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PERSPECTIVE

Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992

*The Honorable Gregory W. Carman**

I. INTRODUCTION

As we approach the third millennium, prefaced by the 20th century, we recognize as an axiom that what has gone before will affect what will happen later. Although we have lived our lives in the 20th century, it is not so easy to comprehend fully the significance of all the events of our time. Our "current events" are certainly a continuance of the past and, without doubt, a portent of the future. We have been astonished by nuclear power, air and outer space travel, television, computers, the genetic code, miracle drugs, and countless other advances. Social change, environmental awareness, high-speed general communication and electronic transfers have all made us feel we are living in an even smaller world. While it is impossible to predict how all of the events of the 20th century

* Judge, United States Court of International Trade.

will affect our lives in the 21st, it is possible to forecast that international trade will be even more significant tomorrow than today.

The United States and the other countries of the world will continue to develop rules and laws governing their relationships in international commercial matters as the years ensue. As part of that agenda, lawyers and members of the international trading community should be familiar with the dispute resolution provisions of the United States Court of International Trade and some of the procedural and substantive problems of the Court. The Court's function is to judicially review disputes under the customs and trade laws of the United States.

II. BACKGROUND

The Constitution of the United States gives to Congress the power to regulate commerce with foreign nations[1] and "to lay and collect taxes, duties, imposts and excises."[2] *It requires all such duties, imposts and excises to be uniform throughout the United States.*[3] In 1789, the First Congress of the United States passed the Tariff Act of July 4, 1789 "[f]or the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported."[4] That first tariff legislation has been followed by about 200 statutes pertaining to the customs and international trade laws of the United States.[5] Many were merely amendments to previous tariff acts—others were policy-making in character.[6]

In 1890, a Board of General Appraisers, consisting of nine members, was established under the general supervision of the Secretary of the Treasury to exercise "supervision over appraisements and classifications, for duty, of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports."[7] The Board of General Appraisers was renamed the United States Customs Court, an Article I court, in 1926, although its powers and jurisdiction remained similar to those of the old Board.[8] In 1956, the Customs

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1 U.S. Const. art. I, § 8, cl. 3.

2 *Id.* art. I, § 8, cl. 1.

3 *Id.* (emphasis added).

4 Tariff Act of July 4, 1789, 1 Stat. 24 (1789).

5 Hon. Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. XI, XII (West Supp. 1992).

6 *Id.*

7 Customs Administrative Act, Ch. 407, §§ 12-13, 26 Stat. 131, 136 (1890).

8 H.R. Rep. No. 1235, 96 Cong., 2d Sess. 18 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, [hereinafter "Committee Report"].

Court was declared to be established under Article III of the United States Constitution.[9]

In 1970, Congress, recognizing that the procedures and jurisdiction of the Court were in need of significant revision, made sweeping procedural reforms, but left substantive issues regarding the jurisdiction and powers of the Court unresolved.[10] The 1979 Trade Agreements Act granted the Customs Court new jurisdiction, particularly with regard to antidumping and countervailing duty cases and, for the first time, authorized the Court to grant injunctive relief in customs cases.[11] In 1980 the Court was empowered to issue money judgments and provide equitable relief.[12]

Nevertheless, it was recognized by Congress that the primary statute governing the United States Customs Court had not kept pace with the increasing complexities of international trade litigation.[13] The result was a jigsaw puzzle with so many missing pieces that it was difficult for everyone except the closest observer to discover what the completed puzzle was intended to show.[14]

The earlier jurisdictional statutes of the Customs Court were construed to facilitate challenges to classification and valuation of merchandise determinations.[15] Although multilateral negotiations led to a diminution in tariff duties and, consequently, to a lessening of importance, at least from a revenue point of view, of classification and valuation cases, antidumping and countervailing duty statutes assumed greater importance.[16]

Many lawsuits involving international trade issues were commenced in the federal district court instead of the United States Customs Court because it was difficult to determine in advance whether a particular case fell within the jurisdictional scope of the Customs Court and because powers of the Customs Court were limited.[17] Most district courts refused to entertain such suits, citing the constitutional mandate requiring that duties be uniform throughout the United States, thus endeavoring to preserve the congressional grant of exclusive jurisdiction to the United States Customs Court for judicial review of all matters relating to im-

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9 28 U.S.C. § 251(a) (1988).

