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Jurisdictional Conflicts in Grey Market Goods Litigation: The Failure of the Customs Courts Act of 1980

Kevin C. Kennedy
Michigan State University College of Law, kenne111@law.msu.edu

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JURISDICTIONAL CONFLICTS IN GREY MARKET GOODS LITIGATION: THE FAILURE OF THE CUSTOMS COURTS ACT OF 1980

*Kevin C. Kennedy**

I. INTRODUCTION

When Congress enacted the Customs Courts Act of 1980 (the Act),[1] one of its major objectives[2] was to clarify the division of subject matter jurisdiction between the district courts and the United States Customs Court[3] (renamed the United States Court of International Trade).[4] To

* Assistant Professor of Law, St. Thomas University School of Law, Miami, Florida. The author expresses his appreciation to Ed Canal (class of 1988) for his invaluable research assistance.

1. Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in scattered sections of titles 19 and 28, United States Code).

2. In addition to enlarging and clarifying the Customs Court's jurisdiction, Congress sought to expand that court's powers to include all powers in equity, thus placing them on par with the district courts. H.R. REP. NO. 1235, 96th Cong. 2d Sess. 19-20 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, at 3730-31 [hereinafter H.R. REP. NO. 1235].

3. As noted in H.R. REP. NO. 1235, *supra* note 2, at 3730-31.

> Many suits involving international trade issues are . . . instituted in the federal district courts rather than the U.S. Customs Court. One reason is that often it is difficult to determine in advance whether or not a particular case falls within the jurisdictional scheme of the Customs Court, that is, an action primarily challenging classification and valuation determinations. In addition, because of the limited powers of the Customs Court, litigants often choose another forum . . . where they can gain the appropriate relief for their alleged injuries. Most district courts have refused . . . such suits, citing the Constitutional mandate requiring uniformity of decisions relating to imports. (See U.S. Const. art. I, § 8.). . . . The result has been inconsistent judicial decisions. . . . Thus, some individuals will obtain relief which is denied others, who by chance select an improper forum to institute suit. . . .
>
> . . . Congress is greatly concerned that numerous individuals and firms . . . are

this end, Congress conferred upon the U.S. Court of International Trade (CIT) exclusive jurisdiction over most civil actions involving imports to the United States.[5] Despite assurances by Congress that the Act would clarify matters involving import transactions (by putting these matters within the exclusive purview of the CIT),[6] recent appellate decisions in the area of grey market goods show that these jurisdictional waters remain murky.[7]

In three appellate decisions[8] involving the Genuine Goods Exclusion Act,[9] the Court of Appeals for the Federal Circuit (Federal Circuit), the District of Columbia Circuit, and the Second Circuit were presented

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expending significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case.

4. Under the Customs Courts Act of 1980, the name of the Customs Court was changed to the United States Court of International Trade. Pub. L. No. 96-417, § 251, 94 Stat. 1727, 1728 (1980).

5. Pub. L. No. 96-417, § 201, 94 Stat. 1728-30 (1980) (codified at 28 U.S.C. §§ 1581-1583, 1585 (1982)). *See* H.R. REP. NO. 1235, *supra* note 2, at 3731. The House Judiciary Committee commented: "The Customs Courts Act of 1980 creates a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the United States Customs Court. . . . This comprehensive system will ensure greater efficiency in judicial resources and uniformity in the judicial decision making process." One subject area over which the CIT lacks jurisdiction is actions involving imports of obscene materials. 28 U.S.C. § 1581(j) (1982).

6. S. REP. NO. 466, 96th Cong., 1st Sess. 4 (1979) [hereinafter S. Rep. No. 466]. "S.1654 would make it clear that the United States Court of International Trade possesses broad jurisdiction to entertain civil actions arising out of import transactions." *Id.*; "H.R.7540 will resolve this problem [of dismissals for lack of jurisdiction] by defining the demarcation between jurisdiction of the Court of International Trade and the federal district courts." H.R. REP. NO. 1235, *supra* note 2, at 3741.

7. *Compare* Olympus Corp. v. United States, 792 F.2d 315, 316 (2d Cir. 1986) (CIT does not possess exclusive jurisdiction over actions arising under 19 U.S.C. § 1526) *and* Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903, 907 (D.C. Cir. 1986) (same), *cert. granted*, 55 U.S.L.W. 3411 (U.S. Dec. 8, 1986) (86-625) *with* Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986) (CIT possesses exclusive jurisdiction over actions arising under 19 U.S.C. § 1526). *See also* Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13 (1985), where the author notes, "Whether or not the 1980 amendments have achieved their intended purpose of eliminating this jurisdictional confusion [between the district courts and the CIT] remains an open question." *Id.* at 16.

8. Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986); Coalition to Preserve the Integrity of American Trademarks v. United States, 790 F.2d 903 (D.C. Cir. 1986), *cert. granted*, 55 U.S.L.W. 3411 (U.S. Dec. 8, 1986) (86-625) [hereinafter *COPIAT*]; Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986).

