CLIENT ALERT

The Month in International Trade – December 2017

January 12, 2018

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This news bulletin is provided by the International Trade Group of Crowell & Moring. If you have questions or need assistance on trade law matters, please contact Jeff Snyder or any member of the International Trade Group.

TOP TRADE DEVELOPMENTS

EU Court of Justice Significantly Limits Use of Related Party Transfer Prices for Customs Value

On December 20, 2017, the Court of Justice of the European Union (CJEU) decided that a company may not use transaction value for customs valuation purposes when a transfer price consisted of both an amount initially invoiced and declared, and a flat-rate adjustment made after the end of the accounting period.

The Community Customs Code (CCC) and its related jurisprudence provides that customs value must be determined primarily according to the transaction value method, with the price actually paid or payable for the goods to be adjusted where necessary to avoid establishing an arbitrary or fictitious customs value. The CJEU found that uncertainty regarding future adjustments at the end of the accounting period made it impossible for the transfer price to be used as the transaction value for imports into the EU.

The case involved the Principal Customs Office of Munich and German company Hamamatsu Photonics Deutschland GmbH (Hamamatsu Deutschland), a subsidiary of Hamamatsu Photonics of Japan. Hamamatsu Deutschland purchased imported goods

from its parent in Japan at intra-group prices subject to an advance pricing agreement concluded between the group of companies and the German tax authorities. The amounts charged by the parent to Hamamatsu Deutschland were regularly checked and adjusted as needed for the sales prices to conform with the arms-length principle.

The CJEU confirmed that a post-importation adjustment to the transaction value is limited to specific situations (*e.g.*, quality defects or faulty workmanship in the goods discovered after their release for free circulation). In addition, it stated that the CCC "does not impose any obligation on importer companies to apply for adjustment of the transaction value where it is adjusted subsequently upwards and it does not contain any provision enabling the customs authorities to safeguard against the risk that those undertakings only apply for downward adjustments." Accordingly, the CJEU held that the CCC does not allow for a subsequent adjustment of the transaction value such as in this case to be taken into account for customs valuation purposes.

The fact that the judgment is based on the CCC rather than the Union Customs Code, which entered into force and replaced the CCC on May 1, 2016, is unlikely to affect the applicability of the CJEU's conclusions. However, differences may arise in the manner in which individual EU Member States will apply the relevant provisions.

In practical terms, companies may no longer be able to rely on transaction value for EU imports if they make transfer price adjustments. While the ultimate customs value of goods is unlikely to change significantly, companies will instead have to rely on alternative valuation methods (*e.g.*, the deductive valuation method or computed value) requiring incomplete or "simplified" declarations that must be reconciled within a fixed time period after their submission. These alternative approaches are more burdensome from a compliance perspective and may increase the risk of penalties for companies with a high volume of customs entries.

Conversely, the U.S. continues to allow importers to use the transaction value method of appraisement in instances involving downward and upward transfer pricing adjustments. Such adjustments are typically made through U.S. Customs and Border Protection's (CBP) Reconciliation Program, which provides importers the opportunity to declare the value of imported merchandise based on the best information available at that time and later follow up with a downward or upward adjustment within the prescribed time frame. While the Program may be used for other types of adjustments (*e.g.*, post-importation proceeds paid to foreign vendors, assists unknown at the time of importation, etc.), it is more common in the context of intercompany payments between related parties, often pursuant to advance pricing agreements. To the extent that an importer is not participating in CBP's Reconciliation Program, or fails to make the appropriate adjustments within the available period prescribed by CBP for reconciliation, other avenues of recourse may include prior disclosures (in the case of an upward adjustment, *i.e.*, duty owing) and protests (in case the case of downward adjustments, *i.e.*, duty refund).

Few countries have formal programs, like CBP's Reconciliation Program, available for importers to report such adjustments. Companies importing into multiple jurisdictions should consider reviewing the requirements of each jurisdiction from a transfer pricing adjustment perspective. In that regard, a company would want to confirm on a per country basis that the proper method of appraisement is used at the time of importation; the underlying transaction meets the related-party pricing arm's length requirement; and any adjustments, if required, are properly managed; among other concerns.

