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Attention K Mart Shoppers: In *K Mart Corp. v. Cartier, Inc.* the Supreme Court Granted District Courts Jurisdiction in Gray Market Disputes

by THOMAS H. WOLFE*

Introduction

In 1984, The Coalition to Preserve the Integrity of American Trademarks (COPIAT) brought an action against the United States for declaratory and injunctive relief.1 Plaintiffs claimed that the Customs Service regulations were inconsistent with the Tariff Act of 1930 and the Lanham Trademark Act of 1946,2 and further that plaintiffs had suffered damage "from the importation and sale in this country of products known as diverted, gray market, or parallel goods."3 A gray 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."4

COPIAT asserted that the tariff and trademark acts barred the importation of "goods bearing trademarks identical to their own."5 The Customs Service regulations, however, "permit the

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2. 598 F. Supp at 846.
3. *Id.*
5. COPIAT, 790 F.2d at 904. The two statutes are § 526(a) of the Tariff Act of 1930, 19 U.S.C. § 526 (1982), and § 42 of the Lanham Trade-Mark Act of 1946, 15 U.S.C. § 1124 (1982). Section 42 issues were not addressed by the courts. Section 526 states:
(a) Importation prohibited. Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of
importation of such goods, *inter alia*, if the American and foreign trademarks are owned by the same or affiliated entities or if the American owner has authorized the foreign entity to use the trademark.78

Defendants, the United States and intervenors 47th Street Photo, Inc. and K Mart Corporation, contended that "the challenged regulations are a correct application of the trademark statutes and that the legislative history demonstrates that it was not the intention of Congress to prohibit importation of diverted goods."7 47th Street Photo also contended "that the Court of International Trade (CIT) has exclusive jurisdiction over [COPIAT's] claims under section 526 of the Tariff Act . . . ."78 Prior to the Customs Court Act of 1980,9 the jurisdiction

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6. 790 F.2d at 904, citing 19 C.F.R. § 133.21(c)(1)-(3) (1985), which states:

Restrictions on importation of articles bearing recorded trademarks and trade names:

(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 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) *Restrictions 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 or trade name are owned by the same person or business entity;

(2) The foreign and domestic trademark or tradename owners are parent and subsidiary companies or are otherwise subject to common ownership or control.

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


8. *Id.* at 847.

of the Customs Court (predecessor of the Court of International Trade) "was limited to review of Customs Service denials of protests concerning exclusion of merchandise, classification, and valuation of imports." In 1980, however, the Congress added section 1581(i), which provided residual jurisdiction for the court in cases where the Government is a party.

The substantive and jurisdictional issues were fully explored by both the trial and appellate courts of the District of Columbia District and four other courts. The findings varied widely, and the appellate courts often took contradictory positions. On December 6, 1986 the Supreme Court consolidated the COPIAT case with two private suits, K Mart Corp. v. Cartier, Inc., and 47th Street Photo v. COPIAT, and granted certiorari. The jurisdictional issue was decided separately on March 7, 1988 in K Mart Corp. v. Cartier, Inc. The substantive issue was returned to the calendar for reargument.


11. 28 U.S.C. § 1581(i), states:

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

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

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


13. In COPIAT the District of Columbia Circuit found that jurisdiction properly lies with the district courts, and the Customs Service regulations were an improper interpretation of section 526. The Federal Circuit, in Vivitar, found that the Court of International Trade properly had jurisdiction, and upheld the regulation. The Olympus court agreed that the district courts had jurisdiction, but, contrary to COPIAT, found the regulations valid.

The purpose of this Note is to review the jurisdictional arguments presented in *K Mart Corp. v. Cartier, Inc.* The Note first provides a survey of the lower courts' decisions. Next, it describes the jurisdictional findings of the Supreme Court. Finally, it criticizes the Court's decision and suggests an alternate interpretation of section 1581(i) of the Customs Court Act of 1980.

I

Lower Court Decisions

A. *Vivitar Corp. v. United States*¹⁶

1. The Court of International Trade

In *Vivitar*, plaintiff Vivitar had licensed foreign manufacturers to use the Vivitar trademark on the photographic equipment they manufactured. Vivitar claimed that third parties imported this equipment without its authorization.¹⁷

The defendant, the United States, moved to dismiss the action for lack of subject matter jurisdiction,¹⁸ arguing that this was a trademark case and, therefore, must be determined by the district courts, not the CIT.¹⁹ The court took exception to both assertions, observing that not all trademark issues must be decided by the district courts.²⁰ It conceded that the district courts generally have trademark jurisdiction; however, it would not concede its own lack of jurisdiction over international trade matters involving trademark issues.²¹

In order to decide this issue, the court had to determine whether an international trade or a trademark dispute existed. It turned to the test used by the CIT in *Schaper Manufacturing*...
In that case, the CIT looked to the gravamen of the complaint to determine whether the "thrust of the grievance alleged and the relief sought by the plaintiff relates to the regulations promulgated by customs and their administration and enforcement. . . ." Vivitar’s complaint was not that a third party had violated its trademark right; "rather the central issue in [Vivitar was] the regulation of international trade in goods bearing genuine trademarks . . . ." The Vivitar court stated that the right to regulate genuine trademark goods is "uniquely a concern of international trade law" and such goods are not otherwise restricted. The court proceeded to explain that its mandate is to provide "a uniform national interpretation" of international trade law and Customs Service regulations. According to the court, such a uniform national interpretation is necessary to provide "a degree of certainty to those involved in complex international trade transactions." The court noted that exclusive jurisdiction over international trade litigation would help to avoid "conflicting interpretations of international trade law" and to reduce confusion in the genuine trademark trade industry. Also, the court would be able to apply its particular expertise in trade matters to the issue. Based on these considerations, the court decided that Vivitar was an international trade action.

