

## **Customs Law**

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### **I. Introduction**

The year 2010 brought significant developments in both United States and Canadian customs law. The influences of heightened economic and security concerns, in particular, were evident in such areas as trade agreements, trade enforcement, customs enforcement, import security, and import safety. This article highlights the year's developments in these and other areas.

### **II. Judicial Review of Customs-Related Determinations**

#### **A. FEDERAL CIRCUIT CASES**

##### **1. *Totes-Isotoner Corp. v. United States*<sup>1</sup>**

In *Totes-Isotoner*, the Federal Circuit considered whether the Harmonized Tariff Schedule of the United States (HTSUS) “unconstitutionally denie[d] equal protection of the laws by imposing different rates of duty on seamed leather gloves ‘for men’ and seamed

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1. *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346 (Fed. Cir. 2010).

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leather gloves ‘for other persons.’”<sup>2</sup> The Court of International Trade had dismissed Totes-Isotoner’s case for failure to state a claim upon which relief could be granted and the Federal Circuit agreed with that result. First, the Federal Circuit considered certain procedural matters and ruled that the Court of International Trade had jurisdiction under 28 U.S.C. § 1581(i), Totes-Isotoner had standing to bring the case, and the political question doctrine did not apply. But the Federal Circuit found that Totes-Isotoner failed to state a claim. The Federal Circuit noted that “[a]bsent a showing that Congress intended to discriminate against men in the tariff schedule, we cannot simply assume the existence of such an unusual purpose from the mere fact of disparate impact.”<sup>3</sup> Because the challenged provision was not facially discriminatory, Totes-Isotoner needed to demonstrate that the government had the purpose to discriminate, and Totes-Isotoner had failed to do so.

2. *Michael Simon Design, Inc. v. United States*<sup>4</sup>

Michael Simon and other importers challenged modifications made to the HTSUS by Presidential proclamation. The U.S. Court of International Trade denied their request for judicial review and the Federal Circuit affirmed. The appellants challenged the Court of International Trade’s conclusion that the relevant statute gave the President complete discretion to accept or reject the International Trade Commission’s proposed modifications to the tariff schedule. The Federal Circuit affirmed “[b]ecause the acts that the appellants complain of are either non-final or not agency actions, and because judicial review is precluded even outside the APA [Administrative Procedure Act] framework due to the discretionary nature of the President’s authority under [the law].”<sup>5</sup>

3. *Outer Circle Products v. United States*<sup>6</sup>

The plaintiff imported bottle and jug wraps. U.S. Customs and Border Protection (CBP) classified these items under heading 4202, HTSUS, dutiable at 19.3%. Outer Circle argued for classification under heading 3924, HTSUS, dutiable at 3.4%. The Court of International Trade agreed with CBP, but the Federal Circuit reversed and ruled for Outer Circle. The Federal Circuit applied its previous analysis of heading 4202, which provided that heading 4202 does “not include containers that organize, store, protect, or carry food or beverages.”<sup>7</sup> Because the Federal Circuit held that Outer Circle’s bottle and jug wraps did “organize, store, protect, or carry food or beverages,” the court ruled that the bottle and jug wraps could not be classified under heading 4202.<sup>8</sup> The Federal Circuit agreed that the proper classification was HTSUS subheading 3924.10.50.<sup>9</sup>

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2. *Id.* at 1349.

3. *Id.* at 1357.

4. *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010).

5. *Id.* at 1338.

6. *Outer Circle Prods. v. United States*, 590 F.3d 1323 (Fed. Cir. 2010).

7. *Id.* at 1326.

8. *Id.*

9. *Id.*

4. *Chrysler Corporation v. United States*<sup>10</sup>

CBP denied Chrysler's claim for Harbor Maintenance Tax payments on exports made prior to July 1, 1990. These payments had previously been declared unconstitutional. Prior to July 1, 1990, CBP required claimants for refunds of payments to submit documentation to support the refunds, and Chrysler failed to submit such documentation.<sup>11</sup> The Court of International Trade agreed with CBP, and the Federal Circuit affirmed, with one judge dissenting. The Federal Circuit agreed, among other things, that Chrysler did not offer any reason to invalidate the regulation requiring documentation for pre-July 1, 1990 export payments.<sup>12</sup>

B. COURT OF INTERNATIONAL TRADE CASES

1. *Hitachi Home Electronics (America), Inc. v. United States*<sup>13</sup>

Hitachi brought an action in the Court of International Trade seeking resolution of protests that had been pending with CBP for more than two years without resolution. Hitachi argued that the protest should be deemed allowed and that duties should be refunded. The Court of International Trade dismissed the case without prejudice, noting that "neither the statute nor the regulation specific[d] any consequences for the failure to allow or deny a protest within the two-year period."<sup>14</sup> The court also considered the legislative history and found that CBP's actions within the two-year period were directory and not mandatory.<sup>15</sup> As a result, the Court of International Trade lacked the necessary subject-matter jurisdiction to consider the merits.<sup>16</sup>

2. *Canex International Lumber Sales Ltd. v. United States*<sup>17</sup>

*Canex* involved the classification of angle-cut lumber and a claim that CBP violated 19 U.S.C. § 1625(c) by effectively modifying or revoking two prior ruling letters without prior notice and comment. First, the Court of International Trade held that CBP had not violated § 1625(c) because the merchandise involved in the cited rulings was not identical to the subject imports.<sup>18</sup> Then, the Court of International Trade agreed with CBP's suggested classification and determined that even though the lumber had been cut, it remained classifiable as wood in heading 4407, HTSUS.<sup>19</sup> The Court of International Trade found that the lumber was not sufficiently advanced to be dedicated solely or principally for use as roof trusses or builders' joinery classifiable in heading 4418.<sup>20</sup>

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10. *Chrysler Corp. v. United States*, 592 F.3d 1330 (Fed. Cir. 2010).

