The CITT allowed the importers’ appeals and ordered refunds of the duties paid by the importers. In all three cases, the imported goods were declared as U.S.-origin and duty-free under the MFN tariff treatment. To maintain the duty-free status of the imported goods on the tariff classification change, the importers contemporaneously “corrected” or adjusted the tariff treatment from MFN to UST.

The CBSA sought to deny the appeals on three main grounds: First, the CITT lacked jurisdiction to consider the appeals because the CBSA had not re-determined the tariff treatment. Second, the MFN tariff treatment was “not incorrect” because either the MFN or UST could have been originally declared. Third, since the importers were claiming duty refunds, the claims made beyond one year from accounting for the imports were statute-barred.

All three grounds were rejected by the CITT. With respect to the first argument above, the CITT found that the CBSA had re-determined the tariff treatment from UST to MFN when the CBSA rejected the importers' corrections from MFN to UST. On the second argument, it was open to the importers to choose to declare the UST instead of the MFN when the imported goods were re-classified.

Finally, the CBSA rejected the third argument, as no duties had been paid when the goods were imported. When the corrections were made, there were no duties to be refunded. They were revenue neutral corrections. To satisfy a condition of appealing the CBSA’s tariff treatment re-
NAFTA Preferential Treatment Claims (cont’d from page 1)

determinations (decisions), the importers subsequently paid the duties assessed by the CBSA.

On that basis, the importers did not make duty refund claims and were not limited by the one-year claim period. The duty relief extended back four years from the time when the corrections were made. All these issues had previously been resolved in an earlier CITT decision in Frito-Lay Canada Inc. v. President of the CBSA (“Frito-Lay”). In that case, the CBSA discontinued its appeal to the Federal Court of Appeal. Instead of directly challenging the CITT’s decision through legal recourse, the CBSA chose, as a matter of deliberate administrative policy, to ignore the CITT’s decision in Frito-Lay and even acknowledged in its administrative policy that treating the corrections as duty refund claims is not legally authorized because no duties had actually been paid. By deliberately impeding the application of the Frito-Lay decision to importers making duty relief claims that matched those approved in Frito-Lay, and thereby negating the precedential value of the decision, the CBSA’s conduct constituted an abuse of process.

Despite these issues being litigated, re-litigated and decided consistently each time by the CITT, there remains uncertainty as to the proper application of the law to circumstances like those seen in Frito-Lay and the Trilogy. On December 16, 2015, the CBSA appealed the Trilogy to the Federal Court of Appeal.

How Has Globalization Changed Free Trade?

by Maureen Thorson, Wiley Rein

At the ABA Section of International Law fall meeting, held October 20-24 in Montreal, the Customs Law Committee sponsored a panel discussion entitled How Has Globalization Changed Free Trade? The panel was moderated by committee co-chair Les Glick, and featured attorneys from Mexico, Canada, and Vietnam, discussing the rise of multiple, overlapping free trade agreements (FTAs) and their effects on international commerce.

Panel moderator Les Glick kicked things off by noting the recent announcement of the successful conclusion to the Trans-Pacific Partnership negotiations, noting that it cast new light on the panel’s topic of discussion, as well as underscoring its importance.

Mr. Glick then turned things over to panel chair Daniel L. Kiselbach, of Deloitte Tax Law’s Vancouver office, and Katherine Xilinas of Vancouver’s Cousin Taylor LLP. Mr. Kiselbach and Ms. Xilinas discussed how increased integration and interaction as a result of globalization had prompted the rise in FTAs, essentially creating a feedback loop in which FTAs fueled further globalization, and thereby fueled future FTAs. Mr. Kiselbach and Ms. Xilinas then discussed how the North American Free Trade Agreement (“NAFTA”) promoted not only trade between Mexico, Canada, and the United States, but spurred regional competitiveness with other trade partners, by integrating supply chains. They then discussed how TPP, sometimes described as “NAFTA 2.0,” could eclipse the original agreement, despite the fact that both NAFTA and TPP would technically be in place simultaneously. In this regard, they noted that under parallel application of NAFTA and TPP, producers and exporters would be able to choose the rules of origin most favorable to them, and rely on these when exporting. This might, for example, lead to certain trade shifts with respect to automotive goods, where the TPP rules of origin are somewhat less restrictive than NAFTA’s.

