citba.org
Customs and International Trade Bar Association

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CITBA & Related News

CITBA Congratulates New Judges and ITC Commissioner

On October 13, 2013 the U.S. Court of International held a special session for the Joint Investitures of the Honorable Mark A. Barnett and the Honorable Claire R. Kelly as new judges on the CIT.

Also, the Honorable Todd M. Hughes was appointed to the United States Court of Appeals for the Federal Circuit by President Obama and confirmed by the Senate on September 24, 2013. He assumed the duties of his office on September 30, 2013. Prior to his appointment Judge Hughes served as Deputy Director of the Commercial Litigation Branch of the Civil Division of the U.S. Department of Justice from 2007 to 2013.

On October 18, 2013, F.Scott Kieff was sworn in as a Commissioner of the U.S. International Trade Commission. Nominated by President Obama, Commissioner Kieff was confirmed by the Senate on August 1, 2013, for the term expiring on June 16, 2020. Commissioner Kieff previously served as a faculty member at the George Washington University Law School and Washington University School of Law.

CITBA extends its congratulations to judges Barnett, Kelly and Hughes, and to Commissioner Kieff on their appointments. The international trade bar will benefit greatly from their service and expertise. We wish them well in their positions and thank them for accepting this responsibility to serve the public and the justice system.

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Government Shutdown Aftermath – Expected Delays

Dear Members,

As a result of the United States government shutdown from October 1 to 16, we are issuing a later than usual edition of the newsletter. In an effort to update our members, CITBA has compiled the following information from government websites and our members regarding the status of agency activities following the shutdown as it may impact international trade. Please note that this information may be subject to change and we suggest that you monitor agency websites and contact agency officials with any questions and for up to date status:

Enforcement and Compliance (formerly, Import Administration), International Trade Administration is uniformly tolling all of its deadlines for the duration of the recent closure by 16 days.

International Trade Commission

Section 337 Investigations

- Schedules and deadlines for all investigative and pre-institution activities will be tolled by 16 days (however, there may be exceptions).
- The Administrative Law Judges may be revising the procedural schedules of the individual investigations over which they are presiding. Parties and the interested public should check the individual investigations in the EDIS system for orders announcing scheduling changes.
- For extensions of target dates by 16 days or fewer, the Commission waives Commission Rule 210.51(a) with respect to issuance by initial determination.

Title VII Investigations

All statutory deadlines pertaining to activities conducted under the authority of Title VII of the Tariff Act of 1930 (including antidumping and countervailing duty investigations and reviews) will be tolled 16 calendar days.

Individual case schedules will be revised and posted on the Commission's website, and separate Federal Register notices will be issued where appropriate.

The Commission's new scheduled dates for conferences in preliminary phase investigations and submission of postconference briefs can be found at: http://usitc.gov/press_room/postshutdown.htm

Customs and Border Protection

CBP Port of Entry Operations, Cargo Security, Revenue Collections, and Border Security programs including Border Patrol and Air and Marine operations remained operational during the shutdown.

Import specialists, entry specialist, fines, penalties and forfeiture officers, agriculture officers, and Centers of Excellence and Expertise remained active during the shutdown.

CBP's Headquarters Office of Rulings & Regulations and at the New York National Import Specialists, were shutdown and are reporting significant backlogs.

CBP's East Coast Trade Symposium, previously scheduled for October 24-25, 2013 has been postponed to a later date yet to be announced.

Bureau of Industry and Security

The Commerce Department's Bureau of Industry and Security has announced on its website that with "the end of the government shutdown, BIS again is accepting and processing license applications, commodity classification requests, advisory opinion requests, and other filings. Given the 16 day shutdown, which included the October 15 startup date for Export Control Reform filings, we anticipate that more than the usual number of filings will occur. We and our sister agencies will do our best to process them as quickly as possible but normal processing times likely will be exceeded for a while."

