Customs Law Committee

UPCOMING EVENTS

Recent Developments in CBP's Entry Process and Duty Refund Branch

An Off the Record Discussion with CBP's Branch Chief Carrie Owens

Thursday, December 6, 2012, from 12:30 PM - 2:00 PM US ET

Please check Our Committee Website for more information and future Committee events.

COMMITTEE LEADERSHIP

Co-Chairs: Damon V. Pike, Teresa M. Polino, Cyndee Todgham Cherniak

Vice-Chairs: Leslie Alan Glick, Gwendolyn L. Hassan, Christine H. Martinez, Matt Nakachi, Mercedes C. Ozcan, Peter A. Quinter, David R. Stepp

Contact information is available on the ABA’s website at:

ABA SIL Customs Law Committee Webpage

Fall Meeting Recap - A Look Inside the Miami Meeting

By Peter A. Quinter

The Customs Law Committee sponsored several seminars at the Fall 2012 ABA SIL Conference held in tropical Miami Beach, Florida, at the Fontainebleau Hotel. Each of them is easily found in the Compliance/Regulatory Track. With the new Apps available to download to your Droid or iPhone, it is easier to plan and track which seminars you want to attend at ABA. ABA Conferences are very social with lots of breakfasts, luncheons, and dinners, plus receptions and cultural activities unique to the locale.

In addition, Member Committee dinners are a good opportunity to get to know your fellow practitioners.

At the Miami meeting, the Customs Committee sponsored a number of great programs, which covered many different areas of Customs Law. The first program offered was “NAFTA Verification Audit,” which was moderated by me, Peter Quinter of GrayRobinson law firm (Miami), and the panelists included: (1) Gabriel Arriaga (Mexico City), (2) Cheryl Johnson, Assistant Field Director, Office of Regulatory Audit, CBP (Houston), Cyndee Todgham Cherniak of LexSage (Toronto), and Turenna Ortiz of Sanchez Devanny (Mexico City). It was a well attended, interactive session.

Committee Members also presented a panel on “Customs Valuation Strategies & Global Developments” moderated by Co-Chair Damon Pike of The Pike Law Firm (Decatur, GA).

Exploring Global Customs and Bribery

By Rob DeFrancesco

Also at the Miami Meeting, members of the Customs Committee presented a panel that explored the degree to which “expediting” or “facilitation” payments made to customs brokers or local agents may be illegal bribes under the Foreign Corrupt Practices Act (“FCPA”). The program considered the recent rise in enforcement actions in this area, the challenges that global companies face, and the compliance steps that can be taken within a corporate customs program to avoid risks of ethics violations and prosecution. The panel included: Melanie Frank from Hughes Hubbard & Reed LLP, program chair and speaker, and speakers Brian Mich from BDO Consulting; Cyndee Todgham Cherniak from LexSage in Toronto; and Joshua Frank, General Counsel & Secretary from DHL Americas. Teresa Polino from Thompson Coburn moderated the panel discussion.

The panel first addressed the U.S. Department of Justice’s interpretation of the FCPA provision as it relates to facilitation payments and customs officials. The panel noted that while there is an exception for “facilitation” payments under the statute it is a difficult exception to satisfy.

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Global Customs and Bribery, cont.

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In particular, companies do not often keep sufficient records to satisfy the record keeping provision of the exception. Further, even where a company does have sufficient records, there must be no prohibition against the facilitation payments under local law as well. It is not often the case that “bribery” or “facilitation payments” are acceptable under the local law. Therefore, it is difficult to satisfy this exception.

Ms. Todgham Cherniak led a discussion on the differences between the FCPA and the equivalent statute in Canada, providing information about Canadian laws, regulations, and cases. While the two statutes are similar there are some differences in Canada. For example, there does not appear to be a similar record keeping provision in the Canadian statute.

The panel then discussed best practices that the panelists have used in their businesses. Mr. Pordzik from DHL noted that in the past to avoid “facilitation” payment violations, they have paid the local government to increase the salaries of the local customs agents to avoid the issue.

