TradeWatch

Volume 17, Issue 1 March 2018

EY Global Trade

Quarterly update

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US President Trump imposes tariffs on steel and aluminum products — Mexico and Canada excluded

On 8 March 2018, United States (US) President Trump signed presidential proclamations imposing additional tariffs of 25% on specifically defined articles of steel and additional tariffs of 10% on specifically defined articles of aluminum, effective on 23 March. Both proclamations specifically exclude Canada and Mexico and leave the door open to approving exemptions for additional countries that are able to reach agreement with the US on "satisfactory alternative means to address the threat to the national security" caused by imports from that country.

The imposition of tariffs follows the US Department of Commerce's investigations and recommendations to the President under Section 232 of the Trade Expansion Act of 1962, as amended, which concluded that imports of certain steel and aluminum products "threaten to impair the national security of the United States."[1]

According to published information from the Department of Commerce, the top international sources of steel imported into the US are Brazil, Canada, Germany, Japan, Mexico, Russia, South Korea and Turkey, each exporting one million metric tons or more of steel annually to the US. The Department of Commerce aluminum investigation under Section 232 found that the top exporters of aluminum into the US are Argentina, Bahrain, Canada, China, India, Qatar, Russia, South Africa and the United Arab Emirates. Canada alone accounts for roughly 50% of the aluminum imports into the US.

The articles that fall under the scope of the steel proclamation are as follows: (a) carbon and alloy flat products (sheets, strips and plates); (b) carbon and alloy long products (bars, rails, rods and beams); (c) carbon and alloy pipe and tube products (pipe and tube products); (d) carbon and alloy semifinished products (semifinished products such as blooms, billets, slabs and ingots); and (e) stainless products: steel products, in flat-rolled, long, pipe and tube, and semifinished forms, containing, at minimum, 10.5% chromium and, by weight, 1.2% or less of carbon, offering better corrosion resistance than other steel.

[1] See EY Global Tax Alert, US Department of Commerce proposes duty surcharge on steel and aluminum imports, dated 20 February 2018.

These products are classified under the Harmonized Tariff Schedule (HTS) subheadings 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90.

The articles that fall under the scope of the aluminum proclamation are as follows: (a) unwrought aluminum; (b) aluminum bars, rods and profiles; (c) aluminum wire; (d) aluminum plate, sheet, strip and foil (flat-rolled products); (e) aluminum tubes and pipes and tube and pipe fitting; and (f) aluminum castings and forgings. These products typically fall under HTS headings 7601, 7604 through 7609, and 7616.99.51.60 and 7616.99.51.70.

The presidential proclamations follow reports from the Department of Commerce issued on 16 February recommending additional tariffs. To address certain articles in which the Commerce Secretary determines there is a lack of sufficient US production capacity of comparable products in response to specific requests from affected domestic parties, the President, through the proclamations, has provided authorization to the Commerce Secretary to exclude import restrictions on those steel articles as necessary.

A number of countries have warned of retaliation in the event that the US adopted the additional tariffs. The European Union (EU) Commission, meeting on 7 March, endorsed a proposal of potential countermeasures against US products, ranging from US steel, agricultural products, bourbon and peanut butter, to cranberries and orange juice. China and South Korea have also stated that they are reviewing options. As with the EU proposal, actions by a country believed to be injured by the additional US duties on steel and aluminum could impact a wide range of US exports.

Companies importing steel and aluminum products under the scope of both orders, and those that use steel and aluminum products, may be significantly impacted by the additional duties imposed. It will be difficult for many companies to adjust supply chains or sourcing patterns quickly, if they can be adjusted at all, and consequently may incur significant excess costs. Impacted business should review sourcing options and consider short supply exemptions if merited.

US exporters will want to carefully monitor reactions of primary export locations, as the scope of any retaliatory measures could be very broad.

Look for updates in future issues of *TradeWatch*.

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Brazil

Update: Authorized Economic Operator program in Brazil undergoes a third change

Recently, on 26 January 2018, the Authorized Economic Operator (AEO) program in Brazil went through yet another change, the third one since its launch in December 2015.[2]

This change is as impactful as the second one (when the Risk Map was implemented), but, in this case, the changes additionally demonstrate the Brazilian Customs authorities' more thorough understanding of the program's role, as well as the approach used to evaluate companies' controls and conformity with customs legislation.

The changes were based on experience with the program over the past two years. Both companies and the Customs authorities have undergone a learning process with the program so far, and the new regulation appears to bring a more solid and efficient way for companies to complete the required application process, as well as to enable the Customs authorities to analyze the submitted information and make decisions in less time.

A comparison of the old and new versions of the application requirements helps to clarify what has really changed.

The old version of the application process included a questionnaire with 95 questions and a Risk Map with around 170 rows and 3 levels of risks to be measured. The new version has excluded the Risk Map and merged the risk events into the questionnaire, which now consists of around 120 questions, including questions and sub-questions, listed under points a, b, c, d and so on.

The new application process appears simpler than before, but actually, it is not easier. The work to be done going forward is much more focused not only on the preparation of the answers and support documentation, but also on the production and improvement of the support documentation itself.

Unlike before, the Customs authorities now expect from the applicant a presentation of written and duly implemented workflows, desk procedures and working instructions covering content that addresses the concerns stated with each sub-question. It is apparent that the goal of this change is to make the program more efficient, as well as to facilitate analysis by the Customs authorities of the almost 200 requests currently pending approval.

[2] Brazil's AEO program was discussed in the June 2015 and March 2016 issues of *TradeWatch*.

The authorities have discussed the procedures and support documentation that would constitute adequate substantiation that the company conducts its operations in accordance with the presented written application. Companies will now be likely to take longer to adapt their procedures and to request their certificates. This gives time for the Customs authorities to reduce the backlog of companies waiting to be certified and speeds up the subsequent analysis of companies already in compliance with the new legislation.

Companies looking to benefit from the newly amended AEO program are well advised to assess their current processes and monitoring programs and take measures to improve the procedures that are already in place.

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Canada

Canada files wide-ranging WTO Dispute Settlement Complaint against US trade remedy law practices

On 10 January 2018, an official Request for Consultations document (the Complaint) filed by Canada in late December was circulated to other World Trade Organization (WTO) members, the first step in the dispute settlement process. Canada claims that the US currently maintains trade remedy measures that are inconsistent with US obligations under the WTO Anti-Dumping Agreement, the *Agreement on Subsidies and Countervailing Measures, the General Agreement on Tariffs and Trade 1994 and the Understanding on Rules and Procedures Governing the Settlement of Disputes.*

Summary of the Complaint

Specifically, Canada claims that the US:

- Collects final anti-dumping and countervailing duties (AD/CV duties) in excess of WTO-consistent rates and does not refund cash deposits of AD/CV duties collected in excess of WTO-consistent rates
- Imposes and collects retroactive provisional duties following the issuance of preliminary affirmative "critical circumstances" (massive imports in a short time frame) determinations, which is inconsistent with the WTO *Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures,* as these agreements permit retroactive imposition of definitive duties only 90 days prior to a preliminary determination and provisional countervailing duties within 60 days after the date of initiation of an investigation
- Improperly treats export controls (e.g., export permitting processes, export levies, export quotas, export restraints, export bans) on input products used or incorporated into a product under investigation as prohibited financial contributions
- Improperly calculates benefits in countervailing duty proceedings by disregarding price comparisons that exceed a benchmark price and result in negative values
- Unduly restricts defendants from submitting information or documents in anti-dumping and countervailing duty investigations by effectively closing the evidentiary record before the preliminary determination
- Creates an institutional bias in the US industry's favor by allowing the International Trade Commission (USITC) "tie vote provision," a provision that deems a tie vote (i.e., 3-3 vote) to be an affirmative determination of material injury, threat of material injury to the industry of the US or material retardation of the establishment of a domestic industry in the US

Next steps

The filing of the Complaint is the first step in the formal dispute settlement process as per Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). If Canada and the US cannot find a satisfactory solution during consultations within 60 days, Article 4.7 of the DSU permits Canada to request adjudication by a dispute resolutions panel. Often, this period is extended, and other WTO members may request to participate in the consultations, which can also delay the process.

Implications

The publication of the Complaint took place shortly after the US Commerce Department applied preliminary countervailing duties on Canadian exports of uncoated groundwood paper, but was filed shortly after a complaint filed by Canada specifically about the softwood lumber dispute determinations in December. It is unprecedented in its scope, as it targets US countervailing and anti-dumping rules and procedures generally. It does not focus on any one AD/CV determination and, instead, seems to challenge the US AD/CV regime as a whole on behalf of all the world's exporters.

Canada would appear to be inviting the rest of the WTO members to support the Compliant, as it cites 188 US anti-dumping and countervailing duty determinations as examples, many of which involve other countries as parties to US trade disputes. This suggests that the Complaint could fundamentally challenge the legitimacy of the US trade remedy system within the framework of the WTO.

The outcome of this WTO filing could have implications not only for the North American Free Trade Agreement (NAFTA) and Canada–US trade in general, but also for the international trade system as a whole, depending on how the US responds to Canada's challenge at the WTO. This is particularly because the current US administration has openly criticized the WTO and indirectly called for reform of the organization.

The other countries named in the annexes to this complaint may take part in the consultations, and this seems to be Canada's strategy in filing such a wide-ranging and unprecedented complaint.

The Trump Administration has applied high anti-dumping and countervailing duties on Canadian exports of softwood lumber and commercial aircraft. Given these disputes, the Complaint appears to be directed against the US trade remedy system and, as such, is a significant departure from past Canadian trade policy diplomacy and from effectively litigating specific cases under the NAFTA and WTO dispute resolution panels on these issues.

The context and timing of the complaint could potentially complicate not only currently outstanding US-Canada trade disputes, but also the next round of NAFTA renegotiations. Recent media reports suggest that the Canadian Government is increasingly expecting that the United States could potentially withdraw from NAFTA[3] or at least issue the withdrawal six months' notice.

The publication of Canada's complaint has already prompted the US Trade Representative to state that the filing has lowered US confidence in Canada's commitment to beneficial mutual trade.[4]

Look for updates on Canada's WTO Dispute Settlement Complaint in future editions of *TradeWatch*.

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[3] "Exclusive: Canada increasingly convinced Trump will pull out of NAFTA," David Ljunggren, Reuters World News, 10 January 2018, available at https://www.reuters.com/article/us-trade-nafta-canada-exclusive/exclusive-canada-increasingly-convinced-trump-will-pull-out-of-nafta-idUSKBN1EZ2K4.

[4] "Canada files WTO complaint against US over trade rules," BBC News, 10 January 2018, available at: http://www.bbc.com/news/business-42639459.

Mexico

New requirements to support customs valuation of imported goods into Mexico

Mexico has announced that 2 July 2018 will be the effective date for additional documentation of valuation requirements. As detailed in our earlier *TradeWatch* article from September 2015, Mexico amended its Customs Law Regulations (the Regulations)[5] on 20 April 2015, including the addition of article 81, which includes a long list of documents that need to be attached to the customs value statement, as follows:

- Commercial invoice
- Bill of lading, packing list, airway bill or other transport documents
- Documents demonstrating country of origin, when applicable, and country of shipment
- Document that supports the guarantee referred to under article 36-A, section I (e) of the Customs Law
- Documents demonstrating payment for the goods, such as electronic transfers or letters of credit
- Documents related to transport, insurance and costs related to the operation
- Contracts related to the transaction of the goods subject to importation
- Documents supporting any additions to value that must be included in the customs value of the goods
- Any other information and documentation necessary to determine the customs value of the goods

Since the customs value statement needs to be submitted for each import declaration that is filed with customs, and considering how broad the new documentary requirements are, compliance with this new obligation could cause significant administrative disruption for importers that will now be required to prepare and submit a detailed documentary file for each import operation.

In addition, these new requirements may present a series of complications for importers that may not be able to obtain the required documents, for instance, in those cases where there is no sale for import or where there are no contracts in place (e.g., related-party operations). Also, the new requirements appear to be open-ended, requiring the importer to present any other information and documentation necessary to determine the customs value of the imported goods.

[5] Reglamento de la Ley Aduanera.

It is important to note that the authorities had apparently recognized that the new requirements are unclear as they had postponed their entry into force. While additional guidelines to provide clarity on how to comply with these new requirements may be released before the effective date, importers should begin to take proactive steps to ensure that, by 2 July 2018, they have compiled accurate and sufficient information to support the customs value of their imported products.

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United States

US Customs publishes draft interim guidance for filing drawback claims under TFTEA

On 9 February 2018, two weeks before the congressionally mandated date for United States (US) Customs and Border Protection (CBP) to publish final regulations and begin accepting electronic filings of drawback claims made under the Trade Facilitation and Trade Enforcement Act (TFTEA), CBP announced that it would not have regulations in place and issued interim guidance on drawback filing. The interim guidance has material impact for exporters that may benefit from TFTEA drawback.

TFTEA, enacted on 24 February 2016, significantly expanded the customs drawback program. Drawback is a mechanism to recover duty, taxes or fees paid with respect to imported merchandise when the imported merchandise, a product manufactured with the imported merchandise or substituted "like-kind" merchandise is subsequently exported. Among the significant changes made by TFTEA are determining like-kind merchandise based on the Harmonized Tariff Schedule classification of the products (replacing a subjective standard with an objective one), requiring automated filing and expanding time frames for recovery. To allow CBP sufficient time to automate the filing system, Congress deferred the date on which claims can be filed until two years after enactment (24 February 2018). Congress also mandated that CBP issue regulations by that date.

