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Aaron Besser

John Boscariol

Cyndee B. Todgham Cherniak

Laura Fraedrich

Melanie Frank

See next page for additional authors

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Aaron Besser, John Boscariol, Cyndee B. Todgham Cherniak, Laura Fraedrich, Melanie Frank, Lawrence M. Friedman, Orisia K. Gammell, Gwendolyn L. Hassan, Greg Kanargelidis, Daniel L. Kiselbach, Christine Martinez, Luis F. Martinez, Perla Martinez, Cortney O'Toole Morgan, Matt Nakachi, Mercedes Ozcan, Julia S. Padierna-Peralta, Damon V. Pike, and David Salkeld*

I. Introduction

Change in U.S., Canadian, and Mexican customs law was extensive in 2011. This article highlights the year's developments in these and other areas.[1]

II. U.S. Judicial Review of Customs-Related Determinations

A. United States Court of Appeals Cases

1. *Hitachi Home Electronics (America), Inc. v. United States*[2]

Under 19 U.S.C. § 1515(a), U.S. Customs and Border Protection has two years to act upon the importer's administrative protest filed pursuant to 28 U.S.C. § 1581(a). But what happens if Customs fails to meet that statutory deadline? The statute provides:

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* The authors are all attorneys who specialize in international trade law. Daniel L. Kiselbach, Miller Thomson LLP, Vancouver, British Columbia; Greg Kanargelidis, Blake, Cassels & Graydon LLP, Toronto, Ontario; Cyndee Todgham Cherniak, McMillan LLP, Toronto, Ontario; David Salkeld, Arent Fox LLP, Washington, D.C.; Perla L. Martinez, Basham, Ringe y Correa, S.C., Nuevo Leon, Mexico; Luis F. Martinez, Basham, Ringe y Correa, S.C., Nuevo Leon, Mexico; Mercedes Ozcan, McBreen & Kopko, Jericho, New York; Lawrence M. Friedman, Barnes, Richardson & Colburn, Chicago, Illinois; Cortney O'Toole Morgan, Barnes, Richardson & Colburn, Washington, DC; Damon V. Pike, The Pike Law Firm, P.C., Decatur, Georgia; Matt Nakachi, Sandler, Travis & Rosenberg, P.A., San Francisco, California; Orisia K. Gammell, Thompson Coburn LLP, Washington, DC; Laura Fraedrich, Kirkland & Ellis LLP, Washington, DC; Julia S. Padierna-Peralta, Hogan Lovells US, LLP; Gwendolyn Hassan, Navistar, Inc., Oak Park, Illinois; Christine Martinez, Barnes, Richardson & Colburn, Chicago, Illinois; and Aaron Besser of Baltimore, Maryland.

1. For developments in 2010, *see* Yohai Baisburd et al., *Customs Law*, 45 Int'l Law. 3 (2011). For developments in 2009, *see* John Boscariol et al., *Customs Law*, 44 Int'l Law. 5 (2010).

2. Hitachi Home Elecs. (Am.), Inc. v. United States, 661 F.3d 1343 (Fed. Cir. 2011).

> [u]nless a request for an accelerated disposition of a protest is filed in accordance with subsection (b) of this section, the appropriate customs officer, within two years from the date a protest was filed in accordance with section 1514 of this title, shall review the protest and shall allow or deny such protest in whole or in part.

Hitachi argued that if Customs failed to act on the administrative protest within the two-year period, the protest would be deemed allowed by operation of law. The Federal Circuit disagreed.

The Federal Circuit began its analysis with what it viewed as established law: when Congress provides a deadline for administrative action, but does not specify a consequence for failing to meet that deadline, the period is directory rather than mandatory.[3] Hitachi attempted to counter this analysis by arguing that the text actually does provide a consequence. According to Hitachi, the statutory language that Customs "shall allow" the protest is an explicit statement that allowance occurs by implication. This is in contrast to denials, which require action by Customs in the form of notice to the importer with an explanation of the reasons for the denial.[4] The Court, however, saw no textual basis to find that the statute called for a default protest approval.[5]

The Federal Circuit also considered the ability of importers to request accelerated disposition under 19 U.S.C. § 1515(b) to be relevant to the ruling. Under that provision, an importer may request that Customs act on the protest. Protests not decided within thirty days of the request are treated as denied and provide the importer with an avenue for judicial review in the U.S. Court of International Trade (CIT) under 28 U.S.C. § 1581(a).[6] According to the Court, this provision in the very next statutory section provided the governing a mechanism for an importer to impose a mandatory deadline on the protest review process.[7]

2. *Dell Products LP v. United States*[8]

Dell Products argued that secondary batteries presented together with a laptop should be classified together with the laptop as a retail set. U.S. Customs disagreed and classified the secondary batteries as "other storage batteries" at a duty rate of 3.4%. The CIT agreed with Customs, holding that the secondary batteries were not offered or displayed together for retail sale with the computer, but rather were offered individually.

On appeal, the Federal Circuit noted that the "phrase 'goods put up in sets for retail sale' most naturally refers to goods that are offered to customers as a set for purchase rather than to a collection of goods that are assembled into a set after the customer has purchased them."[9] The Federal Circuit explained that a set of goods that is packaged for retail sale is a set of goods offered to customers as a single, discrete unit of merchandise.[10] Thus, since Dell offered the secondary batteries individually for sale, and merely packaged

3. *Id.* at 1345–49.
4. *Id.* at 1348.
5. *Id.* at 1350.
6. *See* 19 C.F.R. § 174.22(d) (2011).
7. *Hitachi Home Elecs.*, 661 F.3d at 1349.
8. Dell Prod., LP v. United States, 714 F. Supp. 2d 1252 (Ct. Int'l Trade 2010).
9. Dell Prod., LP v. United States, 642 F.3d 1055, 1058 (Fed. Cir. 2011).
10. *Id.* at 1059.

them together with the laptop when chosen by the customer, the secondary batteries were thus properly subject to separately classification from the laptop computers.