In addition, in other cases DHL has worked with local governments to establish and fund their own ports of entry in the particular country, which DHL staffs itself. Other members of the panel discussed the difficulty in overcoming the combination of both local customs concerns and internal pressures to enter product as quickly as possible in certain locations.

Customs Law and Parallel Imports Program at Fall Meeting

By Lawrence M. Friedman

There was not much gray area between the speakers, who appeared to see everything in either black or white, on the Miami Fall Meeting panel entitled “Gray Market Imports and Customs: Irreconcilable Differences?” In fact, whether these genuine products that have been imported without the authorization of the U.S. copyright or trademark holder should be called “gray market products” or “parallel imports” was itself a subject of dispute.

Representing parallel importers was Alfred Palani of Quality King Distributors in New York. Quality King was party to a Supreme Court case that resulted in the leading decision on the application of the customs laws to copyrighted goods produced in the United States and re-imported without permission from the copyright holder. In October, the Supreme Court heard arguments in a new copyright case raising questions about whether the first sale of textbooks produced outside the United States exhausts the publisher’s ability to control the importation of the book. This was an issue the Supreme Court previously took up in a case involving Omega watches imported by Costco. Unfortunately, in that case, Justice Kagan recused herself and the Court had to let it stand in a four-to-four tie without clarifying the law. According to Palani’s comments, the availability of inexpensive products in markets outside the United States provides an opportunity for entrepreneurs and benefits consumers by creating a supply of inexpensive but genuine products.

Rights holders were represented by Catherine Hoffman of Mayback & Hoffman in Fort Lauderdale. Hoffman focused on the fact that rights holders are given statutory authority to control the importation of products bearing their trademarks or copyrights. Moreover, according to Hoffman, the unauthorized importation of these products interferes with the rights holders’ contracts with U.S. distributors, creates free riders on marketing expenses, adds warranty expenses and causes other business problems. Deborah Stern of Miami’s Sandler Travis & Rosenberg provided valuable insight on the strategies importers and rights holders can use when dealing with Customs and Border Protection on questions of intellectual property enforcement.

Caught in the middle of this debate was Dax Terrell of U.S. Customs and Border Protection. Terrell effectively set out the laws enforced by Customs and discussed the practical issues involved in differentiating between counterfeit goods (which can be seized and forfeited) and parallel imports (which are often—but not always—admissible).

The panelists had a lively discussion but, sadly, separated without any signs of reconciliation.
September BBL: Free Trade Agreement Update

By Maureen Thorson

On September 26, 2012, the Customs Law Committee presented a panel discussion on recent U.S. free trade agreements. The panelists included Claudia Candela, Director of Trade in Colombia’s Trade Bureau; Everett Eissenstat, Chief International Trade Counsel to the Senate Finance Committee, and Elif Eroglu, an attorney with CBP’s Valuation & Special Programs Branch. Felicia Mills of Akerman Senterfitt hosted and moderated the panel.

Ms. Candela opened the discussion by reviewing Colombia’s experience of the first months of the U.S.-Colombia FTA. Ms. Candela indicated that agreement has already resulted in a twenty percent increase in U.S. imports of Colombian products. The agreement has also opened the U.S. market to Colombian products, like footwear, that were not covered under previous preference programs.

Ms. Eroglu followed, discussing the mechanics of claiming preference under both the U.S.-Colombia FTA and the U.S.-Korea FTA. While the agreements are similar in many ways, importers should be aware of subtle differences with respect to the allowable regional value content calculation methodologies for automotive goods, the treatment of remanufactured goods, and the de minimis rules and exceptions. Importers should also be aware that, under the U.S.-Korea FTA, indirect materials are disregarded in regional value content calculations.