11. *See id.* at 1332.

12. *Id.* at 1337.

13. *Hitachi Home Elecs. v. United States*, 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010).

14. *Id.* at 1319.

15. *See id.*

16. *See id.* at 1322.

17. *Canex Int'l Lumber Sales Ltd. v. United States*, slip op. 10-74 (Ct. Int'l Trade June 29, 2010).

18. *See id.* at 7.

19. *See id.*

20. *See id.* at 13.

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3. *Ford Motor Co. v. United States*<sup>21</sup>

The Court of International Trade considered a request for declaratory judgment involving ten reconciliation entries that CBP had not yet actively liquidated. Ford brought seven claims involving the ten entries; however, after the complaint was filed, CBP liquidated six of the entries rendering a number of the claims moot or improperly before the court.<sup>22</sup> Therefore, a number of the initial claims were quickly resolved. Although the Court of International Trade recognized that 19 U.S.C. § 1581(i) grants the court the jurisdiction to hear the remaining claims, the court declined to issue the requested declaratory judgment.<sup>23</sup> Instead, the court held that Ford could obtain “meaningful judicial review over all legitimate legal claims” related to the remaining entries after they liquidate.<sup>24</sup> As a result, the court exercised its discretion not to take jurisdiction of the claims.<sup>25</sup>

4. *Citizen Watch Co. of America, Inc. v. United States*<sup>26</sup>

Citizen challenged CBP’s classification of four different styles of non-corrugated cardboard watch boxes as jewelry boxes and similar articles of heading 4202, HTSUS. The Court of International Trade looked at the durability and intended use of the watch boxes and found that unlike the articles classified in heading 4202, the subject merchandise was not suitable for long-term or prolonged use.<sup>27</sup> The court held that the watch boxes may be used for the “packing, transport, storage, and sale of watches,” and, as a result, agreed with the classification Citizen proposed for packing containers of paper or paperboard in heading 4819.<sup>28</sup>

### III. Executive Branch Developments in Customs Law

#### A. UPDATE ON IMPORTER SECURITY FILING (THE “10+2” RULE)

On January 26, 2010, after twelve months of flexible enforcement, the filing requirements of the *Importer Security Filing (ISF)* and *Additional Carrier Requirements*<sup>29</sup> (ISF Rule) became mandatory. According to CBP, “to achieve maximum compliance,” the agency would “apply a measured, common-sense approach to enforcement.”<sup>30</sup> CBP mapped out

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21. *Ford Motor Co. v. United States*, slip op. 10-80 (Ct. Int’l Trade July 22, 2010).

22. *See id.* at 3.

23. *See id.* at 16, 20.

24. *Id.* at 20.

25. *See id.*

26. *Citizen Watch Co. of America, Inc. v. United States*, slip op. 10-94 (Ct. Int’l Trade Aug. 18, 2010).

27. *Id.* at 13–17.

28. *Id.* at 18.

29. Importer Security Filing (ISF) and Additional Carrier Requirements, 73 Fed. Reg. 71,730 (Nov. 25, 2008) (to be codified at 19 C.F.R. pts. 4, 12, 18, 101, 103, 113, 122, 141, 143, 149, 178, and 192). Under the ISF Rule, importers and maritime cargo carriers must submit additional cargo data before lading goods on board vessels destined to the United States customs territory.

30. *FAQs: Importer Security Filing “10+2” Program*, U.S. CUSTOMS & BORDER PROT., 42 (July 9, 2010), [http://www.cbp.gov/linkhandler/cgov/trade/cargo\\_security/carriers/security\\_filing/10\\_2faq.ctt/10\\_2faq.doc](http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/carriers/security_filing/10_2faq.ctt/10_2faq.doc). CBP Headquarters did not issue an official notice of its “graduated” enforcement strategy. The details of this strategy, however, were published in a Public Information Notice (PIN) by the Port of Dallas/Ft. Worth and

a quarter-by-quarter enforcement strategy.<sup>31</sup> During the first quarter of 2010, CBP's enforcement efforts would focus on importers failing to file ISFs for United States-bound shipments, which may be subject to non-intrusive inspections (NII) and CBP warning letters.<sup>32</sup> In the second quarter of 2010, non-compliant importers would see an increase in manifest holds and cargo examinations.<sup>33</sup> In the third and fourth quarters, CBP would continue to increase the amount of manifest holds and cargo examinations, begin assessing liquidated damages, and issue Do Not Load (DNL) messages for lack of compliance.<sup>34</sup> CBP's graduated enforcement strategy contemplated that all proposed penalty cases (i.e., liquidated damages and DNL) would be initiated by the local ports and submitted to CBP Headquarters for review and approval before any penalties would be issued.<sup>35</sup> Non-compliant Customs-Trade Partnership Against Terrorism (C-TPAT) participants may be suspended or have their C-TPAT status reduced or revoked.<sup>36</sup>