10 Committee Report, *supra* note 8, at 18, *reprinted in* 1980 U.S.C.C.A.N. at 3730.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 18-19.

15 *Id.* at 19.

16 *Id.*

17 *Id.*, *reprinted in* 1980 U.S.C.C.A.N. 3730-31.

ports.[18] The result was inconsistent judicial decisions, with litigants proceeding with caution when choosing a forum for judicial review.[19] Furthermore, the type of relief available was greatly dependent upon the plaintiff's ability to persuade a court that it possessed jurisdiction over a particular case.[20] Some individuals obtained relief, while others, who by chance selected the wrong forum, were denied relief.[21]

With the growth in international trade suits in the federal district court, dismissals for *lack of jurisdiction* increased.[22] The House Legislative Committee Report stated that "Congress is greatly concerned that numerous individuals and firms, who believe they possess real grievances, are expending significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case."[23] Recognizing these problems, Congress passed the Customs Courts Act of 1980, which expanded and clarified the jurisdiction of the United States Customs Court from a substantive and remedial standpoint.[24] The name of the Court was changed from the United States Customs Court to the United States Court of International Trade to reflect "more accurately . . . the *court's clarified* and *expanded jurisdiction* and its new judicial functions relating to international trade."[25] Senator Dennis DeConcini, the Senate sponsor of the Customs Court Act of 1980, indicated that the law would "eliminate the considerable jurisdictional confusion" that existed at the time between the other federal courts and "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."[26]

The prophecy of Senator DeConcini will be examined in the following remarks. It is important to note, however, that to date this prophecy has not been fulfilled.

III. THE COURT

The Court of International Trade is the only national trial court in the United States established under Article III of the Constitution. Arti-

[18] *Id.* at 3731.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* (emphasis added).
[23] *Id.*
[24] Re, *Litigation Before the United States Court of International Trade, supra* note 5, at XIII.
[25] Committee Report, *supra* note 8, at 20, *reprinted in* 1980 U.S.C.C.A.N. at 3732 (emphasis added).
[26] 126 Cong. Rec. 27, 063 (1980).

cle III provides that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may, from time to time, establish.[27] The judges, both of the Supreme Court and the inferior courts, hold their offices during good behavior and receive compensation which shall not be diminished during their continuance in office.[28]

The Court is authorized nine judges who are appointed by the President, with the advice and consent of the Senate.[29] The judges, as with all other Article III judges, may be designated and temporarily assigned by the Chief Justice of the United States to perform judicial duties in any United States Circuit Court of Appeals or any United States District Court.[30] The Court of International Trade possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.[31]

IV. JURISDICTION

The Court's jurisdiction, which is civil in nature, includes civil suits arising from numerous types of actions by agencies as the result of import transactions.[32] The Court's authority pertains to the classification and valuation of merchandise,[33] charging duties and fees on the importation of merchandise, the exclusion of merchandise from entry under provisions of the customs laws, the liquidation of entries, the refusal to pay drawback, and challenge to antidumping and countervailing duty cases.[34] In addition, the Court has jurisdiction over actions to review the denial, revocation, or suspension of a customs broker's license,[35] determinations concerning eligibility for trade adjustments under the Trade Act of 1974,[36] and penalty cases.[37]

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27 U.S. Const. art. III, § 1.

28 *Id.*

29 28 U.S.C. § 251(a) (1988).

30 *Id.* § 293(a).

31 *Id.* § 1585.

32 *Id.* §§ 1581-1584.

33 Classification cases are concerned with the tariff schedules of the United States (TSUS) and the Harmonized Tariff Schedule of the United States (HTSUS), an international agreement systematizing the classification of goods and implementing the International Convention on Harmonized Commodity Description and Coding System. 19 U.S.C. § 3001 (1988).

34 28 U.S.C. §§ 1581-1584 (1988).

35 *Id.* § 1581(g).

36 *Id.* § 1581(d).

37 *Id.* § 1582.

V. RESIDUAL JURISDICTIONAL POBLEMS

If Congress had set out to create a jurisdictional gauntlet for litigants, it is difficult to imagine how it could have designed a better system than that which has resulted since the enactment of the Customs Courts Act of 1980.