Finally, Mr. Eissenstat discussed the prospects for new trade agreements and trade-related legislation. The Trans-Pacific Partnership is the only free trade agreement that the United States is currently negotiating, and it remains in its early stages. Ideally, the TPP will link existing FTAs, and allow for regulatory harmonization and the integration of supply chains. However, there are many thorny issues that remain to be hammered out. Beyond TPP, Mr. Eissenstat believes that there is some prospect of forward momentum with respect to U.S.-Russia trade issues during the lame duck session. He also indicated the need to address the upcoming expiration of Trade Adjustment Assistance and the GSP, as well as the already-expired Customs reauthorization.

The session was then opened up to questions. Attendees were interested in whether U.S. Customs has conducted verifications under the recent free trade agreements. Ms. Eroglu was not aware of any. The attendees and panelists also discussed the confusion that arises when the United States and its FTA partners maintain different positions as to the correct tariff classification of materials or finished products. It is then unclear which country’s view should govern for purposes of making preference claims or certifying origin. The panelists suggested that issues of this kind could be addressed through meetings of the relevant agreement’s Free Trade Commission.

Attendees also asked the panelists about their views on what future free trade agreements might offer that has been missing from past agreements. Mr. Eissenstat, in particular, stated his hope that future FTAs will be better linked to preference programs. He also expressed his sense that there is a need for a standing body, perhaps organized through development banks to provide long-term technical guidance on implementation administration issues to our free trade partners.

Miami Recap, Cont.

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Panelists included Cortney O'Toole Morgan of Barnes, Richardson & Colburn (Washington, D.C.), Monika Brenner, CBP (Washington, D.C.), and Peter Baumgartner of World Tax Services. This was a dynamic presentation that really got into the meat of customs valuation and transfer pricing.

Also at the meeting, and discussed earlier in this newsletter, was a program entitled “Gray Market Imports and Customs: Irreconcilable Difference?” moderated by Larry Friedman of Barnes, Richardson & Colburn (Chicago). Speakers on the panel included Alfred Paliani of Quality King Distributors, Inc., Catherine Hoffman of Mayback & Hoffman, Deborah Stern of Sandler, Travis & Rosenberg, and Dax Terrill at CBP.

It’s now time to look ahead to the Fall 2013 meeting, which will be in London. New program proposals are being sought now; so, in coordination with Committee Co-Chairs and Vice Chairs, please submit your proposals to the Section.

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Spotlight on Committee Leadership

Co-Chair Terry Polino

Returning Co-Chairs Damon Pike and Cyndee Todgham Cherniak are excited to welcome past Vice Chair Terry Polino to the role of committee Co-Chair this year.

Terry has been heavily involved with the ABA, the Section of International Law, and the Customs Committee throughout her career. She is a partner in Thompson Coburn’s International Trade group, focusing on import compliance, eligibility under the various import preference programs, valuation issues, and country of origin marking and labeling issues.

More information is available on our website in Issue 3 of last year’s newsletter.

Vice Chair Gwen Hassan

The Committee welcomes new Vice Chair Gwen Hassan. She is currently the Manager of Corporate Compliance, Navistar, Inc. In her work for Navistar, Inc., a truck/engine manufacturer and defense contractor, Gwen is responsible for the company’s compliance program including compliance strategy and risk assessment, policy development, training and compliance audit. From the Office of the General Counsel in Lisle, Illinois, she has direct responsibility for Navistar’s export licensing organization and devotes a significant portion of her practice to complex global trade compliance matters including Corruption Prevention & Investigation, OFAC, ITAR/EAR, U.S. CBT, and trade sanction and boycott compliance and enforcement.

She also works on the structure of intricate import, export and compliance strategies in international acquisitions and business combinations. She has worked on deal teams conducting trade and corruption diligence, developing trade strategy, negotiating compliance terms, agreements and code as well conducting on-site compliance training for deals in China, India, Europe, and South America.

In addition to the ABA – International Section, Gwen is also a member of the Organization of Women in International Trade (OWIT)’s Chicago Chapter, the Chicago Bar Association, the Society of Corporate Compliance and Ethics and the Chicago Regional Business Ethics Network. She is a frequent speaker- having been invited to speak on best practices in trade compliance, ITAR, compliance with the SEC’s new Conflict Minerals reporting requirements and corruption prevention and compliance.

