SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 36 | Issue 1 Article 14

January 2012

Canada-United States Customs Transaction - The Invisible Border, The

Jessica LeCroy

Kathryn Friedman

Cyndee Todgham Cherniak

Laurie Tannous

THE CANADA-UNITED STATES CUSTOMS TRANSACTION – THE INVISIBLE BORDER?

Session Chair – Jessica LeCroy
United States Speaker – Kathryn Friedman
Canadian Speaker – Cyndee Todgham Cherniak
United States Speaker – Laurie Tannous

INTRODUCTION

Jessica LeCroy

MS. LECROY: Good morning, everybody. I am Jessica LeCroy, and I am the senior advisor at Bennett Jones in the Toronto office.[1] I will be the chair of this, the penultimate session of this wonderful conference.

We will be talking today about United States-Canada customs transactions, as indicated on the agenda. While the agenda shows the title of this session is *The Invisible Border?*, with a question mark, I believe it should more properly read *The Invisible Border!,* to indicate the imperative nature of this issue.

Speaking first will be Kathryn Friedman, director of Law and Policy Research at the University of Buffalo Regional Institute.[2] She will be reviewing her research conducted in collaboration with the Border Policy Research Institute, *The Border Barometer.* Cyndee Todgham Cherniak of Lang Michener[3] will be discussing ten distractions from border transactions.[4] Laurie Tannous, vice president at Sandler Travis Trade Advisory Services,[5] will then respond to Cyndee's presentation.

---

[1] *Jessica LeCroy*, BENNETT JONES, http://www.bennettjones.com/people_item.aspx?person=1733&name=Jessica%20LeCroy&pg=&office= (last visited Oct. 6, 2010).

[2] *Kathryn Bryk Friedman*, UB REGIONAL INST., http://regional-institute.buffalo.edu/staff_indiv.cfm?StaffID=16 (last visited Oct. 6, 2010).

[3] Effective January 1, 2011 Lang Michener LLP merged with McMillan LLP and is now known as McMillan LLP.

[4] *Cyndee Todgham Cherniak*, MCMILLAN, http://www.mcmillan.ca/CyndeeTodghamCherniak (last visited Feb. 6, 2011).

[5] *Laurie Tannous*, STR, http://www.sttas.com/STR_Bio.aspx?id=0 (last visited Oct. 6, 2010).

After each of the panelists' presentations, I will allow a few quick questions before the start of the next presentation. We will reserve longer questions for the full panel and discussion for the end of this session, as time allows. Kathryn, the time is yours.

UNITED STATES SPEAKER

Kathryn Friedman[*]

MS. FRIEDMAN: Thank you very much. I would also like to thank Dan Ujczo for asking me to speak to you this morning to frame the panel conversation on border-related regulatory barriers. To do so, I refer you to the 2010 edition of *The Border Barometer*.

The Border Barometer is a collaborative initiative undertaken between the Border Policy Research Institute at Western Washington University and the Regional Institute at the University of Buffalo School of Law. *The Border Barometer* is a tool that provides a United States perspective on the performance of the Canada-United States border.[6]

In 2009, we published the first edition of *The Border Barometer*, wherein we looked at three ports of entry along the northern border: the Buffalo-Niagara region, the Detroit-Windsor region, and the Pacific Gateway region.[7]

---

[*] Kathryn Friedman serves as director of Law and Policy Research at the UB Regional Institute. In addition to publishing research on international law and governance related to the Canada-United States relationship, Friedman serves as direct program manager for the institute's Canada-United States research program, examining issues including border governance as foreign policy, comparative commercial and passenger flows across the northern border, and international cross-boundary collaboration in the environmental context. She frequently speaks on binational and international issues to both academic and non-academic audiences, including policymakers in Canada and the United States.

Friedman, a practicing attorney, is an adjunct professor at the University at Buffalo School of Law, where she teaches courses on international trade, immigration, and NAFTA. She is a member of the Advisory Council for the Niagara Observatory at Brock University, Women in International Security, and the Small Business Association International Trade Task Force. Friedman also served as vice chair of the International Law and Practice Section of the New York State Bar Association.

In addition to receiving a Ph.D. in political science, with concentrations in international relations and comparative political economy, Kathryn graduated *magna cum laude* from the University at Buffalo School of Law where she served as an international law fellow and as editor-in-chief of the Buffalo Law Review. She received the Carlos C. Alden Award for greatest contribution to the Law Review and the Law Faculty Award for outstanding contributions to the law school. Upon graduating from law school, Friedman served as confidential law clerk to an associate judge on the Court of Appeals of New York.

[6] *See generally* UB REGIONAL INST., BORDER BAROMETER 1 (2009), *available at* http://regional-institute.buffalo.edu/Includes/UserDownloads/Border_Barometer_2010.pdf.

[7] *Id.* at 2.

We also developed indicators of border performance based on data collected at each region.

In particular, we constructed and examined porosity and infrastructure indicators, and mined data sets that illustrated how the border was performing with respect to each indicator.

The 2010 edition is updated, and has been expanded to examine eight ports of entry along the northern border, stretching from Blaine, Washington to Champlain, New York, and virtually every major port of entry in between.[8] The 2010 edition also features the same indicators of porosity and infrastructure, however, we have created three new sections.[9]

First, we have a section looking at the northern border trends. This section highlights trends across the entire border. From these trends, we were able to identify individual port variations.[10]

Second, we included a section on comparative perspectives. In this section, we describe four distinct metrics for measuring performance, and we compare and rank performance of each port according to each metric.[11]

Third, each port of entry in *The Border Barometer* has its own one-page snapshot summary that details performance. Detailed information on each port of entry is found in this section.

This morning, I cannot go through all of the data contained in this publication; however, I can use some of this data to provide a broader framework for our conversation. First, with respect to northern border trends, it should come as no surprise that trucking dominates commercial exchange between Canada and the United States. Despite its dominance, however, those familiar with this industry would not be surprised to learn that border data analyzed suggest that the value of truck exports declined slightly between 2007 and 2008, decreasing from $156 billion to $150.8 billion during that time period.[12]

What is most interesting about these data is that this declining trend is actually driven solely by two ports of entry: Detroit and Buffalo. At the six other ports of entry that we examined, trucking exports actually increased slightly, as reported in *The Border Barometer*.[13] This disparity is most likely due to the economic recession and, in particular, the heavy reliance that these two ports of entry have on auto industry trade.

Second, another data set analyzed was the composition of traded commodities. We thought knowing which goods were crossing the border was as

---

8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* at 5.
12 *Id.* at 3.
13 *Id.*

important as understanding how these goods were crossing the border. The results here were also not particularly surprising: in 2008, manufactured goods dominated trade flows, comprising fifty-four percent of exports and forty-one percent of imports.[14] This finding demonstrates how manufacturing trade serves as the foundation of our interdependent economies.