Directorate of Defense Trade Controls

The State Department's Directorate of Defense Trade Controls has announced that with the return of the Defense Technology Security Administration to normal operating status, the processing of all incoming licenses has resumed, though there may be some delays due to the adjudication of existing licenses referred during the shutdown. In addition, staffing shortages in other U.S. government agencies will continue to affect requests for commodity jurisdiction determinations. However, other regular DDTC functions, such as requests for new or renewing registrations, will continue under normal conditions.

Court of International Trade

On October 1, the CIT issued an order extending the filing due dates occurring during the shutdown. According to the order, which can be found at http://www.cit.uscourts.gov/order.pdf, any Agency filing due date occurring during the shutdown "is tolled for a period equal to the number of days of the lapse of appropriation, not to exceed 14 days; and… that any filing due date in the same case simultaneous to that of such an extended filing due date is similarly extended, and… that any filing due date in the same case which is contingent upon the filing of a document with such an extended due date is similarly extended."

Court of Appeals for the Federal Circuit

The CAFC has issued an order, found at http://www.cafc.uscourts.gov/images/stories/announcements/Misc-Orders/operations%20order%201.pdf indicating that during the Federal government shutdown "{a}ll filing deadlines remain in effect. CM/ECF remains operational for filing of all documents. All cases for oral argument will be heard as scheduled."

UPCOMING PROGRAMS

NOVEMBER 21, 2013, COURT OF APPEALS FOR THE FEDERAL CIRCUIT
WASHINGTON, D.C.
CITBA Annual Meeting
CITBA plans to hold its annual meeting as a joint program with the Federal Circuit Bar Association on November 21, 2013 at the Court of Appeals for the Federal Circuit. This engaging program will include discussion on leading trade remedy and customs issues, as well administrative and procedural developments, from the perspectives of the Bench, United States government, and

private practitioner communities. The event will begin at 1:00pm and will be followed by a reception at 5:00pm in the Dolley Madison House.

NOVEMBER 19-20, 2013
U.S. Customs Compliance Boot Camp –American Conference Institute
Practical, nuts and bolts course covering the ins and outs of fundamental US Customs law topics, how to interact with and respond to US Customs and Border Protection, and apply the requirements to your real-life scenarios.
Time and venue to be determined.

FEBRUARY 27-28, 2014, GEORGETOWN LAW SCHOOL
WASHINGTON, D.C.
International Trade Update
The program, aims to provide the most important developments affecting the trade and Customs bars – and their clients – as well as critical interpretations of those developments by senior partners at law firms, top government officials, judges from the U.S. Court of International Trade, and corporate counsel who focus on trade and customs matters.

PAST CITBA Events

July 31, 2013
CITBA "What's New at the Agency?"
CBP Assistant Commissioner for the Office of International Trade Allen Gina presented at the CITBA International Trade Committee's "What's New at the Agency" reception at the Cassidy Levy Kent Washington, DC office. With colorful anecdotes from his three-decade career at CBP, Mr. Gina explained the current challenges facing his agency in this time of budgetary constraint and sequestration. He described recent high-profile AD/CVD enforcement actions and the complexities of bringing such cases to prosecution. While CBP has experienced judicial and WTO setbacks in its effort to increase the security on AD/CVD imports, this issue remains a high agency priority. He expects that CBP's Centers for Excellence and Expertise will foster uniformity and confirmed his agency's commitment to completing the ACE portal. His remarks generated lively discussion on topics including the responsibility of customs brokers and CBP's capacity to enforce patent infringement at the border. It was a highly informative and entertaining evening for those in attendance.

