

**THE GLOBAL FINANCIAL CRISIS: IMPACT ON
INTERNATIONAL TRADE AND MATTERS POTENTIALLY
COMING BEFORE THE U.S. COURT OF INTERNATIONAL TRADE***

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Introduction and Overview

After reaching a record level of \$16.1 trillion in 2008, world merchandise trade experienced an unprecedented decline of 23 percent in 2009, falling to \$12.1 trillion, reflecting the most severe decline in global trade flows since the Great Depression.² The 2.3 percent decline in world gross domestic product in 2009 marked the first decline in global economic output since the end of World War II.³ Following this massive contraction, however, global merchandise trade is again growing in 2010, and the World Trade Organization recently projected that the volume of world merchandise exports will grow by a robust 13.5 percent in 2010.⁴

This paper will examine two issues relating to the recent shifts in global trade, as well as their interaction with the actions likely to come before (and implications for the jurisdiction of) the United States Court of International Trade ("CIT"). First, anecdotal evidence suggests that as demand has constricted in markets throughout the world, certain unscrupulous businesses that produce or export articles covered by antidumping or countervailing duty orders in the United States have sought to maintain their sales volumes by various schemes to avoid the application of

¹ The views expressed in this paper are strictly those of the author, and do not reflect the views of Kelley Drye & Warren LLP or its clients.

² See World Trade Report 2010: Trade in Natural Resources at 26 (World Trade Organization) (available at: http://www.wto.org/english/res_e/reser_e/wtr_e.htm).

³ See *id.* at 20.

⁴ See "Trade Likely to Grow by 13.5% in 2010, WTO Says," (Sept. 20, 2010) (WTO press release, available at: http://www.wto.org/english/news_e/pres10_e/pr616_e.htm).

the remedies provided by those orders at the U.S. border. Domestic producers in the United States have responded by pursuing an increased number of anti-circumvention proceedings before the U.S. Department of Commerce (“Commerce”), and legislation has recently been introduced in the United States Senate to more clearly define and strengthen the authorities of Commerce and U.S. Customs and Border Protection (“CBP”) to investigate and address this behavior. Given the increased number of agency proceedings and the prospect for new legislation, there is likely to be an increase in the number of matters coming before the CIT seeking judicial review of anti-circumvention proceedings.

A second issue examined in this paper is the significant increase in import-related activities recently undertaken by federal agencies responsible for ensuring that merchandise imported into the United States is in compliance with our nation’s consumer protection, food safety, and environmental protection laws and regulations. While some of these agency activities have been on-going for many years, the broad response of the federal government to a number of incidents involving the safety of imported foods, drugs, and consumer products in the spring and summer of 2007 has resulted in a heightened level of agency activity. These agencies have in the past worked closely with CBP (and its predecessor) in monitoring and policing the safety of imported products. Based on recent developments, however, several agencies are increasingly engaging U.S. importers directly in connection with products that fail to comply with the applicable standards. The expansion of these activities raises the possibility of inconsistent agency action at the numerous ports of entry throughout the United States, and justifies an expansion of the CIT’s jurisdiction to utilize its unique expertise on many customs-related issues and to promote consistency and uniformity.

I. Recent Trends in International Trade

The last two years have witnessed the largest annual decline, followed by the largest (projected) annual growth, in international trade in the post-World War II era. World trade declined by 12.2 percent (by volume) in 2009, dwarfing the other recent declines of world trade volumes experienced in 2001 (-0.2 percent), 1982 (-2.0 percent) and 1975 (-7.0 percent).⁵

At the height of the economic uncertainty in late 2008 and early 2009, leaders of the Group of 20 (“G-20”) nations and the Asia-Pacific Economic Cooperation forum made clear their support for open markets and committed to avoid the lure of protectionism. In a declaration issued following a summit meeting to address financial markets and the world economy in November 2008, the G-20 leaders underscored:

the critical importance of rejecting protectionism and not turning inward in times of financial uncertainty. In this regard, within the next 12 months, we will refrain from raising new barriers to investment or to trade in goods and services, imposing new export restrictions, or implementing World Trade Organization (WTO) inconsistent measures to stimulate exports.⁶

While the leaders’ pledges in this regard were not universally adhered to, by in large the governments of the G-20 nations did not pursue protectionist actions that would have exacerbated the global economic downturn. This pledge was reiterated by the G-20 leaders at their subsequent summits in London in April 2009⁷ and Pittsburgh in September 2009.⁸

The volume of international trade is now growing, and recent indications are that trade volumes will experience robust growth in 2010. In late September 2010, the World Trade

⁵ See World Trade Report 2010: Trade in Natural Resources at 20 (World Trade Organization) (available at: http://www.wto.org/english/res_e/reser_e/wtr_e.htm).