Further, since noncompliance, depending on the country, may result in the issuance of penalties, companies may also want to consider performing an analysis as to whether dedicating more internal resources (*e.g.*, staffing, training, etc.) and developing additional processes would be of benefit.

For more information, contact: Jeff Snyder, John Brew, Charles De Jager, Frances Hadfield, Amanda Simpson

NAFTA NEGOTIATIONS CONTINUE - MAJOR OUTCOMES STILL UNCERTAIN

NAFTA negotiators at the working level met intersessionally from December 9-15 in Washington D.C., conducting technical discussions on digital trade, financial services, customs, energy, state-owned enterprises, and textiles, among other chapters.

No chapters were closed during the latest meeting. Negotiators also mostly avoided addressing in detail the most controversial proposals tabled by the United States at the fourth round of negotiations last October (*i.e.*, rules of origin for automobiles, dispute settlement, the "sunset clause," or procurement). These will likely be discussed at the next formal round on January 23-28.

However, some of the chapters discussed during the December meeting did cover substantive areas of disagreement remaining between the U.S., Canada, and Mexico:

Chapter	**U.S. proposal facing Canadian and/or Mexican opposition**
Digital Trade	Inclusion of safe harbor liability protections for internet companies
Textiles	Elimination of tariff preference levels (TPLs) for certain textile goods that do not meet rules of origin criteria
Customs	Increase level of eligibility for *de minimis* exemptions to U.S. value of $800

Meanwhile, Congressional and industry stakeholders continued their push to persuade the White House to back away from the controversial proposals that could jeopardize the talks or lead to U.S. withdrawal. Groups of Republican Senators including Sen. John Thune (South Dakota), Cory Gardner (Colorado), Pat Roberts (Kansas) and Lindsey Graham (South Carolina) met with President Trump and Vice President Mike Pence in December and early January to express their reservations with the Trump administration's current approach. Executives from General Motors, Fiat Chrysler, and Ford also met with Vice President Pence and U.S. Trade Representative Robert Lighthizer in late November.

The next January round is likely to be a pivotal moment for the course of negotiations. If Canada and/or Mexico again decline to present counteroffers on the various controversial U.S. proposals, they could force President Trump to initiate the process of U.S. withdrawal—or concede that his previous threats were a bluff. On the other hand, substantive counteroffers by Canada and/or Mexico could create a path forward for the Trump administration to achieve its renegotiation objectives. Mexico's Secretary of Economy, Ildefonso Guajardo, suggested in remarks on January 9 that his government could accommodate an autos rule of origin with a higher regional content value requirement—a potential sign of Mexico's willingness to negotiate on U.S. demands.

For more information, contact: Robert Holleyman, Melissa Morris, Evan Yu

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NEW U.K. CUSTOMS BILL: OPPORTUNITIES NOW FOR STAKEHOLDER ENGAGEMENT

Because the U.K. will require its own customs laws following its exit from the European Union, the U.K. Government has issued a White Paper outlining the options for the customs policy to be pursued by the U.K. from March 2019 onwards. In the context of the ongoing withdrawal negotiations with the EU and in view of the new Customs Bill's passage, the U.K. Government is now following through on an important commitment made in the White Paper to engage with stakeholders and receive their comments.

The U.K. Government states that it seeks to ensure that U.K.-EU trade will remain as frictionless as possible while an independent international trade policy, including customs, is established for the U.K. The White Paper thus focuses on seeking a negotiated outcome, including an interim implementation period, that would provide certainty for businesses under one of two options – either (i) a "highly streamlined customs arrangement" between the U.K. and EU that introduces customs formalities but minimizes their impact as much as possible, or (ii) a "new customs partnership" with the EU that supports U.K.-EU trade outside the customs union, but without customs processes at the border. Out of prudence, however, the White Paper also proposes options aimed at minimizing disruption for businesses in the event the U.K. and EU do not conclude a deal on the terms of exit.

The Customs Bill will empower the U.K., at least theoretically, for the first time in many decades to determine autonomously the classification, tariffs, and quotas applicable to imports into the U.K. It will also cover the manner in which the U.K. Government may amend and implement the Value Added Tax (VAT) and excise regimes, as well as the rules governing the collection and enforcement of taxes and duties owed in the context of trade.