The subject matter jurisdiction of the Court of International Trade was revised by 28 U.S.C. § 1581. *Exclusive* jurisdiction was conferred upon the Court pertaining to the various civil actions which I have just discussed.

First, the primary jurisdictional statute of the Court, 28 U.S.C. § 1581, as it has been interpreted by the Courts, presents a confusing and costly jurisdictional maze which is seemingly designed to deny litigants easy access to the Court of International Trade to resolve legitimate customs and international trade disputes. Litigants must slide exactly into a glove of eight jurisdictional fingers, known as 28 U.S.C. § 1581(a)-(h) or they are out of court. The residual jurisdiction section 1581(i) can only be used under exceptional circumstances. One example is where the jurisdictional fingers in 28 U.S.C. § 1581(a)-(h) provide a manifestly inadequate remedy. In this situation, the Court may resort to 28 U.S.C. § 1581(i).

Second, there continues to be considerable jurisdictional confusion between the Court of International Trade and the federal district courts. This confusion has impeded the availability of judicial review in the field of international trade where the goals of national uniformity and expeditious resolution of disputes, although worthy objectives, appear to be evanescent.

VI. THE STATUTORY SCHEME IN THE COURT OF INTERNATIONAL TRADE

In 28 U.S.C. § 1581(a)-(h), the statute sets forth with *specificity* the Court's *exclusive* jurisdiction over classification and valuation cases, antidumping and countervailing duty determinations, review of administrative decisions by the Secretary of Labor pertaining to the granting or denial of eligibility of workers for adjustment assistance, decisions by the Secretary of the Treasury denying, revoking, or suspending customs brokers' licenses or permits, and other matters.

Today, it is essential for plaintiffs to recognize that if provisions for relief can be found in the enumerated subsections (a)-(h), plaintiffs must follow that jurisdictional pathway as a general rule to ensure that the

Court of International Trade will have jurisdiction to resolve the issues in the case before seeking jurisdiction under § 1581(i).

It is important to examine the precise language of 28 U.S.C. § 1581(i), which provides as follows:

> 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 [which prohibits the importation of various immoral articles], the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

The interpretation that a plaintiff must first resort to the specific provisions set forth in 1581(a)-(h) before looking to (i) was early expressed by our appellate court in 1982 in *United States v. Uniroyal, Inc.*.[38] In *Uniroyal*, plaintiff sought declaratory and injunctive relief on account of the Customs Service's determination requiring certain markings on merchandise. The United States Court of Customs and Patent Appeals, the predecessor court to the United States Court of Appeals for the Federal Circuit, held that the Court of International Trade did not have jurisdiction to hear an importer's challenge to a Customs Service ruling under 1581(i), because the importer could have filed a protest following the statutory scheme under 1581(a). The Court said that "[t]he jurisdiction of the Court of International Trade under § 1581(i) is expressly 'in addition to the jurisdiction conferred . . . by subsections (a)-(h),' and the legislative history of § 1581 further evidences Congress' intention that subsection (i) not be used generally to bypass administrative review by meaningful protest."[39]

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[38] 687 F.2d 467, 472 (C.C.P.A. 1982).
[39] *Id.*

In *Miller & Co. v. United States*,[40] an importer endeavored to challenge a countervailing duty order pertaining to pig iron from Brazil. The Court of Appeals, affirming the Court of International Trade, held the importer lacked standing to invoke the exclusive jurisdiction of the Court of International Trade. Chief Judge Markey observed in part:

> The jurisdiction of the Court of International Trade is set forth in 28 U.S.C. § 1581. Subsections (a)-(h) give that Court *exclusive* jurisdiction over specific types of civil actions. [Plaintiff] must establish standing under subsection (i), a *broad* residual jurisdictional provision.
>
> Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be *manifestly inadequate*. Where another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate.[41]

The *manifestly inadequate* element is a judicially-required prerequisite that appears nowhere in the statutory terminology or the legislative history.