Third, we looked at both seasonal truck traffic and auto traffic in order to determine whether there was any variation throughout the year in terms of these modes of transportation. Our findings indicated that although there was not much variation in truck traffic throughout the year, there was indeed more seasonal variation in auto traffic. When you think about it, this makes sense. For example, the Buffalo-Niagara port, as the corresponding individual port page in *The Border Barometer* indicates, has the highest auto traffic entering the United States each month between 2007 and 2008.[15] This is due, in large part, to the fact that there exists a very strong binational tourism industry in the region, with, for example, individuals owning summer homes on each side of the border.

These data sets also suggest that in 2007 and 2008, auto traffic entering the United States peaked at approximately 3.2 and 3.3 million cars, respectively.[16] It is notable that in the last quarter of 2008, from September to December, both truck and auto traffic declined. In particular, there is a very steep decline of autos entering the United States in the latter half of 2008.[17]

In addition to these highlights, as I mentioned earlier, we developed four metrics to provide a comparative perspective on border performance. These metrics are: (1) the percentage change in total trade value from 2007 to 2008; (2) the dependency on manufacturing commodities in 2008; (3) the degree of seasonal variation in car traffic in 2008; and (4) the percentage decrease of car traffic in the time period from July to December in 2007 and 2008. The perspective section provides rankings for certain positions, with lower rankings indicating more desirable positions. I am going to highlight three of the metrics used in calculation of these perspectives.

First, with regard to the percent change in total trade value, the northern border average was negative nine percent.[18] This means that there was a nine percent decrease in total trade value across the northern border. Five out of the eight ports along the border examined actually experienced declines in total trade value,[19] and are thus representative of the declining trend of total trade value along the northern border.

---

[14] *Id.* at 4.
[15] *Id.* at 12.
[16] *Id.* at 4.
[17] *Id.*
[18] *Id.* at 5.
[19] *Id.*

Second, dependency that a certain port has on manufacturing commodities was measured. Dependence on manufacturing is not necessarily a good attribute, so we viewed a more diversified commodity flow across the border as being better in terms of resilience, particularly in economically rough times. Detroit clearly has the strongest dependency on manufacturing commodities, particularly because of its dependence on the auto industry.[20] The Buffalo Niagara port had the second-greatest dependence on manufacturing commodities.[21]

Third, we observed the percent change of car traffic from July through December 2008. Detroit, ranked eighth, experienced the greatest decline in traffic during this period between 2007 and 2008. Auto traffic declined 16.2% compared to the same time frame in 2007 as in 2008.[22] Champlain had the next highest decline, suffering a 12.7% decline.[23] The border-wide average of car traffic crossing the border during this time was a 7.3% decline.[24] Port Huron ranked highest, suffering only a 3.5% decline.[25]

Though these are simply a lot of data and statistics, I hope you can appreciate the declines in both the value of trade and auto and truck traffic across the border.

Determining drivers of these trends is an interesting question raised by the *Border Barometer* findings. Unfortunately, we cannot pinpoint the exact reasons for these trends across the border.

However, we could argue that the economic recession has certainly had an impact on border flows. In addition, inadequate governance mechanisms have had an impact on some of the trends in northern border trade.

Also, the regulatory environment plays a critical role affecting these trends. If policymakers and stakeholders are interested in reversing these trends, then action needs to be taken and thought given to the various regulations in place that create the very transaction costs that actually inhibit trade flows along the northern border. I now turn it over to my colleagues for discussion.

MS. LECROY: Are there any questions for Dr. Friedman?

MR. MCILROY: My name is Jim McIlroy, and I would like to commend you on *The Border Barometer*. It has a lot of data, and I think it is very, very helpful data, and it is very easy to read.

MS. FRIEDMAN: Thanks for that should go to our staff. We have a terrific staff that produced this.

---

[20] *Id.* at 11.
[21] *Id.* at 12.
[22] *Id.* at 5.
[23] *Id.*
[24] *Id.*
[25] *Id.*

MR. MCILROY: One thing that struck me was that some of your presentation referred to imports, but these are what we would call exports. My question, though, is about Canada's modes of transportation. Why does Canada use more rail and less truck? I found this striking because I thought it would be about the same.

MS. FRIEDMAN: I do not have an exact answer for you. In terms of trends, the trucking industry in Canada has been taking a real hit following September 11.[26] Officials are attempting to implement measures to correct the trend, because they are very concerned about it. I do think that the regulatory environment has contributed to this decline.[27] I also think that the economic recession has something to do with it by causing a diminished demand in the United States.[28] Again, however, there are a whole host of different reasons that could explain the decline in trucking and rail.

MR. MCILROY: It is not because of the mixture of traded commodities?

DR. FRIEDMAN: That, too, could be a possible explanation.

MR. CAMERON: Kathryn, could you say something about the situation of maritime shipping trade, not only around the Great Lakes, but also in coastal regions, in comparison to those land-based transactions and trade patterns? How does this type of trade fit in with your analysis?

MS. FRIEDMAN: We have actually not gathered data on that particular segment. My limited knowledge of maritime shipping in the Great Lakes is that it has a lot of potential, and there are different forces and stakeholders at work trying to increase that as a mode of commercial exchange.

MR. UJCZO: Before my question, I just wanted to address the question of maritime shipping, on which a number of us do a great deal of work. The reality is that regardless of whether goods are imported through the Pacific Gateway or through Halifax, those goods still need to make it to the Midwest Heartland. Detroit, for example, did extensive negotiation with Halifax, and Cleveland also just signed an agreement with Halifax regarding short shipping.[29] Halifax is important because it is the closest North American port to southern China and southern Asia, including Vietnam. As a result, it is actually quicker to bring goods in through Halifax.

---

[26] DANIELLE GOLDFARB, CONFERENCE BD. OF CAN., REACHING A TIPPING POINT? EFFECTS OF POST-9/11 SECURITY ON CANADA'S TRADE AND INVESTMENT 17 (2007), *available at* http://www.internationaltransportforum.org/2009/pdf/CDN_TippingPoint.pdf.

[27] *Id.* at 21.

[28] Border Policy Research Inst., W. Wash. Univ., *WHTI, the Recession, and Cross-Border Travel* 5 BORDER POLICY BRIEF, no. 3, 2010, at 3, *available at* http://www.thetbwg.org/downloads/2010_Summer_Border_Brief.pdf.

[29] Tom Breckenridge, *Port Officials in Cleveland and Halifax, Nova Scotia sign agreement on shipping*, PLAIN DEALER (July 16, 2009, 5:33 PM), http://www.cleveland.com/business/index.ssf/2009/07/port_officials_in_cleveland_an.html.

Next, my question is for Katie: could you expand on your thoughts of governance issues? If you had to pick the next three steps in terms of border governance, what would they be?

MS. FRIEDMAN: First, I think that United States policymakers need a better appreciation of how inadequate border governance impacts its global competitiveness.

Second, I think that the Department of Homeland Security (DHS)[30] has to strengthen emphasis on that part of its mission that calls for the facilitation of legitimate trade and travel across the border. I think officials in that agency must start focusing on that to improve governance of the border.

