

PROPOSED CIT JURISDICTION LEGISLATION UNVEILED

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Recently, proposed legislation to augment the jurisdiction of the U.S. Court of International Trade (CIT) has been provided to key industry groups and associations, including the ABA International Trade Committee, for review and comment. The legislation, which is known as the United States Court of International Trade Modernization and Trade Facilitation Act (CIT Modernization Act), is expected to be introduced in Congress by mid-2012. Key provisions of the proposed CIT Modernization Act are discussed below.¹

Two New Categories of Appealable CBP Decisions

Currently, Section 514(a) of the Tariff Act of 1930, as amended (Tariff Act), enumerates seven categories of decisions issued by U.S. Customs and Border Protection (CBP) that are subject to protest.² The proposed CIT Modernization Act would add two new categories that are subject to protest and then appeal to the CIT.

The first category would allow protests when the importer, faced with a demand by CBP for payment of duties pursuant to 19 U.S.C. §§1592(c) or (d) or 19 U.S.C. § 1593A(c) or (d), voluntarily tenders those duties despite disagreement with the demanded duty assessment.³ This change remedies the predicament created by the current law, under which importers who wish to dispute their duty assessments must choose either: (1) to pay duties voluntarily and potentially lose any recourse to challenge those duties later; or (2) to refuse to pay the amount assessed, wait for the government to commence an action at the CIT and risk large monetary penalties for non-payment. The addition of this new category provides an avenue for importers who have voluntarily paid duties in connection with a prior disclosure or pursuant to a demand by CBP to challenge the CBP's liability determinations and amounts through an appeal to the CIT.⁴

The second category would permit an importer to file a protest of a CBP demand for duties after an audit instead of the current situation that forces the importer to wait for CBP to bring a penalty.⁵ Under current law, the importer does not have any administrative procedure for challenging the demand for payment itself. To remedy this situation, the proposed amendment would effectively create an administrative procedure similar to the tax audit procedures used by the I.R.S., which allow taxpayers to challenge a deficiency assessment before making a payment. The proposed change would provide importers with a mechanism to protest a duty assessment without first paying the amount demanded.

*Hat tip to insidetrade.com and tradereform.org for their reporting on this legislation.

¹ The full text of the United States Court of International Trade Modernization and Trade Facilitation Act (CIT Modernization Act) and related materials can be found on the ABA International Trade Committee's website, which can be accessed at <http://apps.americanbar.org/dch/committee.cfm?com=IC776000>

² See 19 U.S.C. § 1514(a).

³ CIT Modernization Act § 104(a).

⁴ The proposed amendment seeks to codify the ruling in *Brother Int'l Corp. v. United States*, 246 F. Supp.2d 1318 (Ct. Int'l Trade 2003). In *Brother Int'l*, the CIT concluded that a payment of duties made after a demand by U.S. Customs is not voluntary, and therefore, a party that overpaid would be able to protest the payment as an exaction.

⁵ CIT Modernization Act § 104(a).

Liquidation Issues in AD and CVD Cases

The CIT Modernization Act also would amend statutory provisions relating to the suspension of liquidation of entries in certain antidumping (AD) and countervailing duty (CVD) cases. In accordance with current law, court-ordered injunctions are routinely granted against the liquidation of entries covered under a judicial review of an agency's AD and CVD determination, but only after parties have filed detailed injunctive motions.⁶ The CIT Modernization Act's proposed amendments would eliminate the need for parties to file injunctive motions with the court and generally would prohibit CBP from liquidating entries of subject merchandise pending the final disposition of the court, including all appeals.⁷

One of the proposed amendments would relate to entries covered under judicial reviews of determinations rendered by the U.S. Department of Commerce (DOC) in scope reviews or administrative reviews under Section 751 of the Tariff Act.⁸ Under the proposed amendment, if a party requests judicial review of such a DOC determination, liquidation of entries covered by the action generally would be suspended pending the final disposition of the court, including all appeals.⁹ However, a provision under the proposed amendment would allow the court to order the DOC to lift the suspension of liquidation before the final decision by the court, upon request by an interested party and a showing that the requested relief should be granted under the circumstances.¹⁰

