

## 1581(c) Actions: Nuts and Bolts, Best Practices and Lessons Learned

### Summons

Best practice: Private litigants need to consider Commerce's 15-day policy on issuing assessment instructions to Customs.

Commerce's description of its policy appears to be changing. In earlier notices of final results, and on its website, Commerce stated that it intended to issue instructions "within 15 days after publication" of the final results in question. Recent notices of final results, however, state that Commerce will issue instructions "15 days after publication" of the results.

#### Continued APO access

Include at least one Form 17 (Access to confidential information) with summons. R.73.2(c)(3), R. 3(h). Other signatories can be added later. Alternative access by court order/ motion?

Consent is needed for any signatory who did not have APO access in the Commerce or ITC proceeding. See Form 17, page 2.

Form 17 is served on the parties in the action and on all interested parties below. R.73.2(c)(5). Moreover, Commerce Administrative Protective Orders require that Form 17 must be served on Commerce APO official. The Court's rules make no mention of this, although they do require that Form 18 (termination of access) be served on Commerce APO unit or ITC Secretary.

#### Other nuts and bolts issues

Concurrent filing of complaint is required for certain listed determinations. 19 U.S.C. § 1516a(a)(1); R.3(a)(3).

If filed by mail, a summons must be filed by registered or certified mail, return receipt requested. R. 5(f).

If challenging both the ITC and Commerce's determinations, separate summonses are required for each agency challenged. R.3(h). This, of course, does not preclude consolidation. R.3, Practice Comment.

The plaintiff must serve the summons for actions challenging certain determinations listed in 19 U.S.C. § 1516a(a)(1), which require the filing of a concurrent complaint. R.4(b). The Clerk of the Court serves the summons in actions challenging other determinations, initiated by the filing of a summons only. R4(a)(4). Best practice: include sufficient copies for service by the clerk. Service on DOJ and agencies must be by registered or certified mail. R.4(i). Include DOJ NY & DC offices.

In addition: "{A}t the time the action is commenced or promptly thereafter," mail copies to all parties in the administrative proceeding below, by certified or registered mail. R.3(f), first par. Rule does not contemplate other notice.

Summons must include the filing fee. R.3(b); Form 3 instructions; R.5 Practice Comment (clerk may reject).

Get court number no more than 24 hours before. R.3 practice comment; Form 3 Instructions. Contact CIT "Case Intake" division to obtain court #: (212) 264-2971.

A summons is signed by an attorney authorized to practice before CIT, and must list the name, address and telephone number of such an attorney, who becomes the attorney of record. R.75(b), Form 11. Form 11 not required when filing Form 3 summons. R.75(b)(1).

Electronic filing is not required. AO 02-01, item 3(a). Parties are *permitted* to e-file summons, *etc.*, but filing fee must be paid using pay.gov (account must be set up in advance). The CM/ECF manual contains instructions for ECF filing of summons.

## Complaint

Drafting of complaint:

Consider *Bell Atlantic Corporation v. William Twombly*, 127 S.Ct. 1955 (2007), re need to make a sufficient factual allegation. Mandates “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” See *Isotoner Corp. v. United States*, CIT Slip Op. 08-73 (July 3, 2008). See also, *Valley Fresh v. United States*, Slip Op. 07-179 (CIT Dec. 17, 2007).

An answer to the complaint is *not permitted* in 1581(c) actions. R.7(a); R.12(a)(1)(A)(i). An answer is *required* for complaints claiming both 1581(c) and 1581(i) jurisdiction.

A complaint must be filed concurrently with the summons if challenging certain listed determinations. 19 U.S.C. § 1516a(a)(1); R.3(a)(3). Otherwise, the complaint must be filed within 30 days from summons. 19 U.S.C. § 1516a(a)(2).

Electronic filing is not required for *original* complaints. AO 02-01, item 3(a) and (b). Complaint may be filed electronically, assuming a court number has already been obtained. Amended complaints must be filed electronically.

Best practice: While not expressly required, the complaint should be filed by registered or certified mail, return receipt requested. R. 3(f) (requires notice of the complaint to interested parties by registered or certified mail, return receipt requested); R. 5(e) (filing date).

## Intervention

Intervention by an interested party is as of right, if filed 30 days or less after complaint. 28 U.S.C. § 2631(j)(1)(B); R.24(a).

Consultation is nevertheless required, and the motion, in the case of a plaintiff-intervenor, must state the intervenor’s issues. R.24(c), par. 2. The court has not permitted a plaintiff-intervenor to expand the contested issues beyond those issues already raised by the original plaintiff, if the time for the plaintiff-intervenor to file his own summons and complaint has expired. *Grupo Industrial Camesa v. U.S.*, 18 CIT 107 (1994); *Timken Co. v. U.S.*, 15 CIT 87, 89, 758 F. Supp. 1518, 1520-21 (1991); *Fuji Electric Co. v. U.S.*, 7 CIT 247, 249, 595 F. Supp. 1152, 1153-54 (1984); *Nakajima All Co. v. U.S.*, 2 CIT 170 (1981).