This alone did not give the court jurisdiction, however. Next, the Vivitar court had to determine whether the particu-

25. Id.
26. Id.
27. See H.R. REP. No. 1235, 96th Cong., 2d Sess. 1, 20 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3731. The CIT'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." Id.
29. Id.
30. Contra Olympus v. United States, 792 F.2d 315, 318 (2d Cir. 1986). The court called this issue a trademark or antitrust issue, and not an international trade issue. Therefore, a CIT decision is not required and would not impair the congressional mandate for uniformity in international trade decisions. Id.
32. Id.
lar issue at stake fell directly within its jurisdiction. The plaintiff argued that the right to a hearing before the court to protest any exclusion of merchandise under section 526(a) and (b) of the Tariff Act of 1930 would give the court jurisdiction "pursuant to section 1581(i)(4) to consider claims arising out of Customs Service regulations governing the administration and enforcement of exclusions . . . ." 33

The plaintiff asserted that Congress granted the CIT broad residual jurisdiction over all civil actions arising from international trade laws in section 1581(i). 34 Section 1581(i) specifically defines the areas of residual jurisdiction to include all categories mentioned in 1581(i)(1)-(3) and jurisdiction over the administration and enforcement of the subject matter found in 1581(a)-(h) and (i)(1)-(3). 35 The court, agreeing in part, found jurisdiction in *Vivitar* through a combination of section 1581(a) and section 1581(i)(4), and, separately under section 1581(i)(3). 36

*Vivitar's* substantive claim was that the Government violated section 526(a) and (b) in failing to exclude genuine trademark goods duly registered by an American citizen or other entity. 37 Under "normal" section 1581(a) procedure, an importing party may file a protest of an exclusion. If the protest is denied, the matter may be brought before the CIT. 38 In *Vivitar*, however, there was no exclusion; instead, the Customs Service had admitted genuine trademark goods. 39 Section 1514 of the Tariff Act of 1930, which defines actions open to protest, allows only

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33. *Id.* at 1424. *Vivitar* presented two arguments. In one argument not considered by the court, the CIT would have jurisdiction because § 526(a) and (b) were laws relating to "revenue from imports within the meaning of § 1581(i)(1), and therefore under § 1581(i)(4) this court has jurisdiction over any claim arising out of the administration and enforcement of § 526(a) and (b)." *Id.* The court rejected this argument in footnote 9. The mere fact that there is a law which may effect importation or exclusion does not qualify the law as relating to revenues from imports. To follow such logic would make the rest of § 1581(i) meaningless. *Id.*


36. *Vivitar*, 585 F. Supp. at 1427. *See supra* note 11. § 1581(a) states: "[t]he 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 1515 of the Tariff Act of 1930."


38. *See supra* note 36.

protests of limited actions, including exclusions, but not admissions.\textsuperscript{40}

Lacking direct section 1581(a) jurisdiction, the court turned to section 1581(i)(4), which gives exclusive jurisdiction for matters arising out of the administration and enforcement of the subject matter of 1581(a).\textsuperscript{41} The court reasoned that the subject matter of section 1581(a) parallels that of sections 1514 and 1515 of the Tariff Act regarding the right to protest exclusions and the right of appeal to the CIT for denial of protest.\textsuperscript{42} "Thus, section 1581(i)(4) is a residual independent jurisdictional basis for litigating Customs Service administration and enforcement of the substantive matter that may be the subject of a protest, but where the protest remedy is inappropriate or unavailability."\textsuperscript{43} A protest is inappropriate under section 1581(a).\textsuperscript{44} Section 1581(i)(4), however, grants residual jurisdiction.\textsuperscript{45}

The court decided that jurisdiction could be found under section 1581(i)(4), despite two restraints on the section. First, in the legislative report that accompanied the 1980 Act, Congress required that this section could not create new causes of action.\textsuperscript{46} The court found that this section only delineated the jurisdiction of the CIT and the district courts.\textsuperscript{47} Second, section 1581(i) could not be used to circumvent the requirements of the protest procedure.\textsuperscript{48} This restraint was not relevant since Vivitar did not have a right to protest.\textsuperscript{49}

One concern of the court was the administrative and enforce-
ment nature of sections 1514 and 1515 of the Tariff Act. The court stated that since cases arising from sections 1514 and 1515 are always in the nature of "administration and enforcement" (filing, review, and denial of protests), a narrow reading of section 1581(i)(4) would "essentially render it meaningless" and duplicative. The court, citing United States v. Uniroyal, pointed out that section 1581(i) has importance independent of the other subsections. "[S]ection 1581(i) may be invoked only when no other remedy is available or the other remedies provided under other provisions of 28 U.S.C. 1581 are manifestly inadequate." The court concluded that section 1581(i)(4) cannot be limited to cases reviewing the administration and enforcement of the subject matters found in 1581(a).

