

**REVIEW OF RECENT CASE LAW WHERE  
THE GOVERNMENT HAS PREVAILED ON  
JURISDICTIONAL ISSUE**

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**REVIEW OF RECENT CASE LAW WHERE THE GOVERNMENT HAS PREVAILED ON**  
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Issues relating to the jurisdiction of the court continue to multiply in cases heard by the CIT and the CAFC. The jurisdictional issues being addressed by the courts have become increasing broad and varied in scope. The following is a summary of several recent Customs cases in which the government prevailed on the jurisdiction issue which illustrates this phenomenon clearly. Why and how the outcome could have been different will be dealt with during our panel discussion.

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1. *Samuel Aaron, Inc. v. United States*, Slip Op. 06-126 (CIT Aug. 17, 2006).

**Background**

Jewelry from Thailand was claimed to be eligible for GSP. GSP has expired for a period of 6 weeks in 1998 before it was renewed. The notice of renewal of GSP was published in the Federal Register. However GSP was not statutorily reinstated until 4 months later. Legislation gave GSP to any entry for which GSP would have applied if made by July 1, 1998, which was contrary to the dates given in the Federal Register Restoration Notice. Customs initially liquidated entries duty-free under GSP from this date, but then reliquidated them as a memo was issued directing reliquidations of those entries which had received erroneous duty-free treatment.

**Issue**

The jurisdictional issue was: what constitutes an adequate notice of liquidation? Defendant argued there was no jurisdiction as an offline bulletin notice was the reliquidation notice, and that consequently the protest was filed more than 90 days after reliquidation.

## Argument

Plaintiff claimed they had made a timely protest under 28 U.S.C. §1581(a) as the offline bulletin notice was not on Customs Form 4333 (nor a result of a calculation to determine the duties on the goods at issue), and that a later, ACS-generated bulletin notice was the actual reliquidation notice. The defendant argued that there was no jurisdiction as the protest which was filed was more than 90 days after the offline bulletin notice reliquidation, which form of notice had been used for decades.

## Result

There was no timely protest, and thus no 28 U.S.C. §1581(a) jurisdiction.

## Rationale

The CIT stated that although the offline bulletin notice did not have CF 4333 on it as did the later ACS notice; this did not make it legally insufficient. The Judge specifically noted that there was no evidence that plaintiff attempted to examine Customs house postings at the relevant time. Therefore, the offline notice was a valid liquidation notice, thus there was no timely protest and no jurisdiction.

2. *Ford Motor Co. v. United States*, 435 F. Supp. 2d 1324, Slip Op. 06-95 (CIT June 21, 2006).

## Background

Importer auto maker sought review of the denial of its protest. Customs filed a motion to dismiss for lack of jurisdiction and lack of standing. The parties also filed motions for summary judgment on the merits. The importer was challenging Customs' decision that the costs of certain prototype engines were properly includable in the price actually paid or payable for production engines in the subject entry. The protest was filed after Customs had commenced an investigation for failure to pay duty on these amounts. Ford's customs broker sent a letter to Detroit Customs enclosing a check for \$ 226,458. That letter did not specify the entry, if any, to which the duties were to be allocated. The broker sent another letter to a Detroit Customs agent requesting that the already deposited \$ 226,458 in duties be "allocated" to an L.A. Entry, which Customs had not yet liquidated. Customs accepted the tender of duties.

## Issue

Was there jurisdiction under §1581(a) when the inclusion of the duty amount owed on the liquidated items was an accounting measure allocating those duties to those liquidations for the purpose of protesting those duties (when otherwise, it would be out of time to protest them)?

## Arguments

Importer argued that Custom had agreed to accept the allocation of the duties to this entry, and

that the protest was valid. Customs argued that there was no legal basis for the allocation and so the protest was invalid/untimely.

### Result

The court granted Customs' motion to dismiss and dismissed the case for lack of subject matter jurisdiction as the protest was untimely and invalid.