On September 10, 2010, the United States Government Accountability Office (GAO) released a report entitled *Supply Chain Security: CBP Has Made Progress in Assisting the Trade Industry in Implementing the New Importer Security Filing Requirements, but Some Challenges Remain*.<sup>37</sup> The report, which Congress had requested, found that CBP's regulatory assessment generally adheres to the Office of Management and Budget (OMB) guidance but could be improved if CBP practiced greater transparency and a more complete cost-benefit analysis.<sup>38</sup> The report also concluded that the 10+2 rule data elements were available for identifying high-risk cargo but that CBP has not yet finalized its national security targeting criteria to include these additional data elements to support high-risk targeting.<sup>39</sup> The GAO recommended that CBP should, if it updates its regulatory assessment, include information to improve transparency and completeness, and it should establish time frames and milestones for updating its national strategy targeting criteria to include the data collected under the ISF in identifying high-risk shipments.<sup>40</sup>

Throughout 2010, CBP continued to hold ISF outreach events and to update the agency's ISF "10+2" Program Frequently Asked Questions document on its web site.<sup>41</sup> CBP data shows that between January 26 and November 2, 2010, CBP received 7,893,073

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revealed by CBP officials at various public venues a few days before January 26, 2010. See *Importer Security Filing (10+2) Talking Points*, Pub. Info. Notice, No. DFW 10-008, Port of Dallas/Ft. Worth, U.S. CUSTOMS & BORDER PROT., 1 (Jan. 22, 2010) (on file with the Port).

31. See *id.*

32. See *id.*

33. See *id.* at 2.

34. See *id.*

35. See *id.*

36. See *id.*

37. See *Supply Chain Security: CBP Has Made Progress in Assisting the Trade Industry in Implementing the New Importer Security Filing Requirements, but Some Challenges Remain* (Publ. No. GAO-10-841), U.S. GOV'T ACCOUNTABILITY OFFICE, Sept. 10, 2010, <http://www.gao.gov/new.items/d10841.pdf>.

38. See *id.* at 20.

39. See *id.* at 35.

40. See *id.* at 40.

41. *CBP ISF/"10+2" 2010 Outreach Schedule*, U.S. CUSTOMS & BORDER PROT., 2010, [http://www.cbp.gov/xp/cgov/trade/trade\\_outreach/09\\_outreach\\_schl.xml](http://www.cbp.gov/xp/cgov/trade/trade_outreach/09_outreach_schl.xml).

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ISF filings (from a total of 2,428 filers) of which only 2.6% (204,870 filings) were rejected, thus, showing an ISF compliance rate of 97.4%.<sup>42</sup>

**B. UPDATE ON CBP PROPOSAL TO CHANGE FIRST SALE PRICING RULE**

On January 24, 2008, CBP proposed that in a transaction involving a series of sales, the price actually paid or payable for imported goods when sold for exportation to the United States would be the price paid in the last sale occurring prior to the introduction of goods into the United States (typically the price paid by the buyer in the United States) instead of in the first (or earlier) sale (that is, the sale between the manufacturer and the intermediary).<sup>43</sup> If implemented, CBP's proposed change in transaction value appraisalment would have likely resulted in higher import duties, and CBP received a number of comments from concerned U.S. importers.

In a September 29, 2010 *Federal Register* notice, CBP officially withdrew its proposal.<sup>44</sup> The withdrawal means that CBP will continue to allow the transaction value of imported merchandise to be based on the price paid by the buyer in the first or earlier sale, if all other requirements for using "First Sale" valuation are met.

**C. IMPORT SAFETY/FOOD SAFETY/CPSIA DEVELOPMENTS**

Since late 2009, various agencies involved with regulating imports into the United States have expanded their efforts to coordinate enforcement of the consumer protection and import safety laws. For example, in December 2009, the Department of Homeland Security (DHS) established the Import Safety Commercial Targeting and Analysis Center (CTAC) to coordinate information sharing, targeting, and compliance enforcement efforts. CTAC is run by the CBP and includes the U.S. Consumer Product Safety Commission (CPSC), U.S. Immigration and Customs Enforcement (ICE), U.S. Food and Drug Administration (FDA), and the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS).

Further, in response to the authority granted in the Consumer Product Safety Improvement Act of 2008 (CPSIA)<sup>45</sup> and a significant increased budget authorization, CPSC began issuing detention notices directly to importers for possible violations of its laws and regulations as of June 14, 2010.<sup>46</sup> Previously, CBP issued detention notices that included CPSC violations.<sup>47</sup> CPSC detention procedures apply to all laws CPSC enforces, not just the CPSIA, and include a description of the alleged violation, its statutory basis, and the

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42. *Importer Security Filing and Additional Carrier Requirements, "10+2" Compliance Update*, U.S. CUSTOMS & BORDER PROT., (Fall 2010) (on file with CBP Office of Field Operations).

43. See Proposed Interpretation of the Expression "Sold for Exportation to the United States" for Purposes of Applying the Transaction Value Method of Valuation in a Series of Sales, 73 Fed. Reg. 4254-4255 (Jan. 24, 2008).

