Let Cooler Heads Prevail: A Survey of Rule 11 Practice in the Court of International Trade

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I. INTRODUCTION

The United States Court of International Trade (CIT) has long encouraged a culture of collegiality among its small and relatively cohesive bar. The CIT's practice with respect to USCIT Rule 11 sanctions reflects this desire for harmonious interaction. A survey of opinions invoking the rule reveals that the CIT uses it primarily not to sanction its practitioners, but to provide them with fair warning of the point where zealous advocacy shades into sharp practice. The CIT has only granted a litigant's motion for Rule 11 sanctions once, in *Wire Rope Importers' Ass'n v. United States*, and the sanctions imposed were modest.[1]

Part II describes the CIT and its specialized jurisdiction over certain matters involving imports. Part III describes the USCIT's Rule 11, which is based on the corresponding Federal Rule of Civil Procedure (FRCP). Part IV undertakes a survey of CIT opinions in which Rule 11 plays a role and argues that the CIT's invocation of the rule has been in service of the twin goals of collegiality and fairness. The CIT's practice in this respect suggests that litigants moving for sanctions against other parties

1. *See* 18 Ct. Int'l Trade 478 (1994).

could increase the chance of a favorable ruling by framing their motions to further these goals.

II. THE U.S. COURT OF INTERNATIONAL TRADE

The CIT is an Article III court with specialized jurisdiction over, inter alia, certain matters arising under the United States Customs laws and the U.S. antidumping (AD) and countervailing duty (CVD) laws.[2] The CIT is only the latest in a line of specialized tribunals dealing with these kinds of matters. The first such tribunal, the Board of General Appraisers, was established by Congress in 1890.[3] This was replaced in 1926 by an Article I court, the United States Customs Court.[4] The Customs Court's status was altered to that of an Article III court in 1956,[5] and the present-day CIT came into being with the Customs Courts Act of 1980.[6]

The CIT's jurisdiction extends to some—but not all—disputes that arise under U.S. Customs laws.[7] These include challenges to denied protests of United States Customs and Border Patrol (Customs) decisions,[8] challenges to Customs' denial of petitions regarding advance rulings on the classification of merchandise,[9] Customs' own actions to collect fines for negligent or fraudulent actions in importing,[10] and challenges regarding the issuance, suspension, and revocation of Customs brokers' licenses and private laboratory accreditations.[11] However, suits regarding Customs seizures do not lie within the jurisdiction of the CIT.[12] The CIT's standard of review in most Customs actions is de novo.[13] While there is no dispute as to the material facts in

2. *See* 28 U.S.C. § 1581 (2006).
3. Customs Administration Act of 1890, ch. 407, § 12, 26 Stat. 131, 136 (1890).
4. Act of May 28, 1926, ch. 411, §§ 1-2, 44 Stat. 669 (1926).
5. Act of July 14, 1956, ch. 589, § 1, 70 Stat. 532 (1956) (codified as amended at 28 U.S.C. § 251(a)).
6. 28 U.S.C. § 1581. The CIT's reviewing court, the United States Court of Appeals for the Federal Circuit, was created in 1982 through the merger of the former United States Court of Claims and the United States Court of Customs and Patent Appeals. *See* Federal Courts Improvement Act of 1982, Pub. L. No 97-164, 96 Stat. 25 (1982).
7. 28 U.S.C. §§ 1581-1582.
8. *Id.* § 1581(a); 19 U.S.C. § 1515(c) (2006).
9. 28 U.S.C. § 1581(a); 19 U.S.C. § 1516.
10. 28 U.S.C. § 1582.
11. *Id.* § 1581(g).
12. *Id.* § 1356. While jurisdiction over an importer's suit to challenge a seizure does not lie in the CIT, the CIT has jurisdiction to consider such seizures in the context of a government suit to recover duties and penalties under 28 U.S.C. § 1582. *Compare id.*, *with id.* § 1582.
13. *Id.* § 2640(a)(1)-(2), (5); 19 U.S.C. § 1592(e)(1); *see also* United States v. Active Frontier Int'l, Inc., 867 F. Supp. 2d 1312, 1315 (Ct. Int'l Trade 2012). Challenges under 28 U.S.C. § 1581(g) are subject to a substantial evidence standard. 19 U.S.C. § 1641(e)(3).

many Customs-related actions at the CIT,[14] this is not always the case.[15] Rule 11 does not apply to certain papers filed in conjunction with discovery,[16] but acrimonious discovery may spill over into sharp practice with respect to non-discovery-related filings, increasing the chances for Rule 11 issues to arise.

The CIT also has jurisdiction over disputes arising from the decisions of the United States Department of Commerce (Commerce) and the United States International Trade Commission (Commission) in conducting AD and CVD investigations and reviewing AD and CVD orders.[17] The majority of these cases are decided "on the [agency] record,"[18] and the CIT's standard of review is fairly deferential—that of determining whether the agency decision is supported by substantial evidence and otherwise in accordance with the law.[19] The record-based nature of these cases precludes disputes as to the relevant facts[20] and results in a fairly limited and predictable briefing schedule.[21]

Beyond this, the CIT also has jurisdiction over appeals from agency decisions as to whether petitioning workers qualify for Trade Adjustment Assistance (TAA) benefits under the Trade Act of 1974.[22] Although these

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14. This allows the parties to truncate discovery or, in some cases, avoid it altogether. *See, e.g.*, Wilton Indus., Inc. v. United States, No. 12-125, slip op. at 2 (Ct. Int'l Trade Sept. 27, 2012); Nat'l Presto Indus., Inc. v. United States, 783 F. Supp. 2d 1287, 1289 (Ct. Int'l Trade 2011); Shell Oil Co. v. United States, 781 F. Supp. 2d 1313, 1316 (Ct. Int'l Trade 2011); Honda of Am. Mfg., Inc. v. United States, 625 F. Supp. 2d 1324, 1326 (Ct. Int'l Trade 2009); E.I. DuPont de Nemours & Co. v. United States, 32 Ct. Int'l Trade 476, 484, 486 (2008); Maxcell Bioscience, Inc. v. United States, 31 Ct. Int'l Trade 1999, 2002 (2007).