The second basis for jurisdiction found by the Vivitar court was section 1581(i)(3), which refers to "embargoes and other quantitative restrictions," and includes statutes that ban goods for nonpublic health reasons:

In effect, section 1581(i)(3) gives this court jurisdiction over cases arising under the customs laws where the importation of goods is limited to a specific quantity. This includes a statutory limit of zero in the case of embargoes and statutes outlawing the importation of certain merchandise. Section 1526(a) provides just such a statutory limit: it outlaws the importation of all trademarked goods under certain circumstances.

The court argued that this meaning is evident upon the face of the statute, and in its legislative history. According to the court, the limiting language concerning public health and safety issues was intended to keep jurisdiction in the district courts for two public health related acts. Legislative history supported this statement. "[T]he Committee adopted a more precise subsection (i) in an effort to remove any confusion over

50. Id. at 1426.
51. 687 F.2d 467 (Fed. Cir. 1982).
52. Vivitar, 585 F. Supp. at 1426.
53. Uniroyal, 687 F.2d at 475.
55. See supra note 11.
57. See supra note 5.
the jurisdiction of the [CIT] regarding this or similar issues."

The court reasoned that since Congress explicitly restricted
the CIT's jurisdiction in only the public health areas, it "obvi-
ously intended section 1581(i)(3) to give this court jurisdiction
generally over statutes prohibiting importation of merchan-
dise." In the court's view, a different interpretation would
render the limiting language meaningless, a result which the
court could not justify.

The final rationale given by the court was the basic principle
of statutory construction. "Since . . . Congress expressly elimi-
nated [from section 1581(i)(3)] one type of statute outlawing
imports, by inference Congress intended other statutes barring
imports to be included."

2. The Court of Appeals for the Federal Circuit

The Court of Appeals for the Federal Circuit reviewed the
findings of the lower court. It noted that two recent district
court decisions expressly rejected the CIT's arguments, and
that jurisdiction for the Customs Court, and now the CIT, was
an exception to the federal question jurisdiction granted the
district courts. Therefore, it was proper to look to the CIT
first to determine whether an issue should be decided by that
court or a district court. Otherwise, the extremely broad
grant of power to the district courts would eclipse jurisdiction
in the CIT, and thwart Congress' intent to grant "exclusive ju-
risdiction over certain matters to the CIT." In fact, the Cus-
toms Court Act of 1980 created more exceptions to district
court power, thereby expanding CIT's jurisdiction without cre-

60. Id. at 48.
62. Id. (citing Dart Export Corp. v. United States, 43 C.C.P.A. 64, 74 (1956), cert. denied, 352 U.S. 824 (1956)).
63. This is the doctrine of expressio unius est exclusio alterius. See United States v. Douglas Aircraft Co., 510 F.2d 1387, 1392 (Fed. Cir. 1975). The doctrine is in line with the broad jurisdictional intent of Congress in § 1581(i).
65. Id. at 1559. The two cases were: COPIAT, 598 F. Supp. 844, 846 (D.D.C. 1984), and Olympus Corporation v. United States, 627 F. Supp. 911 (E.D.N.Y. 1985) (unpublished opinion).
67. Vivitar, 761 F.2d at 1559.
68. Id. (emphasis in original).
ating any new causes of action.69

The court stated further that CIT jurisdiction should be determined by focusing "solely on whether the claim falls within the language and intent of the jurisdictional grant to the CIT."70 Prior to 1980 there was no doubt that jurisdiction over section 526 claims properly belonged in the district courts.71 Yet, Congress' intent in the Customs Court Act was to consolidate in one court all claims against the government in international trade matters.72

Additionally, the circuit court felt that if Vivitar Corp. had raised any substantive trademark or unfair competition claims, the CIT would not have had jurisdiction.73 Such a claim between private parties does not fall within section 1581 of the 1980 Act.74 But the court also felt that the question in Vivitar of whether Customs regulations governing exclusion of goods are valid is a "question to which the CIT can bring expertise."75

Addressing the lower court's "corollary to protest jurisdiction under 28 U.S.C. § 1581(a)," the court agreed with the defendant "that the exclusion of goods by reason of the trademark thereon is not a matter which an importer may protest"76 as long as the dispute is between private parties.77 The court made clear that in matters involving disputes over trademarks between private parties the district court is the proper forum.78 However, if the issue is the validity of regulations or regulatory procedures, the CIT, as properly decided below, has jurisdiction

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69. Id. at 1560. See H.R. REP. No. 1235, 96th Cong., 2d Sess., at 45 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3756. For example:

Subsection (d) of proposed § 1581 is a new jurisdictional grant of authority to the Court of International Trade . . . [It] transfers exclusive jurisdiction to review a final determination of the Secretary of Labor refusing to certify workers as eligible for adjustment assistance under the Trade Act of 1974 from the United States courts of appeals to the [CIT].

Id.