44. Withdrawal of Notice of Proposed Interpretation of the Expression "Sold For Exportation to the United States" as Used in the Transaction Value Method of Valuation in a Series of Sales Importation Scenario, 75 Fed. Reg. 60,134 (Sept. 29, 2010).

45. See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 310-113, 122 Stat. 3016 (2008) (codified as amended at 15 U.S.C. § 2051 n. (2010)).

46. *CPSC Detention of Products at Import: Frequently Asked Questions*, CONSUMER PROD. SAFETY COMM'N, (June 30, 2010), <http://www.cpsc.gov/businfo/detentionFAQ.pdf>.

47. See *id.*

contact information for the CPSC inspector who examined the goods.<sup>48</sup> A violation could result in sanctions under both the consumer safety laws (Title 15 of the United States Code) and the customs laws (Title 19 of the United States Code). In addition, CPSC published its revised final rule on civil penalties including imports.<sup>49</sup>

Finally, the Food Safety Modernization Act (FSMA)<sup>50</sup> was signed into law by President Obama on January 4, 2011. The FSMA gives the FDA the right to require recalls of unsafe food products and provides greater federal oversight of food production; authorizes mandatory food recalls in cases of food-borne illnesses; and requires FDA to conduct inspections of food manufacturers on a more frequent basis and to require that food processors have food-safety plans. New developments in issuing regulations and guidance from FDA would come in 2011 and 2012.

#### D. UNIFORM RULES OF ORIGIN PROPOSAL

In 2008, CBP proposed the establishment of uniform rules of origin for imported merchandise, for non-preferential purposes, including admissibility, origin marking, trade remedy determinations, and applicable duty rates.<sup>51</sup> In July 2010, the Commissioner of Customs indicated in a public letter to several industry and trade associations that CBP and the Treasury Department had reviewed the comments submitted by the interested parties and “expect[ed] to soon be publishing a notice on this matter in the Federal Register.”<sup>52</sup> Informal communications have suggested that the proposal will likely be withdrawn, just as the First Sale Rule proposal was formally withdrawn, but no action has been taken to date.

#### E. LACEY ACT UPDATES

Implementation of the amendments to the Lacey Act,<sup>53</sup> which were contained in the Farm Bill passed by Congress in 2008, continued in 2010. Most notably, the Animal and Plant Health Inspection Service (APHIS) published a proposed rule to define “common cultivar” and “common food crop.”<sup>54</sup> Common cultivars and common food crops are categorically exempted from the Lacey Act Amendment declaration requirements that became effective on April 1, 2009. APHIS received a number of comments and intends to reopen the comment period before finalizing the definitions.

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48. *See id.*

49. Civil Penalty Factors, 75 Fed. Reg. 15993 (Mar. 31, 2010) (to be codified at 16 C.F.R. pt. 1119).

50. Pub. L. No. 111-353, 124 Stat. 3885 (Jan. 4, 2011).

51. *See* Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43,385 (July 25, 2008) (to be codified at 19 C.F.R. pts 4, 7, 10, 102, 134, and 177).

52. Letter from Alan Bersin, Comm’r of Customs, to Catherine Robinson, Pres. of the Nat’l Ass’n of Mfrs., 2 (on file with the Nat’l Ass’n of Mfrs.).

53. Food, Conservation and Energy Act of 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 923 (2008).

54. *See* Lacey Act Implementation Plan: Definitions for Exempt and Regulated Articles, 75 Fed. Reg. 46,859 (Aug. 4, 2010) (to be codified at 7 C.F.R. pt. 357).

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**IV. Legislative Developments in Customs Law**

**A. RECENT DEVELOPMENTS IN TRADE PROMOTION LEGISLATION**

1. *The Small Business Jobs Act of 2010*<sup>55</sup>

The Small Business Jobs and Credit Act of 2010 aims to promote Small Business Exports through the creation of new positions within the Small Business Administration that will focus on export promotion, as well as the allocation of funds for the United States Trade Representative (USTR) to pursue market access and trade enforcement activities. The goal of these activities is to help level the proverbial playing field for small businesses looking to increase their market access. The Act also increases staffing at the Commerce Department to enable further promotion of U.S. exports, including funding of export grants and the State Export Promotion Grant Program (STEP). This Act now requires decisions to fund manufacturing and innovation grants to take into account the potential for export as one of the selection criteria for recipients.

2. *The Haiti Economic Lift Program*<sup>56</sup>

The Haiti Economic Lift Program (HELP) extended the Caribbean Basin Trade Partnership Act (CBTPA) and the Haitian Hemispheric Opportunity through Partnership (HOPE) Act until September 30, 2010. This law is designed to increase U.S. and other foreign investment in Haiti's textile and apparel industry. The law specifically permits Haiti to nearly triple the amount of woven and knit fabrics it can export to the United States duty-free.

3. *Extending GSP and the Andean Trade Preference Act*

House Report 4284<sup>57</sup> was signed at the very end of 2009, and it extended the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA) programs through December 31, 2010.

