citba.org

Customs & International Trade Bar Association

204 E ST NE Washington, DC 20002 ▪ 202-675-8447 ▪ Fax 202-547-6348 ▪ www.citba.org

September 1, 2017

Clerk's Office
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Dear Sir or Madam:

This letter is submitted on behalf of the Customs and International Trade Bar Association ("CITBA"). CITBA's members are attorneys who are interested in the field of customs law, international trade law and related matters and who frequently appear before the U.S. Court of Appeals for the Federal Circuit, generally with respect to appeals from decisions of the U.S. Court of International Trade. CITBA members represent importers, exporters and domestic producers in matters involving U.S. customs laws, antidumping and countervailing duty laws, safeguards, export licensing, and other federal laws and regulations that affect imported or exported merchandise or international commerce. CITBA also includes U.S. Government lawyers at federal departments and agencies responsible for administering the customs and international trade laws.

On behalf of CITBA's members, we write to express our concern with proposed amendments 47.4 and 47.5 to the Court's rules. These proposals would add the term "agency" to the list of pending cases that need to be identified in briefs and certificates of interest and would further eliminate the ability to generally identify appeals where many related cases exist. These revised requirements would present significant problems in trade remedy and customs appeals, given the voluminous number of cases and agency proceedings that can be affected by many of the appeals before the Court.

Specifically, many of the appeals in trade remedy cases involve overarching methodology issues or interpretations of law that can have ramifications in a massive number of cases pending before the Commerce Department or the U.S. International Trade Commission. For example, an issue such as whether the methodological practice of "zeroing" is permitted in antidumping calculations would potentially affect a huge number of agency determinations pending at Commerce. This requirement would place a tremendous burden on parties in attempting to list all

of the literally hundreds of cases that could be directly affected by a decision of the court in a given appeal in a trade remedy case.

Moreover, until there is a full briefing in an investigation or administrative review at the agency level, it would not even be possible to list all directly affected cases. The point of administrative action is to allow the agency to make decisions in the first instance after hearing from the parties. Until final agency action is rendered – at which point, if a complaint is filed, the decision will be before the judiciary and would be identified in the appeal under current Federal Circuit rules – it would not be known whether the case is directly pertinent.

Similarly, where customs appeals are involved, myriad other cases may be affected by a given appeal. By regulation (19 C.F.R. 177.7(b)), Customs and Border Protection (CBP) does not issue ruling letters as to an issue that is pending before the Court. Again, however, this could encompass a broad spectrum of administrative matters.

While it appears appropriate for the Federal Circuit to examine whether a case before it might have implications for other cases pending before the judiciary, it seems less relevant to assess whether and how the Court's decision might affect actions pending before the Executive Branch. By definition, those pending agency actions would not have been the subject of final agency decisions. Moreover, it is likely that many of those pending agency actions will never come before the judiciary. Accordingly, it is unclear how or why it is relevant that the Court be aware of pending agency actions that may be affected by its decision.

In sum, based on the overwhelming burden of this proposed requirement in the context of trade remedy and customs cases, as well as the difficulty for parties to identify cases that could or would be "directly affected" by a decision of this Court, the members of CITBA respectfully urge the Court not to adopt the proposed addition of Fec. Cir. R. 47.4(a)(5), and that the modifications proposed to Fed. Cir. R. 47.5(b) not apply to trade remedy or customs case.

Respectfully submitted,

Lawrence M. Friedman

President, Customs & International Trade Bar Assn.