



Judicial remedies- Challenging CBP decisions and rulings in the Court of International Trade

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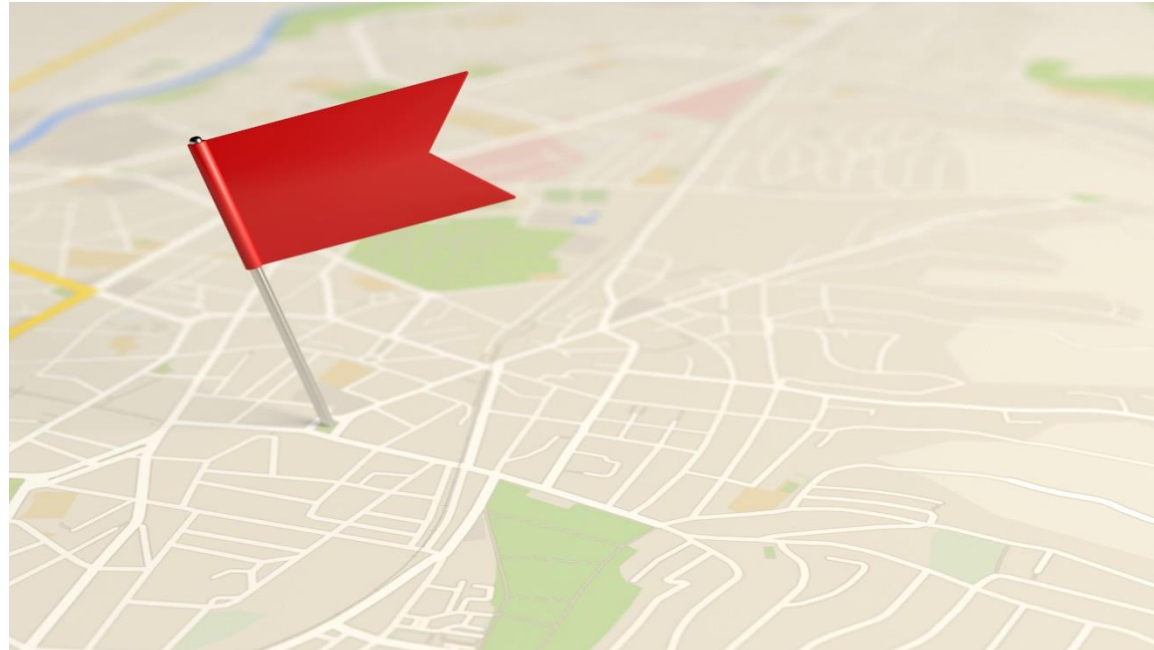
WHERE, WHO, WHEN, HOW

CHALLENGING CUSTOMS IN COURT



WHERE

are court challenges heard?





THE UNITED STATES COURT OF INTERNATIONAL TRADE



CIT Facts

- Located at One Federal Plaza in New York, New York
- Article III court with “all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.” 28 U.S.C. 1585. Thus, the CIT can award:
 - Money judgments (limited)
 - Writs of mandamus
 - Preliminary and permanent injunctions
- Comprised of nine judges chosen by the President and confirmed by Senate with lifetime appointments

CIT Facts Cont.

- Nationwide jurisdiction
- Nationwide subpoena powers
- Conducts trials and hearings nationwide
- Created its own procedural rules that closely mirror the Federal Rules of Civil Procedure
- Follows the Federal Rules of Evidence
- Generally conducts bench trials

CIT Facts Cont.

- Limited subject matter jurisdiction
- Empowered to hear cases related to certain customs and trade disputes
- Exclusive jurisdiction
- Decisions are appealed to the Court of Appeals for the Federal Circuit located in Washington DC with possible cert to the US Supreme Court

WHO

represents Customs?



Customs representation

- Represented by the United States Department of Justice (DOJ)
- Generally, DOJ Civil Division, International Trade Field Office (ITFO) located in New York, New York
- ITFO attorneys are highly trained and seasoned litigators specializing in customs litigation
- Many ITFO attorneys have been practicing exclusively in the customs space for 15+ years
- Assisted by CBP's Chief Counsel's Office acting as content area experts and liaisons between DOJ and CBP

WHAT

decisions/actions can be challenged in the CIT?



