

**Customs-Related USCIT Jurisdictional Provisions To Be Considered By House
Trade Subcommittee**

By Patrick C. Reed*

Over the summer there has been a potentially important development in CITBA's facilitation of proposed legislation to expand the jurisdiction of the Court of International Trade. In July, the staff of the Trade Subcommittee of the House Ways & Means Committee asked the working group on the legislation to submit a revised version of the proposed legislation that is limited to certain customs-related provisions. The subcommittee staff indicated that these provisions would be considered for inclusion in the Customs Reauthorization legislation. The provisions the subcommittee staff asked the working group to include relate to protests, liquidation issues in antidumping and countervailing duty cases, customs brokers' license cases, the residual jurisdiction of the Court of International Trade, and government penalties and seizures. The proposals are summarized below. Copies of the draft legislative language and a more detailed explanation will be available on the CITBA website.

Protest Provisions. The proposed legislation would amend 19 U.S.C. § 1514(a) by adding two categories of CBP decisions that are subject to protest: (1) the assessment or collection of duties, taxes, or fees, whether or not voluntarily tendered, under 19 U.S.C. § 1592(c) or (d) or 1593a(c) or (d); and (2) demands by CBP for payment or repayment of duties, taxes and fees otherwise than in accordance with 19 U.S.C. §§ 1500 & 1501.

In substance, the first amendment overrules *Carlingswitch Inc. v. United States*, 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981), which held that a voluntary tender of unpaid duties in a prior disclosure is not a protestable "exaction," leaving an importer no remedy if the importer made an overpayment in the voluntary tender. The amendment codifies *Brother International Corp. v. United States*, 246 F. Supp.2d 1318 (Ct. Int'l Trade 2003), which distinguished *Carlingswitch* and held that a payment made after a demand by U.S. Customs is not voluntary. As a result, the amendment eliminates the existing uncertainty over whether, in any given future case, a court will rule that the facts are analogous to *Carlingswitch* or *Brother*. It also removes a constitutional cloud that exists in light of *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990), which held that a tax statute with no procedure for refunds of overpayments is unconstitutional.

The second amendment harmonizes CBP procedures after post-entry regulatory audits with IRS procedures after income tax audits. Under this procedure, the importer would have the option of filing a protest against a demand for payment of additional duties, taxes, or fees. Then, if the protest is denied, the importer would be entitled to commence an action in the Court of International Trade without paying the demanded duties, taxes, or fees, since these amounts are not liquidated. This procedure is intended to be analogous to the established procedure in income tax law in which a taxpayer,

without paying the tax, may file a petition in the Tax Court challenging a deficiency assessment. As in tax cases, interest on unpaid duties would continue to run during the litigation.

Liquidation Issues in Antidumping and Countervailing Duty Cases. The proposed legislation amends provisions of 19 U.S.C. §§ 1504, 1516a, and 1675 relating to the suspension of liquidation of entries in antidumping and countervailing duty cases. First, the suspension of liquidation during administrative reviews will remain in effect until the 30-day period for filing a summons and complaint in the Court of International Trade elapses. This amendment corrects the existing and problematic race to the courthouse that has become necessary because the Commerce Department is supposed to issue liquidation instructions within 20 days, i.e., before the 30-day period for filing the summons and complaint elapses. Second, if a party requests judicial review of a determination in an administrative review or a scope review, liquidation of entries covered by the action is suspended pending the final disposition of the court, including all appeals. This makes it unnecessary to obtain a preliminary injunction against liquidation. In cases challenging administrative reviews, these preliminary injunctions are always or nearly always granted on consent in light of *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). Third, after the conclusion of judicial review, the provision for deemed liquidation within 6 months under section 1504(d) does not apply to entries subject to judicial review under section 1516a. This avoids the possibility that a court decision could be nullified if CBP does not liquidate the entries within the required 6-month period, as occurred in *Cemex S.A. v. United States*, 279 F. Supp. 2d 1357 (Ct. Int'l Trade 2003).