⁶ Declaration: Summit on Financial Markets and the World Economy, at 4 (para. 13) (Nov. 15, 2008) (available at: http://www.g20.org/pub_communiques.aspx).

⁷ See The Global Plan for Recovery and Reform, at 6-7 (para. 22) (Apr. 2, 2010) (available at: http://www.g20.org/pub_communiques.aspx).

⁸ See Leaders’ Statement: The Pittsburgh Summit, at 18 (para. 48) (Sept. 25, 2009) (available at: http://www.g20.org/pub_communiques.aspx).

Organization released a projection that world trade will expand by 13.5 percent in 2010, the greatest annual rate of expansion since the WTO began recording such data in 1950.⁹ The next fastest year-on-year growth rate was an 11.8 percent expansion in trade in 1976, following a decline of 7.3% in 1975.

Not surprisingly, the recent experiences in the United States have mirrored those throughout the world. U.S. imports during 2009 were valued at \$1.56 trillion, reflecting a 25.9 percent decline (\$544 billion) relative to the record import value of \$2.10 trillion in 2008. Similarly, U.S. exports declined markedly in 2009, falling to \$1.06 trillion from \$1.29 trillion in 2008 (a decline of 18.0 percent or \$230 billion).¹⁰ Consistent with the global trend, recent data reflect expansions in U.S. imports and exports in 2010.¹¹

II. Apparent Increases in Circumvention of Antidumping and Countervailing Duty Orders: A Response to the Global Economic Slowdown and a Source of Increased Agency Proceedings Subject to Judicial Review?

The declines in global trade in 2009 can be easily quantified, but the magnitude of those declines take on an even greater impact when one considers they reflect lost sales for businesses throughout the world. Confronted with significant declines in the demand for their products, it appears that a number of unscrupulous foreign producers and exporters of products subject to antidumping and countervailing duty orders in the United States have sought to increase their sales volumes in the U.S. market by circumventing the application of those orders. Increases in circumvention-related activities are reflected both in anecdotal information (and non-public referrals to U.S. Customs and Border Protection), as well as through the Commerce

⁹ See “Trade Likely to Grow by 13.5% in 2010, WTO Says,” (Sept. 20, 2010) (WTO press release, available at: http://www.wto.org/english/news_e/pr610_e/pr616_e.htm).

¹⁰ See Foreign Trade Data: Historical Series - U.S. International Trade in Goods (U.S. Census Bureau) (available at: <http://www.census.gov/foreign-trade/statistics/historical/index.html>).

¹¹ See *id.* (monthly data).

Department's initiation of formal proceedings to investigate circumvention allegations.¹² What is less clear, however, is whether the apparent increases in efforts to circumvent U.S. antidumping and countervailing duty orders is a result of the pressures to maintain sales volumes during a period of significantly reduced demand, or whether they reflect a permanent response by foreign businesses to the issuance of such remedies in the United States (and, presumably, other jurisdictions with significant markets).

With respect to anecdotal instances of circumvention, it is increasingly common to learn of U.S. importers mis-reporting the country of origin of a product that is subject to an unfair trade order (i.e., falsely declaring to CBP that the imported product originated in a country that is not covered by an order), or mischaracterizing an imported product so that it determined to fall outside the scope of an antidumping or countervailing duty order. In addition, a number of overseas exporters have brazenly represented to potential customers in the United States (often in e-mail solicitations) that they are initiating schemes to circumvent the application of antidumping orders even before a final order is issued by the Commerce Department. For example, in testimony before the U.S. International Trade Commission in May 2010, a U.S. producer of prestressed concrete wire strand ("PC strand") – a wire-based product that is used to strengthen concrete in residential and non-residential construction – discussed his knowledge of aggressive efforts by PC strand producers and exporters in China to circumvent the application of duties to their shipments – almost from the moment the domestic industry filed its petition for relief – by