**B. TRADE ENFORCEMENT LEGISLATION INTRODUCED IN 2010**

In 2010, Congress focused significant attention on the trade deficit, most notably the United States' trade deficit with China. The China Fair Trade Act of 2010<sup>58</sup> seeks to prohibit the United States Government from purchasing Chinese goods and services until and unless China agrees to the World Trade Organization (WTO) Agreement on Government Procurement. The Emergency China Trade Act of 2010<sup>59</sup> proposes the withdrawal of normal trade relations from Chinese products in an effort to provide for a "balanced trade relationship" between China and the United States.

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55. See Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504 (2010).

56. See Haiti Economic Lift Program Act of 2010, Pub. L. No. 110-171, 124 Stat. 1194 (2010).

57. See Pub. L. No. 111-124, 123 Stat. 3484 (2009).

58. S. 3505, 111th Cong. (2010).

59. H.R. 6071, 111th Cong. (2010).

While not naming a specific country, the Currency Exchange Rate Oversight Reform Act of 2010<sup>60</sup> and the Currency Reform for Fair Trade Act<sup>61</sup> are widely regarded as being directed at the Chinese trade deficit as they would require the Department of Commerce to investigate currency undervaluation as a “countervailable subsidy,” thus requiring the imposition of duties on imports benefitting from such a subsidy or undervaluation.

Several bills were also introduced to address how to sanction other countries who engage in practices the United States disagrees with. The Enforcing Orders and Reducing Circumvention and Evasion Act of 2010 (ENFORCE)<sup>62</sup> would reinforce and strengthen U.S. enforcement of trade remedy laws and is specifically targeted at increased enforcement of antidumping and countervailing duty (AD/CVD) issues. Similarly, the Unfair Foreign Competition Act of 2010<sup>63</sup> would provide for judicial determination of injury in cases of dumped and subsidized merchandise imported into the United States. House Report 1699 alleges that foreign countries have engaged in unfair trade practices in the paper products industry; whereas the Non-Native Wildlife Invasion Prevention Act<sup>64</sup> would amend the Trade Act of 1974 to authorize the USTR to take discretionary action if a foreign country is engaging in so-called “unreasonable acts, policies or practices” in relation to the environment, including the introduction of non-native wildlife species that harm our economy, environment, or health.

#### C. THE U.S. MANUFACTURING ENHANCEMENT ACT OF 2010

On August 11, 2010, the President signed the United States Manufacturing Enhancement Act of 2010 into law,<sup>65</sup> enacting the first miscellaneous tariff bill (MTB) in nearly three years. The MTB primarily renews tariff suspensions or other modifications that expired on December 31, 2009. But it also includes a few new tariff suspensions and duty reductions that cleared both the House and Senate review process. The law also provides for the retroactive duty treatment for expired provisions that are being renewed by the legislation.

A second MTB containing House bills that were originally introduced, but not incorporated into the law, new and existing Senate bills, re-liquidation provisions, and technical corrections was proposed by the House Ways and Means Committee on November 24, 2010 and posted as a discussion draft.<sup>66</sup> It is unclear how quickly this much-anticipated second MTB might proceed through Congress.

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60. S. 3134, 111th Cong. (2010).

61. H.R. 2378, 111th Cong. (2010).

62. S. 3725, 111th Cong. (2010).

63. S. 3080, 111th Cong. (2010).

64. H.R. 669, 111th Cong. (2009).

65. United States Manufacturing Enhancement Act of 2010, Pub. L. No. 111-227, 124 Stat. 2409 (2010).

66. Omnibus Trade Act of 2010, H.R. 6517, 111th Cong. (2010).

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D. UNITED STATES–PERU TRADE PROMOTION AGREEMENT

The United States–Peru Trade Promotion Agreement (TPA) entered into force on February 1, 2009.<sup>67</sup> In February 2010, the Environmental Affairs Council (EAC) held its first meeting under the agreement. The EAC, which is comprised of representatives from both governments, focused on implementation of the Environment Chapter and Annex on Forest Sector Governance (the Forest Annex). The Forest Annex is the first time the United States has included provisions that specifically address environmental concerns; in this case, illegal logging and trade in wildlife. It also promotes sustainable management of natural resources. Peru was given until August 1, 2010 (eighteen months from entry into force of the agreement) to implement its obligations under the Forest Annex. In July 2010, USTR acknowledged that Peru had made “unprecedented changes to its legal and regulatory regimes,” including increasing criminal penalties for environmental crimes and training 3,000 Ecological Police Officers.<sup>68</sup> But USTR also announced that it was “deeply concerned” about Peru’s failure to completely implement its obligations under the Forest Annex by the August 1, 2010 deadline.<sup>69</sup>

The Free Trade Commission (FTC) also held its first meeting in February 2010. The parties reviewed the progress made in the first year of the agreement in several key areas including intellectual property rights and labor commitments. The parties formally established the Committee on Agricultural Trade that will monitor implementation of the agricultural commitments. The parties also established a Standing Committee on Sanitary and Phytosanitary Matters.