70. Vivitar, 761 F.2d at 1560 (emphasis in original).

71. Id.

72. Id. H.R. REP. No. 1235, 96th Cong., 2d Sess., at 33 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3745. "[The addition of § 1581(i)] granted the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws." Id.

73. Vivitar, 761 F.2d at 1560.

74. Id.

75. Id.

76. Id.

77. Id.

78. Id.
under section 1581(a) and (i)(4).  
Finally, the court, without discussion, agreed with the lower court that alternate jurisdiction is available through section 1581(i)(3) and/or (4).  

B. COPIAT v. United States  

1. The District Court  

When the District Court for the District of Columbia took up the COPIAT case, the lower court decision in Vivitar had already been published.  
Intervenor-defendant, 47th Street Photo, cited the decision in its motion to dismiss for lack of jurisdiction.  

The court, however, rejected the motion, and held that the district court had general federal question jurisdiction under sections 1331 and 1338(a) of the United States Code, which specifically relate to trademark disputes.  
The court denied, without discussion, that this case came within the purview of the CIT's jurisdictional grant in section 1581.  

2. The Court of Appeals for the District of Columbia  

The Court of Appeals for the District of Columbia reviewed the case after the Federal Circuit handed down its Vivitar deci-

79. Id.  
80. Id. No explanation for this assertion is given outside of a citation to the use of the word "embargo" in the legislative history of § 526. Referring to § 526, Senator Kellogg said, "Mr. President, this is the first time I ever of in [sic] legislation that the United States proposed to enforce the trademark laws by a prohibition and an embargo against shipments." 62 CONG. REC. 11,603 (1922) (statement of Sen. Kellogg).  
82. Id. at 847. It also argued that the case be dismissed in order to avoid conflicting decisions and for judicial and legal resource preservation reasons. Id.  
83. Id. 28 U.S.C. §§ 1331, 1338(b) (1982). See supra note 19. The court also considered jurisdiction under title 15, § 1124. It held that there is not specific jurisdiction that arises from the Lanham Trademark Act. 15 U.S.C. § 1124 (1946) states in part: No article of imported merchandise which shall copy or simulate the name of the [sic] any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this Act . . . or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States . . . .  
84. COPIAT, 598 F. Supp. at 847.
sion. It defined the issue as being "whether actions of this sort may properly be brought in federal district court or whether they must in all cases be initiated in the Court of International Trade, with appellate jurisdiction in the Federal Circuit."

Judge Silberman, speaking for the court, acknowledged, as all courts had previously done, that without the Customs Court Act of 1980, the district courts would definitely have jurisdiction. However, the court noted that the 1980 act, in particular section 1581, expanded the jurisdiction of the CIT, and therefore restricted some jurisdictional power of district courts.

The court also reviewed and rejected the arguments of the Vivitar appellate decision. Reading the language of section 1581(a), the court concluded "that the matter referred to in section 1581(a) is the denial of protests, or simply protests." However, since this was not a case of exclusion, but of admission, there was no basis for a protest.

The next question addressed by the court was whether this reading of section 1581(i)(4) duplicates section 1581(a). Judge Silberman stated that "whereas Section 1581(a) only provides for jurisdiction over cases contesting the denial of a protest—in other words, challenging the basis of the denial—Section 1581(i)(4) (as applied to Section 1581(a)) provides additional jurisdiction over cases challenging the procedures—that is, the 'administration and enforcement'—generally governing such protests."

The court examined the merits of the argument for jurisdiction based upon actions against federal government agencies regarding "embargoes or other quantitative restrictions" under section 1581(i)(3). Again, the holding in Vivitar was re-

85. COPIAT, 790 F.2d 903 (D.C. Cir. 1986).
86. Id. at 905.
87. Id.
88. Id.
89. Id. at 906. In Olympus Corp. v. United States, 792 F.2d 315 (2d Cir. 1986), the court denied that this was an action arising from administration and enforcement of protests "simply because it tangentially relates to the protest procedure." Id. at 318. Like the District of Columbia Court of Appeals in COPIAT, it restricted § 1581(a) to protest only, "not of all issues that conceivably could arise in a protest action under a hypothetical fact situation." Id.
90. COPIAT, 790 F.2d at 906.
91. Id. (emphasis in original).
92. Id.
jected. The court debated whether the definition used by Vivitar was in fact the one intended by the drafters of section 1581. It inferred Congress' intent from the structure of section 1581(i)(1), relating to “revenue from imports or tonnage,” and (i)(2), relating to “tariffs, duties, fees, or other taxes on the importation of merchandise . . . .” The court rejected the Vivitar court’s definition as too broad, stating that “the structure of the statute belies any expansive reading of the term ‘embargo.’” The court felt that “embargo” should be read to refer to “trade policy, the sort of measures that have traditionally limited the importation of shoes, textiles, automobiles, and the like.”

The court, in its conclusion, acknowledged Congress' intent in the Customs Court Act of 1980 to unify international trade matters in a single, expert court. It pointed out, however, that the district courts still have jurisdiction under section 526(c) over suits between private parties for private enforcement or damages for violation of section 526. Thus, the possibility of conflicting results and forum shopping remained open.

