Tuesday, April 23:

2:20 pm – 3:50 pm, Regency B

**Ethical Red Flags in International Law Practice: Advising Clients and Protecting Your Reputation**

This program will help answer the following questions:

- How do you know your clients if they are located overseas?
- What do you do when you depend on your client for fact based submissions?
- What do you do when conflicts of interest, disagreements with clients, and unforeseen dilemmas arise in international representation?
- What are counsel's ethical obligations in exercising due diligence? What are its limits and when can counsel withdraw representation?

Wednesday, April 24:

9:00 am - 10:30 am, Everglades/Yellowstone

**The Roadmap to China - Navigating, Protecting, and Enforcing your IPR in U.S. and China**

Workshop designed to illustrate how to protect IPR rights in the United States and China concurrently. Unbeknownst to many in the legal field, all is NOT lost if someone violates your IPR in China. There are precautionary, preventative, and punitive actions that can be taken for your clients to protect their IPR in China. United States and Chinese customs lawyers, USPTO attorneys, and trademark attorneys will walk you through the process.

Thursday, April 25:

2:30 pm - 4:00 pm, Capital A

**Governments Cutting Spending: Effects on Customs and Trade Programs**

In the age of government budget deficits, structural and financial reform is underway. The institutional knowledge is leaving government as key government employees take early retirement. The U.S. budget cuts refocus USCBP on security while trade facilitation has been put on the back-burner. The US has opened the Trade Office. Canada is merging its antidumping/countervailing duty regime in the Canadian International Trade Tribunal and Canada has eliminated customs duties on most manufacturing inputs and equipment. Many countries are negotiating bilateral and multilateral free trade agreements. This panel will discuss some of the changes that are being implemented to reduce government costs and the effects on customs and trade programs - good and bad.

2:30 pm - 4:00 pm, Lexington

**Hubs and Spokes – Who is Doing What in Free Trade Agreement Negotiations and What Does It All Mean for Global Companies**

This roundtable program will provide an opportunity for trade and customs practitioners in various countries to discuss the status of current FTA negotiations in their respective countries/regions. It also will include a discussion of how U.S. and global companies may take advantage of the FTA framework for market access and tariff preferences. Finally, the practitioners will discuss how other trade policy initiatives in their countries/regions might affect U.S. and global countries in establishing their operations around the world.
Thursday, April 25 (cont.):

2:30 pm - 4:00 pm, Capital B

Long-Awaited DOJ Guidance on the FCPA: What Does the New Compliance Roadmap Look Like?

An expert panel featuring both private practice and corporate attorneys, as well as key regulators, will discuss the guidance on the FCPA released by the U.S. Department of Justice in November, 2012 and share practical advice on best practices for pro-active compliance programs. Topics covered will include: the intent standard; how the corrupt intent element applies in the context of gifts and entertainment; and the definition of both "Foreign Official" and "Instrumentality." Does the guidance actually deliver on these expectations? Do we now have more predictability? Do we have a new "roadmap" for FCPA compliance? Is it possible corporate declinations are a source of clarity where FCPA compliance programs are concerned? How does the guidance compare to guidance received on the UK Bribery Act?

Friday, April 26:

4:30 pm - 6:00 pm, Capital A

A Close Look at the U.S. Court of Appeals for the Federal Circuit (CAFC) and the U.S. Court of International Trade (CIT): Recent Developments, Trends, and Keys to Effective Advocacy

The vast majority of legal challenges pertaining to trade-related determinations issued by various U.S. Government agencies are initially filed with the U.S. Court of International Trade (CIT), and virtually all appeals of CIT decisions are filed with the U.S. Court of Appeals for the Federal Circuit (CAFC). In the past year, the CIT and the CAFC have issued a number of seminal decisions. During this program, judges from the CIT and the CAFC, and private practitioners with considerable experience before those courts, will discuss some of these important decisions, recent trends in cases, and tips for effective advocacy before both courts.

Also Look for Committee Members at these Sponsored Events:

On Wednesday, April 24, 2013, the Committee will be hosting a "Dutch Treat" dinner in conjunction with the ABA International Law Section's Spring Meeting in DC. The dinner will be held at Uno's, which is located in Washington's historic Union Station in close proximity (easy walk) to the Hyatt Regency on Capitol Hill. We expect to have a prix fixe menu that will cost about $30/person for 3 courses and a non-alcoholic beverage. For further information or to RSVP, please contact Terry Polino (TPolino@THOMPSONCOBURN.COM).
Current Initiatives in CBP’s Entry Process and Duty Refunds Branch

By Maureen Thorson

On December 6, 2012, the Customs Law Committee sponsored a presentation and question-and-answer session featuring Carrie Owens, Chief of CBP’s Entry Process and Duty Refunds Branch. Melanie Frank and Terry Polino moderated the session.