Therefore, the opportunity to participate in current stakeholder engagement efforts coordinated by the U.K. Government in this context is an important one.

For more information, contact: Michelle Linderman, Charles De Jager

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WTO MINISTERIAL CONFERENCE FAILS TO DELIVER MEANINGFUL RESULTS

The 11th biennial ministerial conference of the World Trade Organization in Buenos Aires, Argentina failed to deliver any concrete results. As EU Trade Commissioner Cecilia Malmström bluntly stated, "[W]e failed to achieve all our objectives, and did not achieve any multilateral outcome."

The main areas of contention were agriculture and fisheries, involving the failure to agree on modalities to protect developing countries' ability to ensure their populations' food security through public purchase and stockpiling of foodstuffs and the failure to agree to ban subsidies for illegal, unreported, and unregulated fishing, respectively.

Trying to put a positive spin on the outcome of the meeting, certain officials, including WTO Director-General Roberto Acevedo, sought to emphasize newer areas in which discussions may progress in the year ahead. Foremost among these is e-commerce, with respect to which more than sixty WTO members including the U.S. and EU have launched a new working group to determine to what extent current trade rules can be applied and to establish a foundation for any future negotiations in this context. Other areas in which discussions may progress include the harmonization of services regulation, and assistance to micro, small, and medium-sized enterprises.

In terms of challenges ahead for the WTO, the U.S.' persistence in pursuing unilateral trade remedies and bilateral negotiations based on a narrowly domestic outlook, as well as its continued blocking of appointments to the WTO Appellate Body, could have a long-lasting negative impact. In addition, India will reportedly host in 2018 a mini-ministerial meeting of approximately forty like-minded countries resisting pressure to negotiate new trade issues like e-commerce or perceived non-trade issues like environmental and labor standards until such time as their concerns as developing countries, especially with respect to agriculture, are addressed.

On a more constructive note, Commissioner Malmström sought to emphasize the nature of the WTO as a global public good to which the EU attaches enormous value and to reiterate the EU's commitment to "do what is necessary to support it if it comes under further pressure." This statement echoed the Declaration in Support of the Multilateral Trading System circulated by 46 like-minded developed and developing WTO members at the beginning of the ministerial conference.

For more information, contact: Charles De Jager

RUSSIAN COMPANIES SUPPORTING NEW CRUISE MISSILE ADDED TO BIS ENTITY LIST

On December 20, the Bureau of Industry and Security (BIS) added two Russian companies to its Entity List because they provided technology which aided the development of a new Russian cruise missile—the nuclear-capable Novator 9M729 missile (designated by NATO as the SSC-8)—which the U.S. alleges is a violation of the 1987 Intermediate Nuclear Forces Treaty (INF).

BIS's action is part of the new Trump Administration INF Treaty Integrated Strategy. It states, "While the United States will continue to pursue a diplomatic solution, we are now pursuing economic and military measures intended to induce the Russian Federation to return to compliance." In addition to the first BIS designations related to alleged INF treaty violations, the U.S. is beginning research and development on its own new nuclear cruise missile, an action that Russia is alleging represents a separate violation of the INF Treaty.

The two designated parties are: (1) Joint Stock Company Experimental Design Bureau Novator; and (2) Joint Stock Company Federal Scientific and Production Center Titan-Barrikady.

For more information, contact: Carlton Greene, Cari Stinebower, Chris Monahan, Dj Wolff, Erik Woodhouse

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ENFORCEMENT ACTIONS FOR DECEMBER

Office of Foreign Assets Control (OFAC)