¹² See, e.g., Steel Wire Garment Hangers From the People's Republic of China: Initiation of Anti-Circumvention Inquiry, 75 Fed. Reg. 42,685 (July 22, 2010); Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Initiation of Antidumping Circumvention Inquiry, 75 Fed. Reg. 21,241 (Apr. 23, 2010); Certain Tissue Paper Products from the People's Republic of China: Notice of Initiation of Anti-circumvention Inquiry, 75 Fed. Reg. 17,127 (Apr. 5, 2010); and Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Amended Initiation of Antidumping Duty Investigation, 74 Fed. Reg. 21,331 (May 7, 2009).

engaging in the “carry trade.” This involves a producer transporting PC strand to a third-country that is not subject to an unfair trade order (or investigation), fraudulently re-labeling and repackaging the product with the country of origin of the third-country to avoid the assessment of duties, and then exporting the product to the United States. This behavior is not limited to the PC strand industry, with similar behavior being seen with respect to antidumping orders covering other steel and metals products, as well as chemical and agricultural products.

In response to these and other concerns, on August 5, 2010, Senator Ron Wyden (joined by Senators Olympia Snowe and Charles Schumer)¹³ introduced S. 3725, the Enforcing Orders and Reducing Circumvention and Evasion Act of 2010. The legislation amends section 781 of the Tariff Act of 1930 (as amended) to strengthen the authorities of and coordination between Commerce and CBP in addressing allegations and findings of circumvention.

In particular, the legislation establishes specific procedures and time limits, and designates actions to be taken by Commerce CBP in the event of affirmative preliminary and final determinations of circumvention. Particular provisions of interest include:

- Initiation of Circumvention Proceedings – The legislation amends the statute to provide that Commerce may initiate a circumvention investigation: (1) on its own initiative (based on a conclusion that an investigation is warranted to determine whether circumvention is occurring); (2) in response to a petition submitted by an interested party as defined by 19 U.S.C. § 1677(9)(A), (C), (D), (E), (F), or (G) (containing information that is reasonably available to that party); or (3) in response to a referral from the Commissioner of CBP.
- Time Limits – The legislation amends the statute to provide that: (1) within 30 days of initiating a proceeding Commerce must reach a preliminary determination on whether there is a reasonable basis to believe or suspect that merchandise at issue is covered by an antidumping or countervailing duty order; (2) in instances where an expedited determination is appropriate, Commerce may publish its notice of

¹³ On September 28, 2010, Senators Sherrod Brown, Patrick Leahy, and Bernard Sanders became co-sponsors of S. 3725.

initiation and its preliminary determination concurrently; and (3) to the maximum extent practicable, Commerce shall publish its final determination not more than 180 days after initiation.¹⁴

- Agency Coordination – The legislation requires that the Commissioner of CBP, in response to a request from Commerce, transmit to Commerce copies of entry documentation for merchandise at issue by a date that is not later than the date on which a circumvention proceeding is initiated.
- Counsel’s Access to Information – Subject to an administrative protective order, the legislation provides for the release of confidential information (entry documentation and other information obtained by Commerce) to counsel not later than 10 business days after the initiation of a proceeding.
- Commerce Actions Following Affirmative Preliminary Determination – The legislation provides that, following Commerce’s issuance of an affirmative preliminary determination, Commerce shall instruct CBP to: (1) suspend liquidation of merchandise entered on or after the date of the preliminary determination; (2) suspend liquidation of merchandise entered before the preliminary determination if liquidation is not final as of the date of the preliminary determination; and (3) order the posting of a cash deposit on future entries of the merchandise.
- Commerce Actions Following Affirmative Final Determination – The legislation provides that, following Commerce’s issuance of a final affirmative determination, Commerce shall instruct CBP to: (1) assess duties on the merchandise; (2) reliquidate merchandise entered into the United States up to one year before the date the circumvention proceeding was initiated; and (3) review and reassess the amount of bond or other security an importer is required to post when importing such merchandise subsequent to the final determination.
- Other Commerce Actions – The legislation provides that Commerce, after making an affirmative preliminary determination, shall: (1) transmit a copy of the administrative record to the Commissioner of CBP for appropriate action, including penalty proceedings under section 592 of the statute (19 U.S.C. § 1592); (2) transmit a copy of the administrative record to the head of another agency that requests it.
- CBP Actions – The legislation provides that not later than 180 days after enactment, the Commissioner of CBP shall establish procedures to: (1) allow an interested party to submit a petition to CBP alleging