3. *BenQ America Corp. v. United States*[11]

BenQ America Corp. imported liquid crystal display monitors from China in 2004 and claimed classification under a duty-free provision for display units of automatic data-processing machines. Customs, however, assessed the monitors as reception apparatus for televisions at a five percent duty rate. In agreeing with CBP, the CIT relied on Note 5(E) to Chapter 84, HTSUS, and the Explanatory Notes to heading 8471. The CIT first determined that the monitors could serve as video monitors for a video source, concluding that the monitors could not be classified under heading 8471 because Note 5(E) provides that "[m]achiness performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings."[12]

BenQ appealed, arguing a misplaced reliance on Note 5(E) of Chapter 84 to exclude the monitors from heading 8471. BenQ's principal argument was that the CAFC should determine the "principal function" of the monitors as required by Section XVI, Note 3, HTSUS. The Federal Circuit agreed that the CIT erred in relying on Note 5(E) because the provision applies only when the machine incorporates or works in conjunction with an ADP machine and BenQ's monitors were separate and distinct units.[13] The Federal Circuit ruled that if the monitors were to be classified under heading 8471, HTSUS, there must be an analysis under Note 5(B) of Chapter 84. The Federal Circuit determined that the outcome of the test rested on a principal use analysis, rather than a principal function analysis, and issued a remand.[14]

4. *Camelbak Prods., LLC v. United States*[15]

Camelbak imported back-mounted packs designed to deliver hydration to the user in a "hands-free" fashion. Camelbak claimed that under GRI 3, the goods should be classified under subheading 4202.92.04 or 4202.92.08, HTSUS, at a seven percent rate of duty. Customs has assessed the packs under subheading 4202.92.30, HTSUS with a duty rate of 17.8%. Camelbak took the issue to the Federal Circuit, where it argued that the CIT erred in classifying the packs under GRI 1 instead of performing an essential character analysis.[16] The Federal Circuit agreed and remanded stating that the CIT erred when it did not recognize that the Camelbak packs possess features *substantially in excess* of those within the common meaning of the term "backpack."[17]

11. BenQ Am. Corp. v. United States, 683 F. Supp. 2d 1335 (Ct. Int'l Trade 2010), *vacated*, 646 F.3d 1371 (Fed. Cir. 2011).
12. BenQ Am. Corp. v. United States, 646 F.3d 1371, 1375 (Fed. Cir. 2011).
13. *Id.* at 1379.
14. *Id.* at 1380.
15. CamelBak Products, LLC v. United States, 704 F. Supp. 2d 1335 (Ct. Int'l Trade 2010), *remanded to* 649 F.3d 1361 (Fed. Cir. 2011).
16. CamelBak Prods., LLC v. United States, 649 F.3d 1361, 1366–67 (Fed. Cir. 2011).
17. *Id.* at 1368.

B. U.S. Court of International Trade Cases

1. *CBB Group, Inc. v. United States*[18]

CBB Group questioned the propriety of Customs and Border Protection's treatment of plush toys detained, excluded, and ultimately seized for alleged intellectual property violations. After denying defendant's motion for a stay and protective order in response to plaintiff's discovery requests,[19] the CIT denied the government's motion for judgment on the pleadings.[20] In so doing, the court found that Customs' seizure of excluded goods after a summons regarding their exclusion had been filed with the CIT does not remove the jurisdiction that attached when the summons was filed or preclude the court's granting of any relief that might prove appropriate after the merits of the action are heard.[21] In August 2011, the court accepted the parties' stipulated dismissal of the action.

2. *Airflow Technology, Inc. v. United States*[22]

A particularly vexing issue in the classification of textiles has been the treatment of textiles for technical, rather than apparel, upholstery, or similar uses. In *Airflow Technology*, the CIT provided a thorough description of the tariff analysis necessary for materials and products possibly classifiable in HTSUS Heading 5911, which covers "[t]extile products and articles, for technical uses, specified in note 7 to this chapter . . . ."[23]

The merchandise in *Airflow* was non-woven textile filter media. Customs had classified the merchandise under Heading 5911 on the grounds that filter media is a textile product for technical use and is similar to felt. CIT rejected that approach, noting that Chapter Note 7(a) requires more than that the material be similar to felt. Rather, it must be similar to felt that is covered or laminated with rubber, leather or other material, of a kind used for card clothing, and similar fabrics of a kind used for other technical purposes. Similarly, the Court rejected the argument that the merchandise was a textile article for purposes of Note 7(b). The Court held that textile articles are made up products having a defined identity and dimension, similar to the exemplars in the note. This decision illustrates how to apply General Rule of Interpretation 1 to arrive at a tariff classification that is consistent with the legally binding Chapter and Section Notes.

III. Executive Branch Developments

A. Related Party Valuation and Post-Importation Adjustments

On September 23, 2011, U.S. Customs issued a website notice proposing a change in policy regarding transfer pricing and post-importation adjustments.[24] Specifically, Cus-

18. *See* CBB Group, Inc. v. United States, 783 F. Supp. 2d 1248 (Ct. Int'l Trade 2011).
19. *See* CBB Group, Inc. v. United States, No. 10-00383, 2011 WL 1627583 (Ct. Int'l Trade Apr. 28, 2011).
20. *See CBB Group, Inc.*, 783 F. Supp. 2d at 1256.
21. *See id.* at 1250, 1256.
22. Airflow Tech., Inc. v. United States, No. 02-00099, 2011 WL 5130133 (Ct. Int'l Trade Oct. 31, 2011).
23. *Id.* at *1.
24. *See Trade Outreach*, Customs & Border Protection (Sept. 23, 2011), http://www.cbp.gov/xp/cgov/trade_outreach/public_comment.xml.

toms requested "advance comments" concerning an importer's use of transaction value for imports purchased from a related party when the price is based on a formula predetermined at the time of importation and that requires periodic pricing adjustments pursuant to the importer's income tax transfer pricing policy. Details regarding how the importer's transfer pricing policy might be established, such as transfer pricing studies or Advance Pricing Agreements, were not specifically addressed. CBP's notice proposed accepting these adjustments for customs valuation purposes such that duty refunds (for adjustments to increase profit and thus lower the entered value of imported merchandise) and duty payments (for increases in merchandise value to lower profit) will be allowed—provided that importers participate in CBP's "Reconciliation Prototype" program. The notice contains numerous "Factors to Consider" and, practically, these factors were the focus of most of the advance comments received by the agency in response.[25] Customs is currently reviewing all advance comments prior to any formal publication in the "Customs Bulletin" of the proposed revocation of HQ 547654. Importers and interested parties will have the opportunity to submit detailed comments in response to the formal "1625 Notice" when it is published.