The program began with Ms. Owens describing her three-year tenure with the Entry Process branch, which handles subjects as diverse as entry processing, duty drawback, bonding, requests for further review of protests, and foreign trade zone procedures. Ms. Owens went on to describe recent CBP decisions of interest, such as raising the value limit for informal entries to $2500, and the agency’s practice, now codified in H074225, of allowing importers that fail to file antidumping reimbursement certificates prior to liquidation to avoid double duties by timely filing a protest, along with a reimbursement certificate.

The heart of Ms. Owens’ presentation, however, dealt with pending legislation to increase enforcement of the antidumping and countervailing duty laws through proceedings at CBP. The ENFORCE Act and S. 3524 both contain provisions that would provide for an anti-circumvention process at the agency. S. 3524, which Ms. Owens focused on, would permit CBP to suspend liquidation and require Single Entry Bonds and cash deposits on goods that the agency deemed to circumvent existing trade orders. The bill calls for CBP to make such determinations through a very streamlined process that would be undertaken upon receipt of any information reasonably suggesting that duties are owed. The bill includes a provision for adverse inferences, familiar in Department of Commerce proceedings, but unknown at CBP. Ms. Owens flagged the judicial review standard provided by the bill as a potential trouble spot. The bill permits for arbitrary and capricious review, but it is not clear how the agency record would be treated. She also stated that it is not clear whether a decision to impose duties pursuant to the new proceeding would itself be a protestable event. The bill provides for an appeal process, but does not state that circumvention decisions are not protestable. She also questioned whether S. 3524 and similar legislation, such as the ENFORCE Act, would undermine the agency’s ability to investigate and prosecute fraud, by requiring public identification of importers under investigation for circumvention.

Ms. Owens concluded her presentation by touching on issues regarding the effect of the Claims Resolution Act on disbursements under the Byrd Amendment, and the documentation required to establish proof of export for NAFTA duty drawback, pointing practitioners to H107477, which discusses the role the Mexican “pedimento” can play in the process.

Questions from the audience were focused particularly on the administration of the proposed anti-circumvention proceeding provided for in the ENFORCE Act and S. 3524, as well as on drawback issues. Like Ms. Owens herself, attendees were interested in how the appeal process would work in practice, and whether it included redundancies or loopholes that could complicate the agency’s own internal review of decisions. The audience was also interested in the status of the Drawback Modernization Act. Ms. Owens indicated that there has been no real action on that front, although Lori Dempsey at CBP has been looking into ways to simplify drawback processes that would not require legislation.

Canada Has Introduced Legislation to Establish Effective Anti-Counterfeiting Border Enforcement Measures

By Cyndee Todgham Cherniak

On March 1, 2013, the Government of Canada introduced Bill C-56 “Combating Counterfeit Products Act” in the House of Commons. Bill C-56 provides copyright and trademark owners with a Canadian legal process to stop the import and export of counterfeit goods and permanently remove those goods out of the commercial stream. Trade-mark and/or copyright owners have been asking for effective anti-counterfeiting border enforcement measures in Canada and their wishes are in the process of being granted.

Bill C-56 amends the Trade-marks Act and the Copyright Act to empower Canada Border Services Agency (“CBSA”) officials to proactively target, detain and examine counterfeit goods at the Canadian border (whether imported into Canada or exported from Canada). Once Bill C-56 is passed into law, the trade-mark rights and/or copyright rights holders(s) may seek the assistance of the CBSA by filing a “request for assistance” in the form and manner to be specified by the Minister of Public Safety and Emergency Preparedness (the Minister to whom the CBSA reports). The substance of the “request for assistance” is a request to detain goods that are believed to be counterfeit. The request must include the trade-mark and/or copyright owner’s name and address in Canada and any other information required by the Minister, including information about the work or other subject-matter in question. Undoubtedly, the owner will be required to provide information to demonstrate his/her ownership and sufficient information to permit the CBSA officers to detain the alleged counterfeit goods. For example, the trade-mark and/or copyright owner would be required to provide samples of the goods they manufacture.