CBP has announced that it will deploy an electronic interface for filing drawback claims on 24 February 2018, utilizing the Automated Commercial Environment (ACE). Regulations, however, have not yet been proposed. On 9 February 2018, CBP issued a document titled, Drawback: Interim Guidance for Filing TFTEA Drawback Claims (the Interim Guidance), that provides instructions on filing drawback claims prior to the effective date of final regulations. The Interim Guidance is very restrictive, effectively preventing businesses eligible for TFTEA drawback from benefitting from the statutory changes until final regulations are issued. Moreover, CBP cautions the reader that the Interim Guidance reflects "CBP's tentative and conditional framework for drawback" pending the issuance of final regulations, noting that the Interim Guidance may be revised and cautioning the reader that "any decisions a reader makes based on this draft document are taken voluntarily, and with the understanding that policies and procedures might change."

The Interim Guidance has material implications for TFTEA claims and, in particular, for those filing manufacturing drawback claims or utilizing common drawback privileges, as detailed below.

Manufacturing drawback

Manufacturers can benefit from the TFTEA like-kind substitution standard by claiming drawback on duties, taxes and fees paid on an imported product when a like-kind product is used in manufacturing of an exported product. Prior to filing a manufacturing drawback claim, a manufacturer must generally obtain a product-specific drawback ruling from CBP, approving the production process and records for drawback. In many instances, manufacturers with existing drawback rulings will be able to expand recovery under TFTEA because the like-kind rules are liberalized.

CBP is requiring that drawback claimants with an existing manufacturing drawback ruling must file a supplemental application for a limited modification to their ruling in order to claim TFTEA benefits. For manufacturers without a current ruling, a full application must be made under existing rules, accompanied by a TFTEA modification.

Accelerated Payment

The vast majority of drawback claims are paid via Accelerated Payment, in which the applicant posts a bond and CBP processes the refund in short order. The Interim Guidance states that CBP will not accept TFTEA drawback claims requesting Accelerated Payment, even from claimants with existing approvals, until TFTEA regulations are implemented. Additionally, from a procedural standpoint, TFTEA claims submitted in ACE with an indicator to request Accelerated Payment privileges will be rejected. CBP does provide that submission of bond information at the time that a TFTEA claim is filed will be deemed a request for delayed payment of Accelerated Payment once the regulations to implement TFTEA drawback are in effect.

The suspension of the Accelerated Payment program may cause a substantial cash flow issue for many companies.

Waiver of Prior Notice

In order to claim drawback, an exporter must give CBP prior notice of export and an opportunity to inspect the product to be exported. However, on application, a Waiver of Prior Notice of intent to export or destroy is routinely granted by CBP. Additionally, the privilege is generally accompanied by a one-time, retroactive waiver to allow past exports to qualify for drawback. The vast majority of exporters participating in the drawback program have the Waiver of Prior Notice privilege.

The Interim Guidance states that waivers granted under the current rules (19 CFR Part 191 for claims under 19 U.S.C. 1313(c) and (j)(1)/(2)) will not be in accordance with TFTEA requirements. Notably, under TFTEA, a certification of conformity is required for claimants to continue to operate under the Waiver of Prior Notice if the privilege was granted pursuant to current drawback rules (i.e., 19 CFR Part 191). These certifications will be accepted before the TFTEA regulations are implemented, but the actual claims cannot be processed for TFTEA claims until after the regulations are implemented.

Drawback claimants who have not been eligible for pre-TFTEA substitution drawback should proceed with these rules carefully. TFTEA provides for a five-year period for filing, so when filings are accepted on 24 February 2018, imports dating to 24 February 2013 may be eligible for drawback recovery. In 2013, an exporter would not have known about changes to the law that occurred in 2016 under TFTEA and, consequently, would not have provided CBP prior notice of export. Properly adhering to the rules for the waiver privilege is essential for these companies.

With the ACE drawback interface go-live date rapidly approaching, the Interim Guidance is much needed. Drawback filers are well advised to review the guidance and ensure the interim procedures are followed for the manufacturing drawback, Accelerated Payment and Waiver of Prior Notice so as to avoid further delays in processing once the rules are implemented or claims being rejected and becoming time barred.

Additionally, for a one-year period (through 24 February 2019), an exporter may choose to file under either the pre-TFTEA or TFTEA rules. Claims filed under pre-TFTEA procedures may use rulings and privileges and may be paid under Accelerated Payment. Note, however, that for many companies, TFTEA claims will yield greater benefits because of liberalized substitution. As only one drawback back claim can be filed per export, claimants should review their potential benefit under the more flexible TFTEA rules to optimize recovery.

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Update: Section 201 “safeguard measure” imposes stiff tariffs on solar and washer products

President Trump kicked off the New Year with the announcement of two trade actions. On 23 January 2018, the White House released two Presidential Proclamations imposing tariffs on crystalline silicon photovoltaic cells (solar cells) and large residential washers (washers).

Since May and June 2017, when the Section 201 petitions (Trade Act of 1974) were first filed, businesses and manufacturers alike have been anxiously monitoring the two trade filings seeking import relief. A series of actions from the International Trade Commission (ITC) ensued following the petitions. The ITC actions commenced with the commissioners' investigations of solar cells and washers, followed by their unanimous votes on serious import injury to domestic manufacturers, and finally concluded with the commissioners' submission of penalty recommendations to the President. The procedure and history of Section 201 or the “safeguard measure” are outlined in greater detail in Volume 16, Issue 4 of *TradeWatch*, published in December 2017.

The petitioners for the solar cell and washer cases have initially requested a 50% tariff on imported solar cells and washers and certain covered parts. The ITC commissioners recommended various penalties for imported solar cells, with recommendations ranging from imposing a 30% tariff to simply capping the allowable volume of imported solar cells. President Trump ultimately announced a 30% tariff for solar cells in the first year, with gradual reductions in the following three years. Meanwhile, the President's decision on washers closely followed the commissioners' recommendations. There will be a 20% tariff on the first imported 1.2 million finished washers and a 50% tariff on key covered parts used to manufacture washers, with both tariffs reduced over the next two years.

The effective date of the solar cell and washer tariffs went into effect on 7 February 2018. Tariffs on washers will end in three years on 7 February 2021, while tariffs for solar cells will last for four years until 6 February 2022. The tables below illustrate the classifications and descriptions of the washers and solar cells subject to their respective annual tariff adjustments. The new classifications and duty rates of the washers and solar cells are also found in Chapter 99 of the Harmonized Tariff Schedule of the United States (HTSUS).

Large residential washers and key covered parts[6]		
Classifications	Duty rates prior to the safeguard measure	Items
8450.11.00 8450.20.00	1.4% 1.0%	Finished washers
8450.90.60	2.6%	All cabinets, or portions thereof, designed for use in washers, and all assembled baskets designed for use in washers that incorporate, at a minimum, a side wrapper, a base and a drive hub
8450.90.20	2.6%	All assembled tubs designed for use in washers that incorporate, at a minimum, a tub and a seal
8450.90.60 8450.90.20	2.6% 2.6%	Any combinations of the foregoing parts or subassemblies

Tariff-rate quotas on washers[7]			
	Feb. 2018–2019	Feb. 2019–2020	Feb. 2020–2021
First 1.2 million units of imported finished washers	20%	18%	16%
All subsequent imports of finished washers	50%	45%	40%
Tariff of covered parts	50%	45%	40%
Covered parts excluded from tariff	50,000 units	70,000 units	90,000 units

Solar cells[8]		
Classifications	Duty rates prior to the safeguard measure	Items
8541.40.60	0.0%	Solar cells, whether or not assembled into modules or are made up into panels
8501.31.80 8501.61.00 8507.20.80	2.5% 2.5% 3.5%	Parts or subassemblies of solar cells
8501.61.00 8507.20.80	2.5% 3.5%	Inverters or batteries with CSPV cells attached
8501.31.80	2.5%	DC generators with CSPV cells attached

Safeguard tariffs on imported solar cells and modules[9] (the first 2.5 GW of imports are not subject to the additional tariff)				
	Feb. 2018–2019	Feb. 2019–2020	Feb. 2020–2021	Feb. 2021–2022
Tariff increase	30%	25%	20%	15%

[6] 83 Fed. Reg. 3553 (25 January 25 2018).

[7] "Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules," the United States Executive Office of the President, 22 January 2018.

[8] 83 Fed. Reg. 3541 (25 January 2018).

[9] "Section 201 Cases: Imported Large Residential Washing Machines and Imported Solar Cells and Modules," the United States Executive Office of the President, 22 January 2018.

Product exclusion

Product exclusions may apply, and instructions on justifying such exclusions will be provided by the United States Trade Representative (USTR). Excluded items will not be subject to the same tariffs or quota restrictions as stated in the Proclamations.

On 14 February 2018, the USTR published the procedures informing businesses on how to submit requests to exclude solar products from the safeguard measure by 16 March 2018. The requests should clearly identify the differences in physical characteristics of the products submitted for evaluation from those already subject to the safeguard measure. Some of the factors that will be considered for exclusion include, but are not limited to, total US production of the particular product for each year from 2014 to 2017, inventories of the particular product in the US and whether the exclusions would result in a benefit or advantage to the long-term competitiveness of the solar manufacturing supply chain in the US. For a detailed list of factors in consideration, please review the Federal Register notice.[10]

Procedures to exclude washers are expected to be forthcoming soon in the Federal Register.

Country exclusion

Canada is excluded from tariffs imposed on washers as it was determined that imports of washers from Canada did not cause serious injury to the domestic washer industry.

Developing countries that are members of the WTO, or are Generalized System of Preferences (GSP) beneficiary countries, are excluded from the safeguard tariffs provided that their products do not exceed 3% of imported solar cells and washers. The Philippines and Thailand, even though both are GSP beneficiary countries, are not exempt from the solar tariffs because their export volumes exceed the indicated percentage. Additionally, Thailand is not exempt from the washer tariffs for the same reason.

Impact on US manufacturing in FTZs

At the time of import and admission into a foreign trade zone (FTZ), importers are typically able to elect one of two zone statuses: Privileged Foreign (PF) or Non-Privileged Foreign (NPF). The election permits the importer to have the option of reducing the "foreign" duty rate applicable to the item at time of withdrawal to be the lesser of the duty rate applied to the item itself or the duty rate applied to the resulting manufactured item produced from the imported item under zone procedures. A PF status designation at the time of import and admission to the FTZ allows the imported merchandise to be evaluated for tariff classification purposes based on its condition at the time of zone admission. It is of no consequence whether the merchandise has undergone transformations in the zone. An NPF status designation allows merchandise to be evaluated based on its condition when it has left the zone and has been entered for consumption in the US market, usually in the form of a new and different article.

Advancing materials and components in an FTZ through value-added manufacturing is usually viewed favorably as it provides jobs and other benefits to the US economy. However, in this case, the washers and solar cells subject to the Section 201 safeguard measure are to be admitted into FTZs only in PF statuses. While this may encourage the growth of the US manufacturing base for solar cells and washers, it will increase manufacturing costs of the final products that will ultimately be borne by the US consumer of products made with foreign components.

[10] 83 Fed. Reg. 31 (14 February 2018).

Although solar cells and washers and their parts are subject to tariffs and FTZ restrictions, the production equipment that make the products are not burdened with such restrictions in the Presidential Proclamations. There is still value in setting up FTZs for manufactures in related industries. Savings may still be significant for companies wishing to build supply chains with imported equipment for the manufacturing of US solar cells and washers.

Moving forward

Continuous monitoring of the solar cells and washers in the months and years to come will be crucial in terms of strategizing for business ventures and manufacturing supply chains. Timely submission of exclusion applications, as the instructions become available, may result in reduced duties and flexible zone statuses. The USTR will be publishing any revisions of the classification numbers, excluded countries, as well as excluded products in the Federal Register.

Future Section 201 petitions merit that importers pay close attention to the Trump Administration's actions. Look for updates in future editions of *TradeWatch*.

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US Customs issues significant government procurement origin ruling for technology products

Like many countries, the United States Government has a policy of preferring domestic-made products for government procurement. The primary preference for US products is set out in the Buy American Act of 1933.[11] There are exceptions to the Buy American Act, and one of the primary exceptions is a waiver of the Buy American Act provided by the Trade Agreements Act of 1979 (TAA),[12] applicable when a foreign country has entered into a reciprocal agreement with the US to treat foreign products the same as domestic products for government procurement. Countries that are parties to the World Trade Organization Government Procurement Agreement qualify for reciprocal treatment under the TAA, as do countries with which the US has a free trade agreement providing for government procurement reciprocity.