9. Section 526 of the Tariff Act of 1930 (codified as amended by the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888, at 19 U.S.C. § 1526 (1982)). Section 526(a) provides in part:

> [I]t shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

an identical jurisdictional issue: whether grey market goods actions[10] under section 526(a) of the Tariff Act of 1930, as amended,[11] are within the exclusive jurisdiction of the CIT.[12] In *Vivitar Corp. v. United States*,[13] the Federal Circuit answered this question in the affirmative.[14] One year to the day later in *Coalition to Preserve the Integrity of American Trademarks v. United States (COPIAT)*,[15] the D.C. Circuit parted company with the Federal Circuit, answering that question in the negative. Three days after the *COPIAT* decision, the Second Circuit, in *Olympus Corp. v. United States*,[16] joined the D.C. Circuit in rejecting the contention that the CIT possesses exclusive jurisdiction over section 526(a) cases instituted against the United States.[17]

This article first sketches the jurisdictional conflict between the *Vivitar* decision, on the one hand, and the *COPIAT* and *Olympus* decisions, on the other. That section is followed by a discussion of 28 U.S.C. § 1581(i), the CIT's so-called "residual jurisdiction" provision.[18] The article concludes that this jurisdictional conflict is symptomatic of an inherent tension built into the Act, namely, the desire for jurisdictional

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10. The Court of Appeals for the Federal Circuit explained the nature of grey market goods in *Vivitar*:

> Goods are produced and legitimately sold abroad under a particular trademark and are imported into the United States and sold in competition with goods of the owner of U.S. trademark rights in the identical mark. But for international boundaries and the territoriality of trademark rights, the use of the trademark in competition with the U.S. owner would not constitute infringement because of the relationship between the foreign entity from whom the goods were directly or indirectly obtained and the owner of U.S. rights in the mark. In this sense, grey market goods are "genuine" and bear a "genuine" trademark. In some instances, the U.S. trademark owner is an importer of the goods as well, in which case the grey market goods are known as "parallel importations."

Vivitar, 761 F.2d at 1555. *See* 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); Note, *Parallel Importation—Legitimate Goods or Trademark Infringement?*, 18 VAND. J. TRANSNAT'L L. 543 (1985); Note, *Vivitar Corp. v. United States and Osawa & Co. v. B & H Photo: The Issue of Common Control in the Parallel Importation of Trademarked Goods*, 17 L. & POL'Y INT'L BUS. 177 (1985).

11. 19 U.S.C. § 1526(a) (1982).

12. *COPIAT*, 790 F.2d at 904; *Olympus*, 792 F.2d at 316-18; *Vivitar*, 761 F.2d at 1557-58.

13. 761 F.2d 1552 (Fed. Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986).

14. *Vivitar*, 761 F.2d at 1557-58.

15. 790 F.2d 903 (D.C. Cir. 1986), *cert. granted*, 55 U.S.L.W. 3411 (U.S. Dec. 8, 1986) (86-625).

16. 792 F.2d 315 (2d Cir. 1986).

17. *Id.* at 316. Unlike the D.C. Circuit in *COPIAT*, the Second Circuit upheld the Customs Service regulations. 19 C.F.R. § 133.21 (1986).

18. *See* Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984); Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and A Critique*, 58 ST. JOHN'S L. REV. 700, 743-46 (1984) [hereinafter Cohen, *Recent Decisions*]; Cohen, *The "Residual Jurisdiction" of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471, 472 (1981) [hereinafter Cohen, *Residual Jurisdiction*].

certainty competing with a congressional desire for a narrowly drafted statute.

The conflict can be resolved in one of two ways. First, it can be addressed on an ad hoc, case-by-case basis with a concomitant return of the jurisdictional uncertainty that plagued litigants prior to enactment of the Act. Alternatively, the CIT's residual jurisdictional provision[19]—in the author's view, the primary source of mischief—can be repealed. In any event, uniformity in international trade decisions and jurisdictional certainty are unattainable under the current jurisdictional statutory scheme. In the interest of jurisdictional certainty for prospective international trade litigants, this article proposes either substantial revision of section 1581(i) or, preferably, its repeal.

II. THE *VIVITAR, COPIAT,* AND *OLYMPUS* DECISIONS

The basic fact patterns in the *Vivitar*, *COPIAT*, and *Olympus* cases are essentially identical: U.S. trademark owners sought to prevent importation of goods that lawfully bore the owner's trademark. In *Vivitar*, a U.S. trademark owner filed suit in the CIT seeking to prevent the unauthorized importation of certain goods. The goods were manufactured abroad by the trademark owner's licensees and carried the trademark owner's trademark.[20] In *COPIAT*, a trade association of U.S. companies that own U.S. trademarks and two of its members brought an action in district court,[21] seeking declaratory and injunctive relief. They argued that Customs Service regulations,[22] promulgated pursuant to section 526(a) (permitting grey market goods to enter the United States), are

19. 28 U.S.C. § 1581(i) (1982). That section provides:

> 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 [28 U.S.C. § 1581(j)], the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
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> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
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> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health 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 [28 U.S.C. § 1581(a)-(h)].