The CBSA will review the “request for assistance” and has the discretion whether or not to accept it. The Minister of Public Safety and Emergency Preparedness technically would be the person accepting the request for assistance under the proposed rules. The Minister may impose conditions of the acceptance of a request, such as the trade-mark and/or copyright owner may be required to post security in an amount to be determined by the Minister.
Canada Customs Update: What is Happening at the Northern Border

By Brandi B. Frederick

On February 7, 2013, the Customs Committee presented a webinar/teleconference on the topic of recent Customs developments in Canada. The speakers included Cyndee Todgham Cherniak, founder of LexSage, and Greg Kanargelidis, a partner at Blake, Cassels & Graydon LLP. Teresa Polino of Thompson Coburn LLP moderated the program.

Mr. Kanargelidis opened the presentation with a discussion of recent developments in dealing with “subsequent proceeds.” Mr. Kanargelidis explained that the Canada Border Services Agency (“CBSA”) is taking an aggressive position with regard to payments such as management fees and allocation of overhead expenses for research and development or marketing. In July of 2009, CBSA issued a policy document indicating how CBSA intended to enforce the subsequent proceeds provision. CBSA’s position is that any payment made back to the vendor can qualify as a subsequent proceed. Mr. Kanargelidis explained that there has been an increase in single program audits and valuation audits, and that CBSA is looking at payments made by Canadian importers back to their parent companies with a view toward seeing whether the payments should have been added to the value for duty as subsequent proceeds.

Ms. Todgham Cherniak then discussed the treatment of non-resident importers in the context of purchasers in Canada. Relying on the Harbor Sales case, Canada created the concept of purchaser in Canada. In the Cherry Stix II case, however, the CITT found that when the non-resident importer is both the exporter and importer, the transaction value does not apply because there is not a sale for export.

Ms. Todgham Cherniak noted there is potential for strategic planning, where the importer has expenses in Canada, because the deductive value method may be the better method for them. The CBSA is discussing legislation to level the playing field by changing the definition of “sale” so that non-resident importers can use the transaction value as opposed to the deductive value.

Mr. Kanargelidis then provided an update on the administrative monetary penalty system (“AMPS”, CBSA’s penalty regime), implemented in October 2002. The penalty system is different from that in the United States because in Canada there is list of contraventions by contravention number and if you violate one of the contraventions, then and only then can you be penalized. The penalties are capped at $25,000 per assessment, but with multiple importations, they can add up quickly. It is a graduated penalty system, in that repeat offenders can be assessed higher penalties. Importers have raised concerns that the graduated system of penalties is unfair to high volume importers who import multiple times a day because if they are hit with a penalty, they do not have an opportunity to correct their actions to avoid a new penalty. In response, CBSA recently added a new 30-day non-escalation policy where after the first penalties are incurred, the penalty level will not increase for 30 days, to allow for an opportunity to correct the problem.

Additionally, for certain trade infractions (origin, tariff class or valuation), there are caps imposed where an audit exists. In a first audit, all infractions of a similar type are assessed at the first level penalty and capped at an overall $25,000. Thus, importers can obtain some relief with systemic issues and clerical or administrative type errors. There is also an option to enter into a penalty reinvestment agreement option in which the importer can incur expenses to correct systems issues to offset the penalties that would otherwise be assessed.

Mr. Kanargelidis stated that CBSA has recently made various changes to the master penalty document, eliminating or combining many of the contraventions. The most recent edition, from January 2013, is available on the CBSA website.

Ms. Todgham Cherniak provided an update on key developments in Canada’s Economic Action Plan. The first is the result of a change in 2010, when Canada reduced the Most Favore Nations (“MFN”) rate on thousands of goods imported in the manufacturing and production of equipment and machinery -- intended to remove unrecoverable costs so that Canadian goods would be more competitive when sold abroad. The second key development in the Economic Action Plan Ms. Todgham Cherniak discussed came from the 2012 budget, in which the Canadian government announced that the part of the ADCV Directorate of CBSA that does dumping and subsidy investigations will be combined with the Canadian International Trade Tribunal. Ms. Todgham Cherniak noted that with these changes, enforcement activity is on the rise.

The speakers then discussed several significant recent cases, including Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency, Appeal No. AP-2010-002 (CITT Jan. 8, 2013); Miner v. President of the Canada Border Services Agency, Appeal No. AP-2009-080R (CITT July 20, 2012); President of the Canada Border Services Agency v. Miner, 2012 FCA 81 (F.C.A. March 9, 2012); Jockey Canada Company v. President of the Canada Border Services Agency, Appeal No. 2011-008 (CITT Jan. 4, 2013); and others.