¹⁴ In contrast, the statute currently provides that the Commerce Department shall make a final determination in a circumvention proceeding, “to the maximum extent practicable,” within 300 days of initiating a proceeding. See 19 U.S.C. 1677j(f).

circumvention of an antidumping and/or countervailing duty order; (2) investigate such allegations; (3) notify a party that submits a petition of the CBP's determination or referral to another agency of the petition and the outcome of CBP's investigation.

- Annual Report – The legislation establishes a requirement that Commerce and CBP jointly prepare an annual report detailing: (1) number of investigations initiated; (2) the results of those investigations; (3) the amount of duties collected as a result of the investigations.

The legislation also provides for judicial review by the CIT of circumvention determinations by amending section 516A(a)(2) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)(i)), to explicitly provide for such review.

While the number of actions coming before the CIT seeking review of Commerce determinations made pursuant to Section 781 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1677j) has been relatively modest, that may change given the increasing number of such proceedings in which Commerce has reached affirmative findings (as well as the increased number of such proceedings initiated by Commerce). Moreover, the prospect of S. 3725 being enacted poses several additional issues that have the potential to generate litigation before the Court. In particular, there appear to be at least four potential issues that could arise before the Court if S. 3725 is enacted into law.

First, the legislation provides that, notwithstanding the requirements of section 501 of the Tariff Act of 1930 (as amended) (19 U.S.C. § 1501), following an affirmative final determination, Commerce shall instruct CBP to reliquidate every entry of merchandise that was liquidated “on or after the date that is one year before the date on which the {circumvention} investigation was initiated” and “before the date of the final determination.”¹⁵ U.S. importers confronted with significantly increased duty liability for products entered into the United States

¹⁵ See S. 3725 at 8-9 (setting out statutory language for Section 781A(b)(5)(A)(ii)).

one year prior to the initiation of a circumvention proceeding (and, under the proposed statutory amendment, entries of merchandise that were liquidated prior to the initiation of a circumvention proceeding), can be expected to challenge the re-liquidation of such entries as an inappropriate application of Commerce's circumvention determination.

Second, U.S. importers may challenge as over-broad an affirmative final determination by Commerce that results in that agency's instructing CBP to assess duties on merchandise that entered the United States between a date one year prior to the initiation of the circumvention proceeding and the date of the final determination.¹⁶ In particular, given that a U.S. importer will likely have made several (if not numerous) entries of merchandise during that period, it is not difficult to envision challenges brought before the CIT alleging that the Commerce Department's determination is not supported by substantial evidence with respect to a particular entry or set of entries containing merchandise that is subject to an unfair trade order.

Third, the prospect for concurrent circumvention proceedings by Commerce and CBP raises the possibility for inconsistent determinations.¹⁷ Further, even to the extent that the agencies' determinations are not totally inconsistent (i.e., one agency finding circumvention and the other agency finding no circumvention), there is a possibility of divergent determinations with respect to particular entries. While an entity pursuing a circumvention petition would obviously be able to avoid the possibility of inconsistent agency determinations by proceeding before only a single agency, to the extent the petitioning entity elects to submit allegations to

¹⁶ See S. 3725 at 8-9 (setting out statutory language for Section 781A(b)(5)(A)(i), (ii)).

¹⁷ Compare S. 3725 at 13-14 (statutory language for Section 781A(c)(2), providing that the Commission of CBP shall make a determination within 60 days of receiving a petition alleging circumvention) with id. at 5-6 (statutory language for Section 781A(b)(2), providing that Commerce will typically make a preliminary determination 60 days after receiving a petition alleging circumvention).

both Commerce and CBP concurrently, it risks obtaining inconsistent agency determinations that would complicate review of the agency actions during a review by the CIT.