As a step on the way to doing that, I recommend that the DHS establish a northern border working group within DHS. They already have an established working group that focuses on the southern border.[31] As a small governance measure, establishing this particular working group is a great first step. It would be comprised of private sector individuals, other stakeholders, a mix of individuals from academia, and of people outside of Washington who have an interest and stake in the northern border. It could also have representation from communities along the border to help create strategies for more effectively moving goods and services across the border.

Third, there is still a question of what the governance mechanism for North America should be. There are a number of recommended models. The regional approach seems to make sense and is something we have advocated at the Regional Institute. An alternative model is based upon the North American Border Commission. Both models have tradeoffs. I am trying to digest these tradeoffs to determine which is the better option.

MS. LECROY: Cyndee Todgham Cherniak will address us next.

---

[30] DEPARTMENT HOMELAND SECURITY, http://www.dhs.gov (last visited Nov. 11, 2010).

[31] *See generally* Press Release, Dep't of Homeland Security, Remarks by Secretary Janet Napolitano at the Border Trade Alliance International Conference (Apr. 21, 2009), *available at* http://www.dhs.gov/ynews/speeches/sp_1240361190144.shtm.

CANADIAN SPEAKER

*Cyndee Todgham Cherniak**

MS. TODGHAM CHERNIAK: I am talking today about the Canadian perspective of focusing on the top ten distractions to trade on the Canada-United States border.

Normally, a discussion about the difficulties of trade across the border may start with a discussion about the United States and what it does to create difficulties for Canadian goods getting into the United States. Instead, I would like to look at the Canadian process and what Canadian border agencies do that limits access to the Canadian market.

My top ten distractions are: (1) buy local rules, as in "Buy American" provisions;[32] (2) the Helms-Burton[33] versus Foreign Extraterritorial Measures Act (FEMA);[34] (3) the International Traffic in Arms Regulations (ITAR)[35] and Canada's dual national problem; (4) Canadian antidumping cases and changes in the methodology of calculating normal values; (5) judicial reviews and appeals; (6) North American Free Trade Agreement (NAFTA) verifications;[36] (7) the advance data element reporting; (8) border goods and services tax (GST) interest;[37] (9) harmonized sales tax in Ontario and British Columbia;[38] and (10) Canada's subsequent proceeds D-Memo.[39]

---

* Cyndee Todgham Cherniak is counsel in the International Trade Law, the Business Law, the Tax Law, and the Environment, Energy & Emissions Trading Groups in Lang Michener's Toronto office, which became McMillan on January 1, 2011. Her practice includes: international law, including World Trade Organization (WTO) and Regional Trade Agreements (RTA) analysis, interpretations, and opinions, government relations strategies, and dispute settlement, North American Free Trade Agreement (NAFTA) verifications, value for duty, tariff classification, import and export controls and sanctions, bilateral restraint agreements, bilateral investment treaties, textile references, international protection of intellectual property rights, antidumping and countervailing duties, safeguard actions, government procurement, investor-state disputes, the Foreign Extraterritorial Measures Act, border and national security, food and product safety, anti- corruption and anti-bribery, and compliance programs/codes of conduct. Cyndee also has expertise in commodity tax (i.e., goods and services tax (GST)), Ontario retail sales tax, Ontario employer health tax, Ontario land transfer tax, excise tax, gasoline and fuel taxes, and customs duties. Cyndee is known as an international lawyer who works closely with other lawyers, in-house counsel, international financial institutions, trade associations, non-governmental organizations, and governments.

[32] American Recovery and Reinvestment Act of 2009, 26 U.S.C. § 1605 (2009).

[33] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C.A. §§ 6021-6091 (1997) [hereinafter Helms-Burton Act].

[34] Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (Can.).

[35] International Traffic in Arms Regulations, 22 C.F.R. § 120.1 (2010) [hereinafter ITAR].

[36] North American Free Trade Agreement ch. 11, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 639 [hereinafter NAFTA].

[37] *How GST/HST Works*, CAN. REVENUE AGENCY, http://www.cra-

At times, I do not know where the invisible border is actually drawn. With the Buy Local issue, the border appears to be around states, provinces, and local municipalities. States and municipalities were the first to interpret and act according to the Buy American provision, and Canadian provinces reciprocated by boycotting American goods.[40] This began the sentiment that the Buy-Local Rules should be a two-way street: if the road going south is shut down, the road going north should be shut down as well. It was because of this thinking that some municipalities began to create Buy Canada rules and policies.

These changes moved the border from being along the entire northern border to being around smaller Canadian jurisdictions. This is a recent change, and there is an agreement to begin to work out the concerns created by it.

On February 12, 2010, the governments of Canada and the United States implemented an agreement concerning government procurement.[41] By this agreement, the United States is going to waive Buy American provisions under one of many statutes that require buyers to purchase American-made products. This agreement is only one statute, and it is limited in its duration. The Canadian provinces will soon submit schedules to the World Trade Organization (WTO) for an agreement on government procurement.[42] However, I do not think this is going to solve all of the problems, some of which occur because United States companies are not buying Canadian steel or other goods, or that these companies were not familiar with the benefits of using those materials. It has led to a point of view in Canada whereby people were starting to do the same thing at a municipal level more than at a federal or provincial level. There was an understanding in Canada, however, that this was not the road to go down.

Another issue is that of extra-territoriality. This refers to the phenomenon by which the border moves from the United States into Canada because United States rules are being applied to Canadian companies. An issue we see come up quite regularly associated with the Office of Foreign Assets

---

arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/hw-eng.html (last visited Oct. 24, 2010).

[38] *Harmonized Sales Tax (HST)*, CAN. REVENUE AGENCY, http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/hst-tvh/menu-eng.html (last visited Oct. 23, 2010).

[39] CAN. BORDER SERVICES AGENCY, MEMORANDUM D13-4-13: POST-IMPORTATION PAYMENTS OR FEES "SUBSEQUENT PROCEEDS" (CUSTOMS ACT, SEC. 48) (2009), *available at* http://www.cbsa-asfc.gc.ca/publications/dm-md/d13/d13-4-13-eng.pdf.

[40] *Canadian mayors pass anti-'Buy American' resolution*, CBC NEWS (June 6, 2009, 7:32 PM), http://www.cbc.ca/canada/story/2009/06/06/mayors-resolution.html.

[41] Agreement Between the Government of Canada and the Government of the United States of America on Government Procurement, U.S.-Can., Feb. 12, 2010, *available at* http://www.ustr.gov/webfm_send/1638.

[42] *Id.*

Control (OFAC) rules[43] and Helms-Burton,[44] is the anti-Cuba legislation which limits exports to certain jurisdictions. Because Canada has enacted the FEMA,[45] which actually promotes doing business with Cuba, these rules create problems for Canadian businesses when dealing with Cuba. These rules thus create a no-win situation for businesses, because in dealing with Cuba, companies will either breach Canadian law or United States law.