The TAA determines the origin of products based on "substantial transformation," the same standard that US Customs and Border Protection (CBP) applies to determine the non-preferential origin for other purposes. In fact, pursuant to the TAA, CBP provides advisory opinions and final determinations on origin.[13]

On 30 January 2018, CBP issued a TAA final determination on the country of origin of a Cisco Systems, Inc. Nyquist Ethernet switch. This is the first published decision in which CBP has addressed the impact of in-circuit programming on a country of origin analysis.[14]

Background

Determining the country of origin of technology products using the substantial transformation standard has proven difficult as technology has advanced — the Court of Customs and Patent Appeals referred to this as a "mixed question of technology and customs law" in a 1982 case.[15] The seminal case in the area is Data General v. United States,[16] which deals with technology used in 1979 to manufacture a PROM

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[11] 41 U.S.C. §§ 8301-8305.

[12] 19 U.S.C. § 2501 et seq.

[13] 19 U.S.C. § 2515; 19 C.F.R. part 177, subpart B.

[14] Notice of Issuance of Final Determination Concerning Certain Ethernet Switch Products, U.S. Customs and Border Protection, 83 FR 5139, 5 February 2018. EY assisted Cisco in preparing and obtaining this TAA Final Determination. The text of the Notice is available at https://www.federalregister.gov/documents/2018/02/05/2018-02244/notice-of-issuance-of-final-determination-concerning-certain-ethernet-switch-products.

[15] Texas Instruments v. United States, 681 F.2nd 778, 782 (CCPA 1982). The Court of Customs and Patent Appeals is the predecessor to the Court of Appeals for the Federal Circuit.

[16] 4 Ct. Int'l Trade 182 (1982).

(programmable read-only memory chip). Manufacturing a PROM required that a blank PROM be inserted into a PROM programmer, where the programmer burns the desired pattern of electronic interconnections into each integrated circuit. Substantial transformation was determined to occur because "[t]he 'essence' of the article, its pattern of interconnections or stored memory, is established by programming."

Over the years, a series of CBP rulings have elaborated on the concept that the programming of a device generally constitutes substantial transformation. But, as technology devices have become more and more defined by software, CBP has focused on the origin of the software as a critical factor in determining the location of substantial transformation. A number of recent decisions have found programming a device by downloading software only to constitute substantial transformation when the software was developed and downloaded on to the device in a single country.[17]

Nyquist facts

Cisco's Nyquist Ethernet switch has a multi-country manufacturing fact pattern. Configurable application-specific integrated circuits (ASICs) are fabricated in Korea. Often referred to as a "system on a chip," an ASIC is a set of electronic circuits on a silicon die that are designed for a specific use or set of uses, rather than a general purpose. The ASIC is configurable when specific configuration data added after fabrication sets the logic gates on the ASIC to determine a specific use. Different configuration data may be loaded on to the ASIC to support a different use.

The Nyquist ASICs are sent to China where they are mounted onto printed circuit board assemblies (PCBAs), which also incorporate separate central processing units (CPUs), synchronous dynamic random-access memory (SDRAMs) and flash components sourced from various countries. The PCBAs are tested, and then sent to Mexico, where they are installed in a chassis and housing, along with two power supplies, an uplink module and ancillary devices. Cisco proprietary operating system software and configuration data, both developed in the United States, are then downloaded together into nonvolatile flash memory, where they are transferred to hardware components when the unit is powered on. Final testing also occurs in Mexico.

As opposed to the PROM manufacturing described in Data General, where a hardware component is programmed with a dedicated programmer prior to the assembly of a circuit board, the Nyquist hardware components, and, in particular, the ASICs, are designed to be programmed "in-circuit," after the circuit board is complete. In fact, the ASICs are designed to be programmed by the configuration data after the hardware components of the switch are assembled. As a result, the logic gates on each ASIC, which set the pattern of interconnections on the hardware, are not programmed until the configuration data is loaded on to the Nyquist switch, which is the last step in the manufacturing process prior to testing. Based on these facts, CBP determined that the PCBAs from China are substantially transformed in Mexico, and, as such, the Nyquist switch is considered a product of Mexico for US Government procurement. As a product of Mexico, the Nyquist switch qualifies for the TAA waiver of Buy American Act requirements.

[17] See, e.g., HQ H240199 (10 March 2015), HQ H241177 (3 December 2013), HQ H175415 (4 October 2011).

Implications for business

CBP is careful to couch its assessment based on the totality of circumstances, listing the final assembly, software loading, configuration data download and testing in reaching its conclusion without attributing particular weight to any one aspect. But, in reaching its conclusion, CBP also contrasts the outcome: "CBP has normally focused on where the origin of the software and where the programming took place," citing prior rulings that found substantial transformation only where both were in a single country. The distinguishing factor seems to be the in-circuit programming of the configurable ASIC, which has not previously been discussed in any published origin ruling issued by CBP.

While it is important to emphasize that these decisions are fact specific, and fact patterns can be complex, it is equally important for businesses to understand that CBP is reviewing the detail of the technology in reaching its conclusion. A "mixed question of law and technology" assessment will be continually evolving and can be dependent on the details of the technology produced and the technology involved in production. As the stakes can be quite large — whether or not a product qualifies for US Government procurement waiver of the Buy American Act — it is essential that a business fully understand and carefully assess the details of the technology involved, whether making its own internal assessment of TAA eligibility or providing information to CBP to make the determination.

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Update: GSP renewal

In the December 2017 issue of *TradeWatch*, we discussed the impending expiration of the US Generalized System of Preferences (GSP) and the initiatives to amend the GSP. The amendments of the GSP aim to establish enforcement priorities and to update the beneficiary country review process.

Congress did not renew the Trade Preferences Extension Act of 2015 that extended the US GSP through 31 December 2017, and so, as of 1 January 2018, GSP's expiration has made the importation of some 5,000 tariff items from 120 designated beneficiary countries and territories ineligible for duty-free importation.

However, a bill is pending that would restore GSP retroactively and extend it through 2020. On 13 February, the US House of Representatives passed bipartisan legislation H.R. 4979 to renew the GSP program for a period of three years. According to congressional reports, in 2017 alone, the GSP program saved US businesses over USD865 million in import duties.[18] The House Committee on Ways and Means has urged the Senate to pass the bill as soon as possible. If the bill is enacted as expected, it will extend the expiration of the program through 31 December 2020. It will also retroactively extend benefits to covered imports that have been made since the program lapsed.

Background

The GSP is the largest and oldest US trade preference program. It was established under the Trade Act of 1974[19] to promote economic growth and development in developing and least developed designated countries. In addition, the preference program provides cost savings and tariff elimination to US businesses and consumers across the country. Many US importers depend on GSP duty savings to reduce their import costs in order to remain competitive in the global market.

Implications for importers

Importers of GSP-eligible goods should continue to flag their imports with the applicable A, A+ or A* SPI (Special Program Indicator) code. Prior to its expiration, US Customs and Border Protection (CBP) issued a Cargo System Messaging Service (CSMS) notification[20] advising

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[18] Committee on Ways and Means, US House of Representatives, https://waysandmeans.house.gov/wm-committee-members-introduce-bipartisan-bill-provide-tariff-relief-cost-savings/.

[19] 19 U.S.C. 2461, https://waysandmeansforms.house.gov/uploadedfiles/02.08.18_-_gsp_extension.pdf.

[20] CSMS #17-000622 is available at: https://apps.cbp.gov/csms/viewmssg.asp?Recid=23021&page=&srch_argv=17-000622&sr chtype=all&btype=&sortby=&sby=.

importers to keep flagging GSP-eligible importations with the applicable SPI code. Even though goods currently entered with the applicable SPI code are liable for column 1 general duty rates, once GSP is renewed, CBP will enable an automated duty refund to all Automated Broker Interface (ABI) filers that flagged their importations with the appropriate GSP SPI.

The new bill, as proposed, includes new reporting requirements to improve the effectiveness of congressional oversight of the enforcement of the GSP eligibility criteria. Importers should pay close attention to the annual reports issued by the US Trade Representative, which may impact the future eligibility of current GSP beneficiary countries.

Look for updates in future issues of *TradeWatch*.

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China

China Customs adopts interim administrative procedure for advance rulings

On 26 December 2017, the General Administration of Customs (China Customs) released Decree [2017] No. 236, "The Interim Administrative Procedure for Customs Advance Ruling" (the Interim Advance Ruling Procedure or Decree No. 236).

China Customs enacted the Interim Advance Ruling Procedure, which is in effect as of 1 February 2018, for purposes of promoting trade facilitation, improving the trade environment and providing more certainty to businesses engaged in import/export activities. That is, this new regulation allows importers/exporters to request and obtain a formal advance ruling from China Customs, prior to the actual importation/exportation of the goods in question, as per the scope or subject matter and application procedures.

Ruling scope

1. Tariff classification
2. Origin
3. Customs valuation
    - Considerations related to the dutiable value determination:
        - Royalty payments, commissions, freight and issuance, etc.
        - Special relationships between parties
        - Other considerations as relevant
    - Customs valuation method
4. Other customs matters prescribed by China Customs

Ruling applicant

Importer/exporter of record (IOR/EOR) registered with China Customs, related to the actual importation or exportation in question

Ruling authority

Direct Subsidiary Customs office of China Customs where the applicant is registered

Application documents

The Application Form for Customs Advance Ruling of the People's Republic of China (Application Form) and other relevant documents as required by China Customs

Note: Each Application Form shall only include one specific subject matter for ruling purposes.

Timeline

- The application should be submitted three months prior to the planned importation/exportation. (Note: In limited circumstances where the IOR/EOR has an acceptable reason(s), an application may be submitted less than three months prior to the planned importation/exportation.)
- Customs will decide to either accept or decline the application within 10 days of the receipt of the application.
- Customs will issue a ruling within 60 days from the acceptance of the application.

Validity

The applicant should follow the ruling when making import/export declarations for such goods specified in the ruling, and those declarations will be accepted by China Customs.

Validity period

Three years from the issuance date of the ruling, unless China Customs revokes or withdraws it before then

China Customs may make rulings available to the public unless there is a concern for commercial confidentiality reasons.

Observations

Advance Ruling is a program that has been implemented by customs administrations in many other countries. Rolling out the program is considered a milestone step for China Customs as part of its ongoing reform efforts, aligning with its objective of promoting international trade facilitation and pursuing the balance between supervision and service functions.

Impacts on business

The Advance Ruling program is a proven trade facilitation mechanism for both the applicant and China Customs administration.

- More certainty over the customs treatment and duty cost
- The implementation of the Advance Ruling program will enable importers and exporters to:
  - Make import/export declarations in an accurate and compliant manner
  - Improve the predictability of their duty costs
  - Lower the risks resulting from a misinterpretation of China Customs rules and regulations and declaration error(s)
  - In particular, provide, through the three-year validity period, a more stable customs environment for importers' and exporters' cross-border operations
- More efficient clearance to facilitate international trade

The scope of the Advance Ruling program includes tariff classification, origin and customs valuation, which are the three most critical areas for China Customs' tariff administration. Advance rulings will allow the importer/exporter to reach agreement with China Customs in respect to uncertainties in these areas before the actual importation/exportation. This should help reduce the possibility of challenges and interruptions during the import/export clearance process.

Considerations for implementation

Decree No. 236 outlines the framework of the new Advance Ruling program. Follow-up operational guidelines are expected to be released shortly with further details regarding the program's implementation.

In particular, the following issues are yet to be addressed:

- Transition to the Advance Ruling program:
  - Prior to the release of the Interim Advance Ruling Procedure, China Customs had other processes for the pre-review of classification, valuation or other subject matters. Thus, China Customs may have issued formal documents on its opinion already. However, with the new ruling program, the validity of these previous documents now becomes unclear, subject to China Customs' clarification on the following:
    - Whether the previous formal documents remain valid after the implementation of the Advance Ruling program
    - Whether importers/exporters that have already obtained such formal documents should apply for an advance ruling on the same subject matter after the new program comes into effect

- Validity of the advance ruling
  - In accordance with Decree No. 236, China Customs will accept import/export declarations made in alignment with the advance ruling. However, in situations where the advance ruling is revoked, withdrawn or invalidated, Decree No. 236 does not specify whether it would retrospectively affect previous importation/exportation transactions, in particular:
    - For revoked advance rulings caused by fraudulent, inaccurate or incomplete application documents/information, whether the applicant would be held responsible for previous declarations and, therefore, subject to penalties
    - For advance rulings withdrawn because of "an advance ruling issued by Customs in error," whether the applicant would be exempted from legal liability and penalties resulting from the incorrect declarations made in accordance with that advance ruling
- Department with authority to issue advance rulings
  - Decree No. 236 does not specify which department(s) within China Customs will be responsible for the Advance Ruling program (e.g., acceptance, review and decision, etc.). Though it is anticipated that the Tariff Department will be in charge, there are other department(s) that could possibly be involved in the ruling process.
- Documentation requirement for advance rulings
  - Decree No. 236 does not specify in detail what documents and information are required for the advance ruling application. It is expected that the requirements would vary for applications on different subject matters (e.g., classification, valuation, origin, etc.), and these details should be addressed in the operational guidelines issued at a later date. But, from a practical perspective, this can be critical for ensuring a smooth application process.

Closing thoughts

In general, the introduction of the Advance Ruling program should benefit importers/exporters with regard to the declaration process and improve operational efficiency across these cross-border activities. By reaching agreement with China Customs in advance, importers/exporters will be able to better manage their customs compliance risks.