ANNOUNCEMENTS

ANDREW VANCE COMPETITION WINNERS
CITBA is pleased to announce and congratulate the winners of the 2013 Andrew P. Vance Memorial Writing Competition. Niklas Elofsson from Alta, Sweden, LLM candidate at Columbia University School of law, was the First Price Winner for his article: *Ex Parte Interviews of Party-Appointed Arbitrator Candidates: A Study Based on the Views of Counsel and Arbitrators in Sweden and the United States.* Elisabeth Torpy of West Melbourne, FL, JD candidate at Barry University School of Law, was the Second Price Winner for her submission: *If Criminal Offenses Were Added to CITES, Would Nations be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity?*

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE
*By: Stephen Swindell and Scott Warner**

Transition to PACER
On October 1, 2013, the Court is joining the rest of the federal judiciary in utilizing the Public Access to Court Electronic Records (PACER) system. PACER is a centralized service provided by the federal

judiciary that allows registered users to access case information and documents in all federal appellate, district and bankruptcy courts. Those of you who already have or share a PACER account for use in these other courts will be able to use that account to access the Court's filings and case information after the transition.

You will need a PACER account to perform queries, run reports and view most documents on CM/ECF. Your access will be subject to PACER access fees as determined by the Judicial Conference of the United States. Once you link your PACER account to your CM/ECF account, you will be able to transact all your business with the Court (whether filing or viewing documents) through CM/ECF just as you do now. Please note that your access to information on the Court's website outside of CM/ECF, including the Rules of the Court and Slip Opinions, will not incur a charge. You also will receive one free look at documents served upon you through CM/ECF via Notice of Electronic Filing.

To affect this transition to PACER, the Court has approved amendments to Administrative Order 02-01. The Clerk's Office has notified all attorneys admitted to the Court and all members of the public who are registered with CM/ECF via email. This notice, the amendments to Administrative Order 02-01 and information on how the transition may affect you have also been placed on the Court's website at www.cit.uscourts.gov.

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

FEDERAL CIRCUIT AND CIT CASE SUMMARIES

*By: Claudia Burke & Stephen Tosini**

Federal Circuit Affirms the CIT's Decision on Classification. *Del Monte Corp. v. United States* [O'Malley, Prost, Taranto, JJ.] On September 16, 2013, the Federal Circuit affirmed the CIT's decision upholding U.S. Customs and Border Protection's [CBP] classification of Del Monte's tuna pouches as "in oil" under HTSUS subheading 1604.14.10. The court also affirmed the trial court's decision to uphold CBP's valuation of the merchandise at the time of entry. The court held that the tuna pouches were classified as "in oil" pursuant to Additional U.S. Note 1, stating that the note makes clear that the goods are considered "in oil" even if the liquid substance does not consist entirely of oil. In reaching its decision on valuation, the court rejected Del Monte's arguments that its arrangement with the Thai manufacturer constituted a "formula" under 19 C.F.R. § 152.103(a)(1) because Del Monte never raised such an argument to the trial court, and even if it did, Del Monte's dealings did not amount to a "clear and definite" "agreed-upon, pre-importation 'formula'" that can "overcome the statutory mandate to 'disregard[]' any post-importation 'decrease in[] the price actually paid'" pursuant to 19 U.S.C § 1401a(b)4(B).

Federal Circuit Reverses CIT's Rejection of Part of Commerce's Antidumping Duty Calculation. *Atar S.r.L. v. United States* [Lourie, Bryson, Taranto, JJ.]. On September 11, 2013, the Federal Circuit reversed a judgment of the CIT that had rejected an element of the Department of Commerce's (Commerce) calculation of an antidumping duty rate. When Commerce determines the fair value of an imported product using a constructed value approach, it includes a profit component. When data are not available to determine value by the statutorily preferred methods, Commerce may use "any other reasonable method" as long as the determined profit does not exceed the "amount normally realized" by exporters of similar products (the profit cap). The statutorily preferred methods for calculating constructed value require Commerce to use costs of production, including profits, realized in the ordinary course of trade, which generally means sales arising from arms-length, above cost transactions. Using the "any other reasonable method" for calculating value, Commerce mirrored the preferred methods and excluded unprofitable sales in its calculation of the profit cap. The CIT rejected this approach and required Commerce to use below cost sales in

its calculation. The government appealed, and the Federal Circuit reversed, holding that

Commerce, by excluding unprofitable sales in its calculation, had reasonably interpreted a gap in the statute, requiring it to calculate profit cap according to the undefined "amount normally realized" from sales of similar goods. The Federal Circuit stated that Commerce's original calculation was reasonable and consistent with the Statement of Administrative Action, which is the authoritative interpretation of the statute, and with other profit provisions of the statute.