15. *See, e.g.*, BP Oil Supply Co. v. United States, No. 11-116, slip op. at 14 (Ct. Int'l Trade Sept. 16, 2011) (determining that even after discovery, genuine issues of material fact remained, requiring trial); Roche Vitamins, Inc. v. United States, 750 F. Supp. 2d 1367, 1378 (Ct. Int'l Trade 2010) (denying summary judgment motions "because of outstanding genuine issues of material fact" and offering parties additional discovery); Int'l Custom Prods., Inc. v. United States, No. 09-8, slip op. at 1-2 (Ct. Int'l Trade Jan. 29, 2009) (denying summary judgment and noting the need for trial to address unresolved issues of material fact).

16. U.S. CT. INT'L TRADE R. 11(d). Sanctions for behavior arising out of discovery are more particularly provided for in USCIT Rule 37.

17. 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a.

18. 19 U.S.C. § 1516a(b)(1)(B); 28 U.S.C. § 2640(b).

19. 19 U.S.C. § 1516a(b)(1)(B). In those cases that do not provide for record review, the CIT is instructed to determine whether agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(A). Thus, the standard of review remains deferential.

20. 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a.

21. U.S. CT. INT'L TRADE R. 56.2 (providing for scheduling order and pleadings in cases brought under 28 U.S.C. § 1581(c)).

22. 28 U.S.C. § 1581(d). Several agencies are involved in making benefit determinations that the CIT has jurisdiction to review. The United States Department of Labor makes determinations pursuant to § 223 of the Trade Act of 1974, 19 U.S.C. § 2273; the United States Department of Agriculture makes determinations pursuant to §§ 293 and 296 of the same Act, *id.*

actions are reviewed on the basis of the agency record,[23] the relevant agencies' investigatory procedures have been called into question by the CIT.[24] As a result, Rule 11 has been mentioned several times in proceedings involving appeals of the denial of worker assistance, mostly as the CIT warns government counsel of the potential for sanctions inherent in defending agency action that the CIT finds woefully inadequate.[25]

Finally, the CIT's jurisdiction extends to actions that are not squarely embraced within its other grants of jurisdiction, but that pertain to the "administration and enforcement" of the matters referred to in those other grants.[26] This residual grant of jurisdiction also provides the CIT with authority over actions "aris[ing] out of" laws providing for revenue from imports; tariffs, duties, fees, and taxes imposed on imports for reasons other than revenue; and certain embargoes or quantitative restrictions on imports.[27] The CIT exercises its jurisdiction under this

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§ 2401b; and the United States Department of Commerce (Commerce) makes determinations pursuant to § 251 of that Act, *id.* § 2341. Formerly, Commerce also made determinations pursuant to § 273 of the Act. *Id.* §§ 2371-2374. Section 273 was terminated by law on September 30, 1982. Trade Act of 1974, Pub. L. No. 93-618, § 284, 1974 U.S.C.C.A.N. (88 Stat.) 2290, 2364.

23. 28 U.S.C. § 2640; 19 U.S.C. § 2395. *Compare* 19 U.S.C. § 2395, *with id.* § 1516a(b). The CIT has previously determined that while 19 U.S.C. § 2395 provides the standard for reviewing factual determinations in suits under 28 U.S.C. § 1581(d), no statute specifically provides for the CIT's review of legal determinations in such cases; therefore the CIT has adopted the Administrative Procedure Act's default standard of reviewing legal determinations to decide whether they are "in accordance with law." *See* Former Emps. of Tesco Techs., LLC v. U.S. Sec'y of Labor, 30 Ct. Int'l Trade 1754, 1756 (2006) (citing Former Emps. of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor, 350 F. Supp. 2d 1282, 1286 (Ct. Int'l Trade 2004) (internal quotation marks omitted)). The CIT also considers whether legal determinations in § 1581(d) cases are based on "'a showing of reasoned analysis' by the agency." *Id.* at 1756 (citations omitted).

24. Former Emps. of BMC Software, Inc. v. U.S. Sec'y of Labor, 30 Ct. Int'l Trade 1315, 1321 n.10 (2006) (collecting cases in which the CIT has criticized agency conduct in Trade Adjustment Assistance (TAA) determinations).

25. Former Emps. of BMC Software, Inc. v. U.S. Sec'y of Labor, 31 Ct. Int'l Trade 1600, 1684 n.108 (2007); Former Emps. of IBM, Corp. v. U.S. Sec'y of Labor, 31 Ct. Int'l Trade 463, 522 (2007); Anderson v. U.S. Sec'y of Agric., 30 Ct. Int'l Trade 1993, 1994-95 (2006).

26. 28 U.S.C. § 1581(i).

27. *Id.* The CIT also has jurisdiction over actions regarding the release of confidential information by the Commission and Commerce and actions challenging Customs' rulings regarding country of origin for government procurement purposes. *Id.* § 1581(e)-(f). These two grants of jurisdiction are seldom used. Only one action to date has come before the CIT under § 1581(e). *See* Xerox Corp. v. United States, 753 F. Supp. 2d 1355 (Ct. Int'l Trade 2011). Section 1581(f) formed the basis for the CIT's jurisdiction over a handful of cases in the late 1980s and early 1990s, but has not been used since. *See, e.g.*, Gen. Elec. Co. v. United States, 16 Ct. Int'l Trade 864, 868 (1992); Daido Corp. v. United States, 16 Ct. Int'l Trade 987, 992 (1992); Allied Tube & Conduit Corp. v. United States, 13 Ct. Int'l Trade 698, 702 (1989); Bethlehem Steel Corp. v. United States, 13 Ct. Int'l Trade 617, 618 (1989); D&L Supply Co. v. United States,

residual grant only where jurisdiction is not available, and could not have been obtained, under any of its other grants of jurisdiction.[28]

III. USCIT RULE 11

USCIT Rule 11 is modeled on Rule 11 of the FRCP.[29] The rule requires that all pleadings and papers presented to the CIT be signed by an attorney or, where a party appears pro se, by the party itself.[30] The rule provides that in presenting a pleading, a motion, or another paper to the CIT, the attorney or other presenting party certifies:

> [T]o the best of the person's knowledge, information, and belief, formed after any inquiry reasonable under the circumstances:
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.[31]

If, after the presenter of a paper is given notice and a reasonable opportunity to respond, the CIT determines that the rule has been violated, the CIT "may" order an appropriate sanction.[32] As discussed *infra*, the CIT has rarely imposed sanctions on the attorneys practicing

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12 Ct. Int'l Trade 732, 733 (1988); Timken Co. v. United States, 11 Ct. Int'l Trade 267, 267 n.1 (1987).