Customs Brokers' License Cases. The proposed legislation makes a series of amendments to statutory provisions in Title 19 and Title 28 regarding customs brokers' license cases. It expands the jurisdiction of the United States Court of International Trade to cover all possible bases for the denial, suspension, or revocation of a customs broker's license or the imposition of monetary penalties in lieu thereof. It also clarifies the statutory terminology ("summons and complaint" replaces "petition"), resolves an ambiguity in the statute regarding service of process, and clarifies the provisions governing standing and remedies. These amendments correct a statutory gap identified in *Retamal v. U.S. Customs and Border Protection*, 439 F.3d 1372 (Fed. Cir. 2006), which noted that although the CIT has jurisdiction under 28 U.S.C. § 1581(g) to review the revocation of brokers' licenses under certain statutory provisions, revocation under 19 U.S.C. 1641(g) is not among them.

Residual Jurisdiction under 28 U.S.C. § 1581(i). The legislation rewrites the Court's grant of residual jurisdiction to cover cases arising out of any law of the United States providing for (1) revenue from imports or 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 (e.g., GSP cases); or (6) administration and enforcement with respect to the matters referred to in paragraphs (1) to (5) of subsection (i), subsections (a) through (h) of section 1581, or section 1582.

The revised language relating to “tariffs, duties, taxes, or fees on imported merchandise” omits the existing clause “not for the raising of revenue.” This overrules a misleading dictum in Supreme Court in *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988), which incorrectly stated that the CIT has jurisdiction in cases involved tariffs, duties, taxes, or fees on the importation of merchandise, “but not if they are for the ‘raising of revenue,’” apparently overlooking the court’s jurisdiction involving “revenue from imports.”

The new language giving the CIT residual jurisdiction over cases involving “any prohibition or condition on the importation of merchandise” fills a gap identified in *K-Mart*, in which the Supreme Court pointed out this omission and ruled that an “embargo” is not necessarily synonymous with a prohibition or condition on importation. The new language extending the residual jurisdiction to cases involving importation without duties, taxes, or fees, or with duty-deferral, overrules such cases as in *International Labor Rights Education and Research Fund v. Bush*, 752 F. Supp. 490 (D.D.C. 1990), in which a district court assumed jurisdiction in a case under the GSP statute because the court viewed the statute as providing for duty-free importation rather than tariffs.

The court’s residual jurisdiction is also extended to cases involving administration and enforcement with respect to matters under 28 U.S.C. § 1582 (in addition to the existing provisions). This overrules cases such as *Trayco, Inc. v. United States*, 994 F.2d 832 (Fed. Cir. 1993), in which the Federal Circuit held that a district court had jurisdiction in an importer-initiated lawsuit challenging a customs penalty. The amendment codifies *Bridalane Fashions, Inc. v. United States*, 22 CIT 1064, 32 F. Supp. 2d 466 (1998), in which the CIT assumed jurisdiction over an importer-initiated lawsuit to contest U.S. Customs’s refusal to accept a prior disclosure.

Jurisdiction in Actions by the Government under 28 U.S.C. 1582. The proposed legislation rewrites 28 U.S.C. § 1582. New subsection (a) of 1582 gives the United States Court of International Trade exclusive jurisdiction of any civil action which is commenced by the United States for the following purposes: (1) to recover a civil penalty under any provision of the Tariff Act of 1930 or any other provision of law governing the importation or exportation of merchandise; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; (3) to recover customs duties; or (4) to enforce a summons under 19 U.S.C. § 1510. New subsection (b) of section 1582 gives the Court of International Trade exclusive jurisdiction of any seizure, other than a seizure of narcotics or other controlled substances, under the Tariff Act of 1930 or any provision of law relating to the importation of merchandise.

The amendment expanding the jurisdiction in penalty cases corrects the anomaly that existing section 1582 limits the court’s jurisdiction to enumerated customs penalties, but omits such important customs penalties as those for importation of counterfeit goods under 19 U.S.C. § 1526, which was enacted after the Customs Courts Act of 1980.

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