According to Section 3 of FEMA, when faced with a situation in which a company is told by its United States parent that it cannot trade with Cuba, it has to notify the Canadian Attorney General[46] and, according to Section 5 of the same Act, that company must or should trade with Cuba.[47] We are seeing increased occurrences of this catch-22 situation, and, as a result, the United States' OFAC is imposing large fines on many companies.[48] We try to provide counsel for Canada to take a total business approach. The FEMA's sole purpose is to find a way for Canadian subsidiaries and United States and Canadian companies to do business with Cuba. As Canadian counsel tries to find a practical solution so that companies can comply with both laws, sometimes it is successful, and sometimes it is not. It is because of these issues that I find the border moving more and more into Canada.

We also have a similar extraterritoriality rule with ITAR which is an export-control piece of legislation in the United States. According to ITAR, individuals or entities from a certain list of twenty-two countries are not allowed to have access to ITAR-controlled technical data or goods.[49] Individuals from China, Iran, Haiti, and Cuba are a few examples of those who will not have access to data or goods that ITAR controls.

The ITAR and OFAC regulations further move the border into Canada. The situation is one in which Canadian companies are getting sued when they restrict the ability of a certain individual or employee to gain access to that ITAR-controlled information.[50] Those who are suing say that these Ca-

---

[43] OFF. FOREIGN ASSETS CONTROL, http://www.ustreas.gov/offices/enforcement/ofac (last visited Oct. 24, 2010).

[44] Helms-Burton Act, 22 U.S.C.A. §§ 6021-6091 (1997).

[45] Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (Can.).

[46] *Id.* § 3.

[47] *Id.* § 5.

[48] *Civil Penalties and Enforcement Information*, OFF. FOREIGN ASSETS CONTROL, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last updated Feb. 1, 2011).

[49] ITAR, 22 C.F.R. § 120.1.

[50] Cyndee Todgham Cherniak, *Compliance with U.S. ITARs Causes Problems for Canadian Companies- Part II- U.S. ITARS vs. Human Rights Laws in Quebec/Canada*, TRADE LAW. BLOG (Jan. 20, 2008, 4:24 PM), http://tradelawyersblog.com/blog/archive/2008/january/article/compliance-with-us-itars-causes-problems-for-canadian-companies-part-ii-us-itars-vs-human-ri/?tx_ttnews[day]=20&cHash=68d0d62c77.

nadian companies are discriminating against those individuals on the basis of nationality. In addition, complainants are taking these issues to the provincial Human Rights Commissions[51] in their respective Canadian provinces. This has been the issue in a number of cases, but two in particular: the Bell Helicopter Textron Limited Canada[52] and the General Motors Defense cases.[53] In these two cases, the parties settled instead of taking the matter to court. The settlement, however, was based on acknowledgment that these employees or groups had a valid human rights claim based on a breach of Canadian law. To wit, by restricting the access those individuals had to certain data, or by laying them off or not hiring them because their position required handling ITAR-controlled data, Canadian companies were violating Canadian law and consequently some payment of money was needed in order to reconcile the breach.

This is, therefore, creating a problem for a number of Canadian companies and subsidiaries of United States suppliers; in those companies, there are Chinese or Iranian nationals, or even dual nationals, and the companies do not want to be restricted by this type of regulation.

In fact, the firm for which I work, Lang Michener, had to go through this very thing. The firm was registered with having controlled goods and data, so we had to determine what the firm had to do to comply. The firm had to speak with everyone in the firm, determining whether there were any dual national employees, or whether, by chance, there were any Iranian citizens with the firm. After we discovered that some employees were indeed dual nationals with a listed country, we had to devise a way to comply with the ITAR and Canadian law.

At times, working out a solution to this problem requires walking a very fine line. As a result, there will often be compliance with the United States laws, but there will simultaneously and consequently be substantial fines. These fines may total millions of dollars, accruing pursuant to both the United States export controls laws and Canadian Human Rights laws.[54]

---

[51] *Provincial and Territorial Human Rights Agencies*, CANADIAN HUMAN RIGHTS COMMISSION, http://www.chrc-ccdp.ca/links/default-eng.aspx#provincial (last updated Oct. 12, 2010).

[52] Press Release, Commission des Droits de la Personne et des Droits de la Jeunsse, A Settlement is Reached with Bell Helicopter Following a Complaint to the Commission des Droits de la Personne et des Droits de la Jeunsse (Jan. 17, 2008), *available at* http://www.mccarthy.ca/pubs/Handout_human_rights_settlements.pdf.

[53] *Human Rights Settlement Reached with General Motors of Canada, Ltd. With Respect to Workers With Citizenships Other Than Canadian or American*, ONT. HUMAN RIGHTS COMMISSION, http://www.ohrc.on.ca/en/resources/news/gm/view (last modified Mar. 1, 2011).

[54] Susan M. Hutton, *Amendments Proposed to U.S. ITAR to Address Canadian Human Rights Law Concerns*, MONDAQ INT'L L. (Sept. 2, 2010), http://www.mondaq.com/canada/article.asp?articleid=109046.

The rest of my presentation is going to be focused on discussing things that the Canadian Border Services Agency and the Canadian government itself is doing that may irritate or distract the United States, or United States businesses in Canada.

One example is antidumping cases. In a very few cases, Canada has antidumping and countervailing duty orders against certain goods imported from the United States. We do not need to focus on those instances, because there are only three orders that have been passed down on the subject, with a fourth case going through the process now.[55]

Canada also has antidumping and countervailing duty orders against goods from China.[56] With these orders, there are at least two ways to manage the duties. Canada, for one, has prospective duties creating a dumping margin or normal value rate. This applies on a going-forward basis for all imports that come in after a particular date.

The United States' approach to the collection of antidumping and countervailing duties, on the other hand, is more retrospective in that liquidation comes at a later point in time. The United States is currently investigating

---

[55] *Refined Sugar*, CAN. BORDER SERVICES AGENCY (June 30, 2005), http://cbsa-asfc.gc.ca/sima-lmsi/er-rre/rr2004-007/rr2004-007-sor-eng.html; *Copper Pipe Fittings*, CAN. BORDER SERVICES AGENCY, http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1358/ad1358-i-pi-eng.html (last modified Apr. 2008); *Whole Potatoes,* CAN. BORDER SERVICES AGENCY (December 16, 2004), http://cbsa-asfc.gc.ca/sima-lmsi/er-rre/rr2004-006/rr2004-006-x-eng.html; *Polyisocyanurate thermal insulation board*, CAN. BORDER SERVICES AGENCY (Jan. 21, 2010), http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1386/ad1386-i09-pd-eng.html.