Finally, the legislation has the potential to increase the number of actions before the CIT as a result of increased penalty proceedings pursued by the United States pursuant to Section 592 of the Tariff Act of 1930, as amended (19 U.S.C. § 1592), which the legislation addresses in two different instances.¹⁸ Indeed, the legislation's requirement that the annual report prepared by the Under Secretary of Commerce for International Trade Administration and the Commissioner of CBP specifically identify any Section 592 penalty proceedings initiated as a result of circumvention allegations may increase the political pressure on those agencies to pursue such proceedings.

* * *

While it remains to be seen whether the number of circumvention allegations remains steady or increases once economic growth strengthens, it is probably a safe assumption that circumvention will continue to be a significant enforcement issue. The increased number of circumvention proceedings initiated by the Commerce Department, combined with the prospect of the enactment of new legislation addressing circumvention proceedings before Commerce and CBP,¹⁹ will likely translate into an increasing number of actions coming before the CIT seeking judicial review of agency actions addressing allegations of circumvention.

¹⁸ See S. 3725 at 11 (statutory language for Section 781A(b)(9)(A)(i)); *id.* at 19 (statutory language for Section 781A(e)(2)(D)).

¹⁹ Recent polling showing that Americans are increasingly skeptical of international trade may raise the likelihood that the Congress will take action on Senator Wyden's legislation (or a bill similar to it), in an effort to demonstrate a commitment to the vigorous enforcement of the U.S. trade laws. See Murray, Sara and Belkin, Douglas, "Americans Sour on Trade: Majority Say Free-Trade Pacts Have Hurt U.S.; Wedge Issue in Some Races," *Wall Street Journal*, Oct. 2, 2010 (discussing latest Wall Street Journal/NBC News Poll finding that 53% of those surveyed said free-trade agreements have hurt the United States, while 46% responded in the same manner in 2007 and 32% in 1999).

III. Increasing Activities by Federal Consumer Protection Agencies in Regulating Imports: An Opportunity to Promote Uniformity by Centralizing Judicial Review before the CIT?

Prior to the global financial crisis and associated economic slowdown, U.S. import growth was robust. U.S. merchandise imports increased from \$1.16 trillion in 2002 to \$2.10 trillion in 2008, an increase of 81 percent. The growth was particularly strong between 2004 and 2006, when U.S. imports grew by 16.9, 13.9 and 10.8 percent, respectively.²⁰ In the spring and summer of 2007 – at the end of this period of significant expansion in U.S. imports – a number of high-profile incidents occurred involving imports of dangerous pet food ingredients, toys, seafood, dairy products, and other products. Following a succession of such incidents, President Bush established an Interagency Working Group on Import Safety in July 2007,²¹ an entity that has been continued by President Obama in a similar form.²² Based on the recommendations of these working group, as well as legislative activity by the Congress, several federal agencies have assumed a more active role in inspecting (and where appropriate detaining or preventing the entry of) merchandise exported to the United States.

CBP has been (and continues to be) responsible for carrying out the instructions of agencies responsible for enforcing many of the consumer protection statutes in effect in the United States.²³ The agencies with which CBP has traditionally worked in policing the entry of

²⁰ See Foreign Trade Data: Historical Series - U.S. International Trade in Goods (U.S. Census Bureau) (available at: <http://www.census.gov/foreign-trade/statistics/historical/index.html>).

²¹ See Executive Order 13439 of July 18, 2007, Establishing an Interagency Working Group on Import Safety, 72 Fed. Reg. 40,053 (July 20, 2007).

²² See Remarks of President Barack Obama, Weekly Address (Mar. 14, 2009) (announcing creation of the President's Food Safety Working Group).