E. U.S. COURT OF INTERNATIONAL TRADE IMPROVEMENTS ACT

In 2010, a new proposed version of the U.S. Court of International Trade Improvement Act (CIT Improvement Act) was promulgated.<sup>70</sup> In addition, when it became apparent that the legislation would not be introduced in its current form, it was proposed that certain customs-related aspects of the CIT Improvement Act be included as part of another piece of customs legislation (*e.g.*, the Customs Reauthorization Act).<sup>71</sup> While neither the CIT Improvement Act nor any legislation containing customs-related provisions from it were passed by Congress, the strong support that has been expressed for such legislation by numerous trade groups, including the Customs and International Trade Bar Association (CITBA) and the ABA Section of International Law (SIL), makes it seem quite possible that a similar bill could be introduced and passed by Congress in 2011.<sup>72</sup> A

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67. The United States–Peru Trade Promotion Agreement (TPA) was signed on April 12, 2006. The Peruvian Congress ratified the agreement in June 2006 and the protocol of amendment in June 2007. President Bush signed the US–Peru Trade Promotion Agreement Implementation Act on December 14, 2007.

68. Statement by Ambassador Ron Kirk on the Annex on Forest Sector Governance of the United States–Peru Trade Promotion Agreement (July 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/july/statement-ambassador-ron-kirk-annex-forest-sector-gov>.

69. *Id.*

70. See U.S. Court of International Trade Improvement Act (CIT Improvement Act) (Aug. 2010), *available at* <http://www.citba.org/documents/CIT-Act-August2010Version.pdf>.

71. Patrick C. Reed, *Customs-Related USCIT Jurisdictional Provisions to Be Considered by House Trade Subcommittee*, 8 Q. NEWSL. (CUSTOMS & INT’L TRADE BAR ASS’N), Oct. 2010, at 3.

72. See *Section of International Law: Customs Law Committee*, AM. BAR ASS’N NET, <http://www.abanet.org/dch/committee.cfm?com=IC712000> (last visited Feb. 5, 2011). CITBA initially developed and actively sup-

brief summary of some of the key provisions considered for inclusion in other customs-related legislation is provided below.

Under the proposed CIT Improvement Act, the Court of International Trade would be able to review new categories of decisions rendered by CBP. The proposed bill would allow importers to contest CBP decisions relating to (1) the assessment or collection of duties, taxes, or fees, whether 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 and 1501.<sup>73</sup> This first amendment responds to the issue presented in *Brother Int'l Corp. v. United States*,<sup>74</sup> in which the court ultimately held that a payment made after a demand by United States customs is not voluntary.<sup>75</sup> The second amendment would harmonize CBP procedures after post-entry regulatory audits with IRS procedures after income tax audits; under this system, the importer would have the option of filing a protest against a demand for payment of additional duties, taxes, or fees, and 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.<sup>76</sup>

The CIT Improvement Act also would amend provisions of 19 U.S.C. §§1504, 1516a, and 1675 relating to the suspension of liquidation of entries in antidumping and countervailing duty cases.<sup>77</sup> First, the suspension of liquidation during administrative reviews would remain in effect until the thirty-day period for filing a summons and complaint in the Court of International Trade elapses, which would serve to correct the existing and problematic race to the courthouse that has become necessary because the Commerce Department is supposed to issue liquidation instructions within fifteen days.<sup>78</sup> In addition, under the legislation, if a party requests judicial review of a determination in an administrative review or a scope review, liquidation of entries covered by the action would be suspended pending the final disposition of the court, including all appeals, which would make it unnecessary to obtain a preliminary injunction against liquidation.<sup>79</sup> Moreover, the CIT Improvement Act would provide that, after the conclusion of judicial review, the provision for deemed liquidation within six months under §1504(d) does not apply to entries subject to judicial review under §1516a, which would help to avoid the possibility that a court decision could be nullified if CBP does not liquidate the entries within the required six-month period, as occurred in *Cemex S.A. v. United States*.<sup>80</sup>

In addition, the CIT Improvement Act would make several amendments to statutory provisions in Title 19 and Title 28 of the United States Code regarding customs brokers' license cases.<sup>81</sup> It would expand the Court of International Trade's jurisdiction over all

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ported the proposed CIT Improvement Act. The ABA's SIL, under its blanket authority power, has submitted correspondence in support of the proposed CIT Improvement Act to various members of Congress.

73. See CIT Improvement Act, *supra* note 70, § 102.

74. *Brother Int'l Corp. v. United States*, 246 F. Supp. 2d 1318 (Ct. Int'l Trade 2003).

75. See *Explanation of August 2010 Legislation*, CUSTOMS & INT'L TRADE BAR ASS'N, 8-9, <http://www.citba.org/documents/CIT-ACT-EXPLANATION-AUGUST2010.pdf> (last visited Feb. 5, 2011).

76. See *id.* at 9-13.

77. See CIT Improvement Act, *supra* note 70, § 101.

78. See *Explanation of August 2010 Legislation*, *supra* note 75, at 18-20.

79. See *id.* at 15-17.

80. See *id.* at 1-2.

81. See CIT Improvement Act, *supra* note 70, § 201(1).

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possible bases for the denial, suspension, or revocation of a customs broker's license or the imposition of monetary penalties in lieu thereof.<sup>82</sup> The court also would clarify certain statutory terminology ("summons and complaint" replaces "petition"), would resolve an ambiguity in the statute regarding service of process, and would add clarity to provisions governing standing and remedies.<sup>83</sup>

F. FOREIGN MANUFACTURERS LEGAL ACCOUNTABILITY ACT<sup>84</sup>

In the last few years, a number of cases have highlighted the relative difficulty in trying to sue a non-U.S. company in U.S. courts. In an effort to remedy the difficulty that U.S. companies face when suing a foreign company in a U.S. court in 2010, both houses of Congress introduced versions of the Foreign Manufacturers Legal Accountability Act.