20. *Vivitar*, 761 F.2d at 1555.

21. Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F. Supp. 844 (D.D.C. 1984), *rev'd*, 790 F.2d 903 (D.C. Cir. 1986).

22. 19 C.F.R. § 133.21(c)(1)-(3) (1986). The regulations at 19 C.F.R. § 133.21 provide in part:

> (a) *Copying or simulating marks or names.* Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or

invalid because of inconsistencies with other statutes.[23] In *Olympus*, a U.S. subsidiary and exclusive U.S. distributor of a foreign manufacturer of trademarked goods sought declaratory and injunctive relief from those same Customs regulations.[24]

In addressing the jurisdictional issue in *Vivitar*, the Federal Circuit acknowledged the divergent views on this question,[25] noting the district court decisions in *COPIAT* and *Olympus* which had specifically rejected the argument that the CIT had exclusive jurisdiction over cases involving grey market goods.[26] Despite these contrary authorities, the Federal Circuit concluded that the CIT had subject matter jurisdiction under 28 U.S.C. § 1581(a), (i)(3), and/or (i)(4).[27]

In order to resolve the jurisdictional question, the Federal Circuit observed, "[t]he focus must be solely on whether the claim falls within the language and intent of the jurisdictional grant *to* the CIT."[28] Vivitar's claim raised no question of substantive trademark law with respect to the activities of a private party—a claim that would be within the district court's jurisdiction[29]—but rather went to the validity of Customs

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trade name shall be denied entry and are subject to forfeiture as prohibited importations. A "copying or simulating" mark or name is an actual counterfeit of the recorded mark or name or is one which so resembles it as to be likely to cause the public to associate the copying or simulating mark with the recorded mark or name.

(b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.

(c) *Restriction not applicable.* The restrictions set forth in paragraphs (a) and (b) of this section do not apply to imported articles when:

(1) Both the foreign and the U.S. trademark . . . are owned by the same person or business entity;

(2) The foreign and domestic trademark . . . owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) and 133.12(d));

(3) The articles of foreign manufacture bear a recorded trademark . . . applied under authorization of the U.S. owner.

23. *COPIAT*, 790 F.2d at 906.

24. *Olympus*, 792 F.2d at 316-17.

25. *Vivitar*, 761 F.2d at 1559.

26. *Id.* The two cases cited by the Federal Circuit were the district court decisions in *COPIAT*, 598 F. Supp. 844 (D.D.C. 1984) and Olympus Corp. v. United States, No. CV-84-0920 (E.D.N.Y. Nov. 15, 1984) (unpublished order), *aff'd*, 792 F.2d 315 (2d Cir. 1986). *See Vivitar*, 761 F.2d at 1559. *See also* Parfums Stern, Inc. v. United States, 575 F. Supp. 416 (S.D. Fla. 1983) (holding that jurisdiction over an action brought under 19 U.S.C. § 1526(a) is proper in the district court).

27. *Vivitar*, 761 F.2d at 1555. The government argued that the district court had jurisdiction over all trademark actions, including those brought under 19 U.S.C. § 1526(a), pursuant to 28 U.S.C. § 1338(a), which grants to the district courts jurisdiction over "any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks." The government further argued that since the CIT's jurisdiction is exclusive only, not concurrent with that of the district courts, the CIT has no jurisdiction over Vivitar's action. *Id.* at 1557-58.

28. *Id.* at 1559-60.

29. *Id.* at 1560. *See, e.g.*, Osawa & Co. v. B & H Photo, 598 F. Supp. 1163, 1179

regulations governing the exclusion of goods. As such, it was "the type of question to which the CIT can bring expertise"[30] and over which the CIT thus had exclusive jurisdiction.[31] The Federal Circuit found jurisdiction to exist either as a corollary to the CIT's protest jurisdiction under 28 U.S.C. § 1581(a),[32] or alternatively, under 28 U.S.C. § 1581(i)(3) and/or (4) as an action against the United States that arises out of an embargo on certain goods and the administration and enforcement thereof.[33]

The D.C. Circuit in *COPIAT* and the Second Circuit in *Olympus* were totally at odds with the jurisdictional portion of the Federal Circuit's opinion in *Vivitar*. After summarizing the Federal Circuit's opinion,[34] the D.C. Circuit concluded that "the language of 28 U.S.C. § 1581(a) and (i)(4) will not bear the Federal Circuit's construction."[35] First, in connection with section 1581(a) and (i)(4) jurisdiction, the D.C. Circuit explained that since no right to protest arises from Customs admission of goods into the United States, only from the exclusion thereof, there could neither be a denial of a protest nor any administration and enforcement of protests.[36] Second, as for the Federal Circuit's alternative holding that the CIT has jurisdiction under section 1581(i)(3), the D.C. Circuit disagreed that exclusion of goods under section 526(a) is an "embargo" within the contemplation of section 1581(i)(3).[37] In the D.C. Circuit's view, "the structure of the statute . . . indicates that section 1581(i)(3) only extends to quotas and embargoes arising out of trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like."[38] The D.C. Circuit concluded that "Congress' overriding purpose was to consolidate jurisdiction over certain matters involving international trade in a single specialized court, bringing uniformity and expertise to the area. But those ends would not be served in this case."[39]

In the *Olympus* decision, the Second Circuit reached the same conclusion as that of the D.C. Circuit regarding the exclusivity of the CIT's jurisdiction over grey market goods cases, and it employed essentially the

(S.D.N.Y. 1984) (district court granted exclusive distributor's motion for a preliminary injunction based upon 19 U.S.C. § 1526(a) and 15 U.S.C. § 1124).