²³ CBP's regulations explicitly identify several of these statutes, including the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 et seq.), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136 et seq.), and the Federal Hazardous Substances Act (15 U.S.C.

certain special classes of merchandise into the United States include the Consumer Product Safety Commission (“CPSC”), the Food and Drug Administration (“FDA”), the Environmental Protection Agency (“EPA”), and the Food Safety Inspection Service (“FSIS”) within the U.S. Department of Agriculture (“USDA”). These agencies in their own right, however, have also become increasingly active in carrying out their mandates to monitor the substantial volumes of imported products entering the United States.²⁴

One recent manifestation of the increasing inter-action between CBP and the government agencies responsible for overseeing the application of the import-related provisions of certain consumer protection statutes is CBP’s announcement of the establishment of the Commercial Targeting and Analysis Center (“CTAC”). The CTAC is a new inter-agency facility intended to streamline and enhance federal efforts to address import safety issues by centralizing and strengthening federal efforts to monitor and inspect merchandise entering the United States. The various agencies participating in CTAC operations include CBP, U.S. Immigration and Customs Enforcement (“ICE”), CPSC, FDA, and FSIS.

This efforts to strengthen inter-agency cooperation in Washington, DC have been mirrored by increased activities at various ports of entry throughout the United States, raising the prospect for variations in how similar issues are dealt with across the United States. These potential variations provide a strong rationale for providing the CIT – a court with particular expertise on customs-related issues – with exclusive jurisdiction under 28 U.S.C. § 1581(i) to

§ 1261 et seq.). See 19 C.F.R. § 12.1 (detailing CBP cooperation with certain agencies and joint regulations). See also 19 C.F.R. § 145.57 (providing that “{c}ertain types of plants and plant products, food, drugs, cosmetics, hazardous or caustic and corrosive substances, viruses, serums, and various harmful articles are subject to examination and clearance by appropriate agencies before release to the addressee”).

²⁴ Despite the decline in import volumes, CBP processed 24.8 million trade entries in FY 2009. See U.S. Customs and Border Protection: Performance and Accountability Report, Fiscal Year 2009, at 6 (available at: <http://www.cbp.gov/xp/cgov/newsroom/publications/admin/>).

exercise judicial review of any action against the United States that arises out of any federal law providing for any prohibition or condition on the importation of merchandise.

A. Consumer Product Safety Commission

On April 26, 2010, CBP and the CPSC completed a memorandum of understanding that will allow CPSC officials access to the Automated Commercial System for conducting import safety risks assessments.²⁵ More recently, CBP and CPSC expanded on this cooperation with the announcement that, effective June 14, 2010, CPSC officials (rather than CBP officials) will be responsible for issuing notices of detention in circumstances where CPSC requires additional time to determine whether a product is admissible into the United States. This represents a departure from the prior practice that involved CBP issuing detention orders in instances where a product's admissibility was in question.

In announcing this new policy, CPSC emphasized that its issuance of notices of detention "will eliminate CBP as the information conduit in the admissibility process and will allow the importer and/or his broker to deal directly with CPSC."²⁶ While CPSC officials are the point of contact and ultimate decision-makers on questions concerning admissibility, products detained by CPSC are held in a CBP-regulated bonded facility. Moreover, in instances where CPSC detains merchandise accounting for only a portion of a shipment, importers (or their brokers) must contact and arrange with CBP officials the release of any products that are not subject to detention by CPSC.

²⁵ See CBP, CPSC Sign Agreement to Promote Consumer Safety, Apr. 26, 2010 (CBP press release, available at: http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/04262010_2.xml).

²⁶ "CPSC Detention of Products at Import: Frequently Asked Questions (FAQs)," (June 30, 2010) (available at: www.cpsc.gov/businfo/detentionFAQ.pdf).

Although CPSC's assumption of responsibilities for issuing detention orders has only been in effect for several months (and based on personal experience appears to be working quite well), there is a prospect for inconsistent agency action and delays in the resolution of detention orders and the ultimate release of admissible merchandise. For example, where a detained shipment contains a combination of admissible and inadmissible merchandise, an importer wishing to segregate the two types of merchandise (in order to enter the admissible products into the United States) will first have to coordinate with CPSC officials on which merchandise is admissible and will then have to coordinate with CBP officials on obtaining physical access to the merchandise in order to segregate the admissible and inadmissible products. This scenario highlights the importance of close coordination between CPSC and CBP officials (something that will be facilitated by CPSC's positioning agency officials at 10 of the nation's largest ports to work alongside CBP officials),²⁷ and also makes clear the potential difficulties that could arise where that coordination is absent.