### Rationale

The Court said that assuming *arguendo* that the Customs officials at the Port of Detroit agreed to Ford's request to allocate the \$ 226,458 to the L.A. Entry, and. endeavored to communicate as much to the Customs officials at the Port of Los Angeles, there was no evidence that such allocation was actually and practically accomplished. The liquidation of the entry at issue related to the instant protested decision only by virtue of a legal and accounting contrivance that the importer concocted itself, as the importer attempted to allocate the duty amount owed for the entire prototype program to the transaction value of the production engines in the entry at issue. It is of no legal relevance that Customs, or any of its officials, may have intended to accommodate Ford's request to commence an action under 28 U.S.C. § 1581(a), as an administrative agency may not waive the U.S. government's sovereign immunity by consenting to be sued. Therefore, the protest was not timely as it was filed beyond the 90-day period and the entry at issue was not liquidated to include the prototype engine costs.

3. *H & H Wholesale Services, Ltd. v. United States*, 2006 Ct. Intl. Trade LEXIS 74, Slip Op. 2006-77 (May 23, 2006).

### Background

Importer alleged that Customs acted arbitrarily and capriciously in "excluding" a shipment of certain merchandise. Defendant U.S. government filed a motion to dismiss, arguing that the court lacked jurisdiction under 28 U.S.C.S. 1581(a) and (i) to hear the matter because the merchandise was seized, not excluded.

### Issue

Can a seizure of counterfeit merchandise be a deemed exclusion, giving the CIT jurisdiction?

### Arguments

The importer contended that the merchandise was expressly excluded before it was seized. The importer also argued that Customs failed to provide notice of detention prior to improperly seizing the merchandise as adulterated and misbranded or for bearing a counterfeit trademark. The government argued that the products were seized, and that if a seizure was made within 30 days of presentation, the Court could assume no exclusion.

## Result

The court lacked jurisdiction under 28 U.S.C.S. § 1581(a) or (i).

## Rationale

The Court found that the merchandise was seized within 30 days after it was presented to Customs for inspection. Therefore, no "deemed exclusion" took place. The Court said that it could not assume that there was no exclusion, as sometimes there is an exclusion within 30 days after entry, but here the importer had failed to demonstrate that there had been an exclusion. The Court said that the importer attempted to transform the notices of seizure into exclusions simply by filing a protest. This it could not do, so there was no 1581(a) jurisdiction. Further, in order to show an exclusion, the importer was required to demonstrate that it regained control of the merchandise. The importer's complaint admitted that Customs had denied release of the subject merchandise. The failure to provide a detention notice under 19 U.S.C.S. § 1499(c) (1) related to the administration and enforcement of the seizure of allegedly counterfeit merchandise pursuant to 19 U.S.C.S. § 1526(e), not the denial of a protest of an exclusion, or any other action described in 28 U.S.C.S. § 1581. Thus, the court lacked jurisdiction under § 1581(i). Any other approach would make jurisdiction piecemeal since the district court would then have to deal with seizure.

4. *DaimlerChrysler Corp. v. United States*, 350 F. Supp. 2d 1339 (2004), *aff'd*, 442 F.3d 1313 (Fed. Cir. 2006).

## Background

The corporation's summons was filed within 180 days of the United States Customs Service's denials of the relevant protests, but there were seven inadvertently omitted protests. The corporation's motion to amend the summons was filed more than 180 days after denial of the omitted protests. The question of whether the seven omitted protests were time-barred and thus outside the Court of International Trade's jurisdiction turned on the sufficiency of the summons as to those protests.

## Issues

Was the failure to include the seven omitted protests a jurisdictional defect under 1581(a), or merely a procedural one?

## The CIT decision

The CIT held that there was no jurisdiction under 1581(a). As long as the protests numbers were included on the summons, jurisdiction would attach to every entry listed in the protest. But if there were no entry number or protest number on the summons, the entries could not be included in the summons.

### Argument on appeal

On appeal, Daimler argued that the *Pollak* case holds that failure to comply with any Rule of the Court of International Trade requiring listing of the protest numbers is not jurisdictional.

### Result on Appeal

There was no jurisdiction under 1581(a).

