than the more specialized jurisdiction indicated. Such judicial overreaching is disturbing in its scope. Such activism succeeds in achieving particularly sought results in one case, while leaving behind a mass of confused, practically incoherent, guidelines for future litigants.

Uncertainty also permeates the legacy of the *K-Mart I* Court. As Justice Scalia concluded in his *K-Mart I* dissent: "[t]hese uncertainties arise from today's particular departure from the meaning of 'embargo' as a 'governmental prohibition on importation.' Much greater, unfortunately, are the uncertainties that arise from today's acknowledgement of the principle that departure is permissible."[121] The implementation of social, economic, or political agenda, while common at the Supreme Court, is inconsistent with the overall goals of the Court—clarification and interpretation of United States laws. A decision such as *K-Mart I* leads to nothing more than additional uncertainty in the business world and renders nugatory actions taken by Congress.

As Justice Brennan accurately notes, Congress may not have clearly expressed its intention in dividing jurisdiction between the district courts and the CIT; such a lack of clarity is used by Brennan to fashion an argument that the Court is not in a position to

121. *See K-Mart I*, 108 S. Ct. of 962.

accurately rewrite the statutory language. While in and of itself, the Court is not in a position to rewrite existing language, it does have an obligation to clarify the language based on existing resources, prior to traipsing into its own meadow of lexicography. Even if the legislative history is unclear, a review of similarly worded and founded statutes—i.e., other existing customs laws or jurisdictional statutes—should be examined before the Court establishes its own definition of statutory terms. The fact that two philosophically opposed Justices formulate two equally plausible "common sense" definitions of the term "embargo" indicates that the Court should have trod more carefully.

## VI. Conclusion

The upshot for the business community is a continuing confusion born of the majority's view that "embargoes" are not the equivalent of "import prohibitions." How many more fine lines of definition can be drawn or redrawn in light of the great number of undefined terms in the § 1581(i) statute alone? Is an importer to presume that a tariff is not really a tariff or that a fee is not really a fee because the Supreme Court has determined that an embargo is not really an import prohibition? And what has this done to the jurisdiction of the CIT? All questions relating to § 1581(i) jurisdiction must now undergo a more intensive and possibly tortured analysis in order to determine whether a case is properly before the CIT. District court dockets may become ever more crowded as businessmen are no longer willing to risk bringing suit in the CIT, for fear that the district courts will invoke federal question jurisdiction instead. Suits, then, covering any aspect of trade or customs law will be filed first in the district court to avoid the difficulties and inherent inefficiency of having to file suit in the CIT only to discover later that the district court had jurisdiction.

In addition, the Supreme Court's decision effectively establishes a concurrent jurisdiction between the CIT and the district courts—to be determined by how the litigants frame the issues. Such concurrent jurisdiction directly contradicts the exclusive jurisdiction Congress sought to establish in the CIT. Are these the true results the *K-Mart I* majority sought—a gutting of CIT jurisdiction, a blatant disregard for legislative intent and a return to the jurisdictional quagmire? If not, it is unfortunate that this is precisely what the Court achieved.