CIT Cases

- Subject matter jurisdiction dictates the disputes a court may decide.
- The CIT's subject matter Jurisdiction is set out in 28 U.S.C 1581.
- Though not an exhaustive list, today we will focus on the more common jurisdictional predicates:
 - Section 1581(a)
 - Section 1581(h)
 - Section 1581(i)

Section 1581(a) Overview

- Section 1581(a): The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the [Tariff Act of 1930](#).
- Referred to as the CIT's "Protest Jurisdiction"

Section 1581(a) Overview Cont.

- Commenced by filing a summons alone
- Several conditions precedent:
- Customs decision must be “protestable”
 - Classification
 - Valuation
 - Country or origin
 - Exclusion/deemed exclusion
 - Rate of duty assessed
 - All charges or exactions within the purview of the secretary of treasury
 - Liquidation or reliquidation
 - Refusal to pay drawback
 - Refusal to reliquidate under section 1520(d)

Section 1581(a) Overview Cont.

- Protest must be:
 - Timely
 - Legally sufficient
 - Denied
- Duties, taxes, and fees paid **prior** to commencement
- Timely summons filed with the CIT

Section 1581(a) Overview Cont.

- Decided *De Novo*
- May take several years for resolution
- Generally decided on summary judgment
- Relief includes reliquidation and refunds of excess duties paid with interest
- CIT is not required to find for either party

Section 1581(h) Overview

- Section 1581(h): The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to **review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if** the party commencing the civil action demonstrates to the court that he would be **irreparably harmed** unless given an opportunity to obtain judicial review prior to such importation.

Section 1581(h) Overview Cont.

Requirements:

- Be seeking review of a ruling, refusal to issue a ruling or refusal to change a ruling
- Ruling must be related to:
 - classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters
- Case must be brought prior to importation under the ruling
- Irreparable harm will result absent judicial review

Section 1581(h) Overview Cont.

Requirements Cont.

- Filed within two years
- Requires the concurrent filing of summons and complaint
- Record review case
- Government's action must be shown to be arbitrary, capricious or not in accordance with law
- Customs decision/action can be set aside

Section 1581(i) Overview

- Section 1581(i)
- (1) 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— (A) revenue from imports or tonnage;
- (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

Section 1581(i) Overview Cont.

- (C) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
- (D) administration and enforcement with respect to the matters referred to in subparagraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section.
- (2) This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable by— (A) the Court of International Trade under section 516A(a) of the Tariff Act of 1930 (19 U.S.C. 1516a(a)); or
- (B) a binational panel under section 516A(g) of the Tariff Act of 1930 (19 U.S.C. 1516a(g)).

Section 1581(i) Overview Cont.

Requirements

- The challenged customs action must fit within one of the categories set forth in Section 1581(i)
- Filed within two years
- Requires the concurrent filing of summons and complaint
- Record review case
- Government's action must be shown to be arbitrary, capricious or not in accordance with law
- Customs decision/action can be set aside

HOW

do the various cases progress in the CIT?



Section 1581(a) Phase I

Administrative process

- The administrative process should be considered the first phase of your potential Section 1581(a) action
- Litigation planning and preparation begin when litigation first appears to be a reasonable possibility
 - Adverse ruling letter
 - CF28 request for information
 - CF29 rate advance or classification change
- Planning and preparation includes
 - Fleshing out relevant facts
 - Consider potential legal arguments
 - Locate potential witnesses
 - Begin collecting and preserving **all relevant evidence**



Section 1581(a) Phase I Cont.

- CF28/29 responses and/or protests should be carefully drafted with an eye towards to possible litigation to come
- All documents filed with CBP should be
 - Complete as possible
 - Well supported with evidence
 - Factually accurate

Section 1581(a) Phase II

Pleadings

- Can be commenced by the filing of a summons alone
- Summons transfers jurisdiction over the entries to the DOJ
- When filed without a complaint, a summons is placed on the suspension disposition calendar
- Up to four years to file a complaint before the summons is dismissed for failure to prosecute

Section 1581(a) Phase II Cont.

Litigation Options following summons

- After summons, DOJ attorney assigned to the summons
- DOJ will make an independent assessment of the merits
- Opportunity to approach DOJ and attempt stipulation
- Good approach for discreet factual disputes with sufficient admissible evidence that was either not provided or not considered by CBP
- Stipulation proposal accompanied by robust evidentiary support
- DOJ does not have jurisdiction over any entries or protests remaining before CBP



Section 1581(a) Phase II Cont.