At the conclusion of the topics addressed, an attendee asked the speakers about the typical length of time for audits, noting that clients were frequently experiencing audits taking more than a year to conclude. Ms. Todgham Cherniak noted that while there is an audit manual and plan for conducting an audit, audits can take more than a year to conclude, especially when attorneys get involved. Mr. Kanargelidis noted that audits should only take a few months; however, the audits frequently take as long as a year -- but there is no statutory time limit for audits. The length of the audits most often depends on the facts and the caseload of the auditor.
EPA and CBP Talk Voluntary Disclosures – March BBL Event

By Christine Martinez and Maureen Thorson

The Customs Law Committee welcomed Mark Garvey from the Environmental Protection Agency (EPA) and Alan Cohen from Customs and Border Protection (CBP) to a brown bag lunch event on March 14th. The event presented a fairly detailed overview of the applicable self-reporting tool or mandate, the associated filing process and requirements, and the benefits of self-filing (as opposed to having the agency identify the error).

The meeting, held at Thompson Coburn’s offices in Washington D.C., opened with a significant discussion from Mr. Garvey about importing chemicals under TSCA (Toxic Substances Control Act) and FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act). TSCA covers the importation of chemicals generally, and FIFRA, aptly referred to as the “Pesticide Act,” applies to importations of pesticides. Enforcement of these statutes is a top priority within EPA.

Importers of chemicals and pesticides must file specific forms when goods are brought into the United States. With CBP’s assistance, EPA is working to encourage increased compliance with those requirements. Mr. Garvey also noted an increased use of administrative subpoenas (a tool used to request and gather information about a particular chemical or import) and strategic targeting to improve the effectiveness and efficiency of desktop evaluations.

Failure to comply with TSCA and FIFRA are handled in accordance with the agency’s “Audit Policy,” which looks for importers to meet nine specified conditions in exchange for 100 percent mitigation of any gravity-based penalty. Economic benefit penalties (like loss of revenue in a Customs’ case) may not be mitigated under the Audit Policy. These nine conditions include:

- Systematic discovery of the violation;
- Voluntary discovery of the violation;
- Prompt disclosure in writing to EPA (within 21 days of discovery);
- Independent discovery and disclosure;
- Correction and remediation immediately, if possible, or within 60 days of discovery;
- Prevent recurrence of the violation; and
- Cooperation by the disclosing entity.

Repeat violations and certain types of violations (including those that result in serious actual harm, those that present imminent danger; and those that violate the terms of an administrative or judicial order or consent agreement) are not eligible for the Audit Policy.

Mr. Garvey also noted that violations discovered by a means other than an internal audit are eligible for up to 75 percent mitigation of the gravity-based penalty and “No Action Assurances” are rarely issued for TSCA and FIFRA violations.

According to Mr. Garvey, regulatory changes involving administrative enforcement tools are currently under review and will be published in the Federal Register for public comment soon.

Alan Cohen, senior attorney-advisor in the Penalties Branch, Border Security & Trade Compliance Division, Regulations and Rulings, Office of International Trade, discussed CBP’s processes for handing prior disclosures and the agency’s role in facilitating enforcement actions involving other agencies, such as EPA. Mr. Cohen focused on the differences between CBP’s disclosure process and EPA’s Audit Policy. For example, while CBP disclosures must be presented prior to the opening of an official investigation, disclosures remain valid after a CF-28 Notice is sent. EPA, meanwhile, requires both that the disclosure be made within 21 days of discovery and prior to any EPA inquiry into the matter. Mr. Cohen also stated that nothing in the CBP prior disclosure process prevents importers from obtaining disclosure benefits even though they are reporting an issue that may have already been the subject of previous disclosures.

EPA, however, takes prior violations of the same nature into account when determining penalty mitigation amounts. While CBP’s procedures and requirements may be less strict than EPA’s audit plan, they are well-developed and involve the coordination of various parts of CBP.

The in-person and on-the-phone audience presented a number of great questions. In response, Mr. Garvey highlighted EPA’s current look into import requirements when chemicals are shipped via small package couriers. Using FedEx or UPS does not obviate the importer’s need to file required forms. TSCA section 13 certifications should be filed with EPA Headquarters if it is not possible to file them at entry.