93. Id. at 906-07.
94. Id. at 907. See supra note 11.
95. COPIAT, 790 F.2d at 907.
96. Id. The Olympus court took a different approach, but also denied the CIT jurisdiction. Quantitative restrictions, as meant by this section, apply to “numerical import restrictions such as those imposed by quotas.” Olympus Corp. v. United States, 792 F.2d 315, 319 (2d Cir. 1986). See American Ass'n of Exporters & Importers v. United States, 751 F.2d 1239, 1244 (Fed. Cir. 1985) (suit to challenge import quotas under § 1581(i)(3) properly brought in CIT). The court opined that it “[d]id not think” that a quantitative restriction of zero was what Congress had in mind when it passed § 1581(i)(3). 792 F.2d at 319. Addressing the argument that § 526 was an “embargo,” the court disputed so broad a use for that term, despite the use of the word in the debate on passage of § 526 in 1922. See supra note 80. “To treat section 526 as an ‘embargo’ would be to give that term a construction far broader than its ordinary meaning without any indication of such congressional intent.” Olympus, 792 F.2d at 319.
98. COPIAT, 790 F.2d at 907.
99. See id. at 907. The Customs Act of 1980 does not provide jurisdiction for suits between two or more private individuals. Thus, suits to force the re-exporting, destruction, removal or obliteration of merchandise bearing a protected trademark must be brought in any district court, with the likely result of conflicting decisions and forum shopping on international trade matters. Preventing conflicting decisions and forum shopping was a major goal of the 1980 act. See H.R. REP. No. 1235, 96th Cong., 2d Sess., at 19-20 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 3729, 3731.
II
The Supreme Court Decision in
K Mart Corp. v. Cartier, Inc.

On March 7, 1988, the Supreme Court handed down a decision on the jurisdictional issue,100 and returned the case to the calendar for reargument on the merits. The Court split 5-3 on the question of jurisdiction.101 Justice Brennan, writing for the majority, held that section 526 was not an embargo within the normal use of that term.102 In addition, he rejected the "corollary" to protest rationale suggested in Vivitar.103 Justice Scalia, joined by Justices Rehnquist and O'Connor, questioned the majority's definition of embargo. The plain meaning of the term showed an intent to give the CIT jurisdiction over any governmentally imposed prohibition on importation.104

A. The Court Rejects the Rationale of the District of Columbia Circuit Court of Appeals

Justice Brennan, in analyzing the jurisdictional issue, first reviewed the District of Columbia Circuit Court of Appeals' denial of 47th Street Photo's motion to dismiss.105 While agreeing with the result, Justice Brennan rejected the lower court's argument. Citing to common definitions of the term "embargo," he found no justification for limiting the term's meaning to trade policy. "[T]rade policy is not the sole, nor perhaps even the primary, purpose served by embargoes,"106 he stated, adding that Congress had not expressly intended such a limita-

102. Id. at 959.
103. Id. at 960. See supra notes 41-54, 76-79 and accompanying text.
105. Id. at 956-57.
106. Id. at 956. The Government typically imposes embargoes to protect public health, see, e.g., 21 U.S.C. § 381 (adulterated, misbranded, or unapproved foods, drugs, and cosmetics); safety, see, e.g., 15 U.S.C. § 1397 (motor vehicles that do not conform to federal safety standards); morality, see, e.g., 19 U.S.C. § 1305 (obscene pictures, lottery tickets, and articles for causing unlawful abortion); or to further interests relating to foreign affairs, see, e.g., 22 U.S.C. § 2370(a) (embargo on Cuba); law enforcement, see, e.g., 15 U.S.C. §§ 1241-44 (switchblade knives); or ecology, see, e.g., 19 C.F.R. § 12.60 (1987) (fur-seal or sea-otter skins).
Id. at 956-57.
tion. In fact, if such a meaning had been intended, the limitations that Congress imposed on jurisdiction under sections 1581(i)(3) and (j) would have been unnecessary.

B. Section 526 is not an Embargo Within the Common Meaning of the Term

The Court decided that the term "embargo" meant "a governmentally imposed quantitative restriction—of zero—on the importation of merchandise." This definition followed from the "ordinary meaning" of the word, and "the meaning that Congress apparently adopted in the statutory language." Thus, an importation prohibition that is not set or controlled by the government is not an embargo.

The Court found that section 526 is not a government restriction, but an aid available to private parties to help them enforce a private right:

[Section 526] 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 . . . . The private party, not the Government, by deciding whether and how to exercise its private right, determines the quantity of any particular product that can be imported.

The Court observed that inclusion of section 526 within the meaning of "embargo" would "distort the term 'embargo' beyond its ordinary meaning . . . ." In support of this argument, the Court suggested that there are similar governmental aids which clearly are not considered embargoes. An injunction enforcing an importation prohibition clause, for example, is a governmentally imposed prohibition on importation, used at the request of a private party who seeks to enforce a private right.