30. *Vivitar*, 761 F.2d at 1560.

31. *Id.*

32. *Id.* A protest is an administrative complaint filed with the Customs Service challenging, *inter alia*, classification and duty rates. 19 U.S.C. §§ 1514-1515 (1984).

33. *Vivitar*, 761 F.2d at 1560.

34. *COPIAT*, 790 F.2d at 905-07.

35. *Id.* at 906.

36. *Id.*

37. *Id.* at 906-07.

38. *Id.* at 907.

39. *Id.*

same rationale used in *COPIAT*. First, regarding the CIT's jurisdiction under section 1581(a) and (i)(4), the Second Circuit rejected the argument that section 1581(a) had any applicability inasmuch as no goods had been excluded.[40] The court likewise rejected the argument that section 1581(i)(4) was an appropriate jurisdictional base "simply because [an action] tangentially relates to the protest procedure."[41] The Second Circuit added that "section 1581(i)(4) properly gives the CIT jurisdiction only of those [administration and enforcement] matters that arise from protests themselves, not of all issues that conceivably could arise in a protest action under a hypothetical fact situation."[42] While recognizing the congressional desire for uniformity in the international trade decision making process reflected in the Act, the Second Circuit rejected the contention that uniformity would be promoted "because this action primarily involves antitrust and trademark matters, areas outside the expertise of the CIT."[43] As for the Federal Circuit's alternative holding that "embargo" jurisdiction existed under section 1581(i)(3), the Second Circuit viewed 526(a) (a law providing in essence for quantitative restrictions of zero)[44] as not within the contemplation of Congress when it enacted section 1581(i)(3).[45] Rather, the court concluded, the quantitative restrictions Congress had in mind were those imposed by quotas on textiles.[46] The Second Circuit thus rejected wholesale the Federal Circuit's jurisdictional analysis in *Vivitar*, adopting in large measure the D.C. Circuit's *COPIAT* reasoning in this connection.

The decisions reached by the D.C. Circuit and Second Circuit that the CIT does not possess exclusive jurisdiction over section 526(a) actions instituted against the United States are, of course, conclusions that the CIT has no jurisdiction over such actions whatsoever, given that the CIT's jurisdiction in all instances is expressly exclusive of,[47] not concurrent with,[48] that of the district courts.

At first blush this conclusion would seem flawed when examined in light of the legislative history of the Customs Courts Act of 1980. Both the Senate and House Reports[49] to the Act are replete with references to the need for uniformity in judicial decision making. Hence, Congress accorded the CIT "broad jurisdiction to entertain certain civil actions

40. *Olympus*, 792 F.2d at 318.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 319.
46. *Id.*
47. 28 U.S.C. § 1581(a)-(i) (1984).
48. 28 U.S.C. § 1340 (1982).
49. *See supra* notes 5-6.

arising out of import transactions"[50] and created "a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the CIT."[51]

On closer examination of the CIT's jurisdictional mandate and the accompanying legislative history, however, it is evident that Congress did not make the CIT's jurisdiction over import transactions comprehensive.[52] On the contrary, Congress hedged and even retreated from such a sweeping jurisdictional scheme.[53] In addition, considering earlier drafts of section 1581(i),[54] Congress was obviously sensitive to concerns raised by certain importers that section 1581(i) not be overly broad and, for that reason, ultimately adopted "a more precise subsection."[55] Thus, which of the three courts of appeals' decisions best comports with congressional intent is a close question.

A more perplexing problem from the perspective of the international trade bar is the uncertainty in which international trade litigants now find themselves as a consequence of the decisions. It is true that the Supreme Court stands ready to resolve such intercircuit conflicts.[56] Litigants might find some comfort in that fact if these three decisions were merely isolated instances of jurisdictional uncertainty between the district courts and the CIT. Regrettably, however, in other contexts litigants have been placed in a position of uncertainty over whether the CIT

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50. S. REP. NO. 466, *supra* note 6, at 4.

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

52. *See, e.g.*, 28 U.S.C. § 1581(j) (1982). Moreover, the United States must be either a party-plaintiff or party-defendant to any action brought in the CIT. *See* 28 U.S.C. §§ 1581-1582 (1982).