B. Final Rule Concerning Offsets

On October 25, 2011, Customs published a final rule that revises its audit regulations to allow for offsets to be made by companies submitting a prior disclosure in all cases.[26] When filing a valid prior disclosure, an importer is required to pay duties and fees, plus interest, owed because of the disclosed errors. The revised regulations permit Customs to offset underpayments of duties or fees with overpayments of duties and fees on entries covered by a prior disclosure in all cases (both within and outside audits). The changes amend Title 19 of the Code of Federal Regulations pertaining to prior disclosure procedures and audit procedures.[27]

This offsetting, or netting of underpayments and overpayments, can result in significantly lower amounts owed to Customs because of filing a prior disclosure. The final rule became effective on December 27, 2011. Customs is authorized to conduct audits under 19 U.S.C. § 1509 (sometimes referred to as Customs audits, section 1509 audits, or focused assessments).[28]

Customs has historically treated overpaid duties differently when they arise during the course of a customs audit as opposed to prior disclosures outside the audit context. Under the new rule published on October 25, 2011, importers can receive the benefit of deducting overpayments from underpaid duties owed in all prior disclosures, not just those submitted in connection with a customs audit.

25. For a full discussion of this issue, see Damon V. Pike, *U.S. Customs Propose New Transfer Pricing Policy*, 12 Transfer Pricing Int'l J. 10, 7–11 (2011), *available at* http://www.thepikelawfirm.com/articles/20111001%20Transfer%20Pricing.pdf.

26. CBP Audit Procedures: Use of Sampling Methods and Offsetting of Overpayments and Over-Declarations, 76 Fed. Reg. 65,953 (Oct. 25, 2011) (to be codified at 19 C.F.R. pts. 162–63).

27. *See* 19 C.F.R. §§ 162.74, 163.1, 163.11 (2011).

28. *See Trade Programs: Audits*, U.S. Customs and Border Protection, http://www.cbp.gov/xp/cgov/trade/trade_programs/audits/ (last visited Jan. 11, 2012).

On October 21, 2009, Customs published in the Federal Register[29] the proposed rule to amend prior disclosure procedures and audit procedures. The proposed amendments concerned the use of statistical sampling methods by Customs and private parties and the offsetting of overpayments of duties and fees or over declarations of quantities or values on finally liquidated entries against underpayments or under-declarations on finally liquidated entries under certain prescribed circumstances.[30] Limitations to offsetting include: (1) disallowance with respect to specific overpayments or over-declarations made for the purpose of violating any provision of law, including laws other than customs laws; (2) disallowance for overpayments or over-declarations resulting from a failure to timely claim or establish a duty allowance or preference; and (3) disallowance where Customs determines that any underpayments or under declarations identified for offsetting purposes were made knowingly and intentionally.

C. FTZ Board Update- Changes to Annual Report Process

On August 11, 2011, the Federal Trade Zone Board updated the Annual Reporting Process.[31] Beginning with the 2011 reports, all reports must be submitted through the Online FTZ Information System. Each grantee will receive an email with a user ID and password to log into OFIS. The 2011 report will not be due until March 31, 2012, and the 2011 report will cover January 1, 2011 through December 31, 2011. For the first time, an operator can now also indicate if their data are considered "business proprietary" (in which case any public reports generated based on that data will only indicate ranges into which the data fall). Reports will also incorporate several format changes (which were published for comment in 2009).

D. Customs Proposed Rulemaking on Informal Entry limit and Removal of a Formal Entry Requirement

On October 28, 2011, Customs published a notice of proposed rulemaking[32] to increase the informal entry limit from $2,000 to it maximum statutory limit of $2,500. The current limit of $2,000 was established in 1998, and is reflected in subpart C of Part 143 of Title 19 of the Code of Federal Regulations (19 C.F.R. Part 143), which prescribes the informal entry procedures.[33] In its proposal, Customs explains that while the $2,000 dollar amount has been unchanged, inflation over the intervening years has reduced the value

29. Use of Sampling Methods and Offsetting of Overpayments and Overdeclarations in CBP Audit Procedures: Sampling under Prior Disclosure, 74 Fed. Reg. 53,964 (Oct. 21, 2009) (to be codified at 19 C.F.R pts. 162–63).

30. The final rule also codifies existing practice regarding the use of statistical sampling in reviewing entries covered by an audit or a prior disclosure. Offsetting may be used whether or not statistical sampling is employed in audit or prior disclosure. It has been common practice by Customs to allow statistical sampling, but not offsets, in prior disclosures outside the audit context.

31. *See* U.S. Foreign-Trade Zones Board Update (Aug. 11, 2011), http://ia.ita.doc.gov/Ftzpage/letters/update-11Aug2011.html.

32. *See* Informal Entry Limits and Removal of a Formal Entry Requirement, 76 Fed. Reg. 66,875 (Oct. 28, 2011) (to be codified at 19 C.F.R. pts. 10, 24, 102, 123, 128, 141, 143, 145, 148).

33. *See* 19 C.F.R. §§ 143.21–.28 (2012).

of the amount in real terms.[34] Consequently, Customs proposes to raise the current informal entry amount to its maximum statutory limit in response to inflation.[35]

By increasing the limit by $500, Customs believes that it will reduce the overall administrative burden on importers and other entry filers by expanding the availability of the simplified informal entry procedures.[36] Customs also estimates that increasing the informal entry limit to $2,500 will save the trade community approximately $11 million in merchandise processing fees annually.[37] Customs will accept comments on its proposed rule until December 27, 2011.[38]

E. Recent Customs Changes to Post-Summary Correction Filings

Effective September 22, 2011, Customs updated the way in which entries are corrected prior to liquidation. The new process, called Post-Summary Corrections (PSCs), is effected vis-à-vis an electronic filing in the most recent version of ACE as released on June 4, 2011.[39] Under this new system, Customs effectively moved ACE-based entry corrections from a paper-based system to an electronic filing system. This change will only apply to ACE-eligible entry types (01 and 03 type entries) and not to type 11 informal entries.[40] This change was effected to help streamline and automate the post-entry corrections process.[41]

Certain restrictions will still apply. Notably, all PSC's must be filed within 270 calendar days of entry but will not be accepted within twenty days of liquidation. The filer must also provide a reason for the PSC. Conversely, however, there is no limit set on the number of PSC's that may be submitted with respect to any given entry. As expected, the trade must retain any and all PSC's including, but not limited to; the original Entry Summary for five years following entry. It is also important to note that the original filer will not receive a courtesy copy of any PSC filed by another filer.[42]

F. Modifications to Country of Origin Rules

After two years of administrative rulemaking proceedings, Customs published a Final Rule regarding "Rules of Origin for Imported Merchandise," which declined to establish uniform rules of origin for imported merchandise and adopted amendments to the country of origin rules codified in Part 102 of the Customs regulations[43] with respect to five

34. *See* Informal Entry Limit and Removal of a Formal Entry Requirement, 76 Fed. Reg. at 66,875 (Oct. 28, 2011).