The statute also would be amended to provide that any liquidation that does not occur in accordance with the reviewing court's decision is contrary to law, which would make clear that it is the court's decision, not deemed liquidation, that controls the entries subject to judicial review. In addition, the proposed amendments would permit the court to include language in its orders governing the time for liquidation of the entries covered by the court's decision. Moreover, they would require the DOC to report to the court regarding the status of liquidation within six months of the court's final order, and if the liquidation of subject entries is not completed within a reasonable amount of time, or if the liquidation does not comply with the court's order, then the court may grant appropriate relief.¹¹

In addition, the Customs Modernization Act contains provisions that would require the suspension of liquidation of entries during an administrative review to remain in effect until the time for appeal of the review determination to the CIT under 19 U.S.C. § 1516a has elapsed.¹² Subsequently, liquidation would be required to be made promptly afterward, and, to the greatest extent possible, within 90 days, unless the suspension of liquidation remains in effect during judicial review.¹³

⁶ See 19 U.S.C. § 1516a.

⁷ CIT Modernization Act § 105.

⁸ See 19 U.S.C. § 1675.

⁹ CIT Modernization Act § 105.

¹⁰ *Id.*

¹¹ *Id.*

¹² CIT Modernization Act § 108.

¹³ *Id.*

Augmentation of CIT Jurisdiction to Hear Certain Kinds of Cases

The CIT Modernization Act would expand the number and types of cases over which the CIT has exclusive jurisdiction. Specifically, the proposed legislation would grant the CIT residual jurisdiction to cover cases arising out of any law of the United States providing for: (1) revenue from tonnage, (2) tariffs, duties, taxes, or fees on the importation of merchandise; (3) embargoes or other quantitative restrictions on the importation of merchandise; (4) any prohibition or condition on the importation of merchandise; (5) importation without otherwise applicable duties, taxes, or fees on the importation of merchandise, or deferral of such duties, taxes, or fees; or (6) administration and enforcement with respect to the matters referred to in subsections 1581(a) through (h), paragraphs (1) to (5) of subsection 1581(i), or section 1582. Key changes that would be effected through implementation of the residual jurisdiction provisions of the CIT Modernization Act are discussed below.¹⁴

Under the current legislation, the CIT has jurisdiction over “embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety.”¹⁵ The proposed legislation deletes the phrase “for reasons other than the protection of the public health and safety,” such that the CIT would have exclusive jurisdiction over all embargoes and other quantitative restrictions relating to the importation of merchandise.¹⁶

The CIT Modernization Act also would grant the CIT jurisdiction over “any prohibition or condition on the importation of merchandise.”¹⁷ This change would overrule a portion of the U.S. Supreme Court’s 1988 *K-Mart* decision that narrowly construed the CIT’s jurisdictional grant to include only embargoes and quantitative restrictions,¹⁸ and would codify Congress’s intent to grant to the CIT jurisdiction over all federal laws that impose prohibitions and conditions on the importation of merchandise - not just over the embargoes and quantitative restrictions specified in 19 U.S.C. § 1581(i)(3).

Another proposed addition to 28 U.S.C. § 1581 set forth under the CIT Modernization Act would relate to a grant of jurisdiction over matters involving “importation without otherwise applicable duties, taxes, or fees on the importation of merchandise, or deferral of such duties, taxes or fees.”¹⁹ In other words, the new provision would provide the CIT with exclusive jurisdiction over statutes and federal laws providing for duty-free imports (*e.g.*, duty preference programs such as GSP and AGOA and free trade agreements).