The Court declared that, like an injunction, section 526 grants a trademark owner the exclusive right to exclude im-

107. Id. at 957.
108. Id. See supra note 11. 28 U.S.C. § 1581(j) states: "The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930."
111. Id.
112. Id.
113. Id. at 958.
114. Id. at 957.
ports of foreign-made goods bearing the owner's duly registered trademark. The Government can neither set any limits, nor control such imports.\textsuperscript{115} The Court challenged Justice Scalia's definition of embargo as "\textit{any} governmental 'import regulation that takes the \textit{form} of a prohibition, regardless of . . . its ultimate purpose.}'\textsuperscript{116} The majority argued such a meaning would include not only the injunction scenario, but also other import regulations that require import licenses, tags, or inspections before acceptance by the Customs officials.\textsuperscript{117} The Court found no inconsistency between its reading of the statute and the express Congressional intent to clarify and unify the CIT's jurisdiction.\textsuperscript{118} In fact, the Court pointed out that, prior to the enactment of the Customs Courts Act of 1980, legislation was proposed twice to make a sweeping jurisdictional grant to the CIT.\textsuperscript{119} According to the Court, the rejection of these broader grants, and the adoption of the more specific grant, showed an intent to constrain the CIT's jurisdiction: "Congress opted for a scheme that achieved the desired goals of uniformity and clarity by delineating precisely the particular customs-related matters over which the [CIT] would have exclusive jurisdiction."\textsuperscript{1120} The Court suggested that even the

\begin{itemize}
  \item \textsuperscript{115} Id. at 957-58.
  \item \textsuperscript{116} Id. at 958 (emphasis in original).
  \item \textsuperscript{117} Id. The Court used 19 C.F.R. § 12.7(a) and (b), and § 12.8 as examples. Section 12.7(a) requires a valid permit before milk or cream can be imported. 19 C.F.R. § 12.7(a) (1985). Section 12.7(b) requires that a tag with certain specified information be attached to any container of imported milk or cream. Id. at § 12.7(b). Section 12.8 requires that all imported meat be inspected prior to entry. Id. at § 12.8.
  \item \textsuperscript{120} \textit{K Mart Corp.}, 108 S. Ct. at 959. As a result the CIT has jurisdiction over suits involving import related tariffs, duties, fees and taxes as long as they were not imposed for the purpose of raising revenue. The Court also points out that the CIT does not have:

  direct review . . . of facial challenges to conditions of entry, such as labeling or marking requirements, see, \textit{e.g.}, 19 C.F.R. §§ 11.6-11.7 (1987) (packaging and marking of distilled spirits, wines, and malt liquors); §§ 11.12-11.12b (labeling of wool, fur, and textile products), and inspection, see, \textit{e.g.}, [19 C.F.R.] § 11.1 (inspection of cigars, cigarettes, medicinal preparations, and perfumery); § 12.8 (inspection of meats).
\end{itemize}
choice of wording as to embargoes in contrast to importation prohibitions showed an intent not to restrict CIT jurisdiction to embargoes exclusively.121

The Court readily admitted that there is little reason for the exclusions. Yet, it did not believe that these omissions were inconsistent with Congress' intent to utilize the expertise of the Customs Courts and the United States Court of Customs and Patent Appeals, since these courts did not have, and Congress did not expect them to develop, such expertise.122 The Court concluded that the purpose and legislative history of the 1980 act supported its definition of the term "embargo."123

III
Jurisdiction Appropriately Lies in the Court of International Trade

Since the CIT's jurisdictional grant is exclusive of the district courts, this trademark issue must fall explicitly within one of the statutes that grant the CIT exclusive jurisdiction. In K Mart Corp. v. Cartier, Inc., it should fall within section 1581(a) or (i) of Title 28, which grants jurisdiction to the CIT in civil actions against the United States.

A. Section 1581(i)(3)

The Supreme Court should have found that section 1581(i)(3) provides a basis for jurisdiction in this case. Under section 1581(i)(3) the "Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States ... that arises out of any law of the United States providing for ... embargoes or other quantitative restrictions ... ."124 Does section 526 of the Tariff Act qualify as an embargo or other quantitative restriction?

As Justice Scalia pointed out in his dissent, one of the drafters of section 526, Senator Kellogg, used the word "embargo" in the Congressional Record when referring to that section.125

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122. Id.
123. Id.
While the Second Circuit, in *Olympus*, gave little weight to this,\(^{126}\) it is at least an indication that section 526 *could be considered* an embargo within that term's meaning.\(^{127}\)

More persuasively, the overall intent and structure of section 1581(i) points to a broad reading of that section.\(^{128}\) The primary purpose of section 1581 is to ensure that civil cases involving international trade where the United States is a party should be brought before the CIT.\(^{129}\)

Subsections (a)-(h) list the major jurisdictional grants that the framers desired to give the CIT.\(^{130}\) In subsection (i), it is evident that the framers sought to provide a residual basis to provide jurisdiction for the complaints that properly involve international trade and the United States government, but "[fall] through the cracks" of subsections (a)-(h):

Simply put, subsection (i) is the embodiment of the principle that if a cause of action involving an import transaction exists, other than as provided for in subsections (a)-(h) of proposed section 1581, then that cause of action should be instituted in the U.S. Court of International Trade rather than the Federal district courts or courts of appeals.\(^{131}\)