[56] *See generally, e.g.,* CAN. BORDER SERVICES AGENCY, MEMORANDUM D15-2-52: CERTAIN CARBON STEEL WELDED PIPE ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA (2009), *available at* http://cbsa-asfc.gc.ca/publications/dm-md/d15/d15-2-52-eng.pdf; Can. Border Services Agency, "Certain Carbon Steel and Stainless Steel Fasteners—Statement of Reasons for Making a Preliminary Determination," File No. 4243-38, AD/1308; 4218-17, CVD/103 (2004), *available at* http://cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1308/ad1308p-eng.html [hereinafter Fasteners]; Can. Border Services Agency, "Certain Waterproof Footwear Originating in or Exported from the People's Republic of China—Statement of Reasons Concerning a Determination," File No. 4366-8, AD/1067 (2002), *available at* http://cbsa-asfc.gc.ca/sima-lmsi/er-rre/rr2001-005/rr2001-005s-eng.html; Press Release, Can. Border Services Agency, Anti-dumping re-investigation concerning bicycles and frames from Chinese Taipei (Taiwan) and the People's Republic of China (Mar. 8, 2004), *available at* http://cbsa-asfc.gc.ca/media/antidumping/2004/0901ottawa-eng.html; Greg Kanargelidis & Andrew Thompson, *2009 Year-In-Review: Antidumping and Subsidy Actions Affecting Chinese Products*, BLAKES.COM (Jan. 12, 2009), http://www.blakes.com/english/view_disc.asp?ID=3582 (listing recent cases against China); *see* Cyndee Todgham Cherniak, Presentation at the 2010 Canada-United States Law Institute Henry T. King, Jr. Annual Conference: The Canada-US Customs Transaction –The Invisible Border? Top Ten Distractions (Canadian Perspective), 15 (2010), *available at* http://www.cusli.org/conferences/annual/annual_2010/presentations/Saturday%20Session%202%20-%20Cherniak.pdf [hereinafter Presentation] (listing all the recent Canadian antidumping cases against China).

whether it will adopt the Canadian way, but it is still very early in that process.

Some antidumping duties in Canada on subject goods from China are at a rate as high as 170% or 240%.[57] In addition, there is the countervailing duty rate on top of that. There are not many situations in the United States, however, in which there is both antidumping and countervailing duties in relation to goods from China.

The United States companies that are most affected by Canada's antidumping policies are distribution companies. Distribution companies recognize that Canada does not have a huge population. Canada's population is, in fact, similar to the population of California. As a result, these distribution companies buy goods in bulk from China, importing them into the United States before reselling the goods into Canada. This is creating a problem for some of the United States companies. We just changed our methodology in that we no longer use the dumping margins as we used to; instead, we now assign normal values to the exporters. In the most recent *Fastener* case, we applied Section 30.[58] What that means is that when Canada looks at a United States company, it does calculated duties based on the cost of acquisition plus general sales and administration expenses, plus a reasonable profit. Instead, the first method applied will look at that equation and what the dumping margin of normal values would be for the Chinese company.

This is causing major issues for United States distribution companies. Canada's antidumping approach has affected Canadian sales of some United States distribution companies who sell subject goods.

In addition, Canada is not necessarily accepting that a trading company is an "exporter" for purposes of the Special Import Measures Act.[59] That is currently the Canada Border Services Agency's (CBSA) position.[60] There have been cases in which some disagreed with the CBSA, but there are a number of other cases on that point that try to clarify the correct position.

Judicial reviews and appeals are different in Canada, which also causes grief among a number of American companies. The United States compa-

---

[57] MEMORANDUM D15-2-52, *supra* note 56; *see also* Daniel Workman, *Anti-Dumping Duties on Imports from China-Chinese Carbon Steel Pipe Subject to Highest Canadian Dumping Fees*, SUITE 101.COM (Jan. 22, 2010), http://www.suite101.com/content/antidumping-duties-on-imports-from-china-a192715 ("At 179% of export price, carbon steel welded pipe is charged the greatest rate of anti-dumping duty among all Chinese imports.").

[58] Fasteners, *supra* note 56; *see also* Kanargelidis & Thompson, *supra* note 56.

[59] Special Import Measures Act, R.S. 1985, c. S-15 (Can.).

[60] *See generally EMCO Electrical International – Electrical Resource International v. President of the Canada Border Services Agency* (June 25, 2009), CITT Decision, Appeal No. AP-2008-010, *available at* ftp://ftp.citt-tcce.gc.ca/doc/english/appeals/decisions/ap2i010_e.pdf (stating that SIMA doesn't define "exporter" but the CBSA's interpretation is that SIMA subsection 2(1) provides guidance).

nies simply go to the Court of International Trade[61] and are able to get everything done in one place. In Canada, however, when there is a dispute, judicial review may go to the Federal Court of Appeal, or may go to the Federal Court of Canada.[62] In some other cases, companies resolve any customs issues with the Canadian International Trade Tribunal,[63] where there is more than one remedy available. It is nice to have dispute settlement mechanisms, but it is important to select the correct method/mechanism within the limitation period. NAFTA verifications is another area where there are many cross border distractions. In this economy, the key is to look at the certificates of origin, and to ask whether the goods are or are not NAFTA-originating.

We have verifications going from Canada to the United States and from the United States to Canada. Where there may be problems is with the application of the rules of origin and the specific rules of NAFTA. The rules of origin may indicate that many goods coming from the United States do not qualify as NAFTA-originating, even though there is significant United States contribution, because the rules of origin indicate the goods should be classified as being from another country.[64]

At this point, though, there has not been a review of where the most difficulties occur, or whether the rules of origin should be updated. Now, there may be some need to revisit these rules because United States companies are getting caught on imports into Canada where there is not a domestic manufacturer in the United States that is in Canada as well. These goods must have foreign content, but they are excluded by NAFTA.[65] There is enough United States activity, however, that these goods really should be considered to be NAFTA-originated, but the rules would need to change to be so considered.

The textile apparel area, for example, is one where I find goods are quite regularly knocked out of NAFTA origination status because of extremely restrictive yarn rules.[66] This is an area that, if the United States wanted to increase their exports, would be the very first thing I would put on the list to do—because the rules are so restrictive.

---

[61] COURT OF INTERNATIONAL TRADE, http://www.cit.uscourts.gov (last visited Oct. 24, 2010).

[62] *See generally Canada's Court System*, DEP'T OF JUSTICE CAN., http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html (last visited Oct. 24, 2010).

[63] CANADIAN INT'L TRADE TRIBUNAL, http://www.citt.gc.ca/index_e.asp (last visited Oct. 24, 2010).

[64] *See generally* NAFTA, *supra* note 36, ch. 4.

[65] *Id.*

[66] *See generally* Eric Barry & Elizabeth Siwicki, *NAFTA: The Textile and Apparel Sector*, *in* ASSESSING NAFTA: A TRINATIONAL ANALYSIS 130 (Steven Globerman & Michael Walker eds., 1992).

Canada has passed Bill S.2 which includes authority for the Governor in Council to pass regulations regarding advance reporting of data elements. What this means is that Canada's advance data element requirements do not need further approval by Canada's House of Commons.[67] At the present time, the Canadian Border Services Agency is involved in the preparation of the advance data element requirement. I cannot tell you what they will be, as the process is under a veil of secrecy. We do not know what is happening. You call this "10 + 2" in the United States.