The CIT Modernization Act also would amend the current statute to provide the CIT with jurisdiction over actions relating to administration and enforcement with respect to matters enumerated under 28 U.S.C. § 1582.²⁰ The present law suffers from uncertainty over whether importers can initiate suit and invoke the residual jurisdiction of the CIT in Customs enforcement cases, such as administrative proceedings seeking the imposition of monetary civil penalties for violations of the Customs laws or the assessment of liquidated damages for violation of terms of a customs bond. Premised on the rationale that Congress intended for the CIT to handle all litigation arising from Customs enforcement actions, the purpose of the proposed amendment is to clarify that aggrieved parties may, in appropriate cases, invoke the residual jurisdiction of the CIT in Customs enforcement cases.

¹⁴ CIT Modernization Act § 301.

¹⁵ See 28 U.S.C. § 1581(i)(3).

¹⁶ CIT Modernization Act § 301(3)(B).

¹⁷ *Id.* at § 301(3)(D).

¹⁸ See *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988).

¹⁹ CIT Modernization Act § 301(3)(E).

²⁰ *Id.* at § 301(3)(G).

In addition, the proposed legislation specifies that the CIT does not have jurisdiction over any civil actions arising under Section 337 of the Tariff Act, for which jurisdiction is specifically conferred on the U.S. International Trade Commission (ITC) or the U.S. Court of Appeals for the Federal Circuit (CAFC).²¹ Specifically, the ITC retains exclusive jurisdiction over Section 337 investigations, while the CAFC has exclusive jurisdiction over appeals of the ITC's decisions in Section 337 proceedings. However, other kinds of actions against the U.S. Government that arise in the Section 337 context will be litigated in the first instance at the CIT. For example, the CIT could hear cases relating to CBP rulings pertaining to the administration of Section 337 exclusion orders issued by the ITC.

The CIT Modernization Act also would provide the CIT with exclusive jurisdiction over any civil action commenced by the United States for the following purposes:

1. to recover a civil penalty under any provision of the Tariff Act or any other provision of law governing the importation or exportation of merchandise;
2. to recover a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of Treasury;
3. to recover customs duties; or
4. to enforce a summons under Section 510 of the Tariff Act.²²

In addition, the proposed amendments would provide the CIT with exclusive jurisdiction over any seizure under the Tariff Act or any provision relating to the importation of merchandise, except seizures of narcotics or other controlled substances.²³

Alternative Dispute Resolution Procedures

The CIT Modernization Act also would amend 28 U.S.C. § 2647 to authorize the CIT to issue rules regarding the use of alternative dispute resolution (ADR) processes in civil actions, except that such ADR processes would not be authorized for actions arising under Title VII of the Tariff Act (*i.e.*, AD and CVD cases). In addition, the proposed amendments would allow the CIT to refer certain civil actions to arbitration with the consent of the parties, except actions involving alleged violations of Constitutional rights or actions in which the amount in controversy, or the amount of relief sought, is greater than \$150,000.²⁴

With respect to arbitration awards, the proposed legislation provides that an arbitration award shall be filed with the clerk of the CIT promptly after the arbitration hearing is concluded. The arbitration award will enter as the judgment of the court after the time for requesting a trial de novo or judicial determination has passed and the judgment will have the same effect as a judgment of the CIT in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise. Within 30 days after the filing of an arbitration award with the CIT, a party may file a demand for a trial de novo (in cases for which a trial de novo is provided by law) or a judicial determination (in cases where no trial de novo is provided). Upon demand for a trial de novo or judicial determination, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.²⁵

²¹ *Id.* at § 301(4).

²² *Id.* at § 302.

²³ *Id.*

²⁴ *Id.* at § 306.

²⁵ *Id.*

Future Actions Relating to the CIT Modernization Act

As discussed above, the CIT Modernization Act is available on the ABA International Trade Committee's [website](#). If anyone has comments or concerns about the proposed bill, please send them to Geoff Goodale, Co-Chair of the International Trade Committee, at ggoodale@goodwin.com as soon as possible.

Information concerning developments relating to the proposed legislation, such as when it is introduced in Congress and how the Committee will work to seek blanket authority from the ABA Section of International Law for the submission of comments to Congress on it, will be posted on the Committee's website and sent via the Committee's Listserv as events warrant.