A proper reading of subsection (i) suggests that it is intended to cover each method by which government involves itself in an international trade transaction. First, (i)(1) relates to all revenue gathered by the government from imports or tonnage.\(^{132}\) Second, the wording in (i)(2) covers all other reasons for monetary payments, other than those relating to the raising of revenue.\(^{133}\) Third, with "embargoes or other quantitative restriction," in (i)(3), the government can either bar or restrict the volume of entries into the country.\(^{134}\) In (i)(4), finally, the government can have an impact on an international trade transaction through administrative and enforcement proce-
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Section 526 falls into subsection (i)(3). While the Supreme Court and other courts have rejected a broad reading of section 526 to include it in the embargo category,135 this is not required. The broad reading of section 1581(i), as suggested above, shows that dividing the phrase “embargoes and other quantitative restrictions,” and analyzing section 526 as either an embargo or a quantitative restriction is unnecessary and erroneous. The purpose of subsection (i)(3) is to include in the CIT’s grant of jurisdiction the full range of volume restrictions that the government may impose. The words “[e]mbargoes and other quantitative restrictions,” when read together, show the spectrum of volume restrictions available to the government.137

An embargo is a “[g]overnment order prohibiting commercial trade with individuals or businesses of other nations.”138 It is a bar to entry. “Other quantitative restrictions” are also volume restrictions. They include all other governmentally imposed import restrictions that do not come within the meaning of “embargo.”139 Section 526 makes it unlawful to import foreign manufactured merchandise bearing a genuine trademark, registered and owned by an American citizen or entity.140 It, too, is a bar to entry.141

The intent of the framers of the Customs Act of 1980 should control because that intent is unambiguous. “[T]he 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 [CIT]. This provision makes it clear that all suits of the type specified are properly commenced only in the [CIT].”142 Section 1581 specifies that

135. Id.
136. See K Mart Corp., 108 S. Ct. at 957-59; COPIAT, 790 F.2d 903, 907 (D.C. Cir. 1986); Olympus, 792 F.2d 315, 319 (2d Cir. 1986).
137. COPIAT, 790 F.2d at 907. “[S]ubsection (i)(3) covers restrictions on the quantity of imports.” Id. (emphasis in original).
140. See supra note 5 and accompanying text.
141. See, e.g., K Mart Corp., 108 S. Ct. at 961 (Scalia, J. dissenting) (“Surely § 526(a) prohibits imports, and that prohibition, enacted by Congress and enforced by an executive agency, is surely governmentally imposed.”).
suits where the Government is a party properly belong in the CIT.

The Supreme Court argued that the ability of private parties to invoke section 526 in order to protect a private right runs contrary to the "ordinary meaning" of "embargoes." This argument again presumes that the phrase "embargoes or other quantitative restrictions" is to be read narrowly and separately. The purpose of the subsection is to insure that any sort of restriction of volume imposed by the government, provided it does not relate to public health, is to be heard by the CIT.

The Court analogized section 526 to an injunction that prevents importation in violation of an importation clause. It argued that section 526, in all aspects, more clearly resembles this type of an injunction than an embargo. The Court implied that an injunction is not, and could not be, an embargo.

The dissent attacked this injunction analogy, arguing that an injunction is not an embargo, not because private parties are involved, but because embargoes are generally associated with legislative or executive actions and not judicial actions.

The suggested broad reading of section 1581(i)(3) eliminates the majority's distinction between injunctions and embargoes. Assume, for example, that in the majority's injunction scenario, the private party who sued and received this injunction accused the Customs Service of improperly enforcing it. In this case, the private party would clearly go to the CIT. While the injunction does not qualify as an embargo, it falls within the "other quantitative restrictions" segment of this section. It is a restriction on importation imposed by the government, and is, therefore, a type of action to which the CIT can apply its expertise, ensuring a consistent result.

145. See supra notes 113-15 and accompanying text.
147. Id. at 957. "Yet one could no more deem the private party's enforcement of its 'importation prohibition' an 'embargo' than deem damages for its breach a 'tariff[, duty[, fee[, or other tax[ on the importation of merchandise,' 28 U.S.C. § 1581(i)(2)."
148. Id. at 962 (Scalia, J., dissenting).
149. Id. at 957.
B. Section 1581(a) and Section 1581(i)(4)

The Court, in examining the proposed "corollary" to protest jurisdiction as put forth in Vivitar, adopted the reasoning of the court of appeals in COPIAT:151 "Since this suit involves no 'protest,' much less a denial of one, it cannot by any stretch of the imagination involve a 'law . . . providing for . . . administration and enforcement' of a protest."152

The Court correctly interpreted the plain meaning of the statute, but did not elaborate on its rejection of the "corollary" to protest jurisdiction. Further analysis explains the inherent logical flaw of the Vivitar decisions.