- Managing risk by utilizing advance rulings:
  - An advance ruling provides an additional approach for reducing customs risks.
  - If there are any uncertainties in the areas of tariff classification, customs valuation and origin, companies may wish to explore the feasibility of applying for an advance ruling to manage/mitigate the potential risks as much as possible.
  - Note that ongoing efforts would be required to ensure trade compliance. Health-checks conducted on a regular basis are still considered an effective way to achieve this purpose.
- Preparing before applying for an advance ruling:
  - China Customs could decline a ruling application or even revoke an existing ruling decision if the documents and information provided by the applicant are not complete or accurate.
  - Also, the ruling will be valid for a three-year period, during which the applicant is not allowed to request a separate ruling on the same subject matter from China Customs.
  - In this regard, companies should be thorough when preparing their advance ruling applications to possibly avoid an unfavorable result.

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Japan

Changes to the GSP program effective April 2018

Japan's Generalized System of Preferences (GSP) program was revised on 1 April 2017. The first wave of graduations based on the new criteria will become effective 1 April 2018, and certain products from Brazil and China will no longer qualify for preferential trade treatment. In addition, Brazil, China, Malaysia, Mexico and Thailand are expected to graduate from the program completely on 1 April 2019, and products originating in these countries no longer qualify for preferential trade treatment as of this date.

Overview of Japan's GSP program

The GSP program offers preferential trade treatment to developing and least developed countries with the aim of contributing to their economic development. Specifically, under the program, qualified products from designated beneficiary countries may be imported into Japan at reduced or free rates of duty. Currently, more than 140 countries and territories are beneficiaries of the program.

Countries "graduate" from the program completely (for all products) or partially (for certain products only) when they are considered to be sufficiently competitive. Japan implemented new graduation criteria in April 2017.

New graduation criteria

The new graduation criteria are summarized in the table below:

	Previous graduation criteria	New graduation criteria	Period
Complete graduation *(all products)*	For three consecutive years: 1. The country/territory is classified as a high income economy	For three consecutive years: 1. The country/territory is classified as a high income economy Or 2. The country/territory: a. Is classified as an upper middle-income economy And b. Has a 1% or greater share of world exports	N/A
Partial graduation *(specific products)*	1. The country/territory meets the criteria above for one year And 2. Product rule: a. The value of exports of the products from the beneficiary to Japan exceeds JPY1 billion And b. Imports of the product from the beneficiary accounts for 25% or more of Japan's total imports of the product	1. The country/territory meets the criteria above for one year And 2. Product rule (no change): a. The value of exports of the products from the beneficiary to Japan exceeds JPY1 billion And b. Imports of the product from the beneficiary accounts for 25% or more of Japan's total imports of the product	One year
Country/ product-specific exclusions	1. No country/territory rule 2. Product rule: a. The value of exports of the products from the beneficiary to Japan for the last 3 years exceeds JPY1.5 billion And b. Imports of the product from the beneficiary accounts for 50% or more of Japan's total imports of the product	1. No change 2. No change	Three years

Economic classification is based on the World Bank as follows:

- High-income economy: GNI per capita exceeding USD12,235 in 2016
- Upper middle-income economies: GNI per capita between USD3,956 and USD12,235 in 2016
- Share of world exports based on World Trade Organization (WTO) statistics

Graduations

The first wave of graduations based on the new relaxed criteria will begin 1 April 2018. Specifically, Brazil and China are expected to partially graduate from the GSP program on 1 April 2018. Brazil, China, Malaysia, Mexico and Thailand are expected to completely graduate from the GSP program on 1 April 2019. This means that imports from these countries will be subject to the same rate of duty as imports from developed countries, unless the importer utilizes free trade agreements or other preferential trade programs (Japan currently has an effective free trade agreement with Malaysia, Mexico and Thailand).

Businesses that import products from these countries should closely monitor these trends and assess the potential implications in advance, as this may affect procurement decisions (supplier locations).

Country	GNI per capit in 2016	Market share in 2016	Partial graduation on 1 April 2018	Complete graduation on 1 April 2019
Brazil	USD8,840	1.2%	Agricultural and fishery products – 2 items	Yes
China	USD8,250	13.2%	Agricultural and fishery products – 7 items	Yes
			Industrial products – 861 items	
Malaysia	USD9,860	1.2%	N/A	Yes
Mexico	USD9,040	2.3%	N/A	Yes
Thailand	USD5,640	1.3%	N/A	Yes

Potentially stricter post-importation GSP audits

On a related note, the Japanese Customs Bureau (Japan Customs) recently announced that it is considering the issuance of new rules regarding post-importation GSP audits because of rising instances of incorrect GSP usage.

With the planned product and country graduations above, Japan Customs expects an increase in potential intentional GSP misuse. For instance, Japan Customs has seen instances where a business ships goods manufactured in a non-GSP beneficiary country to a GSP beneficiary country and falsely claims GSP benefits. Another example is where a business claims GSP benefits even though it does not satisfy the origin requirements. In order to crack down on such misuse, Japan Customs is considering establishing audit procedures for goods imported under the GSP program and clarifying criteria for denying GSP benefits (for instance, where the origin requirements are not met, or where the manufacturer or exporter does not cooperate with information requests).

To avoid denial of GSP benefits (and potential reassessment of historical imports under the WTO rate), importers should communicate closely with manufacturers and exporters to ensure compliance with GSP requirements. Furthermore, maintaining comprehensive documentation to prove originating status will be increasingly critical going forward.

Customs duty reductions

The general rate (all countries) of the following items will be reduced effective 1 April 2018.

HS code	Description	General rate	MFN rate	New general rate
HS5308.90	Ramie yarn	9.6%	7.9%	0.0%
HS6216.00	Gloves for kendo	7.8%	6.5%	0.0%
HS3307.90	Pre-shave, shaving or after-shave preparations, etc.: other	5.8%-6.0%	4.0%-4.8%	4.0%
HS6101-6110	Apparel and clothing accessories, knitted or crocheted	14.0%-16.8%	8.4%-10.9%	8.4%-10.9%
HS6111	Babies' garments and clothing accessories, knitted or crocheted	13.0%-16.7%	8.4%-10.9%	8.4%-10.9%
HS6112	Tracksuits, ski suits and swimwear, knitted or crocheted	14.0%-16.8%	8.4%-10.9%	8.4%-10.9%
HS6114	Other garments, knitted or crocheted	12.0%-16.5%	8.1%-8.2%	8.1%
HS6117	Other knitted or crocheted made-up clothing accessories and parts	11.2%-16.8%	8.4%	8.4%
HS6214.90	Shawls, scarves, mufflers, mantillas, veils and the like of other textile materials	5.3%-8.0%	4.4%-6.6%	4.4%
HS6302-6304	Linen, curtains, interior blinds and other furnishing articles	6.4%-16.8%	5.3%-10.9%	5.3%-9.1%
HS3824.99	Dysprosium-iron alloy	3.8%	2.6%	0.0%
HS2818.30	Aluminum hydroxide	3.9%	3.3%	0.0%
HS2907.19	PTBP	4.6%	3.1%	0.0%
HS2827.49	Zirconium oxychloride	3.9%	3.3%	0.0%
HS2923.90	ADAH/TEAH	4.6%	3.9%	0.0%
HS5306.10	Flax yarn	9.6%	7.9%	0.0%

Some of these duty reductions are meant to offset the implications of the partial graduation of China from the GSP program effective 1 April 2018, under which 868 items from China will no longer qualify for preferential treatment.

The new general rate will apply beginning 1 April 2018 to imports from any country, and no proof of origin will be required.

Businesses importing goods subject to the new general rates above may wish to consider delaying imports to 1 April 2018 in order to benefit from the reduced rates.

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Vietnam

Vietnam implements indirect tax changes for 2018

Vietnam's Government recently adopted Decree 125/2017/ND-CP dated 16 November 2017 (customs)[21] and Decree 146/2017/ND-CP dated 15 December 2017 (value-added tax, VAT).[22] The customs and VAT changes introduced are outlined below.

Customs changes

New tariff classifications

For 2018, new preferential tariff classifications will apply for various dutiable commodities (including new entries/changes to the Harmonized System (HS) code, description and duty rates). This list replaces those promulgated in 2016 and is used as a basis for reference by the authorities for various customs purposes, including, but not limited to, buildup of yearly preferential import-export duty tariffs, import license determination, statistics, etc. Companies need to review their HS classification, as their HS classification may be changed and thus subject to new customs duty rates.

Tariffs on imported vehicles

The 0% rate of preferential tariff levied on imported vehicle components (subject to conditions) will now apply from 16 November 2017 to 31 December 2022.

With effect from 1 January 2018, there are significant increases in the import duty applicable to used automobiles (passenger vehicles with fewer than 16 seats).

For vehicles of nine seats or less (including the driver), changes include the following:

- The absolute tariff on passenger cars with cylinder capacity of 1,000cc or lower is doubled at USD10,000 per unit.
- The mixed tariff on pickup trucks, SUVs and sports cars with cylinder capacity over 1,000cc is 200% or 150% plus USD10,000; the lowest rate is applied.
- The mixed tariff for other vehicles classified as passenger cars is the same as applied to new vehicles, adding USD10,000 for those with cylinder capacity over 1,000cc to 2,500cc and USD15,000 on vehicles over 2,500cc.

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[21] Decree 125/2017/ND-CP dated 16 November 2017 of the Government amending and supplementing a number of articles of the Government's Decree 122/2016/ND-CP dated 1 September 2016 on preferential import and export tariff, Goods Classification Nomenclature and absolute tax rate, complex tax rate and import tariff-free quota.

[22] Decree 146/2017/ND-CP dated 15 December 2017 of the Government amending and supplementing a number of articles of the Government's Decree 100/2016/ND-CP dated 1 July 2016 and the Decree 12/2015/ND-CP dated 12 February 2015 on value-added tax and corporate income tax.

For vehicles of 10 to 15 seats (including the driver), the tax rate is the same as applied to new vehicles, adding USD10,000 (vehicles less than 2,500cc) and USD15,000 (vehicles over 2,500cc).

VAT changes

VAT refunds are now allowed for imported goods that are later exported (this was previously disallowed.) In addition, the scope of items not subject to VAT was amended to include exported products that are primarily processed from natural resources and mined minerals. Both these changes are effective as of 1 February 2018.

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Algeria

Algeria's 2018 Finance Act amends Indirect Tax Code

Algeria's Finance Act for fiscal year (FY) 2018 (the 2018 Finance Act), published on 28 December 2017, makes several changes to the Algerian tax regulations, notably relating to the Indirect Tax Code.

The key measures are:

New "solidarity contribution" on imported goods

A new tax of 1% called the "solidarity contribution" is now imposed on all imported goods to be used in Algeria. This tax is to be paid in the same manner as customs duties and remitted to the customs authorities (article 109 of the 2018 Finance Act).

Increase in customs duty rates for certain products

For certain products designated by the 2018 Finance Act, the applicable customs duty rates have increased to 30% for items such as laptop computers and cell phones and to 60%, most notably, for luxury products. The complete list of the designated products is set forth in article 115 of the 2018 Finance Act. Similarly, a list of 851 products subject to a temporary ban for importation was published by the Ministry of Commerce.

Amendment of tobacco manufacturers' requirements

Tobacco manufacturers are now required to hold a share capital equal to or greater than DZD500 million (approximately USD4.4 million), as compared to the prior amount of DZD250 million (approximately USD2.2 million) (article 38 of the 2018 Finance Act).

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East African Community

Uganda to host the fourth World Customs Organization conference on Authorized Economic Operators

Authorized Economic Operator (AEO) is an accreditation/status that is recognized by customs administrations around the world and is used to enhance trade facilitation and boost economic development. The World Customs Organization (WCO) hosts conferences focused on AEOs under the safe framework of standards every two years starting from 2012. Uganda is slated to host the fourth session in the capital of Kampala from 14 to 16 March 2018. In 2012, the first was held in Seoul, South Korea; in 2014, in Madrid, Spain; and in 2016, in Cancun, Mexico.

Why is the program important?

Most countries around the world import a variety of goods and equipment ranging from raw materials to semifinished to finished products. Since countries have borders, there are non-tariff barriers (despite customs unions and common markets in some regions) that are an impediment to trade and fast clearance of cargo. Furthermore, one of the primary roles of customs authorities is to facilitate trade. Once trade is facilitated, it will be exponentially boosted. The AEO program status is approved for those compliant taxpayers that have justified that they can self-clear or manage their cargo clearance process (together with their licensed customs brokers) with minimal interruptions from the customs authority.

The customs authority can then focus on the more risky taxpayers to ensure all due revenues are collected. In the long run, revenue will be boosted. Furthermore, the taxpayers' time of clearance, as well as demurrage, storage and other related costs, will be reduced.

The program has, therefore, been lauded for its success in improving clearance process times and providing cost savings to taxpayers.

About the upcoming conference

The WCO AEO Conference will bring together delegates from different customs administrations, the World Customs Organization, academia, private sector players, government representatives (to mention but a few) under the theme, "Promoting mutual recognition of AEOs to strengthen and secure global trade."

Whereas the AEO already has major successes, it promises to have more value if the different countries adopting the program mutually recognize accredited entities in their countries. For instance, an accredited AEO certified taxpayer in Uganda that exports to France should be recognized as an AEO in France and accorded the same benefits. Several mutual recognition agreements are expected to be concluded and signed by the participating countries.