Federal Circuit Holds that CIT Abused its Discretion in Finding Appellant Failed to Exhaust Administrative Remedies. *Itochu Building Products v. United States* [Lourie, Bryson, Taranto, JJ.]. On August 19, 2013, the Court of Appeals for the Federal Circuit reversed and remanded the judgment of the CIT, holding that the appellant failed to exhaust its administrative remedies when it failed to respond to Commerce's invitation for comments following its preliminary determination of an effective date for the partial revocation of the antidumping duty order at issue. The Federal Circuit held that requiring exhaustion served no purpose because appellant had made its effective date argument to Commerce before the preliminary results. The court further reasoned that exhaustion would have been futile because Commerce in other administrative proceedings had maintained the same effective date position as in this case. Finally, the court also held that the exhaustion requirements of 19 C.F.R. § 351.309 do not apply in the context of a changed circumstances review.

Federal Circuit Reverses CIT Penalty Judgment Holding that Corporate Officers May Be Held Liable Only for Fraud. *United States v. Trek Leather, Inc.* [Plager O'Malley, JJ.; Dyk, J. (dissenting)]. On July 30, 2013, the Federal Circuit reversed a CIT judgment which had held the principal of a corporate importer personally liable for penalties and lost revenue stemming from his own grossly negligent actions. Although the principal had supervised and directed the grossly negligent violations, the court held that certain statutes which proscribe misrepresentations on entry documents limited liability for non-fraudulent conduct to importers of record. The dissent, however, reasoned that the much more broad governing statute prohibited any "person" from entering merchandise into the commerce of the United States through negligence, gross negligence or fraud and, thus, the principal should have been held personally liable for his own violations.

Federal Circuit Reverses CIT's Determination on Classification. *LaCrosse Technology Ltd. v. United State* [O'Malley, J., Newman, SJ; Bryson, SJ (concurring in part and dissenting in part)] On July 25, 2013, the Federal Circuit reversed the CIT in a CBP classification decision. The case involved the tariff classification of composite products most of which incorporated a thermometer, a clock, and a barometer. Some models also included other gauges, ports, or computer software. LaCrosse claimed that all of the products were classifiable by virtue of General Rule of Interpretation (GRI) 1 in the tariff provision for "meteorological instruments." Both the trial court and the Federal Circuit affirmed the government's position that GRI 1 was inapplicable and that a GRI 3(b) analysis of each good's "essential character" governed its classification. However, while the trial court had found that a GRI 3(b) analysis rendered the goods classifiable in three different tariff provisions, the Federal Circuit (with one judge dissenting) determined that the meteorological features predominated on all of the products and that all were classifiable in the claimed provision.

Federal Circuit Rejects CIT's Holding that Agency Lacks Authority to Conduct Mixed Media Inquiry in Case Concerning the Antidumping Order Covering Nails from China. *Mid Continent Nail Corp. v. United States* [Dyk, Linn, Prost, JJ.]. On July 18, 2013, the Federal Circuit vacated the CIT's judgment holding Commerce categorically lacked authority to conduct a mixed media inquiry to decide whether toolkits imported from China, or the nails within those toolkits, should be analyzed as possibly subject to the antidumping order covering nails from China. In its original scope ruling, Commerce had ruled the mixed media toolkits to be outside the nails order, even though the nails within the toolkits, if imported alone, would be subject to the order. The CIT remanded the case to