Under the proposed bill, foreign manufacturers of five general categories of imported merchandise will be required to establish a registered agent in the United States who is authorized to accept service of legal process on behalf of the foreign manufacturer or producer. The five general categories are drugs, devices, and cosmetics as described in the Federal Food, Drug, and Cosmetic Act; biological products as described in the Public Health Service Act; consumer products as defined in the Consumer Product Safety Act; chemical substances as defined in the Toxic Substances Control Act; and pesticides as defined in the Federal Insecticide, Fungicide, and Rodenticide Act. The bill currently requires the issuance of regulations that would mandate that the local agent be located in a state with a "substantial connection" to the importation, distribution, or sale of the products, as well as limiting application of the law to foreign manufacturers or producers of a certain size.

The bill had not been passed by end of the last Congress. There is significant opposition to the bill from retailers, the United States Chamber of Commerce, the National Association of Manufacturers, and the Consumer Electronic Association.

**V. Canadian Legal Developments**

A. FREE TRADE AGREEMENTS

In 2010, the Canadian Government continued to pursue numerous bilateral treaties and free trade agreements. Canada negotiated and concluded a free trade agreement with Panama on May 14, 2010. In addition, the Canada-Columbia Free Trade Agreement, the Labour Cooperation Agreement, and the Agreement on Environment Implementation legislation received Royal Assent on June 29, 2010, and will come into force after Columbia completes its domestic process. Further, Canada commenced discussions with Israel to modernize the Canada-Israel Free Trade Agreement and with Costa Rica to modernize the Canada-Cost Rica Free Trade Agreement.

Also in 2010, Canada continued negotiations of the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). In addition, Canada launched or continued free trade agreement negotiations with Ukraine, Morocco, Korea and the

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82. See *Explanation of August 2010 Legislation*, *supra* note 75, at 21-22.

83. See *id.*

84. S. 1606, 111th Cong. (2009); H.R. 4678, 111th Cong. (2010).

Caribbean Community, the Dominican Republic, India, and the Central America Four, and it engaged in exploratory discussions with Turkey and Japan. Finally, Canada concluded or signed foreign investment promotion and protection agreements (FIPAs) with Bahrain (concluded February 2010) and Jordan (entered into force December 14, 2009), and it launched or continued FIPA negotiations with China, India, Indonesia, Kuwait, Mongolia, Tanzania, Tunisia, and Vietnam.

**B. CUSTOMS CASES**

1. *Cherry Stix Ltd. v. President of the Canada Border Services Agency*<sup>85</sup>

In *Cherry Stix Ltd.*, the Canadian International Trade Tribunal (CITT) held that the transaction value did not apply when the parties to the transactions intended that the property (i.e., title in the goods) would be transferred after importation into Canada. According to the CITT, the intention of the parties, as set out in the vendor agreement, vendor information manual, purchase orders, invoices, and other documentation, is critical to the determination of when a sale takes place (i.e., before or after importation). The CITT did not rule as to which valuation method is appropriate in these circumstances. The Canada Border Services Agency (CBSA) did not appeal this decision and has indicated it intends to pursue legislative changes to define “sale” for customs duties purposes.

2. *Ingedia S.A. v. The Canada Customs and Revenue Agency*<sup>86</sup>

*Ingedia S.A.* serves as an important reminder to practitioners regarding limitation periods for suing the Crown for negligence in customs matters. In this case, the Federal Court of Appeal denied an appeal from a Federal Court decision dismissing an importer’s claim for damages against the Crown regarding the actions of Canada Customs during a high stakes tariff classification dispute. Section 106 of the Customs Act imposes a three-month limitation period for actions or judicial proceedings against Customs officers for anything done in the performance of their duties under the Act.<sup>87</sup> The Federal Court of Appeal agreed with the Federal Court in rejecting the importer’s claim that section 106 applied only to certain enforcement activities and agreed with its finding that the Crown was entitled to invoke the protections afforded to its Customs officers under section 106.<sup>88</sup> In applying section 106, both courts held that the cause of action arose more than three months before the importer commenced its action and was therefore barred by the statute of limitations.

3. *Tara Materials, Inc. v. President of the Canada Border Services Agency*<sup>89</sup>

In *Tara Materials, Inc.*, the CITT addressed a long-standing issue under the NAFTA Rules of Origin Regulations concerning the use of the average inventory management method for originating and non-originating fungible materials and finished goods. In that

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85. *Cherry Stix Ltd. v. President of the Can. Border Servs. Agency*, [2010] C.I.T.T. (Can.).

86. *Ingedia S.A. v. Produits Laitiers Advidia Inc.*, [2010] F.C. 176 (Can.).

87. Customs Act, R.S.C., 1985, c. 1, § 106 (Can.).

88. *Ingedia S.A.*, [2010] F.C. 176 at 14.

89. *Tara Materials, Inc. v. President of the Can. Border Servs. Agency*, [2010] C.I.T.T. (Can.).