Although Chief Judge Markey referred to 1581(i) as a *broad residual jurisdictional provision*, the Court of Appeals for the Federal Circuit has actually interpreted 1581(i) narrowly from a jurisdictional standpoint.[42] For example, in *National Corngrowers* the Court said in part:

> [One cannot] ignore the precepts of subsection 1581 and [attempt] to circumvent the Congressionally mandated process by immediately filing suit . . . . The jurisdictional statute is set up to reflect existing law and not to expand the Court of International Trade jurisdiction to the point of creating new causes of action not founded on other provisions of existing law.[43]

This narrow implementation appears to have exacerbated the problem. Congress endeavored to do away with the jigsaw puzzle approach pertaining to arcane jurisdictional issues. The narrow interpretation given to 1581(i) by the courts has contributed to the effect of requiring individuals and firms that have real international trade and customs law grievances to expend significant amounts of time and money in sometimes futile efforts to obtain judicial review on the merits of the case. The House Committee on the Judiciary stated:

> Subsection (i) is intended only to confer subject matter jurisdiction

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[40] 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988).

[41] *Id.* at 963 (citations omitted) (emphasis added).

[42] *See, e.g., Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547 (Fed. Cir. 1988); *American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Lowa Ltd. v. United States*, 561 F. Supp. 441 (Ct. Int'l Trade 1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984); *United States v. Uniroyal*, 687 F.2d 467 (C.C.P.A. 1982).

[43] *Nat'l Corn Growers*, 840 F.2d at 1556.

upon the court, and not to create any new causes of action not founded on other provisions of law.

The purpose of this broad jurisdictional grant is to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade. This provision makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade. The Committee has included this provision in the legislation to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction. The grant of jurisdiction in subsection (i) will ensure that these suits will be heard on their merits.[44]

Commentators have opined that the lack of a meaningful statutory jurisdictional route, coupled with overly narrow jurisdictional interpretations as to the jurisdiction of the Court of International Trade, has left America with a Court that is approaching the 21st century with 19th century jurisdiction.[45] This statutory scheme in the Court of International Trade between the relationship of 28 U.S.C. § 1581(a)-(h) and 28 U.S.C. § 1581(i) has resulted in limiting access by litigants to resolve legitimate cases and controversies pertaining to customs and international trade cases because (1) of the narrow interpretation by the courts of the jurisdictional statute 28 U.S.C. § 1581 and (2) of the statutory scheme itself.

VII. THE COURT OF INTERNATIONAL TRADE OR THE DISTRICT COURT?

Access to the Court of International Trade has been further limited because litigants do not know whether they should sue in the Court of International Trade or the district court to secure relief in customs and international trade cases or controversies. A discussion of some of the so-called "gray-market" trade cases exemplifies the dilemma confronting litigants when they must decide in which forum to commence their action. A "gray-market" good is a foreign-manufactured good bearing a valid U. S. trademark, which is imported without the consent of the United States trademark owner.

In *Vivitar Corp. v. United States*,[46] the plaintiff-owner of the Vivitar trademark sought an order directing the Customs Service to exclude

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44 Committee Report, *supra* note 8, at 47, *reprinted in* 1980 U.S.C.C.A.N. at 3759.

45 Andrew P. 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, 801 (1984); *see* Marilyn-Joy Heintz, Comment, *The Residual Jurisdiction Controversy of the United States Court of International Trade*, 16 BROOK. J. INT'L L., 341, 355 (1990).

46 585 F. Supp. 1419 (Ct. Int'l Trade 1984), *aff'd*, 761 F.2d 1552 (Fed. Cir. 1985).

from entry any merchandise bearing the Vivitar trade name. The Court observed that, while the district courts generally have jurisdiction over trademark cases, citing 28 U.S.C. § 1338 (1976), the Court of International Trade has jurisdiction generally over cases arising out of international trade disputes. In determining whether the case should belong in the district court or in the Court of International Trade, the Court indicated it was necessary that the gravemen of the complaint be examined. Because the relief sought related to regulations promulgated by Customs and their administration and enforcement, the Court took jurisdiction under 28 U.S.C. 1581(i)(4).

In *Olympus Corp. v. United States*,[47] an American subsidiary of a foreign manufacturer of trademarked goods sought declaratory and injunctive relief declaring Customs regulations, which permitted importation of gray-market goods, invalid. The Court of Appeals rejected the argument that the Court of International Trade had exclusive jurisdiction over the Tariff Act claim and found that the district court properly asserted jurisdiction over the dispute. The Court determined that the Customs regulations were valid.