Commerce to identify the legal authority that allowed it to apply a mixed media test, and then to articulate a consistent mixed media test to apply going forward. On remand, Commerce identified the legal authority and articulated a consistent mixed media test, but the trial court refused to consider it, holding that Commerce had no legal authority to avoid the plain language of the nails order covering the nails in the toolkit. In the government's appeal seeking only to uphold Commerce's authority to apply a mixed media test, the Federal Circuit held that the trial court erred in ruling that the Commerce is foreclosed from interpreting the order to exclude nails within mixed media tool kits. The court then remanded the case "to give Commerce one last opportunity to interpret its order" under the extensive guidance provided in the opinion.

Federal Circuit Affirms Dismissal of Lumber Producers' Challenge to Provision of the Softwood Lumber Agreement of 2006 (SLA). *Almond Bros. Lumber Co. v. United States* [Linn, Moore, Reyna, JJ]. On July 1, 2013, the Federal Circuit affirmed the CIT's dismissal of a complaint filed by a group of lumber producers that objected to a provision of the SLA between Canada and the United States. Plaintiffs challenged, on constitutional and other grounds, an SLA provision (the "distribution term") that required Canada to distribute $500 million to the Coalition for Fair Lumber Imports, an association that included U.S. softwood lumber producers who dismissed pending antidumping and countervailing duty lawsuits and proceedings as part of the SLA. Plaintiffs are not members of the Coalition and did not receive a share of the $500 million. They maintained that Canada should have been required to distribute the money, in pro rata amounts, to all U.S. lumber producers – not only to members of the Coalition. In affirming the lower court's dismissal, the Federal Circuit held that the negotiation and implementation of the distribution term was a matter committed by law to the discretion of the United States Trade Representative (USTR), and, thus, is not subject to Administrative Procedure Act judicial review. The court also held that plaintiffs failed to plausibly allege that the distribution term violated equal protection or constituted an improper delegation of the USTR's authority.

Federal Circuit Affirms Commerce's Determination To Assign An Uncooperative Respondent The Country-Wide Antidumping Rate. *AMS Associates, Inc. v. United States* [Lourie, O'Malley, Taranto, JJ]. On June 24, 2013, the Federal Circuit affirmed Commerce's final results of an administrative review of an antidumping duty order on laminated woven sacks from China. In a nonmarket economy such as China, Commerce presumes that all exporters are subject to government control and subject to a single country-wide rate for antidumping duties, unless a firm affirmatively demonstrates its independence from government control. After preliminarily making such a showing, and preliminarily receiving a favorable separate rate, producer Zibo Aifudi withdrew from the proceeding and removed its confidential information from the record. In its final decision, Commerce found that it did not have sufficient, verifiable, record evidence to determine whether Aifudi was independent of government control, and found that it was part of the China-wide entity. The Federal Circuit affirmed, finding that Commerce was not required to rely upon unverifiable information and had appropriately assigned Aifudi the default rate.

CIT Sustains Assessment of Antidumping Duties on Chinese Pencils Based on Exporter Rather than Manufacturer. *Michael's Stores, Inc. v. United States* [Restani, J.]. On August 21, 2013, the CIT sustained Commerce's instructions to CBP to assess duties based on dumping rates assigned to trading companies that export subject merchandise as opposed to the manufacturer. After Commerce determined that Chinese pencils manufactured by certain producers were dumped at rates lower than the China-wide rate applicable to all other Chinese exporters, Commerce instructed CBP to assess the lower duties only on pencils exported by the reviewed producers. Michael's sued, contending that the rate of duty imposed on its pencils' producer should govern rather than the higher rate imposed on its trading company exporter. The court rejected this contention and sustained Commerce's focus on the exporter of the merchandise as reasonable.