28. Int'l Customs Prods., Inc. v. United States, 467 F.3d 1324, 1327 (Fed. Cir. 2006); *see also* Jinan Farmlady Trading Co. v. United States, 836 F. Supp. 2d 1406, 1408 (Ct. Int'l Trade 2012); Epoch Design LLC v. United States, 810 F. Supp. 2d 1366, 1372 (Ct. Int'l Trade 2012).

29. *See* Wire Rope Importers' Ass'n v. United States, 18 Ct. Int'l Trade 478, 480-81 (1994) (noting similarity between USCIT Rule 11 and FRCP Rule 11).

30. U.S. CT. INT'L TRADE R. 11(a).

31. *Id.* R. 11(b).

32. *Id.* R. 11(c). The CIT's reviewing court, the Federal Circuit, has stated that "once a violation has been found," sanctions are "mandatory." Refac Int'l, Ltd. v. Hitachi, Ltd., 921 F.2d 1247, 1257 (Fed. Cir. 1990). However, in that case, the Federal Circuit was not interpreting the current USCIT Rule 11(c), but the former FRCP Rule 11(b). *Id.* FRCP Rule 11 was amended in 1993 to clarify that sanctions were within the discretion of the court, rather than mandatory. FED. R. CIV. P. 11. The version of USCIT Rule 11 now in effect reflects this amended language. *Compare* U.S. CT. INT'L TRADE R. 11, *with* FED. R. CIV. P. 11. However, as shown below, even in those cases that predate the 1993 amendments, the CIT's attitude toward Rule 11 sanctions was characterized by leniency.

before it, even where the court itself has raised the question of Rule 11's applicability to attorney conduct.

The rule provides that counsel or parties appearing before the CIT may move for sanctions against other counsel or parties, provided that the movant does not file the motion with the CIT until the movant has complied with a twenty-one-day safe harbor rule.[33] The CIT may also, on its own initiative, order an attorney or party to show cause as to why they should not be sanctioned under the rule.[34] Additionally, USCIT Rule 11 limits sanctions to those measures that "suffice[] to deter repetition of the conduct or comparable conduct by others similarly situated."[35] Sanctions may be monetary or nonmonetary in nature,[36] although the rule provides for certain limitations on monetary sanctions.[37] Finally, as noted above, the rule expressly does not apply to certain papers presented in conjunction with the discovery process.[38]

IV. SURVEY OF RULE 11 PRACTICE AT THE CIT

A review of CIT rulings reveals four principal situations in which Rule 11 plays a part. The most common by far consists of cases in which the CIT invokes the rule *sua sponte*, not to impose sanctions, but to warn the attorneys before it that the rule exists, that it governs their conduct, and that they would be wise to take that into account when filing papers.[39] Second, Rule 11 plays a part in those cases in which one party moves for sanctions against another and the CIT dismisses the motion.[40]

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33. U.S. CT. INT'L TRADE R. 11(c)(2).
34. *Id.* R. 11(c)(3).
35. *Id.* R. 11(c)(4).
36. *Id.*
37. *Id.* R. 11(c)(5).
38. *Id.* R. 11(d); *see also id.* R. 37.
39. *See, e.g.*, United States v. Country Flavor Corp., 844 F. Supp. 2d 1348, 1351 n.4 (Ct. Int'l Trade 2012); BenQ Am. Corp. v. United States, 683 F. Supp. 2d 1335, 1347 n.21 (Ct. Int'l Trade 2010); United States v. Tip Top Pants, Inc., No. 10-5, slip op. at 14 (Ct. Int'l Trade Jan. 13, 2010); United States v. T.J. Manalo, Inc., 659 F. Supp. 2d 1297, 1300 n.8 (Ct. Int'l Trade 2009); Former Emps. of BMC Software, Inc. v. U.S. Sec'y. of Labor, 31 Ct. Int'l Trade 1600, 1684 n.108 (2007); Former Emps. of IBM Corp. v. U.S. Sec'y of Labor, 31 Ct. Int'l Trade 463, 522 (2007); Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 30 Ct. Int'l Trade 1173, 1179 n.6 (2006); Volkswagen of Am. v. United States, 22 Ct. Int'l Trade 280, 283 & n.2 (1998); Fuyao Glass Indus. Grp. Co. v. United States, 27 Ct. Int'l Trade 1160, 1163 n.3 (2003); Earth Island Inst. v. Christopher, 20 Ct. Int'l Trade 460, 471-72 (1996); Bomont Indus. v. United States, 10 Ct. Int'l Trade 431, 433 n.5 (1986).
40. *See, e.g.*, Diamond Sawblades Mfrs. Coal. v. United States, No. 10-17, slip op. at 10 (Ct. Int'l Trade Feb. 12, 2012); Warner-Lambert Co. v. United States, 32 Ct. Int'l Trade 263, 269 (2008); Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 29 Ct. Int'l Trade 1204, 1216 (2005) (applying FRCP Rule 11, which is substantively similar enough to USCIT Rule 11 to warrant comparison); United States v. Pan Pac. Textile Grp., Inc., 27 Ct. Int'l Trade 925, 926