The conference will cover topics on:

- A secure business environment for economic development
- Regional collaboration on trade facilitation
- Review of the AEO initiative since inception

The event is expected to also enhance cooperation, while building capacity, to foster a global public-private dialogue. The East African Community has already negotiated and implemented mutual recognition of AEO companies within the region, which has reduced the cost of doing business for these companies.

Closing thoughts

Dedicating a full global conference focused on AEO underpins the importance of trade facilitation in economic development and specifically AEO accreditation. Importers, exporters and other qualifying stakeholders, such as customs brokers, should consider applying for accreditation to take advantage of the benefits.

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European Union

EU27 develops its approach to post-Brexit arrangements

On 29 January 2018, the European Union (EU) 27 Member States (EU27) agreed on their negotiating guidelines for the terms of a transitional period after the United Kingdom (UK) leaves the EU on 29 March 2019. This was followed on 1 February by the release of a presentation given by the European Commission to an EU27 working party on establishing a "level playing field" in the long-term dealings between the EU and the UK. The presentation, covering State aid, tax, environmental issues and employment law, gives an indication on how negotiations might develop, assuming that the terms of any transitional period are agreed upon.

Negotiations have continued since these documents were issued that aim to conclude an agreement on a transition period that would help businesses manage disruption and adapt to the new relationship. Both sides have expressed the hope that agreement can be reached before the European Council meeting of EU leaders in Brussels on 22 and 23 March 2018. Businesses see this meeting as a critical point in the negotiations, if a trade agreement is to be reached before the UK leaves the EU. Details of the respective positions on the terms of such a trade agreement are expected to emerge over the coming weeks.

Transitional arrangements

The release of updated negotiating guidelines for Brexit follows the announcement on 15 December 2017, which welcomed the progress achieved during the first phase of the negotiations and agreed that it was sufficient to move to the second phase of negotiations relating to transition and the framework for the future relationship.

The updated guidelines, which supplement the negotiating directive annexed to the Council Decision of 22 May 2017, primarily deal with the EU's negotiating position in relation to the transition period.

Some of the key points in the guidelines include the following:

- The transition period should apply as from the date of entry into force of the Withdrawal Agreement and should not last beyond 31 December 2020.
- Provisions relating to citizens' rights in the Withdrawal Agreement should apply as from the end of the transition period (i.e., at 31 December 2020), with EU law being interpreted in line with case law of the European Court of Justice (ECJ) up to this date, but with questions of interpretation of EU law in relation to citizens' rights potentially being referred to the CJEU until 2028.

- During the transition period, while the UK should remain bound by its EU obligations and EU law, the UK would have no formal role, or a vote, in any of the EU institutions (although, there may be limited situations in which the UK is invited to discussions without voting rights).
- Any transitional arrangements require the UK's continued participation in the Customs Union and the Single Market (with all four freedoms maintained) throughout.
- The UK may not become bound by international agreements entered into in its own capacity in the fields of competence of EU law during the transition period, unless the EU agrees.

Following the publication of the guidelines, Michel Barnier, the EU Chief Negotiator, confirmed that the UK would be free to initiate negotiations with third countries, but not to implement any agreements during the transition period without the agreement of the EU27.

With regard to the application of agreements during the transition period, he said that while it is possible for the EU27 and the UK to agree, the UK will remain bound by the obligations stemming from all existing EU international agreements, for instance, those for trade and aviation. It is not possible to ensure in an Article 50 agreement that the UK keeps the benefits of these international agreements, as this will depend on the other third countries that are party to those agreements.

Subsequently, the European Commission and the UK have exchanged draft legal text covering how any transitional arrangements should be given effect in the Withdrawal Agreement. In its paper, the UK acknowledges that the agreement will need to ensure that the UK's domestic law reflects EU law for the duration of the implementation period, even though it is no longer a Member State. The UK's paper states that there is "broad alignment" between the UK and EU positions for the implementation period, with only a small number of areas requiring discussion.

One of these areas concerns the end of the implementation period. The EU27 has proposed an end date of 31 December 2020, while the UK effectively wants some flexibility built in as to the actual date. Another likely area for discussion is the application of citizens' rights for EU nationals arriving in the UK during the transition period. Though there has been speculation that the UK will ultimately agree with the EU27's position, the UK Government has continued to maintain that there should be a difference in the expectations of those citizens coming to the UK after March 2019.

Future trading arrangements

The European Commission has released a copy of an internal presentation it gave to the Council Working Party (Article 50) on 25 January 2018. The presentation makes it clear that these are preparatory discussions and that the contents are without prejudice to discussions on the framework of the future relationship. Nevertheless, the slides are interesting in that they highlight some of the issues for the EU27 in creating what the European Commission refers to a "level playing field" in trade negotiations with the UK. This phrase is taken from the European Council's guidelines of April 2017, which say:

"A level playing field must be ensured, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax; social, environmental and regulatory measures and practices."

The presentation recognizes the special factors associated with the trading relationship between the UK and the EU, notably the depth and breadth of the EU-UK economic integration and the geographic proximity of the UK to the rest of the EU. In this context, the presentation looks to focus on the policy areas that are most relevant for a level playing field and identify in each area the key components needed.

Ultimately, it suggests building up an effective system, based on three interlinked pillars:

1. Substantive provisions – the presentation looks at the issues of State aid, taxation, the environment and labor rules. The overarching general approach is to ensure that standards are not ''lowered'' as a result of the UK leaving the EU.
2. Enforcement mechanism – the presentation notes that a range of options could exist, including suspension of obligations, temporary compensations, financial sanctions or cross-retaliation. The presentation notes that the EU has a number of EU autonomous measures, which include the "black" listing of non-tax-cooperative jurisdictions.
3. Dispute settlement system – the presentation suggests that the possible options for judicial dispute settlement are subject to constraints as it says concepts derived from EU law can only be interpreted in a binding way by the CJEU. The slides highlight that this may be an issue.

State aid

In relation to State aid, it seems that the Commission does not consider that the default World Trade Organization (WTO) provisions would adequately protect trade relationships, taking into account the strong mutual reliance between the UK and the EU. The presentation suggests that while the WTO system of subsidy control would apply, it is limited to goods and damage to trade would have to be demonstrated. Remedies, it is suggested, are limited.

In the presentation, the Commission puts forward three building blocks for a future agreement:

- Substantive rules that are equivalent to the current EU State aid rules, including transparency, which raises the question as to whether a mechanism is needed to ensure convergence in case of changes to those rules over time
- Enforcement through prior approval controlled by an Independent State aid authority, having the same powers as the Commission currently
- Effective, swift and unilateral remedies, within and outside the EU-UK Agreement, to address aid threatening the level playing field

Taxation

The presentation notes that after withdrawal from the EU, there will no longer be a legal requirement for the UK to exchange information with EU Member States on tax matters (and vice versa), there will be no legal obligation for the UK to apply the EU's anti-tax avoidance provisions, the UK's political commitment to the Code of Conduct covering no standstill/roll-back of harmful tax regimes will end, and the EU Corporate Tax Directives will cease to apply to the UK.

The Commission suggests that there are risks to the EU27, but these depend on yet undefined future UK tax policy. It suggests that post-Brexit, the UK is likely to use tax to gain competiveness, and, indeed, US tax reform could increase the pressure on the UK to do this. The key risk the Commission sees is targeted UK tax measures to attract investment and business.

Following the principle of non-lowering of existing standards, and recognizing that the EU has its own unilateral listing process for uncooperative tax jurisdictions, the presentation suggests the following steps:

- A tax good governance clause
- Binding requirements on exchange of information, anti-tax avoidance measures and public country-by-country reporting for credit institutions and investment firms (as already exists)
- A Code of Conduct on business taxation (mirroring the EU Code)

The Commission would monitor the application of any legally binding requirements by the UK and the EU Code of Conduct Group would monitor the political commitments. Dispute resolution and sanction measures would be aligned to the wider procedures of any applicable trade agreement.

The environment

The Commission sees the risk that the UK can decide its position on environmental protection against a background in which it is aiming to increase competitiveness as potentially imposing costs on EU citizens and companies. The Commission suggests strengthening multilateral governance and standards rather than introducing parallel bilateral rules. It suggests avoiding a "race to the bottom" through selectively weakening domestic environment protection through the use of a "non-regression" clause.

Labor rules

The Commission suggests a reduction by the UK in labor and social protection may put EU workers' rights under strain and undermine Europe as an area of high social protection. The approach suggested here follows that suggested for environmental standards.

Implications

The forthcoming March European Council meeting represents a key event both for any transitional agreement and for the shape of future trade talks that could start after that meeting. If issues are not agreed upon in March, this may put further pressure on any ratification process for the Withdrawal Agreement.

Businesses are already preparing for what they need to do in order to be ready and will be watching closely the progress of the transitional negotiations and the position adopted by the UK Government on the transition period and any future trade agreement.

While the shape of any future trade agreement may start to be outlined over the coming months, clarity around the outcome of the complex trade negotiations may not be forthcoming for a while longer. Waiting until the end of the negotiation period may not leave enough time to take measured action before rules and trading arrangements change.

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Classification of medical screws: what's in a name?

The expression of "parts of general use" vis-à-vis the classification of medical screws under Chapter 90 of the Harmonized System (HS) has been a hot topic of conversation in the EU in recent months. Key in this debate is to what extent medical screws can be considered parts of general use and by consequence are to be classified as "general screws" under their specific heading and likely subject to customs duties. Despite EU Implementing Regulations, classifying different types of screws is affected by the considerable differences among products and, by consequence, margin of interpretation that inevitably leads to legal uncertainty among economic operators. The European Court of Justice (ECJ)'s recent judgment in the Stryker case[23] and subsequent developments have shifted that margin in favor of classification under Chapter 90 of the HS.

Background

To ensure uniform interpretation and application of EU classification rules in regard to medical implant screws made of titanium, the European Commission in 2014 published three Implementing Regulations: Nos 1212/2014, 1213/2014[24] and 1214/2014.[25]

Regulations 1213/2014 and 1214/2104 classified screws with a cannulated shaft and screws with a polyaxial U-shaped head under HS heading 9021, as they, due to their specific characteristics, do not correspond to a screw of base metal – in this case titanium – of HS heading 8101. Regulation 1212/2014, however, classified screws used in trauma surgery, prima facie falling under HS heading 9021, as parts of general use under HS heading 8101 as they, according to their objective characteristics and regardless of their actual use, were not displaying any special features (e.g., cannulated shaft) that differentiate them from ordinary screws of base metal.

The application by analogy to similar goods (e.g., stainless steel) resulted in, among others, the repeal by Customs of Binding Tariff Information (BTI) decisions, complex reclassification exercises and, eventually, a customs duty impact.

[23] ECJ C-51/61 (26 April 2017) Stryker EMEA Supply Chain Services.

[24] Commission Implementing Regulation (EU) No 1213/2014 of 11 November 2014 concerning the classification of certain goods in the Combined Nomenclature, OJ 14 November 2014, L329/6.

[25] Commission Implementing Regulation (EU) No 1214/2014 of 11 November 2014 concerning the classification of certain goods in the Combined Nomenclature, OJ 14 November 2014, L329/8.

Stryker case (C-51/61)

In line with Regulation 1212/2014, Dutch Customs repealed BTIs (HS heading 9021) issued to Stryker for three types of "implant screws" solely intended to be inserted in the human body for treatment of fractures or the stabilization of prostheses: two types made of stainless steel, one of titanium.

Following an unsuccessful complaint lodged with Dutch Customs, Stryker brought an action against the repeal decision before the Dutch court, claiming that, given their objective characteristics and their inherent intended use, the implant screws could not be classified as "regular" screws of base metal. In that context, the Dutch court stayed the proceedings and asked the ECJ to provide a preliminary ruling on the interpretation of HS heading 9021, as well as the validity of Regulation 1212/2014.

In its judgment, the ECJ stated that the screws at issue fall under HS heading 9021 as the goods have characteristics that distinguish them from ordinary screws or so-called "parts of general use" by means of:

- The finish of their manufacture
- Their high degree of precision
- Their method of manufacture (e.g., types of materials used are specifically designed to minimize the risk of rejection)
- The specificity of their purpose (i.e., solely to hold together two parts of broken bone or to stabilize an artificial joint)

In particular, the fact that medical implant screws, such as those at issue in Stryker, could be inserted in the body only by means of specific medical tools, not ordinary tools, is one of the characteristics the ECJ took into consideration to distinguish those medical implant screws from ordinary screws.

With respect to the validity of Regulation 1212/2014, the ECJ indicated that a classification regulation, such as the one at issue, is of general application in so far as it concerns identical goods. The ECJ, however, avoided the question on the regulation's validity, noting that the screws at issue are not identical but only similar (e.g., different length, different material, etc.) to those in the contested regulation, and thus application by analogy was neither necessary nor possible.