CIT Sustains Treatment of Movement Expenses in Antidumping Duty Calculations for Thai Shrimp, Remands Determination Not to Review Voluntary Respondent. *Ad Hoc Shrimp Trade Action Committee v. United States* [Pogue, C.J.]. On August 2, 2013, the CIT sustained Commerce's determination in the sixth administrative review of the antidumping duty order covering shrimp from Thailand, not to revise its antidumping calculations to deduct the amount Commerce ultimately calculated in duties from its calculation of the United States price as if it were a run-of-the-mill movement expense incident to exporting the subject merchandise into the United States. The court held that doing so would double-count the duties and artificially increase the dumping margin. In line with previous decisions, the court also remanded Commerce's determination not to review a company that had sought individual review as a voluntary respondent, holding that the reasons Commerce articulated for it being "unduly burdensome" to review the respondent (as required by the relevant statutory provision) were sufficiently common to Commerce's administrative reviews that they did not satisfy the statute.

CIT Rejects Commerce's New Policy for Valuing Labor in Non-Market Economy Countries. *Camau Frozen Seafood Processing Import Export Corp. v. United States* [Pogue, C.J.]. On July 31, 2013, the CIT remanded for the second time Commerce's determination to value labor in the fifth administrative review of its antidumping duty order concerning shrimp from Vietnam using labor data solely from Bangladesh, the primary surrogate country for the review. Commerce uses surrogate values for labor and other "factors of production" to calculate the home market prices for foreign exporters from non-market economy countries in which prices are not considered reliable. Commerce had traditionally valued labor using surrogate data from multiple countries by that labor's general correlation with Gross National Income (GNI). Variability among countries at similar levels of economic development made it different from other factors of production that Commerce typically values using data from the primary surrogate country. The court held that Commerce's determination to value labor using data from a single country as a result of court decisions limiting its ability to use data from multiple countries was reasonable, but it again held that Commerce had failed to adequately explain why data from the primary surrogate country, Bangladesh, was the best available information for valuing labor when there was a large difference between labor values in Bangladesh and The Philippines (the other proposed surrogate country for labor), and Commerce continues to agree that labor is highly correlated to a country's GNI (Vietnam's GNI is between that of Bangladesh and The Philippines). The court held that it was not sufficient for Commerce to state that the Bangladeshi and Filipino labor data were not comparable because the Bangladeshi data were specific to the shrimp industry while the Filipino data were from the food and beverage production industry generally.

CIT Sustains Department of Labor's Denial of Trade Adjustment Assistance. *Former Employees of Weather Shield Mfg., Inc. v. Secretary of Labor* (Barzilay, SJ.). On July 1, 2013, the CIT sustained the Department of Labor's remand determination that plaintiffs, former administrative support employees of the subject firm, were ineligible to apply for Trade Adjustment Assistance (TAA) benefits under the Trade Act of 1974. The TAA program is designed to facilitate the reemployment of U.S. workers who have lost their jobs or may lose their jobs due to the effects of international trade. Plaintiffs contended that they were eligible for TAA benefits because they lost their jobs at a producer of doors and windows due to a decrease in sales and production, or a shift to Taiwan in the firm's production of windows and doors. The court concluded that substantial evidence in the record supported findings that the producer's sales and production had increased during the relevant period, and that its sales and production figures were reliable. The court further held that substantial evidence in the record supported findings that production had not shifted to Taiwan.

CIT Holds Unlawful Commerce's Revocation of Old Regulation. *Gold East Paper (Jiangsu) Co., et al. v. United States* [Musgrave, J.]. On June 17, 2013, the CIT remanded for further consideration

Commerce's imposition of antidumping duties in a dumping investigation of certain coated paper from China. The plaintiffs challenged a number of aspects of Commerce's decision, including the application of a special methodology designed to unmask targeted dumping. The plaintiffs argued that Commerce's application of this methodology was inconsistent with a prior regulation, 19 C.F.R. § 351.414(f) (2007). Although the regulation had been withdrawn in 2008, the plaintiffs contended that this withdrawal was invalid because it did not comply with the Administrative Procedure Act's requirements of notice and comment. The Court agreed with plaintiffs, finding that the notice and comment opportunities that Commerce had provided prior to withdrawing the regulation were insufficient, and that none of the recognized exceptions to not notice and comment requirement applied. The Court remanded the matter to Commerce with instructions to apply its targeted dumping methodology consistent with the old regulation.