Third, there are a handful of cases in which the CIT has ordered a party to show cause why it should not be sanctioned or where the CIT has actually imposed sanctions.[41] In the fourth situation, involving motions for attorney's fees under the Equal Access to Justice Act (EAJA), the CIT discusses the interplay between Rule 11 and the EAJA.[42]

A. Rule 11 as a Warning

Most commonly, Rule 11 is invoked in CIT cases as a means of warning the litigants to remember their obligation to conduct a reasonable inquiry into the basis for their claims or defenses, to present the CIT only with facts and argument that a reasonable inquiry reveals to be nonfrivolous, and to have evidentiary support.[43] In some cases, the CIT expressly warns counsel that the continuation or repetition of certain behavior will result in an order to show cause or the imposition of sanctions.[44] In others, Rule 11 is mentioned in passing, though pointedly, as though to remind counsel of its existence.[45] The most common kind of

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(2003); Inner Secrets/Secretly Yours, Inc. v. United States, 18 Ct. Int'l Trade 1028, 1037 (1994) (applying FRCP Rule 11, which is substantively similar enough to USCIT Rule 11 to warrant comparison); Associacao dos Industriais de Cordoaria e Redes v. United States, 17 Ct. Int'l Trade 754, 764 (1993); United States v. Thorson Chem. Corp., 14 Ct. Int'l Trade 550, 551, 553 (1990); Daewoo Elecs. Co. v. United States, 11 Ct. Int'l Trade 125, 126, 130 (1987); United States v. Priscilla Modes, Inc., 9 Ct. Int'l Trade 598, 598-99 (1985); Beker Indus. Corp. v. United States, 7 Ct. Int'l Trade 199, 203 (1984).

41. *See, e.g.*, Anderson v. U.S. Sec'y of Agric., 30 Ct. Int'l Trade 1993, 1995 (2006); Retamal v. U.S. Customs & Border Prot., 29 Ct. Int'l Trade 132, 133 (2005); United States v. Almany, 22 Ct. Int'l Trade 402, 403 (1998); Ornatube Enter. Co. v. United States, 19 Ct. Int'l Trade 1419, 1419-20 (1995); Wire Rope Importers' Ass'n v. United States, 18 Ct. Int'l Trade 478, 485 (1994).

42. *See, e.g.*, Former Emps. of Invista, S.A.R.L. v. U.S. Sec'y of Labor, 714 F. Supp. 2d 1320, 1357 (Ct. Int'l Trade 2010); Yancheng Baolong Biochemical Prods. Co. v. United States, 28 Ct. Int'l Trade 578, 587-88 (2004); Earth Island Inst. v. Christopher, 20 Ct. Int'l Trade 1221 (1996).

43. *See* cases cited *supra* note 39.

44. *See, e.g.*, *T.J. Manalo*, 659 F. Supp. 2d at 1300 n.8 (warning counsel that failure to review facts presented to the CIT for evidentiary support "may result in the imposition of sanctions on parties and/or their counsel"); *Volkswagen of Am.*, 22 Ct. Int'l Trade at 283 n.2 (noting that counsel came "perilously close" to a show-cause hearing); *Earth Island Inst.*, 20 Ct. Int'l Trade 471-72 ("[B]ut for the desirability of curtailing further litigation, this court would order the defendants to show cause why sanctions should not be imposed pursuant to CIT Rule 11(c).").

45. *See, e.g.*, United States v. Tip Top Pants, Inc., No. 10-5, slip op. at 14 (Ct. Int'l Trade Jan. 13, 2010) (noting that under Rule 11, it would be "improper for any action to be maintained against a defendant where no valid basis for such an action could be shown") (citations omitted); Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 30 Ct. Int'l Trade 1173, 1179 n.6 (2006) (referring to Rule 11 in dismissing an argument that the CIT found to have no apparent evidentiary foundation); Fuyao Glass Indus. Grp. Co. v. United States, 27 Ct. Int'l Trade 1160, 1163 & n.3 (2003) (deciding that the plaintiff's motion did not have the "requisite 'evidentiary support' required by the [CIT]").

behavior that leads to such warnings is the failure to adequately investigate the factual and legal basis for claims presented to the CIT.[46] Other behaviors that have previously led to warnings include (1) disregarding court orders and opinions,[47] (2) filings that tend to delay proceedings or otherwise defeat the purpose of the CIT's rules and processes,[48] (3) failure to present relevant facts or to provide citations,[49] and (4) unjustified attempts to enlarge the administrative record.[50]

While one might suppose that private litigants are most at risk of crossing the line from zealous advocacy into questionable conduct, many of the CIT's "shot across the bow" invocations of Rule 11 are aimed at attorneys for the government.[51] The government is also the predominant target of parties' motions for sanctions.[52] But it must be remembered that cases at the CIT nearly always take the form of challenges to government action or government suits against private parties. With the government being such a prominent party in CIT actions, it is little wonder that the government would be the target of warnings and motions for sanctions.

Further, attorneys for the government in cases before the CIT may be in a fundamentally different situation with respect to their client than are private parties. The CIT's jurisdiction over suits against the government primarily involves a fairly deferential standard of review,[53] which limits the scope of possible arguments that a private party can raise as well as the facts that a private party can present. Even in

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46. United States v. Country Flavor Corp., 844 F. Supp. 2d 1348, 1351 n.4 (Ct. Int'l Trade 2012); BenQ Am. Corp. v. United States, 683 F. Supp. 2d 1335, 1347 n.21 (Ct. Int'l Trade 2010); *T.J. Manalo*, 659 F. Supp. 2d at 1300 n.8; *Shakeproof Assembly Components*, 30 Ct. Int'l Trade at 1179 n.6.

47. Former Emps. of IBM Corp. v. U.S. Sec'y of Labor, 31 Ct. Int'l Trade 463, 522 (2007); British Steel PLC v. United States, 20 Ct. Int'l Trade 955, 970 n.14 (1996).

48. *Volkswagen of Am.*, 22 Ct. Int'l Trade at 283; *Earth Island Inst.*, 20 Ct. Int'l Trade at 471-72; Zoltek Corp. v. United States, 13 Ct. Int'l Trade 1098, 1103 (1989).