35. *Id.*

36. *See id.* at 66,875–76.

37. *Id.* at 66,876.

38. *Id.* at 66,875.

39. Post-Summary Corrections to Entry Summaries Filed in ACE Pursuant to the ESAR IV Test, 76 Fed. Reg. 37, 136, 37, 136 (June 24, 2011).

40. Sandler, Travis & Rosenberg, P.A., *New Guide Details Use of Post-Summary Corrections* (June 13, 2011), http://www.strtrade.com/wti/wti.asp?pub=0&story=37274&date=&company=.

41. Laurie Dempsey & Monica Crockett, *U.S. Customs and Border Protection Post Summary Corrections* (Sept. 1, 2011), http://www.cbp.gov/linkhandler/cgov/trade/trade_outreach/webinar_present/psc_webinar.ctt/psc_webinar.pdf.

42. *Id.*

43. Rules of Origin, 19 C.F.R. § 102 (2011).

product groups.[44] In a 2008 notice of proposed rulemaking, Customs proposed the establishment of uniform rules of origin for imported merchandise, as well as amendments to the rules of origin for five specific product groups, and sought comments from the public regarding the proposals.[45] CBP's decision to withdraw the proposed uniform rules of origin comes as no surprise to the industry, as informal communications dating back to 2010 had suggested that such a result was likely.[46]

The remainder of the proposed amendments, which addressed the rules of origin for pipe fittings and flanges, certain textile and apparel products, greeting cards, glass optical fiber, and rice preparations, has been adopted as a final rule without change from the proposed version.[47] With regard to pipe fittings and flanges, the amendment is consistent with the Customs Court decision in *Midwood Industries, Inc. v. United States*, wherein the Court held that where forgings not capable of use by a consumer are converted into flanges and fittings by the importer, the resulting flanges and fittings are different articles of commerce for tariff purposes.[48] The changes to the tariff shift rules pertaining to certain textile and apparel products, specifically fabrics of HTSUS chapter 59 and knit-to-shape goods, are being implemented to "properly align the rules with the language of the underlying statute," which indicates that origin of chapter 59 fabric is derived from where the fabric is formed, and knit-to-shape apparel items derive origin from where the good is knit to shape.[49] Finally, the amendments with respect to greeting cards, glass optical fiber, and rice preparations are intended to achieve consistency between the tariff shift rules in Part 102 of the Customs regulations and Customs practice in applying the substantial transformation standard to these products.[50]

G. Update on Customs Policy Regarding Customs Forms 28/29 and Prior Disclosures

In 2010, the trade community brought to CBP's attention the problem of Ports disregarding otherwise valid prior disclosures filed under 19 USC 1592 by citing to a previously issued Customs Form 28 [Request for Information] or CF 29 [Notice of Action] as a prior "notice of a formal investigation." Customs Headquarters reviewed these concerns and issued guidance that using a Customs Form 28 for this purpose defeats the goal of informed compliance and may dissuade importers from filing valid prior disclosures.[51] To avoid such a result, Customs explained that "[t]he CBP Form 28 is used by CBP when there is insufficient information in the entry summary package to determine admissibility, appraised value, or classification of imported merchandise."[52] Headquarters advised the

44. Rules of Origin for Imported Merchandise, 76 Fed. Reg. 54,691 (Sept. 2, 2011).

45. Uniform Rules of Origin for Imported Merchandise, 73 Fed. Reg. 43,385 (July 25, 2008).

46. Yohai Baisburd et al., *Customs Law*, 45 Int'l Law. 3, 9 (2011).

47. Rules of Origin for Imported Merchandise, 76 Fed. Reg. 54,695.

48. *See* Midwood Indus., Inc. v. United States, 313 F. Supp. 951, 957 (Cust. Ct. 1970); Rules of Origin for Imported Merchandise, 76 Fed. Reg. 54,695.

49. Rules of Origin for Imported Merchandise, 76 Fed. Reg. 54,692; *see also* 19 U.S.C. § 3592(b)(1)(C), (b)(2)(A)(ii) (2000).

50. Rules of Origin for Imported Merchandise, 76 Fed. Reg. 54,692.

51. *See Guidance: CBP Forms 28 and 29 Language* (May 24, 2011), http://www.cbp.gov/xp/cgov/trade/trade_programs/entry_summary/forms_28_29.xml.

52. *Id.*

Ports to "limit the use of the Customs Form 28 for the purposes stated above and not extend its use as notification that a formal investigation has commenced."[53] In conjunction with its instructions not to use the Customs Form 28 as a notice of investigation, Customs clarified that "[t]he preferred mechanism to inform the importer of the commencement of an investigation is by correspondence on Customs letterhead or the Customs Form 29."[54]

IV. Recent Development in Trade Promotion Legislation

A. The United States-Colombia Trade Promotion Agreement Implementation Act[55]

The United States-Colombia Trade Promotion Agreement Implementation Act implemented the U.S.-Colombia Trade Promotion Agreement, as submitted to Congress on October 3, 2011.[56] Under the agreement, over eighty percent of U.S. exports of consumer and industrial products to Colombia become duty-free immediately, with remaining tariffs phased out over ten years. Key U.S. exports gain immediate duty-free access to Colombia. Textiles and apparel items become duty-free and quota-free immediately upon entry into force provided the products meet the agreement's rules of origin. The agreement is expected to enter into force on January 1, 2012, provided President Obama determines that Colombia has taken measures necessary to comply with the provisions of the agreement.[57]