Claudia Burke and Stephen Tosini are attorneys with the Department of Justice, Civil Division, National Courts Section.* ***These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

FEATURE ARTICLES

Time to Start Thinking About ACE

*By: Robert A. Shapiro**
Thompson Coburn LLP

Thirty years ago, The U.S. Customs Service developed the Automated Commercial System ("ACS"). At that time, Customs Commissioner von Raab urged those involved with international trade to adopt the system with the phrase: "Automate or Perish." Now, most entries are filed electronically. CBP has spent the past decade developing the Automated Commercial Environment ("ACE") – the next generation of its automated systems. Adopting an aggressive schedule for the development of an all necessary ACE functionality, CBP now plans to retire ACS by October 1, 2016. The threats of 30 years ago are no longer required. Instead, CBP's advises: "Don't Wait, Migrate."

Over the next year, CBP will implement data validation and duty calculation protocols within the ACE Entry Summary processing system. CBP targets January 3, 2015 for the transition of most entry-types to ACE. CBP will be adopting the "simplified entry" pilot as the ACE Cargo Release module. As currently planned, ACE will be the mandated system for Cargo Release on November 1, 2015. The processing of manifest information is a necessary prerequisite for the release of cargo and is scheduled to be mandated for all modes of transportation on May 1, 2015.

ACE is also scheduled to replace the Automated Export System ("AES") in April of 2014. Electronic Export Information ("EEI") will still be filed using systems like AESDirect. Therefore, the direct impact on exporters will be limited. But, ACE will improve the ability of the government to identify potential compliance issues and to target potential violations. For example, CBP will be able to automatically validate export license information and to decrement the license quantity and value based on the EEI. CBP will be able to target shipments based on tariff classification, end-users, countries, shippers or a combination of these and other factors. As a side effect, exporters should also have access to better information regarding their AES filings (much like ITRAC data and ACE Reports), but the reporting functionality has not yet been fully examined and is not currently included in the ACE development schedule. New AES data reporting requirements that impact the movement of AES data to ACE go into effect on January 8, 2014. *See* 78 Fed. Reg. 16366 (March 14, 2013).

ACS was intended to automate the paper documents that have been filed with CBP for over 200

years. ACE departs from this approach. It is intended to be an entirely paperless system that will permit CBP to transform how it regulates international trade. CBP and the Trade Support Network ("TSN") are examining the regulatory or statutory changes that may be necessary to permit this vision to be realized and CITBA is participating in this effort.

Until now, ACE development has not considered the role of attorneys, but the impact of ACE will be increasingly felt by the Bar as ACE becomes the system of record. Attorneys and the courts will need access to electronic entry and export information. Liquidation information must be available electronically, if CBP is to eliminate the Bulletin Notice of Liquidation. Many ACE reference files contain information that is not otherwise available, but may have substantial impact for compliance and should be available to counsel. Finally, to be truly paperless, ACE must permit attorneys to file protests, petitions, ruling requests and other documents electronically. CITBA has proposed that CBP develop an Attorney Portal in ACE to address these issues and will continue to monitor ACE development for the implications that it may have on the Bar.

**Robert Shapiro is a Partner in the firm's Washington office and Vice-Chair of the Transportation and International Commerce practice group.*

Port Payoffs and FCPA Exposure

*By: Marcus R. Cohen**
Sandler Travis & Rosenberg, PA

Once the bane of oil giant and defense contractors, the Foreign Corrupt Practices Act ("FCPA") has tripped up the Polo pony. In comparison to other high-profile FCPA payouts, Ralph Lauren's recent $1.6 Million settlement with the U.S. Securities and Exchange Commission barely registers. However, it serves as an ominous reminder that any company, in any industry should be mindful of bribes at the border.