49. *Fuyao Glass Indus. Grp.*, 27 Ct. Int'l Trade at 1163 & n.3; Bomont Indus. v. United States, 10 Ct. Int'l Trade 431, 433 n.5 (1986).

50. Ammex, Inc. v. United States, 23 Ct. Int'l Trade 1066, 1066 (1999); Sachs Auto. Prods. Co. v. United States, 17 Ct. Int'l Trade 740, 741 (1993).

51. *Country Flavor*, 844 F. Supp. 2d at 1351 n.4; *T.J. Manalo*, 659 F. Supp. 2d at 1300 n.8; Former Emps. of BMC Software, Inc. v. U.S. Sec'y. of Labor, 31 Ct. Int'l Trade 1600, 1684 n.108 (2007); *Former Emps. of IBM*, 31 Ct. Int'l Trade at 522; *British Steel PLC*, 20 Ct. Int'l Trade at 970 n.14; *Earth Island Inst.*, 20 Ct. Int'l Trade at 471-72; *Bomont Indus.*, 10 Ct. Int'l Trade at 433 n.5.

52. *See* cases cited *infra* notes 59, 64. Of course, the government's primacy as the target of motions for sanctions may say less about the government's behavior than about private litigants' willingness to move for sanctions.

53. *See* 28 U.S.C. § 2640(b) (2006); 19 U.S.C. § 1516a(b)(1)(B) (2006). Cases brought under the CIT's residual grant of jurisdiction, 28 U.S.C. § 1581(i), are generally handled as raising claims under the Administrative Procedure Act, which provides for a deferential standard in reviewing agency action.

Customs litigation under 28 U.S.C. § 1581(a), where significant deference is not ordinarily accorded to agency action or decision making,[54] an attorney representing a private party may be limited in the arguments he can raise by what his client will agree to pay for.[55] An attorney for the government, however, may feel justified in raising any colorable claim or defense on behalf of the taxpayer. In some cases, this may involve arguments that a private party would not choose to advance.

Regardless of the reasons for the government's prominence in cases involving Rule 11, the fact that the CIT so often invokes the rule without ordering a show-cause hearing or imposing sanctions is a testament to the collegial nature of the interactions that the CIT encourages between itself and its bar. Often, the behavior of which the CIT complains in such cases is arguably sanctionable,[56] but the CIT's practice has been to substitute warnings for actual sanctions in all but the most egregious cases.[57] This leniency appears entirely in keeping with the CIT's perception of itself and its bar. With its highly limited jurisdiction, the CIT's bar is relatively small, and its practitioners are generally well-known to both the court and each other. The CIT accordingly encourages its bar to be collegial, and its practice with respect to Rule 11 shows that it adheres to the same civility, even as it takes steps to maintain the integrity of its proceedings.

B. Rule 11 Dismissed

The second most common situation involving Rule 11 at the CIT consists of cases in which one or more of the parties moves for sanctions against another, but the CIT dismisses the motion.[58] In most of these cases, the CIT gives the motion only cursory treatment.[59] Often, the CIT simply states that the motion is denied.[60]

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54. *See, e.g.*, Dell Prods. LP v. United States, 714 F. Supp. 2d 1252, 1256 (Ct. Int'l Trade 2010).

55. More to the point, many importers may not feel that it is worth challenging a Customs decision in court. Given the costs and uncertainties inherent in litigation, and the business necessity of maintaining a cordial relationship with Customs, importers may favor adapting to Customs decisions where possible, even if the importer disagrees with the factual or legal basis for the decisions.

56. For example, a failure to cite relevant precedent or facts may result in a party having presented a paper that lacks legal or factual support.

57. *See* cases cited *supra* note 25.

58. *See* cases cited *supra* note 40.

59. Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 29 Ct. Int'l Trade 1204, 1215 (2005) (applying FRCP Rule 11, which is substantively similar enough to USCIT Rule 11 to warrant comparison); United States v. Pan Pac. Textile Grp., Inc., 27 Ct. Int'l Trade 925, 931 (2003); United States v. Jac Natori Co., 17 Ct. Int'l Trade 348, 348 n.1 (1993); A. Hirsh, Inc. v.

In these types of cases, the lack of substantive discussion makes it difficult to know how the CIT found the motion deficient. However, something may be gleaned from the fact that the CIT has in several cases delayed ruling on parties' Rule 11 motions until it issues its opinion on the separate, dispositive motions in the litigation.[61] Rule 11 itself presupposes that parties' motions for sanctions will relate to particular papers, first by requiring attorneys'/parties' signatures on all papers presented and then by stating that such a signature acts to certify that the paper itself is presented for a proper purpose and that the arguments therein are justifiable both with respect to the law and the facts.[62] If a particular paper violates Rule 11, it would make sense for a court that receives a motion for sanctions to act expeditiously upon it to ensure that the case before it is not unduly affected by frivolous, improper, or unjustified filings.

By delaying disposition of Rule 11 motions until issuing a decision on the merits, the CIT is likely signaling its desire to let cooler heads prevail. Moreover, by disposing of sanctions motions in an abbreviated manner,[63] the CIT signals to movants that even if opposing parties' filings are perturbing, it would prefer not to allow acrimony to disturb its proceedings. The CIT furthers the goal of collegiality by calling out neither movants nor their targets, but simply dropping the matter as expeditiously as possible.

The CIT does not forego discussion in all cases, however. In certain cases involving a litigant's motion for Rule 11 sanctions, the CIT has

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United States, 14 Ct. Int'l Trade 498, 498 n.2 (1990); United States v. Priscilla Modes, Inc., 9 Ct. Int'l Trade 598, 600 (1985).