Section 1581(a) gives the CIT exclusive jurisdiction over parties contesting denial of protests under section 1515 of the Tariff Act.153 In order to lodge a protest, a party must have imported merchandise, and it must have been excluded from entry or delivery.154

In Olympus Corp. v. United States, the court had suggested that "[s]ection 1514, which outlines the circumstances under which a protest may be made, makes no provision for a protest where the Customs Service refuses to exclude merchandise; it permits the filing of a protest only when exclusion of merchandise takes place under a provision of the customs law."155 The Supreme Court decided that since a protest was not and could not be filed, section 1581(a) will not provide a basis for CIT jurisdiction in this case.156

The Vivitar courts, however, found jurisdiction by combining section 1581(a) and (i)(4), calling the combination a "corollary to protest jurisdiction."157 The court reasoned that the corollary is a natural progression of sections 1514, 1515, 1581(a) and 1581(i)(4); moreover, since a party to an importation is permitted to protest the exclusion of his merchandise under any provision of customs laws, if that protest is denied by a Customs

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152. K Mart Corp., 108 S. Ct. at 960 (quoting Olympus, 792 F.2d at 318).
officer, it follows that, in an appeal, a non-importing party, likely to be injured by such an import, should be allowed to protest the failure to exclude an import (an issue of administration and enforcement of the subject matter of section 1514), and denial of such a protest gives the court jurisdiction.

The Vivitar courts contended that section 1581(i)(4) was a grant of a "residual independent jurisdictional basis for litigating Customs Service administration and enforcement of the substantive matter that may be the subject of a protest, but where a protest remedy is inappropriate or unavailable."

1. The Plain Meaning of Section 1581 Does Not Allow For a "Corollary to Protest Jurisdiction"

The CIT's grant of jurisdiction is exclusive of the district courts. As such, it carves out its subject matter from the broad residual jurisdiction of the district courts. Therefore, the grant of jurisdiction must be clear and well defined. What does not fall within the explicit jurisdictional grounds of the CIT must fall within the domain of the district courts. Section 1514 is explicit not only on what matters are subject to protest, but also on who is entitled to lodge a protest. The plaintiffs in K Mart Corp. v. Cartier, Inc. do not qualify in either category.

Section 1581(i)(4), too, is explicit. Only matters of "administration and enforcement" are granted jurisdiction by this subsection. It is illogical that failure to qualify for jurisdiction under protest clauses enables a party to qualify under administration and enforcement of the protest clause just because the protest remedy is inappropriate or unavailable. In that case, if the issue is not one of administration and enforcement, jurisdiction is in the district courts, not the CIT. As the CIT in Olympus observed:

[This action does not arise out of the "administration and enforcement" of protests simply because it tangentially relates to the protest procedure. We think that section 1581(i)(4) prop-

162. Vivitar, 761 F.2d at 1560.
165. See supra note 11.
erly 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 under a hypothetical fact situation.\textsuperscript{166}

The CIT expressed concern in \textit{Vivitar} that denying their reading of section 1581(i)(4) would render it meaningless.\textsuperscript{167} This, the COPIAT appellate court observed, is incorrect: \textit{"[W]hereas Section 1581(a) only provides for jurisdiction over cases contesting the denial of a protest—in other words, challenging the basis of the denial—Section 1581(i)(4) (as applied to Section 1581(a)) provides additional jurisdiction over cases challenging the procedures—that is, the ‘administration and enforcement’—generally governing such protests."}\textsuperscript{168}

The words “administration and enforcement,” in ordinary meaning, apply to issues of procedural management and implementation of the subject matters of section 1581(a)-(h) and (i)(1)-(3). If the Customs Service does not properly follow administrative procedures or does not enforce the law, then (i)(4) gives the CIT jurisdiction over those administrative or enforcement matters.\textsuperscript{169}

\section*{Conclusion}

This Note both concurs with and disputes the Supreme Court’s decision in \textit{K Mart Corp. v. Cartier, Inc.} The Court properly decided that straight protest jurisdiction was not available to the plaintiff. With respect to the “corollary to protest jurisdiction,” the Court also correctly decided against jurisdiction, since, without a legal protest, there can be no administration and enforcement issue.

This Note suggests, however, that a proper analysis of section 1581(1)(3) should have precluded a finding of jurisdiction in the district court and led to dismissal of the case. Given the express intent of Congress, and the structure of section 1581, it is clear that subsection 1581(i) should be read broadly to include sec-

\begin{footnotes}
\item[166.] \textit{Olympus}, 792 F.2d at 318.
\item[167.] \textit{Vivitar}, 585 F. Supp. at 1426.
\item[168.] \textit{COPIAT}, 790 F.2d at 906 (emphasis in original).
\item[169.] For instance, § 1514(c) describes the form, number and amendment of protests and filing of protests. If a Customs Service officer failed to recognize an importer’s right to amend his protest, then under § 1581(i)(4) that importer would have CIT jurisdiction to hear that complaint. On the other hand, § 1581(a) would not provide such a basis, since it applies to the basis of denial of a protest. 19 U.S.C. § 1514(c) (1984).
\end{footnotes}
tion 526 within the scope of the phrase “embargoes and other quantitative restrictions.”

Dismissal would have meant, to the litigants’ dismay, that the substantive matters in COPIAT would not have been decided by the Supreme Court. The decision reached there, however, may well cause more problems in the future for those practicing in the international trade field. As Justice Scalia observed, “the jurisdictional question, if decided incorrectly, may generate uncertainty and hence litigation into the indefinite future.”

With the decision in K Mart Corp., “[i]t remains to be seen what other limitations on the ordinary meaning of ‘embargo,’ no more apparent to the naked mind than the present one, may exist.”

171. Id. at 962.