Despite the frequent congressional assertions of the importance of placing in one court the responsibility for resolving all matters involving import transactions, Congress undoubtedly questioned the wisdom of entrusting to the CIT the power to resolve all actions involving import transactions to which the United States is a party. The most notable example of this reluctance is the jurisdictional exception contained at 28 U.S.C. § 1581(j) (1984). This subsection specifically carves out cases arising out of the importation of immoral articles. *See* section 305 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1305 (1982). Section 305 includes within the ambit of "immoral articles," treasonous and obscene materials. Although the legislative history does not disclose the reason for this exception (other than to note that the provision restates existing law), the constitutional requirement of prompt judicial review following seizure of materials alleged to be obscene may explain why the district courts retained jurisdiction over actions brought under 19 U.S.C. § 1305. *See* H.R. REP. NO. 1235, *supra* note 2, at 3760. Prompt review would not be possible in the CIT if the seizure occurred at a port of entry other than New York City (the location of the CIT). In addition, it may have been Congress' belief that actions involving the importation of obscene and seditious materials presented more of a free speech/free press issue than one involving imports per se.

Whatever Congress' reasons for maintaining this exception, section 1581(j) serves as a testimonial to the congressional concerns about entrusting to the CIT exclusive jurisdiction over all actions involving import transactions in which the United States is a litigant.

53. *See supra* note 52; H.R. REP. NO. 1235, *supra* note 2, at 3758-59.

54. *See infra* notes 68-73 and accompanying text.

55. H.R. REP. NO. 1235, *supra* note 2, at 3759.

56. SUP. CT. R. 17.

has jurisdiction to decide a particular issue.[57] As the next section on the Act's legislative history explains, the principal source of this uncertainty is section 1581(i) as presently enacted.

III. SECTION 1581(i) AND THE CHIMERAS OF CERTAINTY AND UNIFORMITY

Prior to enactment of section 1581(i), the jurisdiction of the CIT's predecessor, the Customs Court, was limited to review of Customs Service denials of protests concerning exclusion of merchandise, classification, and valuation of imports.[58] Then, as now, the Customs Court's jurisdiction was exclusive.[59] Despite the statutory simplicity of this jurisdictional scheme, problems soon arose in cases where an importer wished to challenge a Customs Service regulation prior to actual importation.[60] The Customs Court's jurisdiction could only be invoked after the denial of a protest by the Customs Service, and district court jurisdiction extended to those matters over which the Customs Court lacked jurisdiction.

The question then arose whether a prospective importer could challenge a Customs Service regulation in district court prior to a protest. The decisions treating this question were not uniform.[61] In the Customs Courts Act of 1980, Congress hoped to resolve the confusion between district court and Customs Court jurisdiction.[62]

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57. *Compare* American Ass'n of Exporters and Importers—Textile and Apparel Group v. United States, 751 F.2d 1239, 1245-46 (Fed. Cir. 1985) (CIT had jurisdiction under section 1581(i) over action challenging textile quotas) *and* United States Cane Refiners' Ass'n v. Block, 683 F.2d 399, 402 n.5 (C.C.P.A. 1982) (CIT had jurisdiction under section 1581(i) over action challenging sugar quotas) *with* American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1550-51 (Fed. Cir. 1983) (action properly dismissed since CIT lacked jurisdiction under section 1581(i) where protest action under section 1581(a) was not shown to be inadequate), *cert. denied*, 466 U.S. 936 (1984) *and* Arbor Foods, Inc. v. United States, 600 F. Supp. 217, 220 (Ct. Int'l Trade 1984) (action challenging imposition of sugar quotas dismissed for lack of jurisdiction under section 1581(i)). *See also* United States v. Gold Mountain Coffee, Ltd., 597 F. Supp. 510, 514 (Ct. Int'l Trade 1984) (CIT declined ancillary jurisdiction over civil forfeiture action brought for violation of customs laws).

58. 28 U.S.C. § 1581 (1976), *repealed by* Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

59. The statute providing for federal question jurisdiction over import matters in the district courts, 28 U.S.C. § 1340 (1976), specifically excluded concurrent jurisdiction between the district courts and the Customs Court over international trade matters.

60. *Compare* Sneaker Circus, Inc. v. United States, 566 F.2d 396 (2d Cir. 1977) *with* Consumers Union of United States, Inc. v. Committee for the Implementation of Textile Agreements, 561 F.2d 873 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1978).

61. *See* Annotation, *Jurisdiction of United States Customs Court Under § 110(a),(b) of Customs Courts Act of 1970 (28 U.S.C.S. § 1582(a),(b))*, 50 A.L.R. FED. 378 (1980).

62. *See, e.g.*, American Ass'n of Exporters & Importers—Textile & Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985), where the court noted:

> The decision to *clarify* and *expand* the jurisdiction of the CIT—rather than to clarify the jurisdiction of the district courts—as a means for resolving the jurisdictional

A reading of the legislative history of section 1581(i) leaves little room for doubt that Congress justified the provision by claiming it eliminated the blurred jurisdictional boundary between district court and CIT jurisdiction.[63] However, as the *Vivitar*, *COPIAT*, and *Olympus* decisions demonstrate, the statutory provision that Congress finally enacted to implement its jurisdictional scheme, section 1581(i), has poorly served the dual goals of certainty and uniformity.[64] While the legislative history of the Act reflects a strong congressional desire for jurisdictional certainty and uniformity of decision making in the international trade field, the history is lean in furnishing appropriate analytical tools with which to realize these goals.