Meanwhile, Title V of the implementing legislation provided for the retroactive renewal of the Andean Trade Preferences Act (ATPA) through July 31, 2013.[58] The ATPA renewal applies to articles entered on or after the fifteen day after enactment of the legislation and applies retroactively to entries made on or after February 12, 2011.[59]

B. The United States-Panama Trade Promotion Agreement Implementation Act[60]

The United States-Panama Trade Promotion Agreement Implementation Act implemented the U.S.-Panama Trade Promotion Agreement, which was entered into on June 28, 2007, and submitted to Congress on October 3, 2011.[61] The agreement includes important commitments on market access and progressive elimination of customs duties for originating goods. The agreement is expected to enter into force in 2012.[62]

53. *Id.*
54. *Id.*
55. United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 § 1(a) (2011).
56. *Id.* § 101(a)(1).
57. *Id.* § 101(b).
58. *Id.* § 501(a).
59. *Id.* § 501(c)(1)(i-ii).
60. U.S.-Panama Trade Promotion Agreement Implementation Act, Pub. L. 112-43, 125 Stat. 497 § 1(a) (2011).
61. *Id.* § 101(a)(1).
62. *Id.* § 101(b).

C. The United States-Korea Free Trade Agreement Implementation Act[63]

The United States-Korea Free Trade Agreement Implementation Act implemented the U.S.-Korea Free Trade Agreement that was entered into on June 30, 2007 and submitted to Congress on October 3, 2011.[64] Under the agreement, approximately ninety-five percent of bilateral trade in consumer and industrial products will be duty-free within five years of entry into force of the agreement, with virtually all remaining tariffs eliminated within ten years. The agreement is expected to enter into force in 2012.[65]

Section 503 of the agreement implemented an increase in the merchandise processing fee (MPF) from 0.21% to 0.3464% effective October 1, 2011 through June 30, 2021.[66] This provision did not alter the minimum MPF of $25, or the maximum MPF of $485 for formal entries. Customs issued instructions concerning the process it would employ for generating bills for the period that began October 1 through November 5, 2011 to collect the difference between the old and new rates for that period.[67]

D. Generalized System of Preferences[68]

H.R. 2832 provided an extension of the Generalized System of Preferences Program (GSP) from November 5, 2011 through July 31, 2013.[69] The GSP program, having lapsed on December 31, 2010, has been retroactively renewed by H.R. 2832 to allow for a refund of all duties paid on GSP-eligible merchandise that was entered or withdrawn from warehouse for consumption during the period from January 1, 2011 through November 4, 2011. U.S. Customs and Border Protection (CBP) issued instructions concerning the processing of refunds on October 24, 2011.[70]

H.R. 2832 also included a renewal of a scaled-down version of the Trade Adjustment Assistance (TAA) program.[71] Additionally, H.R. 2832 included an increase in the merchandise processing fee (MPF), as well as provisions for prepayment and reconciliation for the MPF paid on formal and informal entries during a forty-two-day period on 2012.[72] However, because the U.S.-Korea Free Trade Agreement Implementation Act was signed by the President after H.R. 2832, the MPF provisions prevail, and the MPF rate has been increased for formal and informal entries to 0.3464% effective October 1, 2011 through June 30, 2021. The $25 minimum and $485 maximum MPF per entry has not been affected by either piece of legislation.

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63. United States-Korea Free Trade Agreement Implementation Act, Pub. L. 112-41, 125 Stat. 428 § 1(a) (2011).

64. *Id.* § 101(a)(1).

65. *See id.*

66. *See* US-Korea Free Trade Agreement Implementation Act, *supra* note 63.

67. *See Merchandise Processing Fee Increase* (Oct. 26, 2011), http://www.cbp.gov/xp/cgcg/trade/trade_programs/entry_summary/merch_fef_incr.xml.

68. Trade Act of 1974, Pub. L. No. 112-40, 125 Stat. 401 (2011).

69. *See id.*

70. Memorandum from Brenda B. Smith, Exec. Dir., Trade Policy and Programs, Office of Int'l Trade, to Directors, Field Operations (Oct. 24, 2011), http://www.cbp.gov/linkhandler/cgov/trade/trade_programs/international_agreements/special_trade_programs/gsp_gen_system/mem_gsp.ctt/mem_gsp.pdf.

71. *See* US-Korea Free Trade Agreement Implementation Act, *supra* note 63, at 402–13.

72. *See id.* at 426–27.

E. TRANS-PACIFIC PARTNERSHIP

In 2009, the Obama administration announced its intention to participate in the Trans-Pacific Partnership (TPP) negotiations that would lead to an Asia-Pacific trade agreement that addresses U.S. priorities and values.[73] Currently, the negotiations include eight partners: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, and Vietnam. In addition, Japan, Canada, and Mexico have expressed interest in joining the TPP negotiations.[74] In response to their request, the U.S. Trade Representative indicated that the countries would need to be prepared to liberalize trade in accordance with the standards contemplated by the TPP negotiating members, and to meet concerns raised by the United States with respect to trade barriers in each market.[75] The U.S. Trade Representative will also need to consult with Congress, U.S. industry members, and the other negotiating partners before formally accepting the three additional countries into the negotiations.[76]

Through the TPP Agreement, the United States seeks to increase U.S. exports to the region, which includes forty percent of global trade and some of the world's most robust economies.[77] This agreement has particular relevance with respect to customs. Following the ninth round of negotiations, on November 12, 2011, the TPP negotiating members announced that they had agreed on several areas relating to key customs issues.[78] In particular, the TPP members and the negotiating groups have developed consolidated legal texts covering twenty key substantive topics, many of which have a customs nexus.[79]

The TPP tariff schedule will cover all goods, representing more than 11,000 tariff lines.[80] Notably, the TPP negotiators reached an agreement on key elements of the customs text, which is intended to establish customs procedures that are "predictable, transparent and that expedite and facilitate trade,"[81] while (1) attempting to create rules to

73. *The United States Trans-Pacific Partnership* (Nov. 2011), http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership.