In *Coalition to Preserve the Integrity of Am. Trademarks v. United States*,[48] the Court held that the district court had jurisdiction to hear an action for declaratory judgment regarding the validity of Customs Service regulations that were in conflict with the Tariff Act of 1930 and the Lanham Trademark Act of 1946 under the grant of general federal question jurisdiction.[49] The Court also specifically declined to follow the holding in *Vivitar*, which conferred jurisdiction upon the Court of International Trade. The Court, however, reversed the district court's holding that the Customs regulations were valid, by finding that Customs' interpretation of the statutes did not meet the "sufficiently reasonable" standard.

In *K Mart Corp. v. Cartier, Inc.*,[50] Justice Brennan, writing for the majority in a five-to-three decision, rejected the theory that Section 256 of the Tariff Act of 1930, which prohibits importation into the United States of any merchandise of foreign manufacture if the merchandise bears a trade name, was an embargo. The Supreme Court *held* that:

> (1) a federal district court has jurisdiction to hear a challenge to a regulation of the Secretary of the Treasury permitting importation of certain gray-market goods; and

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47 627 F. Supp. 911 (E.D.N.Y. 1985), *aff'd*, 792 F.2d 315 (2d Cir. 1986).

48 790 F.2d 903 (D.C. Cir. 1986), *reversing* 598 F. Supp. 844 (D.D.C. 1984).

49 *See* 28 U.S.C. § 1331 (1988).

50 485 U.S. 176, 183 (1988).

(2) the Court of International Trade did not have exclusive jurisdiction under 28 U.S.C. § 1581(i)(3) which grants such jurisdiction over certain suits involving embargoes or other suits involving quantitative restrictions on the importation of merchandise for reasons other than the protection of public health or safety.

The Court accepted the meaning of embargo adopted by Congress in its statutory language to mean "a governmentally-imposed quantitative restriction—of zero—on the importation of merchandise."[51] Justice Brennan indicated that the mere allowance of a private party to enforce rights using government assistance was not an embargo.[52]

Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connnor in his dissent, concluded that § 526 falls within the ordinary meaning of the term embargo.[53] He buttressed his position not only with lexicographic definitions but legislative history as well. Significantly, Justice Scalia pointed out that the Supreme Court was blurring jurisdictional lines established by Congress. Justice Scalia stated:

> "[w]hile the gray-market question is of greater immediate economic importance . . . the jurisdictional question, if decided incorrectly, may generate uncertainty and hence litigation into the indefinite future. In my view, the Court's resolution of this question strains the plain language of the statute, and blurs a clear jurisdictional line that Congress has established.
>
> The Court of International Trade's exclusive jurisdiction extends to any civil action against the United States, its agencies or officers, "that arises out of any law of the United States providing for . . . embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(3). The statute does not define "embargo," and there is no reason to give it anything other than its ordinary meaning. An embargo is "a prohibition imposed by law upon commerce either in general or in one or more of its branches," Webster's Third New International Dictionary 738 (1981), a "[g]overnment order prohibiting commercial trade with individuals or businesses of other nations," Black's Law Dictionary 468 (5th ed. 1979), an "[a]uthoritative stoppage of foreign commerce or of any special trade," Funk & Wagnalls New International Dictionary of the English Language 411 (1984).
>
> The present lawsuit challenges a Customs Service regulation, . . . that implements § 526(a) of the Tariff Act of 1930, ... That statutory provision, which begins with the caption "(a) Importation prohibited," excludes from the United States foreign-made merchandise bearing a trademark owned and recorded by a United States citizen or corporation. Section 526(a) is, to borrow language from the Senate debate, "an *embargo* against

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51 *K Mart*, 485 U.S. at 185.

52 *Id.*

53 *Id.* at 193-96.