For example, the Report of the House Judiciary Committee spotlighted the difficulties litigants faced in determining the proper forum in which to bring their international trade actions. The House Report noted:

> [T]he intricacies of the Customs Court's jurisdictional statutes and the complexities of international trade litigation have rendered it exceedingly difficult for litigants to determine whether or not a particular case comes within the jurisdiction of the Customs Court and is, therefore, excluded from the jurisdiction of the district courts. This has resulted in considerable confusion by litigants and the courts.[65]

Similarly, the Senate Judiciary Committee Report spelled out the intended effect of the new Act:

> Because the statutes defining the jurisdiction of the Customs Courts are so intricate and because international trade problems have become so complex, it has become increasingly

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problem indicates that Congress intended plaintiffs in appellants' shoes to bring their cases in the CIT rather than in the district court.

Id. at 1245.

63. *See* Cohen, *Recent Decisions*, *supra* note 18, at 770.

64. H.R. REP. NO. 1235, note 2, at 3730-31, 3741; S. REP. NO. 466, *supra* note 6, at 3-4.

65. H.R. REP. NO. 1235, *supra* note 2, at 30. The Report went on to cite several cases in support of its contention:

> See *SCM Corp. v. United States International Trade Commission*, 549 F.2d 812 (D.C. Cir. 1977). Some district courts have asserted jurisdiction over international trade actions. See *Sneaker Circus v. Carter*, 566 F.2d 396 (2d Cir. 1977); *Timken Co. v. Simon*, 539 F.2d 221 (D.C. Cir. 1976). However, other district courts have compounded this problem by dismissing such actions for want of jurisdiction. See *Consumers Union of United States v. Committee for the Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1977); . . .
>
> The dismissal of these actions, after great expenditures of time and resources, has produced frustration on the part of litigants and the courts. H.R. 7540 will resolve this problem by defining the demarcation between jurisdiction of the Court of International Trade and the federal district courts.

Id.

> more difficult to determine, in advance, whether or not a particular case falls within the exclusive jurisdiction of the Customs Court and is therefore excluded from the jurisdiction of the district courts. The result has been considerable confusion which has been demonstrated by the fact that a significant number of civil actions have been instituted in the district courts only to be dismissed for lack of jurisdiction. . . .
>
> The dismissal of these actions has resulted in the expenditure of time and effort by individuals who believe that they have real grievances in this field only to find that their cases will not be heard on its merits. The amended bill attempts to solve this problem by clarifying the existing jurisdictional statutes relating to the United States Customs Court and by expanding the jurisdiction of the Court. . . .[66]

Notwithstanding the wealth of congressional statements on the importance and desirability of having jurisdictional certainty and decisional uniformity in international trade litigation, the jurisdictional provision which was enacted was not drafted with sufficient breadth, largely out of fears that the CIT would adjudicate matters traditionally within the exclusive purview of the district courts.[67] By comparison, in one of its earliest drafts,[68] section 1581(i) would have given the Customs Court jurisdiction over a civil action arising under the Constitution, a law, treaty, executive agreement, or executive order if the subject matter of the action "directly affected" imports.[69] Although subsequent versions

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66. S. REP. NO. 466, *supra* note 6, at 4-5. The Senate Report further noted:

> The clarification and expansion of the customs courts' jurisdiction is warranted not only because it will eliminate the considerable jurisdictional confusion which now exists, but because of two other important considerations: considerations of judicial economy, and the need to increase the availability of judicial review in the field of international trade in a manner which results in uniformity without sacrificing the expeditious resolution of import related disputes.

Id. at 4. The Senate Report identified another important consideration for enactment of the Act: "assuring our trading partners that administrative determinations in this area will be subject to judicial review only by a limited number of courts. . . ." *Id.*

67. *See* H.R. REP. NO. 1235, *supra* note 2, where the House Judiciary Committee noted the following:

> The American Importers Association (AIA) testified that subsection (i) could have been interpreted to permit the court to assert jurisdiction over civil actions involving the application of the Federal Food, Drug and Cosmetic Act or the Toxic Substances Control Act to imported merchandise. AIA believed that these actions do not involve questions of classification, valuation or rate of duty but rather questions of public health and safety. . . .
>
> In keeping with the intent of the Customs Courts Act of 1980 to provide a uniformity of jurisdiction, the Committee adopted a more precise subsection (i) in an effort to remove any confusion over the jurisdiction of the Court of International Trade regarding this or similar issues.

Id. at 3759 (footnote omitted).