60. For example, consider *Inner Secrets/Secretly Yours, Inc. v. United States*, where the government moved for sanctions (citing FRCP Rule 11) in the form of attorneys' fees when the plaintiff failed to establish that the CIT had subject matter jurisdiction over its claim. 18 Ct. Int'l Trade 1028, 1037 (1994). The CIT's discussion of the government's sanctions motion is tacked on at the end of the merits discussion. In its entirety, it states: "Defendants have requested attorneys fees pursuant to 28 U.S.C. § 1927 (1988) and Federal Rules of Civil Procedure, Rule 11. In light of the above, the Court finds that the allowance of attorneys fees in this matter is not warranted and accordingly denies defendants' request." *Id.*; *see also Jac Natori*, 17 Ct. Int'l Trade at 348 n.1 (denying in full the defendant's motion to strike or dismiss parts of Customs' complaint, noting in passing that the defendant's motion also asked for Rule 11 sanctions); Sachs Auto. Prods. Co. v. United States, 17 Ct. Int'l Trade 290, 295 (1993) ("Plaintiff's motion for attorneys fees under Rule 37(a) and defendant's motion for Rule 11 sanctions are both denied.").

61. *See, e.g.*, *Hebei Metals & Minerals*, 29 Ct. Int'l Trade at 1215 (applying Rule 11 of the FRCP, which is substantively similar enough to USCIT Rule 11 to warrant comparison); *Pan Pac.*, 27 Ct. Int'l Trade at 927-28; *Inner Secrets/Secretly Yours*, 18 Ct. Int'l Trade at 1037 (applying FRCP Rule 11, which is substantively similar enough to USCIT Rule 11 to warrant comparison); United States v. Thorson Chem. Corp., 14 Ct. Int'l Trade 550, 551, 553 (1990).

62. U.S. CT. INT'L TRADE R. 11(b).

63. *See* cases cited *supra* note 59.

taken the opportunity to make larger points about the rule and the type of behavior that it permits[64] or to specifically warn counsel treading close to sanctionable territory.[65] These cases again point to the CIT's twin desires for fair and collegial litigation. By providing warnings in place of sanctions, the CIT ensures litigants' understanding of the bounds of propriety without dampening the zealousness of representation. It also takes care to maintain the collegiality of its proceedings by providing notice of when parties are in danger of breaching their ethical obligations while signaling that the standard for a successful sanctions motion is high.

C. Orders To Show Cause and Imposition of Sanctions

In very few cases, the CIT has ordered parties to show cause as to why they should not be sanctioned under Rule 11.[66] As one might surmise from the preceding discussion, a party's behavior must be fairly egregious before the CIT will make such an order.

For example, in a case in which a plaintiff repeatedly accused the CIT (as well as Commerce and agency counsel) of constituting a criminal enterprise, the CIT issued a Rule 11 order for the plaintiff to show cause as to why its action should not be dismissed.[67] In its show-cause order, the CIT described the plaintiff's filings in the case as "non-responsive," "insolent," "unfounded," "scandalous," and "inflammatory."[68] Although counsel "blatantly violate[d] the rules and orders of [the CIT]," the CIT's sanction was to dismiss the case without prejudice—an action which may have been less punitive than inevitable.[69]

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64. *E.g.*, Diamond Sawblades Mfrs. Coal. v. United States, No. 10-17, slip op. at 10 (Ct. Int'l Trade Feb. 12, 2010); Warner-Lambert Co. v. United States, 32 Ct. Int'l Trade 263, 263 (2008); Associacao dos Industriais de Cordoaria e Redes v. United States, 17 Ct. Int'l Trade 754, 755 (1993); TIE Commc'ns, Inc. v. United States, 17 Ct. Int'l Trade 125, 126 (1993); Daewoo Elecs. Co. v. United States, 11 Ct. Int'l Trade 125, 126 (1987); Beker Indus. Corp. v. United States, 7 Ct. Int'l Trade 199, 203 (1984).

65. *Diamond Sawblades Mfrs. Coal.*, No. 10-17, slip op. at 8-10; *TIE Commc'ns*, 17 Ct. Int'l Trade at 126.

66. Anderson v. U.S. Sec'y of Agric., 30 Ct. Int'l Trade 1993, 1995 (2006); Retamal v. U.S. Customs & Border Prot., 29 Ct. Int'l Trade 132, 133 (2005); United States v. Almany, 22 Ct. Int'l Trade 402, 403 (1998); Ann's Trading Co. v. United States, 22 Ct. Int'l Trade 446, 446 (1998); Ornatube Enter. Co. v. United States, 19 Ct. Int'l Trade 1419, 1419-20 (1995).

67. *Ornatube Enter.*, 19 Ct. Int'l Trade at 1419-20.

68. *Id.* at 1419.

69. *Id.* at 1420. The CIT's prior opinions in the litigation gave hints of the trouble to come. *See* Ornatube Enter. Co. v. United States, 17 Ct. Int'l Trade 134 (1993). First, the plaintiff's counsel was denied access to confidential information under a Judicial Protective Order, on the basis of his past history of noncompliance with rules regarding confidential information. *Id.* at 134. Although the CIT expressed some sympathy for the plaintiff's case, it noted the plaintiff's counsel's failure to abide by court rules and procedures in *Ornatube*

In a Customs action to recover fines and penalties against an importer doing business in his own right, the CIT similarly found the importer's counsel's "motions to be spurious and the accusations contained therein to be scandalous."[70] The CIT took the step of ordering both the attorney and the *importer himself* to appear and show cause as to why they should not be held in contempt of court—a step that shows the depth of the CIT's concern over the conduct of the defendant's case.[71] The importer avoided the hearing by firing his counsel and obtaining other, presumably less incendiary, representation.[72]

In another case resulting in a show-cause hearing, a plaintiff's failure to undertake a reasonable inquiry into the basis for its action resulted in the waste of judicial resources.[73] While the CIT has jurisdiction to hear challenges to Customs' decisions to exclude merchandise, it does not have jurisdiction to hear appeals of Customs' seizures of merchandise.[74] At a hearing on the plaintiff's challenge to the exclusion of merchandise, the plaintiff's counsel admitted that he had undertaken no investigation to ensure that an exclusion had occurred, rather than a seizure.[75] Worse, it was clear that the plaintiff's counsel had evidence that Customs had in fact seized the relevant merchandise.[76]