The Clerk of the Court may rule on the motion if consented to or if no objection is filed within 10 days after service. R.24(c).

For the intervenor, continued APO access requires that at least one Form 17 be included. R.24(a); R.73.2(c)(3)(i). *The form usually requires additional service: it must be served on all interested parties below.* R.73.2(c)(5).

The motion must be accompanied by an entry of appearance. R.75(b)(2). In a firm, an attorney “responsible for the litigation” must be designated. Form 11; R.75(b)(2).

## Motions to consolidate

The Court has often consolidated actions challenging the same determination, or related determinations.

Lessons learned: Where related cases are *not* consolidated, key issues may reach the CAFC faster. In addition, consolidation may raise special issues for defendant and defendant intervenor, who, in a consolidated case will likely be required to address a large number of issues. In this regard, note that the Standard Chamber Procedures contain page limits (40 for main briefs, 15 for reply). SCP<sup>1</sup>, Para. 2(B).

## Preliminary injunctions

Lessons learned: Actual signed injunction is necessary in appeals from annual administrative results to preserve the jurisdiction of the Court. *See SKF USA v. U.S.*, 512 F.3d 1326 (Fed. Cir. 2007).

Best practice: Consent is important to obtain timely injunction.

In any event, consultation with other parties is required by the rules. R.7(b); R.56.2(a).

Consultation may also resolve errors and ambiguities in the product descriptions.

Consent likely in preliminary injunctions enjoining the liquidation of entries subject to a contested annual review result.

Nominal deadline for filing (not accounting for Commerce 15-day instruction policy): 30 days after complaint, or later, for good cause. R.56.2(a).

What can be enjoined?

The liquidation by CBP of entries covered by the contested determination may be suspended. 19 U.S.C. § 1516a(c)(2).

Deposits? Some parties have argued that Court has authority to reduce the level of deposits on a preliminary injunction. *Queen's Flowers de Colombia v. United States*, 20 CIT 1122, 947 F. Supp. 503 (1996); *GPX v. United States*, Slip Op. 08-121 (CIT Nov. 12, 2008) (movant has “extremely heavy burden”, no injunction granted). *See also, NTN Bearing Corp. v. United States*, 892 F.2d 1004 (Fed. Cir. 1989).

Entries of plaintiff-intervenor. Parties have argued that a party who is contesting the agency’s determination along with other plaintiffs, but did *not* file its own summons and complaint, should nevertheless be able to enjoin the liquidation of its entries. *See, NSK v. United States*, 547 F. Supp. 2d 1312 (CIT Trade 2008) (liquidation was enjoined).

Covers appeals and remands. *See Yancheng Baolong v. U.S.*, 406 F.3d 1377 (Fed. Cir. 2005).

---

<sup>1</sup> The CIT website contains two different versions of the standard chamber procedures, both undated. One version is contained in the consolidated “Complete listing of USCIT Rules, Forms and Administrative Orders,” dated May of 2008. A separately posted version contains additional language. References below are to the latter.

CMECF:

BDS standard permits manual filing if document exceeds 2MB, because document is not listed a “core document” for which E filing is required.

### **Filing of administrative record by the agency**

DOC/ITC must file record 40 days after complaint is filed. R.73.2(a). Government will often file motions to obtain additional time. The filing of the administrative record triggers due dates for the parties’ Joint Status Report /Proposed Briefing Schedule, which must be filed 30 days after the record is filed. R. 56.2(a).

Lessons learned: Documents are often omitted from the record. Correction, however, is generally non-controversial.

### **Joint status report and proposed briefing schedule**

R. 56.2(a) prescribes the content of the status report: jurisdiction, consolidation, stays, JPO issues, “other information the court should be aware of.” Statement of separate views, however, is expressly permitted. *Id.*

While the report is normally filed by the plaintiff, the status report must be signed by counsel for all parties. R.56.2(a). AO 02-01 imposes special requirements regarding the electronic filing of documents that must be signed by multiple parties. The order instructs the filer to obtain physical signatures “to the extent practicable”, and to maintain a “hard copy” of the document with original signatures for one year following the disposition of the action. AO 02-01, par. 4(d)(3).

R. 56.2(a) also prescribes the content of the proposed briefing schedule.

Lessons learned: While the rule does not appear to contemplate this, parties have also included the timing for motions for oral argument in the proposed briefing schedule. This may be helpful to avoid missing the deadline imposed by R.7(c).