Repeal of Regulation 1212/2014

Seven months after the Stryker judgment, the EU Commission repealed Regulation 1212/2014, thereby specifically referring to the ECJ's reasoning in the Stryker case. In the repealing regulation, the Commission applies the ECJ's criteria as established in the Stryker case on the screws covered by Regulation 1212/2014: "the product corresponds to the ISO/TC 150 standards for implant screws, is presented for use in the field of trauma surgery for setting fractures, is presented in a sterilized package, is marked with a number and therefore traceable throughout production and distribution, and is to be installed in the body using specific tools."[26]

This is remarkable, given that in Stryker, the ECJ determined that the Stryker implant screws were not identical to the screws referred to in Regulation 1212/2014. The EU Commission thus extends the scope of application of the criteria used in the Stryker case to non-identical products. It is therefore important to mention that the interpretation in the Stryker case will not likely be limited to screws but could also impact other medical appliances (e.g., plastic tubes, nuts, pins, wires) that were, by virtue of now repealed Regulation 1212/2014, classified as a "part of general use" and accordingly subject to customs duties.

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[26] Commission Implementing Regulation (EU) No 2017/2243 of 30 November 2017 on repealing Implementing Regulation (EU) No 1212/2014 concerning the classification of certain goods in the Combined Nomenclature, OJ 8 December 2017, L324/1.

The Stryker judgment may also impact ongoing discussions within the Harmonized System Committee and the interpretation of the expression "parts of general use" among WCO members, as this is not only a European issue. In Ruling H003717,[27] for example, US Customs and Border Protection (CBP) determined that screw implants with extremely high levels of purity required for surgical implants were to be classified under HS heading 7318, given that the same grade of stainless steel is also used in chemical applications. US CBP supports its findings by noting — despite the US Food and Drug Administration's assessment of the screws as medical devices — that the screw implants, by themselves, are not identifiable as parts of orthopedic appliances nor suitable for use only with such appliances.

Objective characteristics vs. intended use

The foregoing considerations reiterate the importance of the objective characteristics and intended use as criteria for the classification of medical screws. In Stryker, the ECJ stated that it is settled case law to seek the tariff classification of goods in their objective characteristics and priorities first: the intended use may constitute an objective criterion only if it is inherent in the product (and thus must be capable of being assessed on the basis of the product's objective characteristics and properties).[28]

As such, the ECJ confirms the reasoning of Regulation 1212/2014,[29] in which the Commission explicitly set aside the intended use as a criterion for classification unless it is shown in the characteristics of the product. This begs, of course, the question when the intended use is inherent in the product itself. It is apparent that both in the EU and the US, there has been a strong focus on the outward appearance of the product: in Ruling H003717, the fact that the cortex screw was intended to be implanted into the body did not alter its classification as an ordinary screw, as it was not considered to be an orthopedic appliance by its own objective characteristics. This line of reasoning finds support in the explanatory note to HS heading 9018, which, although with regard to tools, states that instruments used in medicine that are tools (e.g., hammers, gauges, etc.) are classified in this heading only when they are clearly identifiable as being for medical or surgical use by reason of their special shape.

It remains to be seen how Stryker and the consequent repeal of Regulation 1212/2014 will impact future classification decisions. According to the Explanatory Note to HS heading 9021, nails, pins, etc. to be inserted in the human body by surgeons are included, however are subject to the exclusion of parts of general use. Thus, implants also need to rise above the level of parts of general use.

[27] US CBP Ruling HQ H003717, 22 February 2007, https://rulings.cbp.gov/index.asp?ru=h003713&qu=H003713&vw=detail.

[28] See also Case C-276/00 Turbon International, paragraph 21, and Case C-260/00 Lohmann and Medi Bayreuth.

[29] Regulation 1212/2014 provided that "due to its objective characteristics, the product entirely corresponds to a screw of base metal, even though it is intended for use in trauma surgery. Regardless of their actual use, screws of base metal are, in accordance with note 2(a) to Section XV, parts of general use."

It seems, however, that certain European customs administrations have consistently decided on classification under HS heading 9021 as if the product is surgically implanted into the body, despite having very few specific characteristics that separate it from "ordinary products."[30] Notwithstanding the ECJ's case law in this respect, the intended use remains an important element in classifying medical instruments in practice, even if it is not always inherent. Another point of view is that for implants, intended use is presumed to be inherent by many EU customs administrations. In any case, Stryker and the repeal of Regulation 1212/2014 could provide more flexibility to classify implants under HS Chapter 90, despite the outward appearance and objective characteristics of a regular screw.[31] That being said, the classification of a medical screw will always have to be done on a case-by-case basis and with due regard to the concept of "parts of general use."

What does this mean for businesses trading medical instruments?

In the EU, the tendency to classify medical screws under Chapter 90 has gained ground over the past year. It remains to be seen how this will affect other WCO countries worldwide. For companies trading in similar goods that were negatively affected by Regulation 1212/2014 (e.g., ongoing customs audits, repealed BTIs, etc.), the outcome of the Stryker judgment and subsequent repeal of Regulation 1212/2014 might have a positive impact on their duty bill (i.e., duty-free rate for future transactions and refund procedure for historical transactions), as well as value-added tax (VAT) whenever reduced duty rates are linked to the product's tariff classification.

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[30] GB122726687 28 February 2013; GB502099961 13 November 2014; GB5021001138 12 November 2014.

[31] Compare, for example, BTI DE11512/16-1 and BTI BED.T.277.025.

Update: Use of transfer price as transaction value — ECJ rules on the Hamamatsu case

In the September issue of *TradeWatch*, we discussed a request for a preliminary ruling from the Finanzgericht München (Germany) lodged on 17 October 2016 before the European Court of Justice (ECJ). The case deals with the question of whether a transfer price (TP) subject to retroactive price adjustments can be used as the basis for the transaction value (TV) method to determine the customs value.

The ECJ issued its decision in the Hamamatsu case (C-529/16) on 20 December 2017.[32] In this much-awaited decision, the ECJ ruled that EU customs law does not permit an agreed transaction value, composed of an amount initially invoiced and declared, and a retroactive adjustment made after the end of the accounting period to form the basis for the customs value when it is unknown at the time of import whether that adjustment would be made up or down at the end of the accounting period.

The ECJ ruling can have considerable impact for businesses with intercompany EU-import transactions as the ECJ seems to question the TV method for such transactions. Although the ruling is subject to different interpretations, as explained below, it is likely that customs authorities will view the year-end adjustments (upward or downward) as no longer applicable in determining the TV or may even reject the use of TV as such, thus forcing importers to use alternative methods of customs valuation.

Facts of the case

- The case is about a customs duty refund application filed by Hamamatsu Photonics Deutschland GmbH (Hamamatsu Germany), which is a subsidiary of Hamamatsu Photonics Japan (Hamamatsu Japan). By means of a Mutual Agreement Procedure (MAP), Hamamatsu Germany and Hamamatsu Japan concluded on an Advance Pricing Agreement (APA) with the German tax authorities in the context of the double tax treaty between Germany and Japan. The APA covers transactions between Hamamatsu Germany and Hamamatsu Japan of goods imported into the EU. Under the APA, the transactions must meet the arm's-length standard. At the end of the accounting period (year-end), the initially used TP is adjusted based on the residual profit split method.

[32] Judgment of 20 December 2017, Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München, C 529/16, EU:C:2017:984 (Hamamatsu Judgment) available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CJ0529.

- The customs value of the goods imported by Hamamatsu Germany is being based on the initially determined TP. At the 2010 year-end, the Hamamatsu group realized that the operating margin of Hamamatsu Germany was less than the benchmarked range. Therefore, the TP was retroactively adjusted downward so that the operating margin of Hamamatsu Germany for the year 2010 came within the benchmarked range. Following the adjustment, Hamamatsu Germany filed a request for repayment of overpaid import duties. The German customs authorities rejected the request, based on the argument that the total amount of the repayment was not allocated to specific goods.
- Hamamatsu appealed against the decision of the customs authorities in the Finanzgericht München, i.e., the Finance Court, Munich, Germany (the court). The court was of the view that the "final" TP between the parties is based on the OECD arm's-length principle; however, the price declared at the time of import is provisional and subject to final TP adjustment. Therefore, such a price is fictitious and cannot be used as the transaction value for customs valuation purposes. In view of this, the court stayed the proceedings and referred the following questions to the ECJ for a preliminary ruling:

1. May a transfer price be used to determine the customs value where the transfer price is adjusted at the end of the year, regardless of whether the year-end adjustment leads to a refund or additional payment of import duties?
2. If so, may the customs value be reviewed and/or determined using simplified approaches where the effects of subsequent transfer pricing adjustments (both upward and downward) can be recognized?

Key statements and interpretations of the judgment

- The ECJ refers to other cases to iterate that customs value should primarily be based on the transaction value of the imported goods and only if such value cannot be determined at the time of import, an alternative method of valuation should be used.
- The ECJ further states that the transaction value should reflect the economic value of the goods at the time the goods are declared for free circulation and take into account all elements of the goods that have economic value (e.g., selling commissions, transport costs, and royalty and license fees).
- After the goods have been released for free circulation, the transaction value may be adjusted only in certain specific circumstances, such as an adjustment made by the seller with respect to defective goods. The ECJ holds that there is no legal basis to allow other adjustments (such as TP correction) to determine the customs transaction value.
- The ECJ continues stating that EU customs law does not impose an obligation on the importer to take other types of corrections into consideration. In other words, the provisions of EU customs law do not oblige importers to revise the transaction value in case of a downward adjustment and neither does it provide an obligation to the importer to make an upward adjustment. Moreover, the ECJ ruled that the importer is not even allowed to take the downward or upward adjustment into consideration for determining the transaction value.

- The ECJ ruled with regard to the first question that EU customs law does not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down. In other words, the transaction value cannot be based on a transfer price, which is based partly on an amount initially invoiced and declared, and partly on a year-end adjustment.
- The ruling of the ECJ is short and does not include an in-depth analysis of the convergence between transfer pricing and customs valuation. It can be read as putting the transaction value method under fire where a TP can be adjusted retroactively. However, it can also be read as a rejection of the view that there is a connection between customs valuation and transfer pricing.
- This is, to say the least, remarkable as this ruling would appear to be contrary with the view that the World Customs Organization (WCO) expressed in the WCO Guide to Customs Valuation and Transfer Pricing published in 2015. In this report, the WCO calls for further alignment between transfer pricing and customs valuation as the WCO found arguments to point out that the two may influence each other. The alignment between transfer pricing and customs valuation has been reinforced as well in the WCO Case Studies 14.1 and 14.2.
- Nevertheless, the ECJ ruled in the Hamamatsu case that EU customs legislation does "not permit an agreed transaction value, composed of an amount initially invoiced and declared and a flat-rate adjustment made after the end of the accounting period, to form the basis for the customs value, without it being possible to know at the end of the accounting period whether that adjustment would be made up or down."[33]
- It seems that there is no conclusive interpretation of this ECJ judgment, and the two most likely interpretations are as follows:
  - The ECJ is of the opinion that the initially reported customs value is the transaction value and that retroactive adjustments, be they downward or upward, cannot be applied.

    Or

  - The ECJ is of the opinion that the initially reported customs value should be rejected (because it can be adjusted retroactively) and one of the other customs valuation methods (not being transaction value) should be applied.

Reaction from different customs authorities in the EU: divergent views and controversy ahead?

No official reaction from the European Commission has been published yet. However, it is understood that the case will be discussed in the Customs Valuation Committee meeting in March this year. Most Member States' customs authorities have not yet reacted pending this discussion. Nevertheless, the customs authorities of Belgium, Germany and the Netherlands have already reacted unofficially.

The Belgian authorities have issued new customs valuation guidelines, which (while not referring to the Hamamatsu case) only allow a transaction value to be based on a TP, if that TP itself is based on the comparable uncontrolled price (CUP) method, i.e., resale minus or cost plus method. The German authorities have indicated informally that they will maintain their past policy, i.e., not allowing refund of import duties on downward adjustments, but retroactively assessing import duties on upward transfer pricing adjustments. Finally, the Dutch authorities have indicated that they regard the Hamamatsu judgment case-specific that cannot simply be extended to other cases. They have also indicated that for the time being, they will allow a TP to be used as transaction value and will also take into account both upward and downward adjustments. However, importers should come to an agreement on this with the customs authorities.

[33] Hamamatsu Judgment, paragraph 35.

The above overview indicates diverging approaches by different customs authorities in the EU. Most Member States' customs authorities have not responded yet. However, it is apparent that until the EU Customs Valuation Committee comes with its view, uncertainty remains and controversies may arise. Customs authorities could read the Hamamatsu judgment as prohibiting a TP from being used as a transaction value and may insist on using one of the alternative customs valuation methodologies, such as the transaction value of identical or similar goods of a cost plus or resale minus methodology.

Impact on different intercompany transactions

The ruling of the ECJ may have a major impact on businesses having international supply chains to the EU and currently using transfer prices with possible retroactive adjustments. It creates uncertainty for these businesses, since it is not clear how the ruling should be interpreted. For that reason, it is advisable for these businesses to review and assess their current transfer pricing policy and price adjustment mechanism and to determine whether they are potentially affected by the ruling.

The impact of this judgment would be relevant for transaction models, such as:

- Sales entities buying and importing goods from a principal company on a resale-minus price. The adjustment may happen at year-end when the final sales price to the third-party customers is confirmed.
- Contract manufacturers selling goods at a cost-plus price, which is subject to finalization of cost at year-end.
- Manufacturing entities buying goods from a procurement company at a markup of the spend amount. The markup may be adjusted upward or downward if the procurement company delivers extra benefits or fails to deliver agreed benefits.