In another case, the CIT ordered the United States Department of Agriculture to show cause as to why it had not violated Rule 11 in refusing to abide by a court order.[77] In refusing to carry out the order, the agency relied on a United States Court of Appeals for the Federal Circuit decision that the agency viewed as binding.[78] The CIT, however, stated that the precedent was not applicable to the facts at issue.[79] More importantly, the CIT stated that if its order was inconsistent with

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Enterprise Co. v. United States, 18 Ct. Int'l Trade 38, 40 (1994). In a later proceeding, the CIT warned the parties that "any further misapplication of the Court rules or other delay will be viewed with the utmost scrutiny." Ornatube Enter. Co. v. United States, 18 Ct. Int'l Trade 467, 468 (1994). At the same time, the plaintiff's counsel does not appear to have been the only "bad actor" in the litigation. The CIT also called out the government for its "self-serving interpretation" of a remand order and blamed it for delaying the proceedings. *Ornatube Enter.*, 18 Ct. Int'l Trade at 39.

70. *Almany*, 22 Ct. Int'l Trade at 402.

71. United States v. Almany, 22 Ct. Int'l Trade 459, 459 (1998); *Almany*, 22 Ct. Int'l Trade at 402-03.

72. *Almany*, 22 Ct. Int'l Trade at 459.

73. *See* Ann's Trading Co. v. United States, 22 Ct. Int'l Trade 446, 448 (1998).

74. 28 U.S.C. § 1356 (2006); *see also* PRP Trading Corp. v. United States, No. 12-126, slip op. at 5-6 (Ct. Int'l Trade Oct. 2, 2012).

75. *Ann's Trading*, 22 Ct. Int'l Trade at 448.

76. *Id.*

77. Anderson v. U.S. Sec'y of Agric., 30 Ct. Int'l Trade 1993, 1995 (2006).

78. *Id.* at 1993.

79. *Id.* at 1994.

governing precedent, the agency should have moved for reconsideration of the order, rather than have simply refused to comply with it.[80] Other cases involving apparent failures to follow CIT orders have resulted only in warnings,[81] but the CIT justified a show-cause hearing in this case on the basis that "a plain reading of [Federal Circuit precedent] would have demonstrated its inapplicability."[82]

Despite these few cases, *prudence* and *forbearance* are the watchwords of the CIT's handling of Rule 11 matters—wise ones, given that even the CIT itself has been taken to task for acting too rashly in Rule 11 matters. In a case challenging the revocation of a customs broker's license, the CIT sanctioned an attorney who represented a client on a motion for reconsideration without having filed a substitution of counsel notice.[83] The sanction was later overturned by the Federal Circuit, which noted that because the client had previously appeared pro se, there was no counsel to substitute.[84]

There is only one instance in which the CIT has granted a litigant's motion for sanctions under Rule 11.[85] *Wire Rope Importers' Ass'n* involved a challenge mounted by a coalition of importers against a Commission finding that imports of wire rope were injuring the U.S. industry, justifying an AD duty order.[86] The government subsequently sought Rule 11 sanctions relating to (1) the plaintiff's motions to intervene in two other parties' cases challenging the Commission's decision and (2) the plaintiff's untimely complaint and response to the government's motion to dismiss for failure to timely file a complaint.[87] The CIT denied the motion for sanctions as it related to the plaintiff's intervention motions, noting that the plaintiff had a statutory right of intervention.[88]

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80. *Id.*

81. *See* Former Emps. of IBM v. U.S. Sec'y of Labor, 31 Ct. Int'l Trade 463, 522 (2007); British Steel PLC v. United States, 20 Ct. Int'l Trade 955, 970 n.14 (1996).

82. *Anderson*, 30 Ct. Int'l Trade at 1994. Interestingly, the Federal Circuit later criticized the CIT for misconstruing the precedent at issue and held that the agency had interpreted it correctly. Hacker v. United States, 613 F.3d 1380, 1386 n.4 (Fed. Cir. 2010). This does not, of course, mean that the agency was correct to defy a court order, rather than move for reconsideration.

83. Retamal v. U.S. Customs & Border Prot., 29 Ct. Int'l Trade 132 (2005). The sanction took the form of an admonition under Rules 11, 7, and 75. *Id.* at 133, 137.

84. Retamal v. U.S. Customs & Border Prot., 439 F.3d 1372, 1374, 1377 (Fed. Cir. 2006).

85. Wire Rope Importers' Ass'n v. United States, 18 Ct. Int'l Trade 478 (1994).

86. *See id.* at 479.

87. *Id.* at 479-80.

88. *Id.* at 481.

However, the CIT granted the motion as to the plaintiff's untimely complaint and response to the motion to dismiss.[89] The statute governing challenges to Commission injury determinations requires the filing of a summons and a complaint within a certain amount of time.[90] These timing requirements were uniformly held to be jurisdictional at the time of the litigation.[91] Accordingly, the CIT found that the plaintiff's claim that a timely complaint was not jurisdictional, was unreasonable, and was not justified by a good-faith argument for the modification of existing law.[92] Interestingly, the CIT has recently noted the existence of United States Supreme Court precedent suggesting that the statutory timing requirements are *not* jurisdictional.[93] As such, the argument that resulted in sanctions in the 1980s might be seen as nonfrivolous today.

D. Rule 11 and the EAJA

Several of the CIT's cases discussing Rule 11 do so in the context of motions for attorneys' fees under the EAJA.[94] These cases suggest that where one party desires to recover the fees incurred in responding to frivolous motions or arguments, the EAJA may be a more practical means to that end than Rule 11. If past precedent is anything to go by, Rule 11 motions are rarely granted,[95] whereas EAJA applications have been moderately successful at the CIT.[96]

As discussed above, Rule 11 motions are meant to prevent frivolous and unjustified pleadings.[97] Because a motion for sanctions can be made in response to any violative pleading, Rule 11 motions may be filed well

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89. *Id.* at 485.