It is entirely possible that Canada's "10 + 2" is not going to be the same as the United States' "10 + 2," and most of us do not know what is on the list right now for data elements. Then we have "plus 3," which means all three modes are going to be covered by this data element reporting requirement according to rumors, unlike the United States where it is only applies by land. We are actually talking about having air and marine as well, which is significantly different, and will require significant computer, reporting, and document changes in the United States if we decide to go that way.

In regard to border interest of GST, Canada has a number of cases where there is no duty on the goods, but where border GST may be assessed on the value for duty for customs purposes. We have a situation where CBSA does a verification on value and decides there is a different value required, which increases the value. So when you apply the GST at five percent (with Harmonized Sales Tax (HST) at thirteen percent), there is additional GST assessed. Businesses that are engaged in commercial activities and are registered for GST/HST purposes get that GST back, but there is an interest component that is not recoverable because they say the GST should have been paid on day one.[68]

We have about three or four cases going through the courts right now. In one case, there was a million dollars worth of border GST just because of the change in the valuation.

We have subsequent proceeds in the D-Memo, which came out last year, which relates to post importation payments and fees and subsequent proceeds. What you need to know about this particular D-Memo is how it matches up with transfer pricing and what is included in the management and administrative fees and other valuations for the duties.[69] If there is an intercompany transfer price paid, the CBSA is going to take the point of view that this relates to the goods, and they are going to expect that an adjustment be

---

[67] CAN. BORDER SERVICES AGENCY, MEMORANDUM D19-10-3: ADMINISTRATION OF THE EXPORT AND IMPORT PERMITS ACT (EXPORTATIONS) (2010), *available at* www.cbsa-asfc.gc.ca/publications/dm-md/d19/d19-10-3-eng.pdf (stating that the Governor in Council may establish a list of goods and technologies to be exported or transferred which the Governor believes it necessary to control).

[68] Presentation, *supra* note 56.

[69] MEMORANDUM D13-4-13, *supra* note 39.

made to the value for additional duties to be paid; they made it quite clear that the outside preconditions, once the service tapped in with respect to the operation of the business in Canada, cannot be something that is just a percentage.

If you have an administrative fee of five percent and you cannot match it up to any particular services, they are going to say that this is in relation to the value for the goods. So that means if the goods are not NAFTA, there are going to be additional duties, additional GST, and then there will be that border GST that I spoke about. This is a huge issue that is looming with any intercompany payment that is made between a United States company and its subsidiary, obviously the subsidiary, if it is the importer of record in Canada that is responsible for payment.

The last thing I want to raise is on July 1, 2010, Ontario and British Columbia are going to be harmonizing their sales taxes with the GST, so there will be a twelve percent tax in British Columbia[70] and thirteen percent tax in Ontario.[71] New Brunswick and Newfoundland and Labrador had already harmonized their sales taxes and each have a thirteen percent tax as well.[72] Nova Scotia announced they will be raising their GST-HST rate by two percent, so Nova Scotia's HST will be fifteen percent.[73] In Alberta, some people say they have zero percentage provincial value-added tax so that the HST rate would be at five percent.[74] The imposition of HST is going to affect businesses in the United States who are currently registered for GST purposes, because they are going to (1) need to know the place of supply rules and (2) start charging GST and HST on the goods and services and intangible property.

MS. LECROY: Cyndee, thank you very much. In the interest of time, we will proceed to the next panelist. Laurie, you are next.

---

[70] *Harmonizing Sales Taxes- What to Expect*, CBC News (June 30, 2010, 12:56 PM), http://www.cbc.ca/money/story/2009/03/27/f-tax-faq.html.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] GOV. OF ALTA., BUDGET 2010: STRIKING THE RIGHT BALANCE 157 (2010), *available at* http://www.finance.alberta.ca/publications/budget/budget2010/tax-plan.pdf (stating that Alberta has no sales tax); Rob Ferguson, *One last trim: 5% GST kicks in*, TORONTO STAR (Jan. 1, 2008), http://www.thestar.com/article/290192 (stating that the federal goods and services tax is 5%).

UNITED STATES SPEAKER

Laurie Tannous[*]

MS. TANNOUS: Good morning, everyone. My name is Laurie Tannous, and I am the vice president of Business Development for Sandler Travis Trade Advisory Services.[75] Some of the issues we will be discussing today are near and dear to my heart simply because I worked for Canada Border Services Agency from 1996 until 2003.

I was on the front line prior to, during, and following September 11. As a result, I have firsthand experiences that can offer a helpful perspective on border security. Although some of these regulatory regimes that we are discussing today can hinder trade, having hands on experience, I can definitely attest to the need for some of these regimes.

While they are needed, the system is still not perfect. The goal is to have these regimes working a little smoother than they currently are.

There are two programs specifically about which I will discuss and provide brief updates. The first is "10 + 2"[76] and the other is the Customs-Trade Partnership Against Terrorism (C-TPAT).[77] Both of these programs work. If they are used properly, they bring many benefits in terms of smoother flow of traffic and ease of goods flowing across the border.

This past January, the enforcement of "10 + 2" began here in the United States.[78] It is apparently going to be a gradual enforcement. Officials are

---

[*] Laurie A. Tannous of Sandler Travis creates and maintains global business development strategies and processes for all business lines. She also participates in new service/product development, provides direction and coordination to firm professionals regarding business development activities, and provides leadership in the development of firm materials, Web site, and branding.

An accomplished lawyer within the industry since 2004, Ms. Tannous practiced immigration and corporate law in Ontario as a barrister and solicitor prior to joining STTAS. In 2006, she became certified as a special legal consultant in the state of Michigan. She also worked for seven years for the Canada Border Services Agency as a customs and immigration officer responsible for the enforcement of Canadian customs and immigration laws and regulations. Ms. Tannous is an accomplished lecturer and a requested presenter at many trade and industry forums on matters related to marketing strategies, networking, immigration, and other customs and trade related matters.

[75] SANDLER TRAVIS TRADE ADVISORY SERVICES, http://www.strtrade.com (last visited Dec. 15, 2010).

[76] Importer Security Filing and Additional Carrier Requirements, 19 C.F.R. §§ 4, 12, 18, et al. (2008).

[77] *C-TPAT Overview*, CBP.GOV, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml (last visited Feb. 7, 2011).

[78] *See generally* U.S. CUSTOMS & BORDER PROTECTION, IMPORTER SECURITY FILING AND

going to be issuing certain letters; however, they are not planning on going into full enforcement mode until October 2010.

They are hoping that Customs and Border Protection (CBP)[79] can have educational outreach to explain what the program is, so that those affected can prepare for any changes created by the program. Without going into too much detail, they are going to be issuing program reports, and those reports are going to be used to mitigate violations later on down the road. They are planning to use these program reports this coming fall when enforcement is going to be in full effect.