74. Press Release, Ron Kirk, U.S. Trade Representative, Statement by U.S. Trade Representative Ron Kirk on Announcements from Mexico and Canada Regarding the Trans-Pacific Partnership (Nov. 13, 2011), http://www.ustr.gov/about-us/press-office/press-releases/2011/november/statement-us-trade-representative-ron-kirk-announ; Press Release, Ron Kirk, U.S. Trade Representative, Statement by U.S. Trade Representative Ron Kirk on Japan's Announcement Regarding the Trans-Pacific Partnership (Nov. 11, 2011), http://www.ustr.gov/aboua-us/press-office/press-releases/2011/november/sstatemen-us-trade-representative-ron-kirk-japans.

75. *See* Statement by U.S. Trade Representative Ron Kirk on Announcements from Mexico and Canada Regarding the Trans-Pacific Partnership, *supra* note 74; *See* Statement by U.S. Trade Representative Ron Kirk on Japan's Announcement Regarding the Trans-Pacific Partnership, *supra* note 74.

76. *USTR Indicates Japan's Joining TPP Free Trade Talks To Take Time*, MAINICHI DAILY NEWS (Dec. 2, 2011), http://mdn.mainichi.jp/mdnnews/business/news/20111201p2g00m0bu106000c.html.

77. *See The United States in the Trans-Pacific Partnership* (Nov. 12, 2011), http://www.ustr.gov/aboua-us/press-office/fact-sheets/2011/november/ununit-states-trans-pacific-partnership.

78. *See Outlines of the Trans-Pacific Partnership Agreement* (Nov. 12, 2011) http://www.ustr.gov/aboua-us/press-office/fact-sheets/2011/november/ououtlin-trans-pacific-partnership-agreement; *see also Trans-Pacific Partnership Leaders Statement* (Nov. 12, 2011) http://www.ustr.gov/aboua-us/press-office/press-releases/2011/november/ttran-pacific-partnership-leaders-statement.

79. *See Outlines of the Trans-Pacific Partnership Agreement*, *supra* note 78.

80. *Id.*

81. *Id.*

ensure that goods are released from customs control as quickly as possible and (2) preserving the ability of customs authorities to strictly enforce customs laws and regulations.[82]

Like other free trade agreements, the rules of origin text will include a common set of rules of origin, with provisions for preferential treatment for goods that originate in the TPP region. The TPP members are also discussing proposals for an efficient system for verification of preference claims.[83]

With respect to market access, the text is intended to eliminate tariff and non-tariff barriers, including significant commitments beyond the partners' current WTO obligations. In addition, the TPP partners are considering proposals related to import licensing, export licensing, and remanufactured goods. The text relating to temporary entry will address transparency and efficiency in processing of such applications. The textile and apparel text will address customs cooperation and enforcement procedures and rules of origin, and will include a special safeguards procedure. Finally, the negotiating partners intend to include capacity building provisions that would address the needs of developing countries with respect to market access and trade facilitation.

Although many of the legal texts are nearly complete, there are sensitive issues that vary for each country, and the countries are continuing both bilateral and multilateral consultations among the members. Some of the major issues include pharmaceuticals and ready access to medicine, agriculture, intellectual property, and labor concerns regarding competition over jobs in a globally depressed market.[84] The TPP members expect to continue negotiations of these topics in early 2012, and President Obama has stated that the administration is confident that the members will conclude an agreement within the year.[85]

V. Canadian Legal Developments

A. Free Trade Agreements

In 2011, the Canadian Government continued to pursue a number of bilateral treaties and free trade agreements. On January 27, 2011, Canada and Morocco announced the start of free trade agreement negotiations and the first round took place from October 11–14, 2011 in Ottawa. In May 2011, the first and second rounds of the Canada-Ukraine

82. *Id.*

83. *Id.*

84. Nicole Gaouette, *Clinton's Global AIDS Fight May Be Hurt by U.S. Trade Initiative*, Bloomberg (Nov. 20, 2011), http://www.bloomberg.coc/news/2011-11-21/clinton-s-global-aids-fight-may-be-hurt-by-u-s-trade-initiative.html; Brian Fallow, *Trade Deal Taggers-on Come with Risks*, The New Zealand Herald (Nov. 17, 2011), http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10766510; Dayna Levy, *No Pharmac in Trans-Pacific Partnership*, Stuff (Nov. 16, 2011, 3:58 PM), http://www.stuff.co.nz/national/politics/5978921/No-Pharmac-in-Trans-Pacific-Partnership; *Concerns Raised About Trans-Pacific Partnership Trade Deal*, ABC Radio Australia (Nov. 15, 2010), http://www.radioaustralia.net.au/pacbeat/stories/202010/s3066983.htm; *Big Pharma Lobbying Intensifies as USTR Signals IP Proposal Deadline*, The Trans-Pacific Partnership Digest (May 2, 2011), http://tppdigest.org/index.php?option=com_content&view=article&id=291%3AAbi-pharma-lobbying-intensifies-as-ustr-signals-ip-proposal-deadline&catid=1%3Alates A-news&Itemid=1; Richard Chirgwin, *US Trans-Pacific Partnership Proposal Leaked*, The Register (Mar. 11, 2011), http://www.theregister.co.uk/2011/03/11/us_tpp_prpropos_leaked/.

85. *Remarks by President Barack Obama in Meeting with Trans-Pacific Partnership* (Nov. 12, 2011), http://www.ustr.gov/aboua-us/press-office/speeches/transcriptt/2010/november/remarks-president-barack-obama-meeting-tran.

Free Trade Agreement took place. In July 2011, Canada and India completed the second round of negotiations toward a Comprehensive Economic Partnership Agreement (CEPA). On August 12, 2011, Canada and Honduras concluded free trade agreement negotiations. The Canada-Columbia Free Trade Agreement, the Labor Cooperation Agreement, and the Agreement on Environment entered into force on August 15, 2011. On October 10, 2010, Canada and Israel started to take steps to modernize the Canada-Israel Free Trade Agreement and on October 29, 2011 Canada published a Canada Gazette notice seeking the views of Canadians about the scope of the negotiations. Canada introduced legislation in the House of Commons on November 15, 2011 to implement that Canada-Panama Free Trade Agreement and the Canada-Jordan Free Trade Agreement.

In 2011, Canada conducted a number of rounds of 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 Caribbean Community, the Dominican Republic, India, and the Central America Four. Canada is also in exploratory discussions with Turkey and Japan.