90. 19 U.S.C. § 1516a(a)(2) (2006).

91. *Wire Rope Importers' Ass'n*, 18 Ct. Int'l Trade at 482-84.

92. *Id.* at 482-85.

93. Baroque Timber Indus. (Zhongshan) Co. v. United States, 865 F. Supp. 2d 1300, 1303 (Ct. Int'l Trade 2012).

94. *See* cases cited *supra* note 42.

95. As discussed above, there is only one case in which the CIT has granted a party's motion for Rule 11 sanctions. *Wire Rope Importers' Ass'n*, 18 Ct. Int'l Trade at 478.

96. *See, e.g.*, Diamond Sawblades Mfrs. Coal. v. United States, 816 F. Supp. 2d 1342, 1363 (Ct. Int'l Trade 2012); Lizarraga Customs Broker v. Bureau of Customs & Border Prot., No. 11-128, slip op. at 1-2 (Ct. Int'l Trade Oct. 17, 2011); Former Emps. of Invista, S.A.R.L. v. U.S. Sec'y of Labor, 714 F. Supp. 2d 1320 (Ct. Int'l Trade 2010); Former Emps. of BMC Software, Inc. v. U.S. Sec'y. of Labor, 31 Ct, Int'l Trade 1600 (2007); Former Emps. of Tyco Elecs., Fiber Optics Div. v. U.S. Dep't of Labor, 28 Ct. Int'l Trade 1571 (2004); Libas, Ltd. v. United States, 27 Ct. Int'l Trade 1193, 1194 (2003); Humane Soc'y of the U.S. v. Bush, 25 Ct. Int'l Trade 851 (2001).

97. U.S. CT. INT'L TRADE R. 11(b); *see also* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) ("[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus . . . streamline the administration and procedure of the federal courts." (citation omitted)).

before litigation concludes.[98] A Rule 11 motion can also be filed by any party to a litigation, against any party in a litigation.[99] The merits of a Rule 11 motion do not hinge, in whole or in part, on which party prevails in the litigation as a whole.[100] It is enough that the party that is the target of the motion has filed a paper that violates the rule, either because it was made for an improper purpose or because it presents arguments that are not justified under the facts or applicable law.[101]

By contrast, there are significant limitations on the availability of fee awards under the EAJA. A private party may only apply for an award against the government.[102] An application can only be made after litigation has ended,[103] and only then if the applicant is the prevailing party in the litigation as a whole.[104] Also, the applicant's net worth must be below a certain threshold.[105] The EAJA, then, is of no help to a party that wishes to obtain sanctions against a nongovernmental party, a party that is not the prevailing party in the case as a whole, or a party that has a net worth that exceeds the statutory maximum.

However, from a practical perspective, the CIT appears far more likely to grant a monetary award in conjunction with an EAJA application than it is to grant any sanction at all in response to a Rule 11 motion.[106] The differing treatment of the two types of motions may be traceable to the fact that Rule 11 is essentially punitive, while EAJA awards are restorative. Under Rule 11, a party that fails to abide by the rule is punished to ensure future adherence to the rule.[107] Under the EAJA, a small litigant that prevails against the government may recoup the costs it undertook in challenging unjustified government action or defending against unjustified action.[108] Under the EAJA, the point is not so much that the government is punished as that the prevailing party is made whole.

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98. *See* Daewoo Elecs. Co. v. United States, 11 Ct. Int'l Trade 125, 126, 129 (1987) (examining Rule 11 compliance of counsel's signature on a summons).

99. *See* cases cited *supra* note 15.

100. *See, e.g.*, Inner Secrets/Secretly Yours, Inc. v. United States, 18 Ct. Int'l Trade 1028, 1037 (1994) (applying FRCP Rule 11, which is substantively similar enough to USCIT Rule 11 to warrant comparison).

101. *See* Wire Rope Importers' Ass'n v. United States, 18 Ct. Int'l Trade 478 (1994).

102. 28 U.S.C. § 2412(d)(1)(A) (2006); *see also id.* § 2412(d)(2)(B), (H).

103. *Id.* § 2412(d)(1)(A)-(B).

104. *Id.* § 2412(d)(1)(A), (2)(H).

105. *Id.* § 2412(d)(2)(B).

106. *See* cases cited *supra* notes 95-96.

107. U.S. CT. INT'L TRADE R. 11(c)(4).

108. *See, e.g.*, Allegheny Bradford Corp. v. United States, 28 Ct. Int'l Trade 2107, 2108 (2004).

The CIT's preference for remedial, rather than punitive, action is reflected in *Wire Rope Importers' Ass'n*.[109] The sanctions issued in conjunction with frivolous filings took the form of a monetary award meant to defray the costs the movant had incurred in responding to those filings.[110] The amount of the sanction was based on a bill of costs supplied by the movant and was thus specifically tailored to restore the movant to the position it would have been in absent the frivolous papers.[111] The sanction was inherently remedial, rather than punitive.

Wire Rope Importers' Ass'n not only tends to confirm the reason for the success of EAJA petitions, but also provides guidance for future Rule 11 movants. To the extent that it is possible to frame a Rule 11 motion as focused not on punishing the target party, but on remedying harms caused by the target party's filings, the CIT may be more inclined to listen.

V. CONCLUSION

A survey of CIT opinions invoking Rule 11 demonstrates that the CIT favors using the rule to guide, rather than to punish. The rule is most often invoked simply to inform and warn litigants of the boundaries of acceptable behavior without any sanctions actually being imposed. Litigants' own motions for sanctions are often dismissed without substantive discussion or otherwise turned again to the CIT's preferred end of guiding future conduct, rather than punishing what has already occurred. The CIT's practice with respect to both Rule 11 and awards under the EAJA suggests that framing a motion for sanctions as remedial rather than punitive may lead to more favorable outcomes than other, less collegially minded approaches.

109. 18 Ct. Int'l Trade 478 (1994).
110. *Id.* at 485.
111. *Id.*