Although the ruling is not clear, the following consequences for businesses are apparent:

- Customs authorities could interpret the judgment as no longer allowing a TP to be used as transaction value, thus forcing importers to use other customs valuation methodologies.
- Customs authorities are no longer permitted to require the importer to adjust its customs value based on an upward transfer pricing adjustment.
- Businesses are no longer allowed to adjust their initially declared customs value based on a downward transfer pricing adjustment.
- Customs valuation rulings covering agreements about how retroactive transfer pricing adjustments should be taken into account need to be assessed to see whether they remain valid.
- Businesses may explore the option of dynamic pricing based on continuous and prospective TP adjustments.
- Another future approach may be to ensure that TPs for individual product sales always reflect a real arm's-length value that represents the real economic value of the product (e.g., with an acceptable gross margin for the exporter).

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Finland

Finland revises VAT procedures for imports effective 1 January 2018

Effective 1 January 2018, Finland will implement new rules for the payment of value-added tax (VAT) on goods imported into Finland from outside the European Union (EU). Under the new rules, Finnish VAT-registered businesses will no longer pay VAT at importation; instead, the import VAT due on imported goods will be self-assessed and recovered by VAT-registered businesses using their periodic VAT returns. This procedure is known as "postponed accounting."

Postponed accounting will improve cash flow for Finnish importers that recover VAT in full, as they will no longer actually pay the VAT due on their imports and then recover it. Effectively, the new rules will put goods imported from outside the EU on the same footing as goods acquired from other EU Member States, as self-assessment procedures already apply to intra-EU acquisitions.

The changes will not affect how VAT will apply to goods imported by private persons or by businesses that are not registered for VAT in Finland.

In Finland, VAT is generally levied by the Finnish Tax Administration, and it is reported by VAT-registered persons on periodic VAT returns. This treatment applies to domestic supplies and to intra-EU movements of goods. However, to date, VAT payable on goods imported from outside the EU has been administered by the Finnish Customs authority, it has been collected at the time of importation, and the input VAT has been deducted subsequently in the periodic VAT returns.

As a part of a larger reform of the administration of taxation in Finland, the responsibility for import VAT will be partially transferred from Finnish Customs to the Finnish Tax Administration. As a result of the reorganization, new provisions will apply to all importations that clear Finnish Customs on or after 1 January 2018.

With effect from that date, VAT on imports for Finnish VAT-registered businesses will be levied and reported using the same procedures that apply to other supplies; for imports, this means they will be subject to the general procedural provisions that apply to self-assessed taxes. Under the self-assessment rules, the amount of import VAT will be calculated, reported and paid independently by the importer of record. In addition, new reporting requirements will apply with respect to the related VAT bookkeeping and reporting requirements for imports under the general VAT accounting rules for self-assessment.

The legislative changes do not affect how VAT applies to importations made by private persons or by businesses that are not registered for VAT in Finland. VAT on importation will, in these cases, still be levied by Finnish Customs at the time of customs clearance. The legislative changes will also have no impact on the customs procedures used by taxable persons. Finnish Customs will also continue to oversee importation procedures and be responsible for crime prevention.

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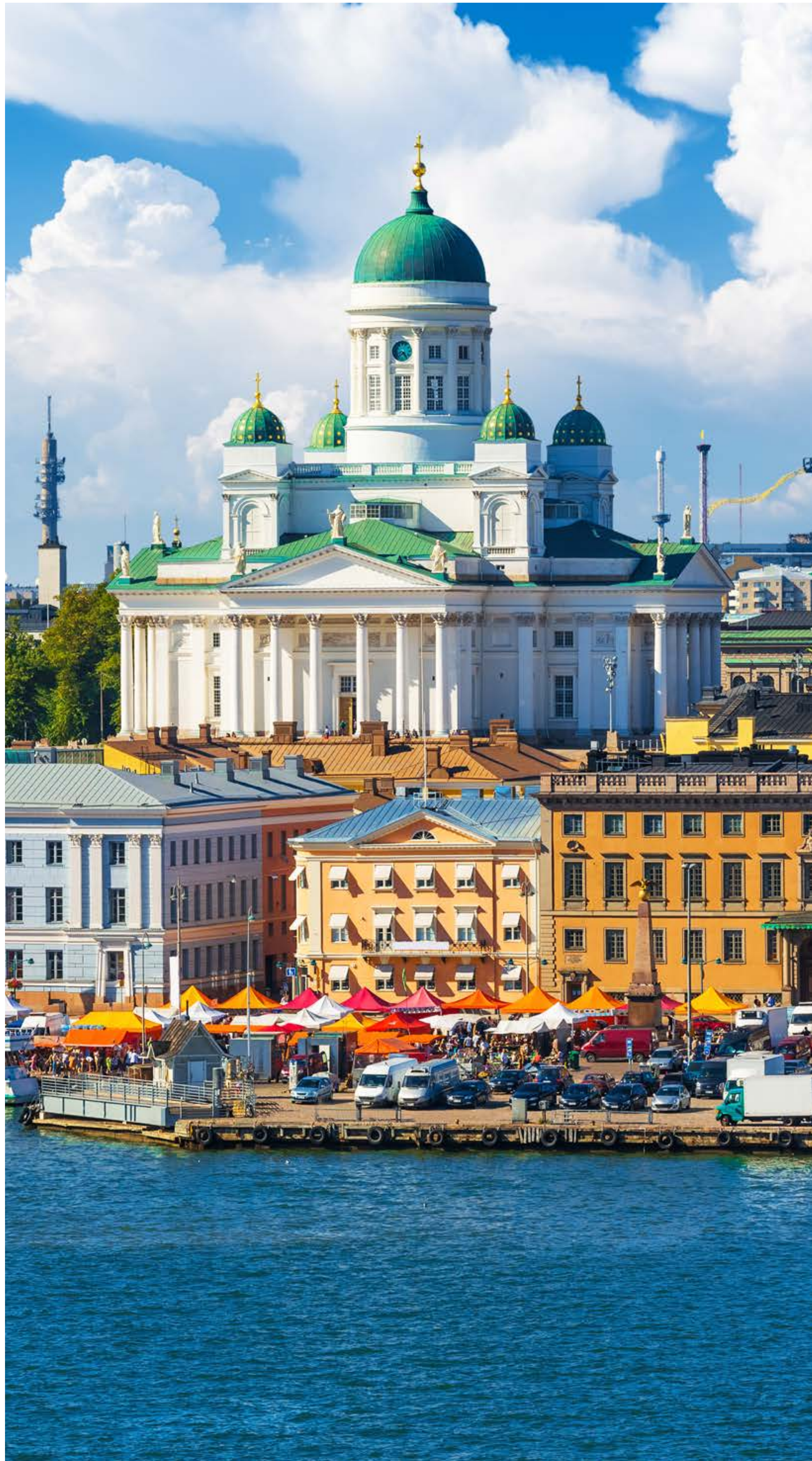

Gabon

New customs duty exemption provisions

Due to the particularly difficult economic environment, and the loss of revenue from the practice of granting duty-free status on an exceptional basis and of exemptions from duties and taxes on imported goods, the amended Finance Act No. 009/2017 dated 3 August 2017[34] (the amended Finance Act) has been adopted to provide a legal framework for special transactions (suspensive and economic) to improve the revenues of the state.

Effectively, the amended Finance Act introduced two main changes to the duty-free and customs exemptions regime in Gabon. The first one relates to the conditions that must be met to take advantage of the exemptions, and the second one relates to prohibited exemptions.

1. Conditions to be met

According to Section 22 of the amended Finance Act, and in accordance with the laws currently in force and the Customs Code, the Finance Minister and regional Customs managers will no longer grant exemptions from customs duties on an exceptional basis.

Going forward, economic operators who wish to benefit from exemptions must submit an application to the Minister of Economy to register according to the amended Finance Act.

2. Prohibited exemptions

According to section 23 of the amended Finance Act, no customs duties and other tax exemptions on imported goods may be granted, unless provided for by the Finance Act. Therefore, exemptions not provided for in the Finance Act are now prohibited.

Any proposed exemptions from import tax and duties must specify the revenue losses from such exemptions that are granted by Customs and the Indirect Tax Administration.

On 23 August 2017, the Minister of Economy issued a decree order that referred to the main changes in the amended Finance Act on duty and other customs exemptions in Gabon.

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[34] Law No. 009/2017 dated 3 August 2017 amending certain provisions of Law No. 26/2016 dated 6 January 2017 determining the income and expenses of the State for the year 2017.

Ghana

Ghana amends Customs Act regarding bonded warehousing of goods

Ghana's Parliament has passed the Customs (Amendment) (No. 2) Act, 2017 (the Act). The President assented to the Act on 29 December 2017, and the Gazette notification was issued the same day. Accordingly, the Act came into force on 29 December 2017. The Act amends the Customs Act, 2015 (Act 891) to provide additional requirements for the bonded warehousing of goods and other related matters.

The key amendments include the following:

- For the purpose of declaring goods to be placed under a customs procedure, the Commissioner-General (CG) of the Ghana Revenue Authority (GRA) may require importers to furnish the following documents:
  - Letter of credit, where applicable
  - Bank guarantee or insurance cover
- The CG of the GRA will cease to grant a dispensation to an importer, owner or a person who intends to keep or maintain goods in a bonded warehouse without the submission of letters of credit, bank guarantees or insurance coverage from reputable financial institutions.
- The CG of the GRA may publish in two daily newspapers and in the Gazette a list of reputable financial institutions required to issue letters of credit, bank guarantees or insurance coverage.

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Russia

Important changes in customs legislation

On 1 January 2018, the new Customs Code of the Eurasian Economic Union (EEU) entered into force replacing the Customs Code of the Customs Union. This document regulates import and export of goods in EEU member countries (Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia) along with the acts of the EEU bodies, international agreements and national legislation. The new Customs Code integrated several EEU agreements that previously regulated such key issues as, for example, determination of the customs value of imported goods.

The Customs Code introduces numerous changes and specifications regarding the current customs clearance process. Examples of the most important changes include the following:

1) The EEU Customs authorities must release imported goods within four hours. In practice, however, the release of goods may take longer.
2) Importers and exporters do not have to provide supporting documents together with the declarations on goods. However, Customs may further request such documents. Therefore, the importers/exporters of record should have the necessary documents at hand when they submit the declarations on goods.
3) It is now possible to register customs declarations without involving customs officers and release goods automatically.
4) The Customs Code provides for an opportunity to receive an advance ruling on the applicable method of customs valuation. However, the mechanism of receiving such rulings has yet to be specified by the national legislation. Currently, Russian legislation does not establish such a mechanism.
5) The concept of the Authorized Economic Operator (hereinafter, the AEO) has changed significantly:
   - The AEO status can now be received not only by importers and exporters of record but also by customs representatives (brokers) and logistics companies.
   - There are now three types of AEOs. Each type provides for different special simplifications and different requirements that applicants must meet. Companies that received the third-type AEO status can benefit from all the available simplifications.
   - The amount of securities for customs payments depends on how long a company is using the AEO status.

6) The Customs Code specifies when importers and exporters are not required to declare the customs value of goods. Such situations include placing goods under certain customs regimes, such as customs transit, customs warehouse, destruction, abandonment to the State and special customs procedure.

Additionally, a new Federal Law "On customs regulation" is to enter into force in 2018 to ensure compliance of Russian legislation with the new Customs Code. Before this new law takes effect, the provisions of the current federal law on customs regulation[35] that do not contradict the new Customs Code are applicable. The Ministry of Finance has issued a letter[36] specifying which articles of the current law are no longer applicable and the provisions that are applicable instead.

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[35] Federal law N 311-FZ of 27 November 2010 "On customs regulation in the Russian Federation."

[36] Letter of the Ministry of Finance № 03-09-20/88036 of 28 December 2017.

Switzerland

Tackling the "Swiss island of high prices" through import facilitations

On 20 December 2017, the Swiss Federal Council decided to unilaterally lift customs duties on imports of industrial goods. Customs duties on selected agricultural goods that are not produced in Switzerland are also expected to fall. In addition, the Cassis de Dijon principle is to be strengthened by reducing the exceptions to this principle for products. The measures are supposed to achieve cost savings of around CHF900 million (approximately USD970.25 million), which would directly benefit consumers and companies.

The Federal Council called for the examination of the "economic, financial and foreign policy advantages and disadvantages of an autonomous lifting of all import duties in the industrial sector." Four external and independent economic research institutes were commissioned to carry out analyses of specific aspects. Based on the findings of these studies, the Federal Council has now decided to unilaterally lift import duties on industrial goods, to reduce import duties on selected agricultural goods and to achieve a more efficient implementation of the Cassis de Dijon principle.

Elimination of import duties on industrial goods

At present, there are still numerous tariff and non-tariff barriers to trade that are still in place for historical reasons, but are no longer appropriate due to globalization and the corresponding liberalization of the economy. Industrial goods are defined as all goods of the customs tariff numbers in Chapters 25 to 97 of the Swiss Customs Tariff. These tariff numbers include consumer and industrial goods, such as vehicles, leather goods, personal care products, clothing, as well as inputs for production processes. The unilateral duty elimination would mean that all tariff rates are set to zero. The international obligations under the World Trade Organization (WTO) or free trade agreements would remain unchanged. As a result of the tariff savings, the Confederation would lose approximately CHF490 million (approximately USD527.2 million) in revenue, constituting 0.7% of the total federal revenue. However, 30% of this loss could be offset by higher government tax revenues as a result of higher economic growth. On average, import duties on industrial goods amount to only about 1.8%. The protective function of these duties is therefore insignificant, not in the least because the industrial goods concerned are not manufactured in Switzerland and the elimination of customs duties, therefore, does not endanger the domestic industry.