- Filing a complaint begins active litigation
- Complaint is the DOJ and CIT's first exposure to the dispute
- DOJ will and determine how best to respond in conjunction with their CBP counterpart
- DOJ has 60 days to “respond” to the complaint Response can include:
 - A Motion including a full or partial Motion To Dismiss (MTD)
 - Answer
- MTD essentially postpones the action or part of the action while the motion is fully briefed by the parties and decided by the court

Section 1581(a) Phase II Cont.

- Common MTDs in 1581(a) case
 - Late protest (outside of 180 days)
 - Late summons (outside of 180 days)
 - Protest not yet denied
 - Non-protestable decision
 - Failure to pay all duties, taxes and fees **prior** to commencement
 - Legally insufficient protest
 - Errors or omissions on summons
 - Failure to state a claim for which relief can be granted
- Other possible motions
 - More definite statement
 - Motion for more time to respond to the complaint

Section 1581(a) Phase III

Discovery

- After Answer the judge will send the parties a “Rule 16 Letter”
 - Parties must confer and try to create a mutually agreeable scheduling order:
 - Initial disclosures
 - Time period for fact and expert discovery
 - Dispositive motions
 - Trial
 - Note dates may be extended on good cause
 - Once the order is entered by the court, formal discovery may commence

Section 1581(a) Phase III Cont.

Required Disclosures:

- Initial disclosures
 - Governed by USCIT Rule 26
 - Mandatory
 - Name and addresses of persons with knowledge
 - All evidence a party may use to support their claim and/or defense
 - Due 14 days after the scheduling conference or a later date agreed upon by the parties.
 - Must be supplemented
 - Failure to comply may result in costly motion practice, delays or preclusion
- If litigation planning has been ongoing, all information should have already been gathered and be ready for exchange

Section 1581(a) Phase III Cont.

- Expert Disclosures
 - Governed by Rule 26
 - Mandatory
 - Must include a written signed report containing
 - All Opinions and the basis
 - All facts and data considered by the witness
 - All exhibits that the expert will use
 - Expert's qualifications
 - Publications authored in previous 10 years
 - Testimony given within last 4 years
 - Compensation
 - Must be disclosed at the time ordered by the court, if no such order, at least 90 days prior to date set for trial, if the expert provides rebuttal report, 30 days after report being rebutted
 - Failure may result in costly motion practice, delay or preclusion

Section 1581(a) Phase III Cont.

- Pre-trial disclosures
- Governed by rule 26
 - Must include:
 - Identity of all witnesses to be offered
 - Designation of any deposition transcripts
 - Identification of all evidence and summaries to be offered
 - Unless court orders otherwise, must be made at least 30 days before trial
 - Failure may result in costly motion practice, delay or preclusion

Section 1581(a) Phase III Cont.

Opposition discovery

- Notice to Admit
 - Governed by USCIT Rule 36.
 - Written requests to “admit” facts, the application of law to facts, opinions about either or the authenticity of any document or article.
 - Used to narrow issues
 - Must be answered (admitted/denied/objected) within 30 days
 - Admitted facts are considered conclusively established for purposes of the case
 - Admissions may only be withdrawn by motion to the court and at the court’s discretion

Section 1581(a) Phase III Cont.

Interrogatories

- Governed by Rule 33
 - Written questions directed to a party
 - Limited to 25
 - Questions can generally seek any relevant information
 - Responses must be served within 30 days
 - Response must separately answer each question or interpose an objection
 - Responses are under oath and must be signed by the answering person(s)
- Failure to respond completely may result in delay, costly motion practice, or possible preclusion
- Responses can be used by opposing party for a variety of purposes including:
 - Evidence in chief
 - Impeachment



Section 1581(a) Phase III Cont.

“Document requests”

- Governed by Rule 34
 - Written requests seeking the production of “things” Must be in writing
 - Must describe what is being sought with reasonable particularity
 - Must specify a reasonable time, place, and manner for inspection or exchange
 - Responses or objections must be served in 30 days
 - Responses must identify which “thing” is being produced in response to which request
 - Failure to produce may result in costly motion practice, delay or preclusion
 - Can seek documents from third-parties with subpoena

Section 1581(a) Phase III Cont.