Gwen has a particular fascination for foreign languages and cultures. She is bilingual in Spanish, fairly fluent in Italian, dabbles in French and Portuguese and is, at the moment, working to master a few key phrases in Mandarin Chinese.

Prior to her position with Navistar, Gwen served as VP, General Counsel & Secretary for a logistics firm (NAL Worldwide), and as in-house counsel for two other multinational manufacturers (Federal Signal Corporation and Hartmarx Corporation). She is a graduate of DePaul University School of Law and is also a proud Badger as a graduate of the University of Wisconsin – Madison where she grew up.

Gwen lives in Oak Park, IL, with her husband (a luxury hotel manager and avid Chicago sports fan), two very athletic children (baseball, fast pitch softball and volleyball at the moment) and what seems to be an ever-expanding menagerie of pets, currently including two cats, a dog and a fish. She and her family are preparing for a major remodel of their 1917 Bungalow and can be found pouring over remodeling websites during any spare time they can find between sporting events.

Continuing in a tradition started in the newsletter last year, we will spotlight new additions to our Committee Leadership team in each issue.

Previous issues of the newsletter are available on the Committee webpage at the ABA. In those newsletters you can find spotlight articles introducing current Co-Chairs Damon Pike and Cyndee Todgham Cherniak and read about last year’s programming, which included updates from CBP, valuation initiatives, and more.

If you would like to be involved with a future issue of the newsletter, contributions are strongly encouraged and always welcome. Please contact one of the Co-Chairs.
Call for Meeting Proposals - Fall 2013 Meeting

Planning has begun for the next Section of International Law Meeting, which will be October 15 - 19, 2013 at the London Hilton on Park Lane in London, United Kingdom.

Program proposals will be accepted from November 13, 2012 through January 7, 2013. According to the recent Call for Programs email, which you should have received, the 2013 Fall Meeting will provide cutting-edge programs with world class speakers and materials on issues that will enhance attendees’ professional skills including professional ethics. The programs will provide timely and practical guidance to attendees and should reflect the “best thinking” on private and public international law issues. Your program proposals are an essential part of ensuring that the Section’s programming meets these goals.

The following programming tracks have been established for the meeting:
- Corporate / Business Transactional
- Dispute Resolution
- Public International Law / Rule of Law / Human Rights
- Regulatory

Successful programs follow these guidelines:
- Program titles and descriptions should be punchy, accurate, brief, and designed to convince people to attend your program.
- Panels should reflect the ABA’s diversity goals.
- Proposals should focus on cutting-edge legal issues of interest to practicing international lawyers.
- Innovative and interactive formats are strongly encouraged.
- Programs involving more than 4 speakers and a moderator may not leave enough time for questions.
- Program proposals should specifically contemplate the delivery of high-quality written materials for the program.

Please bring your program ideas to the next committee call on December 13, 2012.

Customs News from Around the Globe: EU Changes GSP for Developing Countries

On October 31, 2012, the European Commission announced that the EU has revised its import preference system, known as the Generalized Scheme of Preferences (GSP), for developing countries most in need. Under the revised program, there will be fewer beneficiaries but the program will last ten years instead of the current three-year time frame. The new GSP also makes procedures affecting importers and exporters more detailed and transparent.

The new rates will be effective on Jan. 1, 2014 and affect 89 beneficiaries: 49 least developed countries in the Everything But Arms (EBA) scheme (33 in Africa) and 40 other low and lower-middle income partners such as China, Iran and Iraq. Those who will no longer receive preferences include overseas economies such as Bermuda and the U.S. Virgin Islands; countries subject to other trade arrangements, including free trade agreements; and economies that the World Bank has listed as high or upper-middle income for the past three years, including Saudi Arabia and Argentina.

Legislation setting out those procure and other aspects relating to the revisions will be published next year. The updated regulation with more information is published here.

If you have an interesting Customs Law update from another jurisdiction for inclusion in a future issue, please contact one of the Co-Chairs.

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