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case, the United States-based appellant had used both NAFTA originating and non-originating materials in its production of artist canvasses, some of which were exported to Canada. Using the average method under Schedule X to the Regulations, the appellant determined that seventy-two percent of the fabric material it used in production of the canvasses was originating. Following an on-site verification, CBSA agreed with the ratio, but ruled that this meant only seventy-two percent of the canvasses exported to Canada could qualify as originating. The appellant took the position that it should be permitted to allocate its production of originating goods to all of its exports to Canada since those exports were less than seventy-two percent of its total production for that year. The CITT denied the appeal; its decision turning largely on the meaning of “inventory” in subsection 7(16.1) of the Regulations. It held that when fungible materials and fungible goods are drawn from the same inventory, the inventory method used for determining the origin of the materials must be the same as that used for the goods. Even though the materials and finished goods were stored in separate rooms in the appellant’s warehouse, the CITT viewed them as coming from the same inventory. Accordingly, the appellant could not designate all of its exports to Canada as NAFTA-originating and instead had to apply the seventy-two percent ratio to each shipment. This decision has been appealed to the Federal Court of Appeal.

4. *Volpak Inc. v. President of the Canada Border Services Agency*<sup>90</sup>

This case concerns an appeal by *Volpak* of the CBSA’s refusal to make a re-determination of the tariff classification of imported chicken breasts. The CBSA’s refusal was based on its decision that the appellant had failed to provide security satisfactory to the Minister of National Revenue. On appeal, the CITT ruled that it did not have jurisdiction to make a re-determination based on the insufficiency of security, stating that its jurisdiction is limited to actual decisions taken by the CBSA pursuant to §60 of the Customs Act. The CITT further rejected *Volpak*’s argument that the tribunal has exclusive original jurisdiction to deal with all matters broadly related to a customs appeal, finding instead that its power to hear, determine, and deal with appeals and all matters related thereto did not grant it authority to determine all questions of law that arise in any matter before it. The CITT’s narrow view of its jurisdiction as expressed in *Volpak* should encourage importers to consider carefully the appropriate jurisdiction for appeals of any decisions by CBSA that are not clearly taken pursuant to §60 of the Customs Act.

C. ADMINISTRATIVE MONETARY PENALTY SYSTEM UPDATE

2010 also brought important changes to Canada’s Administrative Monetary Penalty System (AMPS) following a Fundamental Review. The AMPS regime consists of a list of numbered “contraventions” that may be assessed against importers and exporters, and in some cases, against customs brokers, carriers, duty free shop licensees, and warehouse operators. The contraventions are treated as absolute liability offenses by the CBSA and are applied at a graduated level so that repeat offenders face increased penalties. The intent of the AMPS regime is to create a program that fosters optimal compliance, institutes a corrective approach to contraventions, and is fair, coherent, and forward-looking.

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90. *Volpak Inc. v. President of the Can. Border Servs. Agency*, [2010] C.I.T.T (Can.).

In this regard, the penalties are set at relatively modest levels (starting from a minimum of \$100 for a first level penalty) with a statutory cap of \$25,000 per individual penalty assessment. But, as penalty assessments may be applied to each affected import entry, aggregate penalties can be significant.

As a result of the Fundamental Review, the CBSA reset all the penalty amounts in connection with its introduction of a risk-based penalties scheme. The CBSA developed a “penalty grid” to assess the level of harm associated with a given instance of non-compliance. The grid ranks risk using four criteria—national security, health and safety, economics, and international commitments. Under this ranking system, more severe infractions and infractions by higher risk persons are subject to greater penalties.

The Fundamental Review also produced ten recommendations that are expected to be implemented in three phases by 2012. Phase I, which was completed in April 2010,<sup>91</sup> included the re-setting of the penalty amounts and the elimination of most of the penalties previously assessed as a percentage of the value for duty of the affected entry. Under the new regime, the penalties are set at flat penalty amounts or at fixed amounts that increase for repeat offenders. Phase I also included the introduction of a thirty-day delay in the escalation of penalty levels for low- and medium-risk contraventions. Previously, a high-volume importer with multiple entries on a single day could escalate to the highest penalty level in the course of a single day if identical contraventions were found to have occurred in multiple entries. The thirty-day delay allows the importer thirty days from the date of the first penalty assessment in which to correct its discrepancy or otherwise bring itself into compliance. The thirty-day delay in escalation applies only to certain contraventions that are considered to be in the low- or medium-risk category.

The Phase II implementation was announced by the CBSA in Customs Notice 10-020, dated November 17, 2010. Effective December 15, 2010, a new Master Penalty Document was published on the CBSA’s website that incorporates all Phase II changes.<sup>92</sup> Among other things, sixty-eight individual marking contraventions will be eliminated in favor of a single marking contravention (new C377), and some 250 other contraventions were consolidated to less than half that amount. In addition, new contraventions were added to the list of those subject to the thirty-day delay in escalation, which was implemented in Phase I. Finally, certain additional improvements will be implemented to enhance the consistency of the application of AMPS across all ports of entry. The implementation process is scheduled to be concluded during Phase III, over the course of the next two years.

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91. *Customs Notice*, CAN. BORDER SERVS. AGENCY, 10-002 (2010).

92. *Master Penalty Document*, CAN. BORDER SERVS. AGENCY, (Dec. 2010), <http://www.cbsa-asfc.gc.ca/trade-commerce/amps/am-rm-eng.pdf>.

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