Depositions

- Limited to ten per side.
 - Depositions by written questions
 - Governed by Rule 31
 - Deposition questions are provided in advance and response are provided in writing under oath
 - Rarely used by the DOJ
 - Deposition by oral examination
 - Governed by Rule 30
 - Requested by sending deposition notice to adversary on reasonable notice
 - Can be accompanied by a document request
 - Recorded by stenographer, audio recording or audiovisual, however, must method be disclosed ahead of time
 - Testimony under oath
 - Limited to one day of seven hours without leave of court
 - Failure of deponent to attend may result in motion to compel and court issued subpoena

Section 1581(a) Phase III Cont.

Various witnesses can be deposed:

Fact witnesses

- Requested through deposition notice
- Testify as to any relevant matter
- Testifies based on personal knowledge
- Does not bind a party

Designated agents

- Requested through detailed deposition notice
- Witness is designated by the party to speak on its behalf.
- Binds the producing party.
- Witness need not testify based upon personal knowledge

Expert witness

- Requires a subpoena
- Requesting party pays costs

Third-party witness

- Requires a subpoena

Section 1581(a) Phase III Cont.

What to expect

- The number and type of witnesses deposed by the DOJ is discretionary and varies by case and attorney
- Deposition approach varies by attorney
- Unprepared 30(b)(6) will invite a motion to compel

Section 1581(a) Phase IV

Resolution

- Stipulation
 - Negotiated without court assistance
 - Negotiated through court mediation

Section 1581(a) Phase IV Cont.

Summary Judgment

- Majority of Section 1581(a) matters are decided by the court without trial
 - Motion for summary judgment (MSJ)
 - An MSJ consists of two parts:
 - Statement of undisputed material fact
 - Supporting legal memorandum
 - MSJ must be supported by sufficient evidence
 - Parties afforded the opportunity to not only file their own MSJ but respond to their adversary's.
 - CIT generally holds oral argument
 - If there are no disputes of **material** fact the CIT will find for a party, if there are material facts in dispute CIT set the matter for a trial
 - Parties can opt for trial instead of MSJ

Section 1581(a) Phase IV Cont.

Trial

- Generally, bench trials
- Begin with pre-trial motion practice
- Plaintiff (importer) has the burden of persuasion and “goes first”
 - Offer exhibits
 - Call witnesses
- DOJ has chance to object to or probe exhibits and witnesses
- At the end of the plaintiff’s presentation the plaintiff will “rest”

Section 1581(a) Phase IV Cont.

- DOJ present its case second by calling witnesses and offering exhibits.
- Plaintiff can object and cross-examine
- DOJ can rest its case without offering testimony or exhibits
- CIT allows for closing arguments likely followed by post-trial briefs
- Decision based solely upon the record created at trial

Sections 1581(h) and (i) Phase I

Pleadings

- Commenced by the concurrent filing of a summons and complaint
- Often involve MTDs
 - Section 1581(h)
 - Failure to show import has not occurred
 - Failure to demonstrate irreparable harm
 - Section 1581(i)
 - Another jurisdictional predicate **is or was** available
- Absent a successful motion to dismiss, the Government must answer the complaint

Sections 1581(h) and (i) Phase II

Filing of the administrative record

- Government files
 - Must include all materials considered directly or indirectly by CBP in make its decision/taking its action
 - Plaintiff can challenge the sufficiency of the record and in limited circumstances may take discovery to probe the record for completeness
 - Forms the record upon which decision will be based

Briefing

- Both party's will file a motion for judgment on the agency record arguing judgment should be rendered in their favor
- CBP's action/decision will be upheld unless, based upon the administrative record, it is found to be arbitrary, capricious or not in accordance with law.
- The parties will be afforded an opportunity to respond to the opposing motion
- The CIT often holds oral argument prior to deciding the motions



Appeal

- Decisions appealed to the Court of Appeals for the Federal Circuit in Washington, DC
- Possible cert to the Supreme Court of the United States
- Notice of appeal must be filed within 60 days
- Civil Division must get approval to Appeal from the Solicitor General
 - Often file protective appeals
- Appellant must compile and file the record
 - Limited to the record before the trial court
- Legal issues reviewed *de novo*
- Factual issues reviewed for clear error
- Appeal can take 18 months or more



Questions?

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