> any foreign country shipping goods here where an American claims he has a trade-mark upon them." 62 Cong. Rec. 11603 (1922) (remarks of Sen. Kellogg) (emphasis added). Because this suit against the United States arises out of a law providing for an embargo, I would hold that it is within the exclusive jurisdiction of the Court of International Trade.[54]

One commentator has pointed out that the confusion born of the majority opinion in *K Mart*, that certain embargoes are not the equivalent of import restrictions, will necessitate that all questions relating to § 1581(i) jurisdiction undergo a more intensive and possibly tortured analysis in order to determine if a case is properly before the Court of International Trade.[55] It has been suggested further that the effect of *K Mart* is the establishment of concurrent jurisdiction between the Court of International Trade and the federal district courts, depending upon how litigants frame the issues.[56] Of course, this result is counter to the exclusivity mandate that is found in 28 U.S.C. § 1581.

It would be a mistake to think that the dilemma facing litigants, who do not know if they should sue in the Court of International Trade or in the district court, is limited to gray-market or trademark cases.

In a recent case challenging a condition imposed by the Foreign-Trade Zone Board, requiring foreign crude oil used as fuel for a refinery in a foreign trade zone be made dutiable, the government argued the district court did not have jurisdiction, and that exclusive jurisdiction was in the Court of International Trade. The district court adopted the view that, although 28 U.S.C. § 1581(i) did not create any substantive right governing exclusive jurisdiction in the Court of International Trade, nevertheless, because the case involved an appeal of an administrative decision directly relating to tariffs on imported goods and the use of revenue in that field, § 1581 should be applicable to the case regardless of whether an actual tariff on foreign commerce was presently imposed. The district court dismissed the suit for lack of subject matter jurisdiction without prejudice and at plaintiff's costs, finding that proper jurisdiction lies in the Court of International Trade.[57]

Plaintiff subsequently commenced an action in the Court of International Trade. In that subsequent action, the government moved to dismiss upon the ground that the Court of International Trade had no subject matter jurisdiction and, further, *no* court has subject matter

[54] *Id.* at 191-93.

[55] Giovanni M. Cinelli, *Jurisdictional Quagmire: The Implications of K Mart Corp. v. Cartier*, 16 SYRACUSE J. INT'L L. & COMM. 39, 63 (1989).

[56] *Id.*

[57] *Conoco, Inc. v. United States Foreign-Trade Zone Bd.*, No. 89-1717-LC (W.D. La. 1990).

jurisdiction.[58]

What Congress specifically tried to correct and what appears to be a type of jurisdictional ping-pong game continues to plague individuals and firms. They must waste time and money as they pursue futile efforts to obtain judicial review. Which court has jurisdiction, the Court of International Trade or the district court? One commentator points out:

> When considering jurisdictional issues, the CIT [Court of International Trade] should weigh the executive branch's disdain of judicial review, and its interest in limiting the scope and availability of such review against the needs of international trade litigants. The courts represent the main defense available to citizens fighting the federal government. The failure to find a home for international trade cases effectively immunizes the Customs Service, the International Trade Administration, and the International Trade Commission. It has been argued that the CIT's [Court of International Trade] failure to provide judicial review over international trade matters appears to invite unchecked arbitrary governmental action.[59]

Even if one does not agree with these conclusions, the frustration level of litigants is clearly on the rise.

The prediction of Justice Scalia, that "the jurisdictional question [referring to the *K Mart* case], if decided incorrectly, may generate uncertainty and, hence, litigation into the indefinite future,"[60] seems to have an eerie prescience.

VIII. CONCLUSION

Individuals and firms are required to expend an inordinate amount of time and money to obtain judicial review. They are required to navigate arcane jurisdictional passages. They waste time and resources fighting over jurisdiction and often times they are denied the chance to be heard on the merits of the case. These obstacles unnecessarily increase cost and hurt the efforts of the United States to be competitive in the international community.

The restricted statutory scheme of § 1581(a)-(h) and its relationship to 1581(i) should be re-examined. The blurred jurisdictional line referred to by Justice Scalia in his dissenting opinion in *K Mart* needs to be clearly brought into focus before the hopeful prediction of Senator DeConcini to "eliminate the considerable jurisdictional confusion" can be realized.

* * *

[58] *Conoco, Inc. v. United States Foreign-Trade Zone Bd.*, 790 F. Supp. 279 (Ct. Int'l Trade 1992).
[59] Heintz, *supra* note 45, at 374-75 (footnotes omitted).
[60] *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 192 (1988).