As a result, companies that purchase inputs from abroad could import at a lower cost of production and export them more cheaply after the production stage has taken place or, depending on the industry, achieve higher margins. The export industry and the import industry would thus benefit greatly from these measures. At the company level, an increase in the number of jobs would be possible due to higher production output. This would also reduce "shopping tourism" abroad.

The reduction of customs duties to zero would, in addition to the financial advantages, result in a major administrative relief for importing companies in Switzerland in connection with the customs clearance of goods in cross-border traffic. For example, the cost of applying free trade agreements, including obtaining and presenting a valid proof of origin for duty-free importation, or the use of special customs procedures would no longer be necessary, as no more customs duties would be due at any time. The term "special customs procedures" includes, for example, the customs procedure of temporary importation or the customs procedure of inward processing, with which companies benefit temporarily from tariff relief or exemption if the goods are then exported from Switzerland after a certain period of time. Due to strict procedural regulations, carrying out these operations constitutes enormous efforts for both the Swiss Federal Customs Administration and companies. However, this elimination of customs duties would not affect steering levies or excise duties, such as the mineral oil tax or the volatile organic compounds (VOC) incentive tag.

The Federal Customs Administration also benefits from these measures, as the absence of administrative tasks, such as taking samples to check the declared tariff number, would then be unnecessary and the correct classification would no longer be of central importance for the correct levying of customs duties. In principle, this would result in a more efficient and streamlined customs clearance for all parties involved.

Reduction of import duties on selected agricultural goods

Consumer food prices in Switzerland are on average 60% higher than in the European Union. The dismantling of import duties on products that are not produced in Switzerland at all, such as bananas or other exotic fruit, would in no way jeopardize Swiss agricultural production. Consumers in Switzerland could, therefore, benefit from a reduction in customs duties and the associated cheaper imports of such agricultural products. The customs duties on agricultural products that are also produced in Switzerland would remain unchanged.

Cassis de Dijon principle

In accordance with the Cassis de Dijon principle, goods can be imported into Switzerland if they have been manufactured and legally marketed in accordance with the regulations of the European Union. The Cassis de Dijon principle does not apply to products that are subject to mandatory registration or a prior import license. There are currently 24 exceptions to categories of goods that, despite the Cassis de Dijon principle, do not benefit from this simplification. These include pesticides, pharmaceuticals, war material, chemicals, etc. The Federal Council has decided to abolish regulations on the energy efficiency of household appliances and the declaration of wood products in the scope of these exceptions, constituting a reduction in the number of exceptions.

The proposal also provides for the replacement of the requirement to obtain authorization for foodstuffs in accordance with the Cassis de Dijon principle with a digitized notification procedure. This will make it easier to import foodstuffs and, at the same time, cheaper for companies, which in turn would lower sale prices in Switzerland. Moreover, it would also be expected that this implementation would increase the diversity of products in Switzerland.

Conclusion

Reducing tariff and non-tariff barriers to trade would most likely have positive effects for Switzerland as a business location and, according to the study, would result in financial savings, efficiency gains through leaner administrative processes and growth of the Swiss economy. It remains to be seen how the various stakeholders will react to the Federal Council's proposal. The consultation period for the package of measures proposed by the Federal Council runs until 23 March 2018, but the effective implementation of these import facilitations is not expected before 2020.

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Turkey

Recent changes in certificate of origin requirements

Turkish customs regulations no longer require proof of origin certificates to enable importers to avoid imposition of certain additional customs duties on imports from the European Union (EU). Additional customs duty (ACD) applies to the importation into Turkey of certain product categories, unless a preferential arrangement is in place. Under new regulations, published on 30 December 2017 and effective 28 February 2018, an "exporter declaration" will generally be sufficient to prove the origin of EU imports (and to exempt them from ACD). A certificate of origin will only be requested if the Turkish authorities have doubts related to the origin of the imported goods based on ″serious and concrete reasons.″ This measure will reduce the compliance burden for traders importing goods into Turkey from the EU.

ACD is based on the origin of the imported goods under Turkey's preferential trade arrangements (i.e., free trade agreements and generalized system of preferences). However, the customs union between Turkey and the EU is based on the free circulation of goods, rather than on their origin. Therefore, under the customs union, origin is not regulated and the method to prove origin has been unclear with regard to ACD on goods imported from EU Member States.

Goods in the customs union in ″free circulation″ are accompanied by an A.TR Movement Certificate to indicate this status. However, the A.TR Movement Certificate does not indicate the origin of the goods (which may have been previously imported into the customs union from outside the EU or Turkey). To determine the origin of goods imported with an A.TR Movement Certificate, therefore, the Turkish customs authorities previously requested a certificate of origin as documentary proof to eliminate ACD, which caused additional operational burdens for traders. As noted, under the new regulations, an importer declaration is sufficient and the certificate of origin is no longer requested except for cases where the customs authorities have ″serious and concrete″ reasons to question the declared origin of the goods.

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United Kingdom

UK Government introduces new Customs Bill

On 20 November 2017, the United Kingdom (UK) Government introduced a new Taxation (Cross-border Trade) Bill (the Customs Bill) to the House of Commons, and the Customs Bill was given its First Reading. No dates have yet been set for future stages. The Customs Bill follows the Trade Bill released on 7 November, which makes provisions relating to international trade that are not directly tax-related. This includes the power to implement non-tariff obligations and the establishment of a Trade Remedies Authority to deliver the UK's trade remedies function. The two bills together are intended to" set the groundwork for the UK to become an independent global trading nation."

The Explanatory Notes accompanying the Customs Bill point out that whatever the outcome of negotiations with the European Union (EU), the UK will need domestic legislation to be in place for a new Customs regime beginning in March 2019. That new regime will need to provide for the tariff-related aspects of the UK's future trading framework.

As the Customs Bill does not presuppose any particular outcome from the UK's negotiations with the EU, it needs to provide sufficient flexibility to give effect to a range of potential outcomes. These could include a negotiated position between the UK and the EU, including a possible" implementation period" or the introduction of a new Customs regime that reflects the fact that no negotiated settlement has been reached. It also is necessary for the Customs Bill to amend existing value-added tax (VAT) and excise legislation as a consequence of the UK's withdrawal from the EU (with or without an agreement) in order to ensure that these regimes work appropriately upon withdrawal.

In assessing the options for the UK's future customs relationship with the EU (and therefore, how the Government uses the powers in the Customs Bill), the Government's White Paper of 9 October 2017 sets out that it would be guided by what delivers the greatest economic advantage to the UK, and by three strategic objectives:

- Ensuring UK-EU trade is as frictionless as possible
- Avoiding a hard border between Ireland and Northern Ireland
- Establishing an independent international trade policy

The Customs Bill

Parts 1 and 2 of the Customs Bill, which provide for a new stand-alone Customs regime, are largely based on current EU law, and it is the Government's intention that the UK's Customs regime will continue to operate in much the same way as it currently does following exit from the EU. However, depending on the outcome of the negotiations, traders that currently trade only with the EU may be subject to customs declarations and customs checks for the first time.

The Customs Bill would allow for divergence from EU law where the Government feels it is necessary to do so, or where it believes that there is a clear benefit to business to diverge from it and such divergence is consistent with any bilateral arrangements the Government ultimately agrees to with the EU.

While the precise nature of the UK's future customs relationship with the EU will be the subject of negotiations, the Customs Bill will allow the Government to:

- Charge customs duty on goods (including on goods imported from the EU)
- Define how goods will be classified to establish the amount of customs duty due
- Establish a new UK tariff and set out additional tariff-related provisions
- Set and vary rates of customs duty, as well as specify where goods are subject to quotas and where goods are relieved from duty
- Vary or suspend duty at import in certain circumstances, e.g., supporting developing countries by offering preferential treatment
- Implement arrangements to establish a Customs union between the UK and another territory or country
- Request and collect tax-related information from declarants and store and share it as appropriate
- Provide for amendment of existing VAT and excise legislation by providing for the EU concept of acquisition VAT (for business-to-business intra-EU movements) to be abolished so that import VAT is charged on all imports from outside the UK
- Allow the VAT and excise regimes to continue to function whatever the outcome of the negotiations

The Government has previously noted that it is keen to agree with the EU, as soon as possible, on a model for an interim implementation period, which would mean that only one adjustment to a new customs relationship is needed. The length of this interim period is also to be agreed upon.

Delegated powers are included in the Customs Bill to allow the Government to make future amendments to the imposition, administration, collection and enforcement of customs duty, including any simplifications that it is not possible to implement immediately upon EU exit. Such powers will also grant flexibility to make appropriate amendments to VAT and excise legislation and allow the Government to make appropriate amendments to primary legislation and use secondary legislation to implement negotiated agreements.

Next steps

Following the progress of negotiations in December 2017, it was agreed that talks could begin on the future UK-EU trade relationship. These talks are ongoing, and the next few months may prove decisive in determining the form this relationship will take. For the time being, it is highly likely that there will be a transition period after exit day during which trade rules would remain largely the same as they are now. After this period elapses, however, it remains to be seen which rules will apply.

Implications

The progression of these two pieces of domestic Brexit legislation will be seen as a positive step by many, despite the final post-Brexit trade and customs models remaining unknown and subject to further EU negotiation and agreement. That said, the UK has acknowledged that it will leave the current EU Customs Union, and it is clear that, no matter how light, there will be a UK-EU border that businesses should start preparing for now.

Waiting until the end of the negotiation period may not leave enough time to take measured action before rules and trading arrangements change.

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End-use relief authorization procedure changes: implications for UK importers

The EU Commission has recently clarified its position on the possibility to enter goods under end-use relief (end-use) with planned assignment outside the European Union. In the UK, this led to a change in Her Majesty's Revenue and Customs (HMRC) position, which impacts all the businesses that currently import goods under end-use with the aim to subsequently dispatch them from the UK to the continental shelf.

Background

Historically, HMRC's position was that oil and gas companies could import goods in the UK under end-use relief with the aim to subsequently use these goods offshore, i.e., in oil rigs and fixed platforms in the North Sea. The end-use relief allowed the import of goods duty free provided:

- The business held an appropriate end-use authorization
- The conditions outlined in the business's authorization were met
- The goods were put to their prescribed end-use

Following discussion in the Special Procedures Expert Group in Brussels, the Commission reviewed the guidance on end-use procedures and specified that "the assignment of goods to the prescribed end-use must take place within the customs territory of the Union because assignment outside of the Union would require an export of goods." The export (physical exit) of goods renders the end-use procedure inapplicable for companies that know in advance that the goods will be placed under prescribed end-use outside of the European Union.

From a business perspective, where such "assignment outside the Union" is envisioned, the goods should not be placed under the end-use procedure. Such goods may be entered into the UK under a different customs arrangement, such as customs warehouse or temporary storage for subsequent export. These alternative customs arrangements entail obtaining the necessary authorizations.

To promote a smooth transition in the change of policy, HMRC has allowed businesses under standard operating procedures to discharge goods from the end-use procedure outside the customs territory of the European Union up to 31 July 2018.

Business challenges

In practice, the end-use changes imply that, for example, oil and gas companies that currently use the end-use relief for goods destined for operations in the North Sea will no longer obtain an end-use authorization from HMRC for these specific operations. Considering that companies imported products in the UK based on valid end-use authorizations, it can be logistically and practically impossible to export these goods outside the Union by 31 July 2018.

In the event that companies continue to hold stock of goods intended to be assigned to the prescribed end-use outside of the Union after 31 July 2018, HMRC's position is that these products should be diverted to home use with full payment of customs duties and import value-added tax (VAT). The customs duties will constitute an irrevocable cost for the businesses.

While the current discussions with HMRC address the possibility to re-route the products placed initially under end-use to a customs warehouse, this situation is not explicitly mentioned in the Union customs legislation as a viable solution to discharge the end-use procedure. So far, HMRC has not confirmed that companies are allowed to amend the initial customs declarations and indicate that the goods are re-routed to a customs warehouse procedure.

Each alternative mentioned above should be carefully analyzed by the affected businesses to verify if it is feasible, from a business perspective, to implement it (e.g., an export might not be possible within the given time frame) and to identify the business implications (e.g., apply for other customs authorization, such as a customs warehouse).

Oil and gas companies that currently hold stock of goods in the North Sea should undertake the necessary actions in-line with the above as the assignment of these goods must take place within the customs territory of the European Union to benefit from the end-use relief.

Businesses that are currently using end-use for offshore supply will need to consider and apply for other customs duty authorizations, such as the customs warehouse.

Going forward, businesses that want to obtain a UK end-use authorization will have to demonstrate that the goods will be placed under prescribed end-use within the customs territory of the European Union.

Check for updates in future issues of *TradeWatch*.

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EYG no. 01511-181Gbl
BSC no. 1802-2605398

ED None

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