68. S. 2857, 95th Cong., 2d Sess. (1978).

69. *Id.* This Senate bill exempted several types of civil actions from the Customs Court's

of section 1581(i) underwent jurisdictional narrowing, they were still broader than the current version of section 1581(i).

One early draft, for example, would have required a civil action not only to "arise directly from import transactions"[70] or to "arise out of import transactions,"[71] but also to "involve" specific statutes by name, or to "involve" a provision of the Constitution, a treaty, law, executive agreement, or executive order that directly and substantially involve international trade.[72] An earlier Senate version of section 1581(i) would have expanded the Customs Court's jurisdiction to include any civil action involving (1) imports and (2) a statute, constitutional provision, treaty, executive agreement, or executive order directly and substantially concerned with international trade.[73]

Concerns were raised by importers that the proposed drafts of section 1581(i) were overly broad,[74] so the current section 1581(i) was adopted instead as "a more precise subsection,"[75] in the view of the House Judiciary Committee. Whether the desired precision has been achieved is open to considerable doubt in light of the *Vivitar*, *COPIAT*, and *Olympus* decisions. The three decisions leave little doubt that the congressional desire for statutory precision sacrificed considerations of jurisdictional certainty and decisional uniformity.

If one of the earliest versions of section 1581(i) had been enacted, would this jurisdictional conflict have resulted? Arguably not. Under the hybrid version of section 1581(i), derived by engrafting portions of S.

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jurisdiction, such as antitrust actions and actions arising under the Freedom of Information Act.

70. S. 1654, 96th Cong., 1st Sess., 125 CONG. REC. 11,473 (1979).

71. H.R. 7540, 96th Cong., 2d Sess., 126 CONG. REC. 26,546.

72. *Supra* notes 68-71. For an excellent discussion of the legislative history of section 1581(i), *see* Cohen, *Residual Jurisdiction*, *supra* note 18, at 498-501.

73. *See* S. 1654, 96th Cong., 1st Sess. (1979); S. REP. NO. 466, *supra* note 6, at 5. Proposed section 1581(i), as contained in section 201(a) of H.R. 6394, 96th Cong., 2d Sess. (1980), reads as follows:

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) through (h) of this section and subject to the exceptions set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action against the United States, its agencies, or its officers, which—
>
> (1) arises directly from an import transaction; and
>
> (2)(A) involves the Tariff Act of 1930, the Trade Expansion Act of 1962, the Trade Act of 1974, or the Trade Agreements Act of 1979; or
>
> (B) involves a provision of—
>
> (i) the Constitution of the United States;
>
> (ii) a treaty of the United States;
>
> (iii) an executive agreement executed by the President; or
>
> (iv) an Executive order of the President, which directly and substantially involves international trade.

74. *See supra* note 67.

75. H.R. REP. NO. 1235, *supra* note 2, at 3759.

2857 onto H.R. 6394,[76] the CIT would have been vested with exclusive jurisdiction over all civil actions that "involve imports"[77] and "the Tariff Act of 1930."[78] The grey market goods actions filed in *Vivitar*, *COPIAT*, and *Olympus* would fall squarely within the ambit of such a jurisdictional provision. An action to exclude grey market goods from entry into the United States would "involve imports." Moreover, such an action, being brought under section 526(a) of the Tariff Act of 1930, would clearly satisfy the second prong of this hybrid jurisdictional statute. By limiting the scope of the residual jurisdictional statute to specifically named statutes such as the Tariff Act of 1930, the Trade Agreements Act of 1979, and the Trade and Tariff Act of 1984,[79] the objection[80] that it would be difficult to determine whether a civil action involves a treaty, constitutional provision, or executive agreement which "directly and substantially involves international trade"[81] would be met. To eliminate this source of potential confusion, the proposed hybrid statute therefore would have deleted references to the Constitution, treaties, and executive agreements or orders as originally contained in H.R. 6394,[82] and would instead list the specific statutes involving imports over which jurisdiction extended.

This proposed amendment to section 1581(i) might have advanced the goal of jurisdictional certainty, but in the end it could neither guarantee certainty nor could it necessarily secure the companion goal of decisional uniformity. The goal of uniformity in judicial decision making has been, and will continue to be, a will-o'-the-wisp as long as CIT judges are free to part paths with their brothers and sisters on the CIT.[83] Such

76. *Supra* notes 68 & 73.

77. S. 2857, 95th Cong., 2d Sess. (1978).

78. H.R. 6394, 96th Cong., 2d Sess., 126 CONG. REC. H496 (daily ed. Jan. 31, 1980) [hereinafter H.R. 6394].

79. By listing the statutes over which the CIT has residual jurisdiction, the objection raised that the CIT's jurisdiction might become too broad and encompass statutes such as the Food, Drug, and Cosmetics Act would be met. *See supra* note 67.

80. The American Bar Association expressed fears that the district courts and the Court of International Trade would reach conflicting interpretations of the provision. *See Proposed Amendments to the Customs Courts Act: Hearings on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 106 (1980).