From Buenos Aries to Busan, and from Dubai to Durban, occasional customs officials have been known to have their itchy palms akimbo. Historically, minor payouts to port officials were characterized as mere grease payments, usually related to obtaining customs clearances. But no more.

Port "payolas" per container are typically only minor; usually well under $100. However, a systemic pattern of making such small disbursements violates the FCPA, as well as other international anti-corruption laws and regulations. Violations of the FCPA and anti-corruption laws of other nations, particularly those of OECD (Organisation for Economic Co-operation and Development) member countries, can result in staggering fines and even prison terms for individuals. However, in terms of penalties for mini-bribes, the FCPA casts the darkest shadow and remains the preeminent anti-bribery law in terms of enforcement.

Jointly enforced by the SEC and U.S. Department of Justice, the FCPA prohibits corrupt payments to foreign officials. The law also requires that defined standards regarding accounting practices be adopted and maintained by publicly traded companies and their majority-owned subsidiaries, regardless of where they are based. Largely unenforced for the majority of its existence, the U.S. Government enforcement of the FCPA has skyrocketed within the past decade, with individual penalties exceeding $500 million and prison terms as long as seven years.

While the FCPA specifies that corrupt offers and payments (or promises thereof) are prohibited for the purpose of "obtaining or retaining business," the scope of proscribed transactions is considerably broader. For example, even minor payments to foreign customs officials to reduce customs duties or avoid inspections may be violations of the FCPA.

The law is not quite as heartless as often portrayed and, unlike the UK Bribery law, contains certain, limited exceptions. Specifically, the FCPA provides for an exception from liability for payments made to facilitate or expedite the performance of "a routine governmental action." Many international companies routinely make small payments - generally under duress - to customs officials to clear cargo around the globe. Most companies view these outlays as facilitating payments that fall within the FCPA's exception. However, the SEC and DOJ disagree.

In 2010, a series of FCPA settlements totaling $236 million for violations with Panalpina World Transport Inc., a freight forwarder with worldwide offices, and with several oil and gas companies began as investigations into bribery of customs officials. In its settlement with the DOJ and the SEC, Panalpina acknowledged that the company paid approximately $49 million in petite, albeit habitual payments to customs officials to circumvent customs rules and regulations in numerous countries including Nigeria, Angola, Brazil, Russia, Kazakhstan, Turkmenistan and Azerbaijan. The Panalpina case demonstrates that the U.S. government takes a limited view of the facilitating payment exception for routine grease payments. And the reverberations of Panalpina continue in 2013 as other companies continue to settle with the DOJ, including Houston-based Parker Drilling which just paid approximately $16 Million for its involvement with Panalpina in Nigeria.

Whether it's a global freight forwarder, a petro-giant, or clothing creator, U.S. government takes the view that for a facilitating payment to be considered acceptable, the payment would have to be a small, one-time expense and not made as a standard business practice.

To safeguard against the risks of violating the FCPA and other anti-corruption laws, companies should carefully examine their operations around the world and scrutinize payments made by them and by their agents. In addition, companies are well-advised to develop and maintain a comprehensive FCPA compliance program that includes detailed policies and procedures related to training of relevant personnel and auditing of their activities to ensure the policies and procedures are being followed. Ongoing vigilance is key to ensure that customs brokers, freight forwarders, shippers and other third-parties are not paying bribes on the company's behalf.

**Marcus Cohen is Of Counsel in the firm's Washington, D.C., office and advises clients on compliance with U.S. and international anti-corruption measures such as the FCPA and U.S. export controls, economic sanctions and anti-boycott laws.*

CITBA Online

Please look for further announcements and copies of past newsletters at http://www.citba.org.

Membership

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at https://www.paypal.com.

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