On September 26, 2011, the Canadian Government concluded a foreign investment promotion and protection agreement (FIPA) with Kuwait. In addition, in 2011, Canada launched or continued FIPA negotiations with Mali, Ghana, China, India, Indonesia, Kazakhstan, Mongolia, Pakistan, Poland, Tanzania, Tunisia, and Vietnam.

B. Customs Cases

1. *United Parcel Service Canada Ltd. v. Canada (Public Safety and Emergency Preparedness)*[86]

The decision by Canada's Federal Court of Appeal in *UPS* was released on February 21, 2011. The decision is significant because it is one of the first substantive decisions to deal with customs administrative monetary penalties (AMPS). The Canada Border Services Agency (CBSA) issued penalties to UPS alleging there were parcels that were removed from a customs/sufferance warehouse prior to release. CBSA initially issued a single "notice of penalty assessment," then cancelled and replaced it with 174 individual NPAs totaling $522,000. UPS filed an application for judicial review versus an action in the Federal Court. The decision clarifies the following issues:

Judicial Review vs. Action. A challenge of the decision that there has been a contravention must proceed by way of action under section 135 of the *Customs Act* (ninety-day limitation period). In contrast, an appeal of the penalty amount must proceed by way of application for judicial review (thirty-day limitation period).

Statutory Cap of $25,000. Since the CBSA issued a single NPA initially, the question to be addressed was whether the maximum penalty is only $25,000 versus $522,000. The Customs Act stipulates a maximum of $25,000 per penalty assessed. The Court determined that an NPA is not the equivalent of a penalty; rather one NPA may reflect an

86. United Parcel Serv. Canada Ltd. v. Minister of Pub. Safety and Emergency Preparedness, [2011] F.C. 204 (Can.).

assessment of multiple penalties that in aggregate can amount to more than $25,000 but individually each must not exceed $25,000.

Cancellation of Penalty Authority. This issue concerned whether the CBSA is authorized, once an NPA is issued, to cancel and reissue the NPA notwithstanding that the conditions for cancellation in section 127.1 of the Act do not apply. The Court did not accept that the reissuance of the penalties in a different form (i.e., individually on separate NPAs) was the same as a "cancellation" and in any event the Court was prepared to dismiss the appeal on the basis that no substantial wrong had occurred.

2. *C.B. Powell v. Canada Customs and Revenue Agency*[87]

The decision by Canada's Federal Court of Appeal was released on April 15, 2011 and involved a number of proceedings at the FCA but also at the Federal Court and at the CITT. The facts involved an importation of bacon bits that were imported under an MFN duty-free tariff classification number. Following a CBSA audit, the goods were reclassified to a dutiable classification and the importer appealed under section 60 of the *Customs Act* in order to claim NAFTA origin treatment. The one year limit to claim NAFTA treatment (by way of refund under s. 74) had been exceeded and the CBSA did not accept an appeal of the origin issue since there was no "redetermination" of origin, only of tariff classification. In an earlier proceeding, the Federal Court held that the CITT, not the Federal Court, has the jurisdiction to decide whether the CBSA has made a "decision" for purposes of section 60 of the *Customs Act*. The importer then came before the CITT, but the CITT decided that a refusal by the CBSA to make a decision under section 60 of the *Customs Act* is not in itself a decision that may be appealed to the CITT. In this particular case, the CITT decided there was no "decision" on origin and therefore the importer had no right to appeal to the CITT. The importer appealed to the FCA but its appeal was dismissed, effectively leaving the importer with no remedy in the facts at issue. The importer has filed leave to appeal to the Supreme Court of Canada.

C. Canadian Exports Increasingly Subject to Outbound CBSA Scrutiny

During 2011, Canada's customs authority, the CBSA, continued to exercise its broad authority under the *Customs Act* to ensure that exports from Canada were in full compliance with Canadian law. Reports of U.S. authorities' dissatisfaction with Canadian enforcement of export controls appear to be at least part of the reason for the increasingly aggressive CBSA enforcement.[88] In addition to prosecutions and convictions in addressing export violations, these enforcement actions have included detentions and seizures that delay and disrupt shipments and lead to lost contracts.[89] Three areas of particular vulnerability for exporters are:

(i) Iran and Syria: the supply of any goods to Iran for use in the petrochemical, oil or natural gas industry, or for nuclear purposes is prohibited under SEMA and UNA

87. C.B. Powell Ltd. v. Canada (Border Services Agency), [2011] 2 F.C.R. 332 (Can.).

88. *See, e.g.*, Colin Freeze, *Fronts in Canada Set Up to Ship Banned Goods Abroad: Secret Cable*, Globe and Mail (Nov. 23, 2011), http://174.120.17.199/indin.php?topic=6323.0.

89. Proceedings of the Standing Senate Committee on National Security and Defence (Oct. 31, 2011) (statement of Geoff Leckey, CBSA Director General, Intelligence and Targeting).

regulations that also contain an extensive list of other prohibited items;[90] there is a ban on the export of any controlled goods to Syria; further, no U.S.-origin goods or technology can be transferred to either country without an export permit that can only be obtained in limited circumstances;[91]
(ii) Belarus: Canada's sanctions program is more aggressive than others; it prohibits the export or transfer of all goods and technology to Belarus and permits are available only in very limited circumstances, *i.e.*, for humanitarian purposes[92] and;
(iii) Information security items: Canada's export controls over encryption products are more cumbersome than their U.S. counterparts; often, exporters first discover that their products are subject to control when subject to detention or seizure.

D. Canadian Cabotage Enforcement

In 2011, the CBSA issued an enforcement notice related to the Cabotage laws that restrict the point-to-point movement of domestic goods in Canada by foreign-based transportation businesses.[93] Consequences for non-compliance include detentions, the assessment of duties, taxes, interest, penalties, cancellation of a carrier's enrollment in trusted trader programs such as Free and Secure Trade, forfeiture, or criminal liability.

1. *Duty-Free Entry of Foreign-Based Trucks and Trailers*

The duty-free entry of foreign-based trucks and trailers used *for international commercial transportation* (in and out) is permitted if certain conditions are met. They must: (a) be owned or leased and imported by a foreign-based person; (b) leave from and return to the foreign country in the normal course; (c) be controlled from the foreign country and; (d) be exported within thirty days of the import (or for a period not exceeding twenty-four months where the export of the truck is delayed in specified circumstances). They may be used *for the commercial transportation of goods from one point in Canada to another point in Canada* if: (a) the transportation is "incidental" to the international traffic of the imported or exported goods; (b) the transportation does not occur outside Canada and; (c) the truck does not enter Canada for an in-transit movement through Canada to a point outside of Canada.