### **Motion of oral argument**

CIT R. 7(c) requires you move for oral argument within 20 days after the response to a motion. This deadline applies to R.56.2 motions as well. R.56.2(e). Different deadlines, however, may have been included in the parties’ proposed briefing schedule and accepted by the Court. *Supra*. Moreover, a Judge may require or expect oral argument regardless of whether a motion has been made.

### **Briefing on motion for judgment on the record**

In 1581(c) cases, the court’s review of the agency’s decisions is limited. 19 U.S.C. § 1516a(b). The memorandum supporting a motion for judgment on the record and the reply, or the memorandum in opposition to such a motion, are likely the only documents in which you are able to present your case fully to the court. *See also, Canadian Lumber Trade Alliance v United States*, 425 F. Supp.2d 1321, 1332, n. 11 (CIT 2006) (court reviews decisions on the basis of the agency record -- it has no fact finding role; thus, 12(b)(5) motions to dismiss are treated as motions under R. 56 for judgment on the record).

Public Briefs (or Public Versions of Confidential Briefs)

CMECF: The BDS requires that the brief supporting the motion for judgment on the record be filed electronically. If too long, it must be divided in portions that do not exceed the 2MB limit.

A “non-confidential” (public) version may be filed one business day after the date of filing of the confidential version, if the confidential version filed on the first day contains the prescribed warnings on the cover and each page containing BPI. R.5(h).

#### Confidential Briefs:

Briefs containing confidential information must be filed manually; electronic filing of BPI is not permitted. AO 02 par. 3(b) and EFM page 10. The manually filed confidential brief must be accompanied by a disk with an electronic version of the brief in word perfect format. SCP, Par. 2(A)(1).

There are detailed rules on labeling and use of brackets. R.5(h); R.81(h), BPI App. Par. G. Each page with confidential information “shall bear a legend so indicating.” R.81(h).

#### Mechanics:

Page limits: 40 pages for main briefs, 15 pages for reply briefs in trade cases. The limit applies equally to briefs and comments on remand results. SCP, par. 2, introductory paragraph and sect. B. The page limits, however, are readily expanded.

Prescribed content: R.56.2(c); R.81.

Rules on citation: R.81, Practice Comment, which also refers to the Blue Book and the GPO Style manual. Citations supporting statements in the text must be in the text, rather than in footnotes. SCP, par. 2(C).

#### Appendix of record documents cited

The appendix contains “a copy of those portions of the administrative record cited in the brief.” R.56.2(c)(3). Thus, the confidential appendix contains excerpts of confidential documents cited in the brief, as well as excerpts of public documents cited in the briefs. The public appendix contains only the latter. The Court has not required that the public version contain the public version of a confidential document, if the brief cited only the confidential document.

The appendix must be filed within 3 days after filing the brief. R.56.2(c).

Some judges require the filing of a Joint Appendix.

Even though the BDS does not list the appendix among “core documents” for which E filing is required, the Court has permitted electronic filing of the appendix using the procedures in par. 3 of the BDS.

### **Oral argument**

#### Lessons learned:

Prior to argument, consider your preferences for the organization of the argument, because they may affect the timing and the effectiveness of your presentation, and because the judge may ask before the start of the argument. Common methods are:

Issue by issue, where plaintiff and defendant each address the issue, before moving to the next issue.

Traditional, where plaintiff addresses all issues affecting it, before the defendant proceeds.

Consider also that the format of the argument may differ greatly depending on the judge (for example: presentations vs. response to a series of specific questions).

Best practices:

Know the details of relevant cases and relevant portions of the record.

Be prepared to direct the court to specific sections of the appendix.

Anticipate potential questions and prepare responses.

Be prepared to address what you believe are errors in opposing counsel's verbal presentation.

Don't interrupt the judge, even if the format of the argument becomes a question/answer discussion.

Confidential data during argument:

The BPI App., par. J. requires attorneys to "endeavor to avoid the unnecessary use" of confidential data during oral argument.

Best practice: notify court in advance so arrangements can be made with the court reporter for closed session. BPI App, par. J ("whatever mechanism").

Transcripts: SCP, Item 7, requires that changes to transcripts be by MOTION.

**Remands**

Agency can ask for a remand ("voluntary" remands).

Lessons learned: These requests are generally granted. *See SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). *See also, Shakeproof v US*, 412 F. Supp.2d 2d 1330, 1335-39 (2005) and *Corus v. US*, 27 CIT 388, 391-394 (2003).

Remand orders usually contain a schedule for comments. Commerce often requests comments on its draft redetermination *prior* to filing with the court – although it may allow only one or two days.

**End of litigation**

Private litigants must comply with R. 73.2(c)(4)(iii) and (iv), by filing Form 18, attesting to the destruction of documents containing Business Proprietary Information.