Next, Tuan A. Phung of VCI Legal in Ho Chi Min City discussed Vietnam’s experience with FTAs, comparing and contrasting TPP against China-led regional political and economic organizations, such as the Association of Southeast Asian Nations. Mr. Phung noted that TPP ventured beyond simple tariff reduction and market access, involving commitments on state-owned enterprises, as well as environmental and labor rights. TPP, in his estimation, would have significant positive export effects for Vietnam, but could potentially be disruptive to the country’s agricultural industries, which remain predominately local and unmodernized.

Further, he indicated that Vietnam’s reliance on state-owned production would likely be an issue in the rollout of the agreement, noting that approximately forty percent of Vietnam’s gross domestic product is attributable to state-owned enterprises. However, the agreement represents a big opportunity for Vietnam’s textile and apparel industry to push into new markets and to attempt to unseat China as a source of supply. That said, because Vietnam’s textile’s industry is inadequately supported by local production of components and accessories, China may have a role in feeding such inputs into Vietnam.

Finally, Gustavo Uruchurtu, of Mexico City’s Uruchurtu y Asociados Abogados, took the floor to discuss the Mexican experience with FTAs. He observed that Mexico’s forays into regional agreements had resulted in a number of changes to the country’s legal and judicial systems. In particular, investor-state dispute resolution had led to greater rule of law and predictability in the administration of the economy, spurring increased manufacturing operations, particularly in the automotive, aeronautic, and textile sectors. Mr. Uruchurtu stated that TPP was poised to expose Mexico to greater competition for supplying the U.S. market. In

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Spotlight on Committee Leadership: Vice Chair Shama Patari

Shama Patari is an associate in Barnes/Richardson’s Chicago, IL office where she advises foreign and domestic companies on all aspects of international trade regulation, planning and compliance, including customs, export controls, economic sanctions, embargoes, international trade agreements and preference programs. Shama represents clients across various industries, including automotive, agricultural commodities, petroleum, plastics, steel, textile and apparel, and consumer electronics.

Shama’s practice in customs law includes issues of tariff classification, valuation, country of origin marking, preferential duty programs, foreign trade zone administration, customs audits, logistics security, seizures, penalties and voluntary disclosures. Her practice in export issues focuses on compliance and enforcement of the U.S. export control regulations and economic sanctions regimes. Shama has assisted clients in obtaining necessary government approvals related to the export or transfer of their products, software, technology and services.

Shama has represented both foreign and domestic clients before U.S. Customs and Border Protection, the Department of Commerce, the U.S. International Trade Commission, the Office of the U.S. Trade Representative, the Bureau of Industry and Security, the U.S. Department of State, as well as the Court of International Trade and the Court of Appeals for the Federal Circuit.

Shama is actively involved with the U.S. and International Trade Law Committee of the Chicago Bar Association. She is also a member of the Customs and International Trade Bar Association and Organization of Women in International Trade.

In her spare time, Shama volunteers at a pro bono legal services clinic, teaches and performs in the Indian traditional dance style of Bharatanatyam, and spends time with her husband and son.

How Has Globalization Changed Free Trade? (cont’d from p. 2)

order to preserve the gains it has achieved through NAFTA, while keeping China at bay, Mexico will need to better develop its capacity for manufacturing hi-tech components.

The panelists concluded by discussing the potential interplay of NAFTA with TPP. For example, there is an open question as to whether NAFTA’s Chapter 16, dealing with temporary entry for business persons, is now outdated. The chapter’s provisions are less broad than those established in the Canada-EU Comprehensive Economic Trade Agreement (CETA), for example, and if not reviewed and updated, could be left behind by TPP or other agreements. The panelists also discussed the potential effects of TPP on Canada’s dairy and agricultural subsidies system. Finally, the panelists discussed the mechanisms by which TPP would be integrated into national law, with Mr. Uruchurtu noting that, unlike in the United States or Canada, FTAs in Mexico are self-executing, and become part of national law upon entry into force.

The Committee welcomes contributions to the newsletter, including summaries of committee events and developments from other jurisdictions. If you are interested in contributing, please contact the Committee’s vice-chairs for Publications.

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