### Rationale on Appeal

The CAFC said that while in *Pollak* they held that failure to comply with the Rules of the Court of International Trade is not jurisdictional, it did not address, explicitly or implicitly, the jurisdictional effect under the statute of the failure to list the protest numbers. In *Pollak* the summons specifically identified the challenged protest by number, and no issue was raised concerning the statute's requirements regarding the identification of protests. Thus the CAFC held that *Pollak* did not govern the issue in this appeal. The CAFC concluded that the initial pleading in actions to contest Customs' denial of a protest to a merchandise classification was the summons, and because each protest formed the basis for a separate cause of action, the summons had to establish the trade court's jurisdiction as to each protest. Because the corporation failed to identify the seven protests in the summons, the summons was insufficient to commence an action in the trade court as to the seven omitted protests within the 180-day limitation period of 28 U.S.C.S. § 2636(a). The Court said that “[b]ecause the importer may omit particular protests in a summons in order to preserve the right to relitigate the issue, the government has no reason to assume that all related protests are intended to be included in a given suit”. The CAFC held that under these circumstances, a summons can provide fair notice only if the contested protests are identified with particularity. Thus, the CIT correctly denied the corporation's motion to amend the summons on the ground that the omitted protests were time-barred and thus beyond the court's jurisdiction.

- 4(a). *VWP of America, Inc. v. United States*, Slip Op. 06-144 (CIT Sept. 26, 2006). (This case follows the *Daimler Chrysler* decision and is included to illustrate how the courts may view other inadvertent errors on the summons)

### Background

VWPA commenced a number of actions including this one to contest denial of protests on the valuation of textile fabrics from Canada. There was a test case and this case was suspended under it. VWPA filed a motion to amend the summons, requesting that one entry number covered by the protest be corrected. The government then moved to sever and dismiss, taking the position that with regard to one entry, dismissal for lack of jurisdiction was appropriate. The port had denied the protest in full as to all of the entries protested, but included in handwriting on the claim “wrong entry # ... Partial denial . . 1 wrong #”, and on the Customs form transmitting the entry documents to the CIT, someone had written “Invalid entry number”.

### Issue

The jurisdictional issue was: whether the summons could properly be amended to include the corrected entry number, or was the protest of that entry not validly protested because the wrong entry number had been listed, and thus time-barred?

### Arguments

The government argued that since the entry was never included in any protest, it was never the subject of a valid protest, and that the *Pollack* case [which held that entry numbers do not need to be identified on the summons in order to invoke jurisdiction] did not involve a situation where the entries were not included in any protest. VWPA argued that the summons provided fair notice to the government, who were aware from the time of the protest that there had been an error in the protest number.

### Result and Rationale

The CIT stated that as noted in *Daimler-Chrysler Corp. v. United States*, 442 F.3d 1313 (Fed. Cir. 2006), the issue for the purpose of subject matter jurisdiction is whether the summons constituted fair notice to the government. The Court further stated that this implicates the protest, and what *indicia* or implicit circumstances surround it as would clarify to the mind of Customs the intent of the importer and the subject matter of the protest. Here, VWPA's error in transcription was manifest as all of the other entry numbers began with "551-35" except for the erroneous one, which began with "551-25". The use of the "wrong entry #" by the Customs official considering the protest meant that he was aware that there was an entry covered by that protest. The judge was therefore not persuaded that the government lacked notice as to the entry in question, and he stated that to require VWPA to then protest the corrected entry number would have been futile given Customs' well-known position on VWPA's other entries. However, since proof of an actual entry the protest intended to encompass is a prerequisite to subject matter jurisdiction, the motions were to be held in abeyance while the parties tracked down pending counsel locating the actual intended entry number and its entry papers.

5. *Corrpro Companies, Inc. v. United States*, Slip Op. 04-116 (Sept. 10, 2004, Goldberg J.), *reversed*, 433 F.3d 1360 (Fed. Cir. 2006).

### Background

This matter arose from a denied NAFTA claim and protest. Plaintiff moved for summary judgment, defendant moved to dismiss for lack of jurisdiction. Plaintiff claimed that its protest was a joint protest for NAFTA preferential treatment and classification.

### Issue

Was there a protestable denial of the NAFTA claim giving 1581(a) jurisdiction?