B. Food and Drug Administration

The FDA also exercises authority to issue detention orders where it has credible evidence or information indicating that an imported food presents a threat of serious adverse health consequences or death to humans or animals. This authority was provided to the FDA in the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 ("Bioterrorism Act"), and FDA issued a final rule in June 2004 that details its detention procedures and the process for appealing a detention order.²⁸

²⁷ See Remarks of CPSC Chairman Inez Tenenbaum at Memorandum of Understanding (MOU) Signing Ceremony, (Apr. 26, 2010) (available at: <http://www.cpsc.gov/pr/tenenbaum04262010.html>).

²⁸ See Administrative Detention of Food, 69 Fed. Reg. 31,660 (June 4, 2004) (codified at 21 C.F.R. §§ 1.377 *et seq.*).

Since the passage of the Bioterrorism Act, FDA and CBP have been working collaboratively to strengthen the integration of the two agencies' abilities to review and screen shipments containing food before they enter the United States. While FDA is responsible for issuing detention orders, the agency must rely on CBP's recall authority under 19 C.F.R. § 141.113(c) in the event a determination is made to detain or refuse entry of merchandise that has been released from CBP custody. This requires close coordination between FDA and CBP personnel, including the CBP import specialist who is responsible for identifying the liquidation status of refused merchandise, issuing a notice to redeliver to the U.S. importer, updating the ACS entry for the shipment, and (if necessary) initiating liquidated damages proceedings against the importer if the merchandise is not re-delivered. With imported foods accounting for approximately 15 percent of the volume of food consumed in the United States as of 2005²⁹ and growing, the need for close cooperation (and the opportunities for potentially contradictory agency actions when that coordination doesn't occur) will be heightened.

C. Environmental Protection Agency

A final agency that also plays an active role in monitoring and policing products imported into the United States is the EPA. A particular area of focus for the EPA has been ensuring that imported non-road engines (commonly used in equipment such as tractors, lawnmowers and other hand-held garden equipment, generators, and off-road motorcycles) comply with the requirements of the Clean Air Act. These imported engines must be certified by EPA as meeting the applicable Clean Air Act emissions standards and must display an appropriate label reflecting that the engine complies with the applicable standards. Over a ten-month tracking period in

²⁹ See Jerardo, Andy, "What Share of U.S. Consumed Food Is Imported?," Amber Waves: The Economics of Food, Farming, Natural Resources, and Rural America, Feb. 2008 (available at: <http://www.ers.usda.gov/amberwaves/february08/datafeature/>).

2006, EPA assessed \$819,155 in penalties for the importation of 55,832 uncertified engines valued at nearly \$13 million.³⁰ Over an 18-month period in 2007-2008, EPA assessed approximately \$2.4 million in civil penalties in connection with the importation of 48,000 engines that failed to possess the appropriate certifications.³¹

As with the agencies discussed above, a bifurcated system has developed with EPA and CBP each holding responsibility for undertaking certain actions with respect to non-road engines that fail to comply with the requirements of the Clean Air Act. In particular, while EPA is responsible for making determinations on whether to detain merchandise, CBP is responsible for issuing detention and seizure notices, receiving mitigation submissions from the U.S. importer, and informing the importer of determinations made with respect to the merchandise. EPA, however, is the ultimate decision-maker with respect to determinations regarding the adequacy of mitigation petitions, settlement agreements, and compliance with the requirements of the Clean Air Act. As with the scenarios discussed above, the dual responsibilities shared by CBP and EPA require close coordination to ensure that the agencies' actions and instructions to the U.S. importer are coordinated and consistent with respect to opportunities for the importer to remedy or address compliance-related issues.

D. Judicial Review of Agency Action by the CIT – An Opportunity to Advance Uniformity and Utilize the Court's Unique Expertise

Recent increases in customs-related activities by agencies responsible for monitoring and ensuring the safety and environmental-related compliance of imported products, combined with

³⁰ See “EPA Enforcing Stringent Standards for All Nonroad Engines,” Enforcement Alert Sept. 2006 (available at: <http://www.epa.gov/compliance/resources/newsletters/civil/enfalert/2006eds.html>).