90. *Special Economic Measures (Iran) Regulations, SOR/2010-165*, CanLII (Jan. 7, 2012), http://www.canlii.org/en/cc/laws/regu/sor-2010-165/latest/sor-2010-165.html; *Regulations Implementing the United Nations Resolutions on Iran, SOR/2007-44*, CanLII (Jan. 7, 2012), http://www.canlii.org/en/cc/laws/regu/sor-2007-44/latest/sor-2007-44.html.

91. *Export Controls Handbook*, Foreign Affairs and Int'l Trade Canada (Nov. 8, 2011), http://www.international.gc.ca/controls-controles/export-exportation/exp_ctr_handhand-manuel_ctr_exp-p2.aspx?lang=eng&view=d (item 5400 controls all U.S. - origin goods and technology for export or transfer from Canada); *General Export Permit No. 12—United States Origin Goods*, Dep't of Justice Canada (Jan. 9, 2012), http://laws-lois.justice.gc.ca/eng/regulregula/SOR-97-107/page-1.html#h-1 (No.12 allows for the shipment of goods to any destination other than Belarus, Burma, North Korea, Cuba, Syria, and Iran).

92. *Area Control List*, CanLII (Jan. 7, 2012), http://www.canlii.org/en/cc/laws/regu/sor-81-543/latest/sor-81-543.html.

93. *Customs Notice 11-014*, Canada Border Servs. Agency (Aug. 25, 2011), http://www.cbsa-asfc.gc.ca/publications/cn-ad/cn11-014-eng.html.

2. *Repositioning Moves*

A foreign-based truck may be used to move goods between two Canadian points following delivery of a load of imported goods, if the vehicle is en route to pick up a scheduled load of goods for export from Canada. The following conditions apply: (a) the export load must be scheduled for pick-up when the contract for the domestic load is made; (b) the drop-off point for the repositioning load must be in line for the pick-up of the export load and; (c) only one repositioning move is permitted.

3. *Foreign-Based Containers*

Foreign-based shipping containers may be imported into Canada duty-free where: (a) the transportation does not occur outside Canada and; (b) the container has not entered Canada for in-transit movement through Canada to a point outside of Canada. Containers must be exported within 365 days of the date of their import (or for an additional period not exceeding twenty-four months where the export of the containers is delayed for specified reasons).

4. *Truck Drivers*

Under NAFTA, foreign drivers may enter Canada without a permit as business visitors. Drivers may transport goods or passengers to Canada from a NAFTA territory, or load and transport goods or passengers from Canada to a NAFTA territory. However, NAFTA does not authorize a foreign driver to load and unload domestic goods in Canada. A foreign truck driver must meet other conditions including the following: (a) the driver must be a U.S. or Mexican citizen; (b) must show that the purpose of the trip is international; (c) that he or she is not seeking to enter the local labor market; (d) that the primary source of remuneration for the work is outside Canada and; (e) that the principal place of business is outside of Canada.

VI. Mexican Legal Developments

A. Free Trade Agreements

On September 22, 2011, Mexico and Japan signed a Protocol that amended the original FTA between the two countries. On November 22, 2011, a new trade agreement replaced three individual agreements Mexico had with Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The new FTA, called "United FTA between Mexico and Central America," is broader, deeper, and covers trade in goods, services, investment, intellectual property, and streamlines rules of origin and procedures. Mexico also negotiated and signed an FTA with Peru.

B. Elimination of Retaliatory Measures under NAFTA

On October 20, 2011, an Executive Order was published in the Mexican Official Gazette to remove retaliatory tariffs that were implemented in response to the failure by the United States to resolve properly the U.S.-Mexico NAFTA trucking dispute. When the United States would not comply with a NAFTA panel decision, Mexico suspended the

preferential tariff treatment to certain U.S. originating merchandise by way of Executive Orders published in the Federal Gazette in March 18, 2009 and August 18, 2010.

However, in 2011, resolution of the dispute was a priority. In June and July 2011, an agreement was reached pursuant to which the United States agreed to comply with the cargo transport liberalization and Mexico agreed to suspend the retaliatory tariffs on U.S. goods. Mexico made this modification on July 7, 2011 through an Executive Order and the United States granted the first authorization to a Mexican freight company to operate in U.S. territory. Finally, on October 20, 2011, the Mexican government completely eliminated the preferential tariff treatment suspension. More authorizations to Mexican freight companies will be gradually given until completing full liberalization.

C. Invitation to Make Proposals for NAFTA Regulatory Improvement

The Mexican government issued a public invitation for Mexican citizens on April 14, 2011 to send proposals for improving the regulatory requirements for foreign trade operations among the United States, Canada, and Mexico according to NAFTA. This invitation is derived from the National Development Plan 2007–2012. This effort is destined to promote foreign trade and investment amongst the three Parties by reducing costs, improving the access to products and services, and increasing health, security, and environment protection. The proposals should be related to non-tariff trade regulations, such as norms, technical rulings, procedures for the evaluation of conformity of products, procedures, and services, and sanitary and phyto-sanitary measures in Mexico, the United States, and Canada.

D. Article 152 of the Mexican Customs Law

In 2010, the Mexican Supreme Court *en banc* determined that Article 152 of the Mexican Customs Law breached the Mexican Constitution because it does not provide a legal term for a customs entry port to notify an importer of the result of the laboratory analysis of a sample of merchandise that is of difficult tariff classification. Previously, the Second Chamber of the Mexican Supreme Court had established a legal term of four months for this notification to cover that loophole. In October 2011, the Collegiate Circuit Tribunals established an integrated interpretation considering the two previous precedents of the Supreme Court and as a result considered the resolutions issued in compliance with the four-month term to be legal.[94]

94. Ley Aduanera [LAD] [Customs Law], art. 152, Diario Oficial de la Federación [DO], Octubre de 2011 (Mex.), http://200.38.163.161/UnaUnaTesislnk.asp?nIus=160160.