The question of whether the courier who acts as the Importer of Record (IOR) is responsible for compliance was also raised. According to the EPA, some disclosures filed by nominal IOR’s are received. Consignees and recipients of imported chemicals and pesticides should not assume, however, that they are not responsible for complying with TSCA and FIFRA requirements because they are not the IOR; the agency may be able to reach past the nominal IOR to the actual owner of the imported chemicals.

Continued on Page 6.

We welcome volunteer authors to write up summaries of recent committee events. If you are interested, please contact one of the Co-Chairs.
Canada's Anti-Counterfeiting Border Enforcement Measures, cont.

Continued from Page 3

A “request for assistance” would be valid for a period of two years beginning on the day it is accepted by the Minister (and may be extended every two years). If, after the “request for assistance” is granted, the ownership or substance of the trade-mark or copyright changes, the trade-mark and/or copyright owner must inform the Minister in writing.

After the “request for assistance” is accepted, the CBSA may detain any goods that are the subject matter of the accepted request. The CBSA has the discretion to provide a sample of the suspected counterfeit/ infringing goods to trade-mark and/or copyright owner and any information about the copies that the CBSA officer reasonably believes does not directly or indirectly identify any person. The CBSA may also permit the trade-mark and/or copyright owner to inspect the detained goods. The trade-marks and/or copyright owner will be given up to 10 days (5 days for perishable goods) to commence court proceedings to obtain a remedy under the Act. The trade-mark and/or copyright owner must provide the Minister with a copy of the document filed with the court to commence proceedings (the intake mechanism for the provision of the proof of court proceedings is yet to be determined). If the trade-mark and/or copyright owner does not commence proceedings, the detained goods will be released.

Where infringing works or counterfeit goods are detained pursuant to an accepted “request for assistance,” the owner of the trade-mark and/or copyright is liable for the storage, handling and destruction costs. That being said, the owner of the infringing works or counterfeit goods and the importers or exporters are jointly and severally liable for all such charges if the goods are ultimately forfeited.

Bill C-56 also sets out the powers of the court in respect of the alleged infringing works or counterfeit goods. While the process for such court proceedings will develop over time, Bill C-56 does establish some of the rules for the proceeding. If the court finds in favour of the applicant, the court may make any order that it considers appropriate in the circumstances, including an order that the detained goods be destroyed. The court also has the power to order the Minister/CBSA to detain goods to be imported or goods that have not been released.

If the detained goods are determined to not be infringing works or counterfeit goods or if the court proceedings are dismissed or discontinued, Bill C-56 grants the court the power to award damages against the trade-mark and/or copyright owner in respect of the losses, costs or prejudice suffered as a result of the detention.

Bill C-56 also creates a new civil remedy for trade-mark and/or copyright owner(s) to pursue the infringer for monetary damages. Bill C-56 also sets out new criminal offenses and permits the court to impose fines up to $1,000,000 and/or imprisonment up to five years. New criminal offenses include a prohibition against the possession of or exportation of infringing copies or counterfeit trade-marked goods, packaging or labels.

Bill C-56 will be closely watched. Trade-mark and/or copyright owners may start to prepare their “requests for assistance” so that action may be taken when Bill C-56 becomes law. Bill C-56 must proceed through the Canadian legislative process. However, with a majority government, it may not take long to become law.

This article originally appeared at www.canada-usblog.com and has been modified slightly.

Voluntary Disclosures, cont.

Continued from Page 5.

The answer to this question is also in flux at CBP. The agency (and importers) are currently awaiting the Court of Appeals for the Federal Circuit’s decision in Trek Leather, which should help clarify if and when CBP can look beyond the named IOR to a party with substantial interest in the transaction. Otherwise, if the recipient of the merchandise participates in the violation or is an aider or abettor of fraud by clear and convincing evidence, the agency will seek administrative penalties from both the recipient and the IOR.

It was also asked whether non-TSCA or non-FIFRA qualified chemicals may be admitted into a Foreign Trade Zone (FTZ) for the purpose of bring the chemicals into compliance. According to Mr. Garvey, the answer is ”yes” for TSCA chemicals but ”no” for FIFRA pesticides.

Both agency representatives also recommend the filing of a protective disclosure with all agencies involved in a violation. For example, if an importer discovers that a Notice of Arrival form was not filed, a disclosure should be filed with both EPA and CBP to reduce penalties to the fullest extent possible.