C-TPAT, on the other hand, has been around for some time. I do not think everyone here really appreciates the value that this program can have, specifically for the truck industry. I was an immigration lawyer prior to having the position I now have, and, during that time, significant numbers of individuals enquired as to how they could become C-TPAT certified. Many of these individuals expressed how difficult it was to be hired because they required C-TPAT certification. I was really surprised at the number of people that came seeking that service.

Again, the goal of C-TPAT is to better secure the whole supply chain. While it is taking a longer time to educate people on what they need to do, C-TPAT to date has validated about 11,000 members, and they revalidated about 3,000 more.[80] One good thing is that there is a noticeable decrease in inspections at the border.

Trucks crossing the border still require processing, and, even if those crossing the border are being inspected, they are getting faster front-line treatment. To me, this is similar to NEXUS.[81] To illustrate, I will explain an example from my own experience. I commute every day from Windsor. I would wait, and wait, and wait. I finally applied for a Nexus card, and my wait time has significantly dropped. I parallel this with the C-TPAT program. Obtaining C-TPAT certification is a good way to prepare clients and importers for the International Shipping Federation,[82] and, as I said earlier,

---

ADDITIONAL CARRIER REQUIREMENTS (2009), *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/publications/trade/import_sf_carry.ctt/import_sf_carry.pdf (last visited Dec. 15, 2010).

[79] U.S. CUSTOMS & BORDER PROTECTION, http://www.cbp.gov (last visited Dec. 15, 2010).

[80] *See generally* Gardner Carton & Douglas, *C-TPAT Update*, CLIENT MEMORANDUM: CORPORATE CUSTOMS & INT'L TRADE PRACTICE, March 2006, at 1, *available at* http://www.drinkerbiddle.com/files/Publication/10ce0f71-c2c8-442c-acf7-09341089970e/Presentation/PublicationAttachment/0cdfa7e8-ffd7-449c-a671-0fb78e5eff36/CTPATUpdateCMMarch06.pdf.

[81] *NEXUS Program Description*, CBP.GOV, http://www.cbp.gov/xp/cgov/travel/trusted_traveler/nexus_prog/nexus.xml (last visited Dec. 16, 2010).

[82] INT'L SHIPPING FED'N, http://www.marisec.org (last visited Dec. 16, 2010).

there is a direct symbiotic relationship between them. Even if there are violations, the C-TPAT is able to mitigate problems that arise later down the road, even if drivers have only started their application.

Another item I wanted to touch on is President Obama's efforts to double exports over the next five years. Officials are excited about these efforts and emphasize the importance of working on all these programs together. What they are not taking into consideration, however, is the hindrances upon the border. There are export controls that will hinder the progress of these efforts. As Cyndee explained, the Office of Foreign Assets Control (OFAC) and the International Traffic in Arms Regulations will stop even individuals who are educated about the process dead in their tracks.

Without going into too much detail, this is the problem with the invisible border. This phenomenon certainly exists for entities owned or controlled by United States companies, and even foreign-owned subsidiaries of United States companies. They are subject to OFAC, as Cyndee mentioned, and so it can be a scary process for them. Nevertheless, there are reasons for these regulations in light of September 11.

I was on the front lines and have seen firsthand the need for protecting security on both sides of the border. I understand why it is necessary. Cyndee mentioned the significant fines that these companies can be subject to. When I was collecting my data, the number and magnitude of such fines was shocking. Regardless of where these fines originate, it is evident that companies in Canada are affected by these United States-Canada regimes.

DISCUSSION FOLLOWING THE REMARKS OF KATHRYN FRIEDMAN, CYNDEE TODGHAM CHERNIAK, AND LAURIE TANNOUS

MS. LECROY: Do we have any immediate, short questions for Cyndee or Laurie before opening up questions and discussion with the full panel?

MR. NEWCOMB: My name is Rick Newcomb. My question is for Cyndee. In 1992, when the Foreign Extraterritorial Measures Act passed,[83] there was a great deal of dismay by the government of Canada about the Cuban Democracy Act, only outdone by the Helms Burton. Also, great powers were given to us by the Canadian Attorney General. Can you tell us about Canada's enforcement history of the Foreign Extraterritorial Measures Act in 1992 and 1996?

MS. TODGHAM CHERNIAK: I can tell you that you will not find any decided cases by the federal court system in Canada relating to the Foreign Extraterritorial Measures Act. There have been a number of behind-the-scenes cases that have gone to the Attorney General where counsel and a

[83] Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29 (Can.).

number of the Canadian firms have worked cooperatively with the government counterparts to resolve issues. One of the two most famous cases involves Walmart.[84] Walmart United States told Walmart Canada to remove the Cuban pajamas from its racks, and Walmart Canada complied.[85] That caused the Attorney General to take action against Walmart Canada.[86] The Cuban pajamas were eventually returned to Walmart Canada stores.[87]

There is another case where an individual from Canada was prosecuted in the United States because of his Cuba-related activities.[88] Now there is a Cuban watch group in Canada that is active and notifies the government if they hear of these sorts of issues.[89] As a result of this watch group, there have been a couple of cases that have come to my attention.[90]

What Canadian counsel does across the border, though, is simply try and find a resolution to the issue: for the most part, they have success, and do so without blowing the issues out of control. I think success is found in managing the differences between the two pieces of legislation.

MR. NEWCOMB: As a follow-up question, are you aware of any fines or prosecutions by the Office of the Attorney General?

MS. TODGHAM CHERNIAK: I am aware of issues that have arisen that needed to be addressed. I would not say that there have not been any fines. However, I will say the details are difficult to discuss because each resolution is subject to confidentiality restrictions.

MR. ROBINSON: I can offer some clarification, without giving any specifics, because the issue has come up at my office as well. The rule of thumb appears to be to follow two obligations: (1) to notify; and (2) not obey the instructions, despite pressure from the United States.

---

[84] H. Scott Farley, Remarks at the American Bar Association, International Law Section Fall Meeting: Damned if You Do, Damned if You Don't: National Regulation of Investment and Trade with Cuba (Oct. 28, 2009), *available at* http://apps.americanbar.org/intlaw/fall09/materials/Fairley_Scott_Damed%20if%20You%20Do.pdf; *see also* John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 L. & POL'Y INT'L BUS. 439, 440-41 (1999).

[85] Farley, *supra* note 84, at 6.

[86] *See id.*

[87] *Id.* at 6.

[88] United States v. Brodie, 174 F. Supp. 2d 294 (E.D. Pa. 2001) (denying a Canadian citizen defendant's motion to dismiss indictment charging violations of the Trading with the Enemy Act and the Cuban Assets Control Regulations under the foreign sovereign compulsion doctrine).

[89] *See generally* H. Scott Fairley, *Between Scylla and Charybdis: The U.S. Embargo of Cuba and Canadian Foreign Extraterritorial Measures Against It*, 44 INT'L LAW. 887 (2010) (discussing instances of Canadian businesses operating subsidiaries in the United States and American businesses operating subsidiaries in Canada having difficulties as a result of the United States' embargo of Cuba).