- On December 6, OFAC announced that DENTSPLY SIRONA Inc. (DSI), a U.S. company incorporated in Delaware, the successor in interest to DENTSPLY International Inc. (DII), agreed to pay $1.2 million to settle its potential civil liability for 37 apparent violations of the Iranian Transactions and Sanctions Regulations. Between 2009 and 2012, DII subsidiaries exported 37 shipments of dental equipment and supplies from the U.S. to third countries, with knowledge or reason to know the goods were ultimately destined for Iran. OFAC determined this was a non-egregious case and that DII did not voluntarily disclose the apparent violations.
    - Aggravating factors included:
        - The subsidiaries acted willfully and had knowledge or reason to know the goods were destined for Iran;
        - Management knew of the apparent violations; and
        - DENTSPLY is a large and commercially sophisticated company with knowledge of U.S. sanctions requirements.
    - Mitigating factors included:
        - DENTSPLY had not received a penalty notice or Finding of Violation from OFAC in the five years preceding the date of the first transaction, although DENTSPLY was previously the subject of a settlement involving substantially similar apparent violations in 2001;
        - The harm to the ITSR program objectives was limited because the exports were likely eligible for a specific license;
        - DENTSPLY took remedial steps, including voluntarily expanding the scope of the review to include a full, company-wide inquiry following a subpoena to one of its subsidiaries that led to the subsequent revelations involving the other subsidiary; and
        - DENTSPLY cooperated with OFAC's investigation, including by providing detailed and well-organized information for its review, and by agreeing to toll the statute of limitations for a total of 1,104 days.

For more information, contact: Jeff Snyder, Edward Goetz

CROWELL & MORING WELCOMES

Dainia Jabaji is an associate in Crowell & Moring's International Trade Group and a resident in the firm's Washington, D.C. office. She joins us after four years at HSBC Bank USA, N.A., where she worked as a Bank Secrecy Act (BSA)/Anti-Money Laundering (AML) and Regulatory Analyst and Vice President for U.S. Economic Sanctions. Dainia investigated complex breaches of Office of Foreign Assets Control (OFAC)-administered sanctions, and managed a team of investigators performing in-depth research into potential OFAC violations. She also researched, identified, and analyzed BSA/AML matters pertaining to corporate and financial institution clients. Prior to joining HSBC, she worked at two boutique law firms. At Crowell, Dainia's practice will focus on sanctions, BSA/AML, and other financial crime issues, drawing on her in-house and financial industry experience.

Sejong Kim is a law clerk in the firm's D.C. office, working with clients on unfair trade law matters. Although currently enrolled as a full-time student at the University of Arizona's James E. Rogers College of Law, Mr. Kim has considerable previous work experience. Prior to law school he was a financial and cost accounting analyst at The International Trade Consulting Company in Seoul, Korea, where he consulted on accounting and legal issues including anti-dumping and countervailing duties under World Trade Organization regulations. In this role he prepared domestic anti-dumping petitions, conducted differential pricing analyses, cost of production tests, cost and sales reconciliations, and the calculation of dumping margin ratios. He also advised on rules of origin according to Free Trade Agreements (FTAs), including analyzing the Harmonized Commodity Description and Coding System to ensure compliance with FTA rules, and compared various provisions of FTAs. Mr. Kim also worked in Seoul as an accountant at Yejyo & Seonjin Accounting Corporation, as a senior consultant at CalebABC Accounting Corporation, and as an insurance sales agent at New York Life Korea. He is a native speaker of Korean, is fluent in English and is conversational in Chinese, and has a Bachelor of Arts in Law from Hanyang University in Seoul and an American Law Specialist Certificate from KOABELS American Law Research Institute, *summa cum laude*.

CROWELL & MORING SPEAKS

On February 9, Carlton Greene and Frances Hadfield will be speaking at the Federal Bar Association's 5th Annual Fashion Law Conference at the Theresa Lang Center at The New School in New York. Carlton will be a panelist for "Financial Crimes and Fashion." This panel will examine the risks of economic sanctions and money laundering liability in the fashion industry as well as whistleblower litigation pursuant to the False Claims Act. Frances Hadfield will be speaking on a panel entitled, "Trump's NAFTA Renegotiation: Potential Changes and Impacts to Brands, Apparel, and Textiles." This panel will survey the impact of the Trump administration's renegotiation of NAFTA on the fashion industry, and how counsel should advise clients in navigating this potential new landscape.

On March 13, Chris Monahan will be speaking at the International Compliance Professionals (ICPA) 2018 Conference in San Diego, CA. His talk will be "2017 Export Year in Review."

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