³¹ See Isin, Amelie, Wick, Anne and Kushner, Adam M., “Environmental Protection Through Border Protection,” Eighth International Conference on Environmental Compliance and Enforcement, at 387 (2008)

the traditional responsibilities of CBP to facilitate the clearance and entry of such products into the United States, present significant opportunities for agency actions that could require judicial review. Indeed, the posting of inspectors and other personnel at ports of entry throughout the United States, combined with increases in the volume of imports entering the United States, makes it inherently more difficult to ensure consistent and uniform exercise of agency authorities. Similarly, with jurisdiction to review these types of agency actions residing in the federal district courts, the opportunity of U.S. importers to pursue judicial review of agency actions is also widely dispersed.

Providing the CIT with exclusive jurisdiction over actions against the United States arising out of any federal law providing for any prohibition or condition on the importation of merchandise could help promote greater uniformity of agency actions that would be beneficial to U.S. importers as well as the responsible agencies. Given its expertise on customs-related matters, the CIT is well-positioned to undertake the centralized review of these types of agency actions. Nevertheless, the CIT's current jurisdictional grant – established 30 years ago when the consumer protection agencies played a much less active role in monitoring daily import flows – precludes the Court from reviewing these types of agency actions. In particular, the Court's residual jurisdiction provision, provides that:

the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for

...

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (emphasis added).

The Customs and International Trade Bar Association (“CITBA”), recognizing the evolution in the import-related activities of the federal consumer protection agencies, has drafted legislative language to broaden the CIT’s jurisdiction to include the review of such agency determinations. The legislative language accomplishes this objective by amending Section 1581(i) to provide that the CIT’s residual jurisdiction will cover actions against the United States that arise out of any federal law providing for, *inter alia*, “any prohibition or condition on the importation or exportation of merchandise.”³²

Expanding the Court’s jurisdiction in this manner would accomplish several important goals. First, it would centralize judicial review of agency actions and promote uniformity in circumstances where assignment of agency personnel to various ports of entry throughout the United States tends to promote non-uniformity. Second, it would provide for judicial review of these types of agency actions in the federal court with long-standing and unique expertise in reviewing import- and customs-related issues. Finally, providing the CIT with exclusive jurisdiction over these types of actions would update and align the Court’s jurisdiction in a manner that reflects the evolution in the import-related activities of federal agencies in the years since the enactment of the Customs Courts Act of 1980.

IV. Conclusion

The global financial crisis and associated declines in economic activity have had a significant impact on international trade. While international trade will certainly return to and

³² See U.S. Court of International Trade Improvements Act (June 29, 2009) (available on the CITBA website at: <http://citba.cwsit.com/CITJurisdictionLegislation.php>).

exceed the record levels reached in 2008, several recent developments will likely continue to affect the flow of goods across national boundaries.

First, efforts by unscrupulous producers and traders to circumvent unfair trade orders in an effort to maintain or increase their access to large overseas markets will likely continue, requiring increased activity by Commerce to review such allegations and by the CIT to review the agency determinations. These activities may be influenced in the near term by the enactment of legislation to strengthen the authorities of Commerce and CBP to address allegations and findings of circumvention, and to encourage coordination between the two agencies.

Second, recent incidents involving the importation of contaminated food and dangerous products exposed shortcomings in the federal government's activities to protect the public from imported products with the capacity to harm it. In responding to these incidents, as well as the significant increases in the volume of imports entering the United States, federal agencies such as CPSC, FDA, and EPA have taken increasingly active roles in dealing directly with U.S. importers of products that may be unsafe or do not meet the applicable regulatory standards from entering the United States. Although judicial review of disputes over actions by those agencies currently resides in the federal district courts, the CIT possesses a unique expertise and an ability to provide for centralized review of such actions that would help promote uniform and consistent agency actions.

If one considers the nature of the actions coming before, and the jurisdiction of, the CIT and its predecessor over time, there is a distinct evolution. Just as the CIT and its predecessor evolved in addressing and resolving the customs- and trade-related disputes coming before it, so too can we expect that these newly emerging issues (and the prospect of the enactment of

legislation addressing them) will continue influence the jurisdiction and activities of the CIT in the years to come.

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