[90] *See generally id.*

Clients are informing; they file a notice to indicate that they have been pressured by the general counsel of a certain corporation and told not to have anything to do with Cuba.

Clients send a copy of this notification in to Ottawa, and they gather on the desks of officials. These officials do not follow up to determine whether there was compliance. Really, it depends on your point of view whether the issue is a festering boil or a non-issue. Usually, in Canada-United States relations, issues are going to be worked out diplomatically.

MS. LECROY: There is a question in the back.

MR. CAMERON: Don Cameron. Cyndee, you mentioned that in Canada you have a lot of simultaneous dumping and countervailing duty cases brought against Chinese respondents, while the United States does not do that. I just wanted to point out that since about 2007 when the United States decided that it could apply a countervailing duty to an MME country,[91] this has been the methodology in the United States as well. This creates a number of legal problems in terms of double counting, but this is nevertheless the case. In most cases, officials are bringing cases under both subsidies: countervailing duties and dumping. There are 600% margins because that, of course, is a realistic number. This was just an observation.

MS. TODGHAM CHERNIAK: I accept that observation. There have been some cases coming through in the last two years.

MS. LECROY: Dan.

MR. UJCZO: Thank you. These last presentations were extremely informative regarding the current state of affairs at the border. For those of us that are in this business that deal with people crossing the border, from what we hear on the ground every day, I can certainly appreciate the level of Customs-Trade Partnership Against Terrorism (C-TPAT) verifications that are going forward.

I understand they have been encouraging C-TPAT certifications because we must have verifications. We are hearing two things, however, with the C-TPAT and trust and travel programs. One issue is regarding infrastructure. It is great to have a NEXUS card if you are sitting in the Detroit-Windsor tunnel, but there may be a two-hour lineup to cross.

The other issue deals with drugs: drug dealers are smart people. I spent six and a half years around guns, drugs, and thugs in the federal court system, and they are innovative people. Immigration and Customs Enforcement and others know this, so they are actually now inspecting C-TPAT certifications.

---

[91] *See generally* Harry L. Clark et al., *Movement Towards a US Countervailing Duty Remedy for Chinese Goods That Are Found to be Subsidized*, 2007 INT'L TRADE L. REV. 136, *available at* http://www.deweyleboeuf.com/en/People/C/~/media/Files/attorneyarticles/MovementTowardsaUSCountervailingDutyRemedyforChineseGoodsThatAreFoundtobeSubsidized.ashx.

With increasing frequency, officers are saying they look at these certifications more closely, because drug dealers know that if they go to a C-TPAT approved carrier, they can get their contraband across the border. That is an issue we are dealing with on a daily basis.

Highlighting both of these issues is just a long way of saying that we are constantly "chasing the ball" in regard to the border. What program do we create next? If you had to pick three things that our North American leaders could do to deal with the border, what would they be?

MS. TODGHAM CHERNIAK: Canada has Partners in Protection (PIP),[92] which is a similar program to the Customs-Trade Partnership Against Terrorism.[93] Canadian companies are not signing up for PIP in significant numbers, but if there could be some mutuality between the two, that would be extremely helpful.

MS. TANNOUS: Speaking on the infrastructure issue, whether or not you have NEXUS, if you are stuck in traffic, you are simply not going anywhere. I have been to meetings on the subject, so I can definitely agree that infrastructure is a significant issue.

Regarding the other issue, it is just taking a long time to complete the project. The initial intent was to have all data in one central place, without having to use the manual documents.

MS. FRIEDMAN: I think there has been progress made in terms of governance. Meetings at the highest levels, between the Minister of Public Safety and Secretary of Homeland Security, are taking place twice a year. However, issues at the border are still extremely challenging, because, as I mentioned earlier, what is happening at the northern border is akin to a slow burn. September 11 was a shock to the system that was already in place. The ramifications were immediately felt and seen. What is happening now is unlike September 11; it is happening slowly, over a space of time. You are seeing increased regulations, increased transaction costs, declines in flows; and, as a result, the ramifications are much harder to pinpoint. Many people feel the consequences of this, but, in large part, it is all happening "under the radar." Because it is happening slowly, it is very difficult to get policymakers to pay attention to these issues when they are distracted by seemingly more pressing issues such as Afghanistan, Iraq, and healthcare. This may not answer your question directly, but I think it sets forth some of the challenges in getting them to the table.

MR. FUNG: David Fung. Every time, Canadians and Americans fall into the same track. We need to get out of the track. North America is the

---

[92] *Partners in Protection*, CAN. BORDER SERVICES AGENCY, http://www.cbsa-asfc.gc.ca/security-securite/pip-pep/menu-eng.html (last updated July. 9, 2010).

[93] *C-TPAT Overview*, *supra* note 77.

only continent in the world that uses regulations to stop the use of marine traffic.

You can go to the Great Lakes, or the Cleveland Harbor and look out there. You would see that it is quiet. There is no traffic. We are the stupidest people in the whole world: we have the greenest way of moving products but use regulations to stop it. The Customs-Trade Partnership Against Terrorism is a great thing; however, there is a huge traffic lane out there in the Great Lakes that we are not using. What is stopping the use of that resource is the United States Harbor Maintenance Act.[94] The port of Oshawa, for example, was built fifty years ago by the United States and Canada as part of the St. Lawrence Seaway.[95] Nineteen ports are on the St. Lawrence Seaway, and almost none of them are being used.[96]

Can you believe that these countries invested in nineteen ports, and we use regulations to stop them all? What do we do? We turned the world's biggest seaway into only a commodity seaway. If I have a load of auto parts from General Motors (GM) Oshawa, I can put my goods on a truck that will travel several hundred kilometers to Windsor-Detroit to line up on the Ambassador Bridge and wait to cross the border. Meanwhile, there is a ferry that crosses from Windsor to Detroit with much greater ease.

But GM cannot afford to put that truck on to the ferry, because when it arrives on the other side, it would have to pay the United States Harbor Maintenance Act levy.[97] This is how we are killing ourselves. There must be vested interests that are stopping us from doing that. For once, let us turn those Great Lakes into competitive traffic lanes.

MS. TODGHAM CHERNIAK: My original list had the harbor maintenance fee as a distraction to trade across the border. I agree that these additional fees will increase the cost of goods, especially from a Canada-United States trade perspective.

MS. LECROY: Unless there are other questions, I would like to conclude this panel. Thank you very much.

---

[94] S. 3213, 111th Cong. (2010).

[95] *See generally* Roger William Benedict & Pierre Camu, *Saint Lawrence River Seaway*, HISTORY.COM, http://www.history.com/topics/saint-lawrence-river-and-seaway (last visited Dec. 16, 2010).

[96] *See generally* D'ARCY JENISH, THE ST. LAWRENCE SEAWAY: FIFTY YEARS AND COUNTING (2009), *available at* http://www.greatlakes-seaway.com/en/pdf/Jenish_en.pdf.

[97] S. 3213.