## Arguments

Plaintiff argued that it was precluded by law from claiming NAFTA until 2 years after the time of entry when it was reclassified, as there had been a binding Customs ruling in place. Customs argued there was no NAFTA protest, or alternatively, that if there was a protest, that it was invalid as it did not include certificates of origin as required by 1520(d). Plaintiff agreed it did not send the certificates of origin with its protest, but much later.

## CIT Arguments

Plaintiff moved for summary judgment and the U.S. cross-moved for dismissal for want of jurisdiction or alternatively for summary judgment. Customs argued that there was no jurisdiction as a 1514(a) claim must be preceded by a decision by Customs either through a claim for NAFTA treatment at the time of entry or through a post-importation petition under 1520(d). Essentially, Customs was seeking to prevent importers from raising a NAFTA claim for the first time by way of protest.

## CIT Result

There was jurisdiction under §1581(a).

## CIT Rationale

The Court found that Corpro could not make a claim at the time of entry, or at the 1520(d) post-importation period, because of the contrary classification ruling that existed and the possibility of penalty for failing to follow a ruling and making a NAFTA claim. The Court found that Corpro behaved as a reasonable importer would in following the classification ruling, which precluded it from filing a NAFTA claim or making a 1520(d) petition. In these circumstances, such claim may be raised for the first time by protest. The Court then found the importer could submit the certificates of origin any time prior to liquidation, and that the entries were entitled to NAFTA treatment.

## Result on Appeal

There was no jurisdiction under 1581(a) as there was no protestable NAFTA claim.

## Rationale on Appeal

The CAFC found that the importer could not establish that Customs engaged in some sort of decision-making on the merits of a valid NAFTA claim. To do that, the importer would have had to make a claim either at entry or within a year of entry with a written declaration and certificates of origin. Because the importer did not satisfy the statutory requirements in order to make a valid NAFTA claim until 2002, Customs could not have and did not consider the merits of that claim in its initial classification decision or liquidation. Accordingly, there was no protestable decision conferring jurisdiction on the Court of International Trade under 28 U.S.C.S. § 1581(a).



6. *Nufarm America's, Inc. v. United States*, 398 F.Supp.2d 1338, Slip Op. 05-133 (Oct. 5, 2005).

### Background

Nufarm sought to create a class of plaintiffs to join in challenging a duty deferral program of Customs. Plaintiffs would be all entities that paid duties subject to the duty-deferral program, and all future payers of such duties. Importer wanted to challenge constitutionality of program.

### Issue

The parties agreed that there was 1581(a) jurisdiction. The decision was, whether there was jurisdiction under 1581(i)?

### Arguments

The importer argued that there was jurisdiction as a protest based on constitutional grounds was futile and concurrent (a) and (i) jurisdiction existed for both constitutional and other types of claims. The government said that there is no (i) jurisdiction as they have not shown (a) jurisdiction to be manifestly inadequate, and unlike the HMT case, Custom could play an active role in determining whether the duty deferral program was unconstitutional.

### Result

The Court found no 1581(i) jurisdiction. Plaintiff's motion for class certification was denied, defendant's motion to dismiss granted.

### Rationale

The Court found that there had not been exhaustion of other avenues of recourse as required under the case law, namely, 1581(a). This exhaustion was a prerequisite to 1581(i) jurisdiction that had not been satisfied. The mere raising of a constitutional claim is not enough to allow (i) jurisdiction—if a constitutional claim may be disposed of on non-constitutional grounds, a litigant is required to exhaust administrative remedies. Jurisdiction under 1581(i) is only proper if another subsection of 1581 is unavailable/manifestly inadequate. The Court may not exercise concurrent jurisdiction under (a) and (i) [citing *Miller, Swisher*]. The exhaustion remedy exists to ensure that an agency is given the opportunity to correct its own errors; if litigants could deprive it every time by asserting a constitutionality exception, the agency might rarely receive this opportunity to review. Instead, only if it would be futile will exhaustion of administrative remedies not be required. There was no protest here, and a failure to timely file a protest may only be excused if such failing is not jurisdictional.