81. H.R. 6394, *supra* note 73.

82. *Id.*

83. *Compare* Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834 (Ct. Int'l Trade 1983) *with* Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int'l Trade 1984) *and* Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), where the CIT has taken different tacks in answering the question whether certain government subsidies to industry are subject to countervailing duties.

For an example of a direct conflict among three Customs Court judges on a similar issue, *compare* ASG Indus., Inc. v. United States, 467 F. Supp. 1187 (Cust. Ct. 1979), *rev'd*, 610 F.2d 770 (C.C.P.A. 1979) *and* ASG Indus., Inc. v. United States, 467 F. Supp. 1195 (Cust. Ct.

uniformity is unachievable as long as an independent judiciary is the decision maker. From the perspective of fostering amicable trade relations with our trading partners, it would certainly be desirable to have perfect uniformity in decision making on the part of the federal judiciary, but such uniformity cannot be legislated.

Insofar as jurisdictional certainty is concerned, ingenuous (and disingenuous) lawyers who practice in cities other than New York, the site of the Court of International Trade, may not be overly anxious to file an action in the CIT. In close jurisdictional cases, therefore, attorneys may advance plausible arguments for why the district courts should take jurisdiction over the particular action. The pressure to make such arguments will be great where the need for expeditious judicial relief is most acute.[84] In addition, the determination of whether an action arises out of an import transaction is subject to manipulation. For example, the Second Circuit characterized the grey market goods issue in *Olympus* as "primarily involv[ing] antitrust and trademark matters, areas outside the expertise of the CIT."[85] In short, broadening the scope of section 1581(i) is no guarantee of jurisdictional certainty.

If Congress desires jurisdictional certainty in the field of international trade litigation, a rational legislative response to the *Vivitar*, *COPIAT*, and *Olympus* trilogy would be to repeal section 1581(i),[86] thereby conferring upon the district courts jurisdiction to hear all "residual" international trade cases.[87] Existing jurisdictional statutes would adequately fill the gap left by a repeal of section 1581(i), such as 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1340 (conferring upon the district courts jurisdiction to hear cases involving

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1979), *rev'd*, 610 F.2d 785 (C.C.P.A. 1979) *with* ASG Indus., Inc. v. United States, 467 F. Supp. 1200 (Cust. Ct. 1979).

The Federal Circuit may eventually resolve such conflicts on appeal. Until it does, however, our foreign trading partners will not know exactly where they stand. This concern was voiced by the Senate when it considered the Customs Courts Act of 1980. S. REP. NO. 466, *supra* note 6, at 3-4.

84. One of the major defects with the CIT is its New York City location. The location contributes in large measure to the virtual monopoly that East coast law firms (particularly those in New York City) enjoy in international trade law practice. *See* Kennedy, *supra* note 7, at 31-32.

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

86. Repeal of section 1581(i) would not only represent a rational legislative response, but it would also be the more probable legislative response. A recent bill that was introduced in the Senate would have eliminated the CIT's jurisdiction to review antidumping and countervailing duty determinations. *See* S. 1672, 98th Cong., 1st Sess., 129 CONG. REC. S10,755-57 (1983). Although this bill was not enacted, it nevertheless reflects some congressional dissatisfaction with the role of the CIT in international trade litigation. Given this legislative atmosphere, it seems unlikely that Congress would be prepared to enlarge the CIT's jurisdiction by making section 1581(i) a more sweeping provision.

87. For statistics suggesting that the burden on the district courts from the additional caseload would be light, see Kennedy, *supra* note 7, at 34-36.

revenue from imports). This latter provision, if expanded to include actions affecting imports for nonrevenue purposes, would subsume the lion's share of cases formerly falling within the CIT's section 1581(i) jurisdiction.

IV. CONCLUSION

When it enacted the Customs Courts Act of 1980, Congress sought to eliminate the jurisdictional confusion that had plagued international trade litigants prior to 1980. That confusion unfortunately persists, as reflected most recently in the *Vivitar*, *COPIAT*, and *Olympus* decisions. The confusion could probably be mitigated by amending section 1581(i) to broaden the scope of international trade matters within the exclusive purview of the CIT. Any such expansion of the CIT's residual jurisdiction may reduce the kind of confusion presented in these three grey market goods cases, but it is not likely to eliminate the confusion entirely. Jurisdictional certainty between the district courts and the CIT would be more likely realized by repealing section 1581(i), leaving for CIT review those actions encompassed by section 1581(a)-(h). International trade litigants would thereby have the benefit of knowing, with a far greater degree of certainty, in which forum to bring their international trade actions.

In addition, by conferring upon the district courts jurisdiction to hear section 1581(i) cases, especially those involving embargoes and quotas where swift judicial relief is frequently imperative, litigants would have greater freedom to retain counsel outside of the New York City area. If section 1581(i) were repealed, the pressure to retain counsel with offices physically proximate to the CIT would be significantly reduced in such cases. This development, coupled with the elimination of jurisdictional confusion between the district courts and the CIT, would be an invaluable benefit to trade litigants who, after all, were the intended beneficiaries of the Act.

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