

# Global Customs Hot Topics

Thursday 8 October, 2.00 - 3.30 pm BST



# Speakers



**Jessica Mutton**  
Senior Associate (Chair),  
London



**Jon Cowley**  
Partner, Hong Kong



**Adriana Ibarra-Fernandez**  
Partner, Mexico City



**John McKenzie**  
Partner, San Francisco



**Eunkyung Kim Shin**  
Senior Associate, Chicago



**Francisco Allegue**  
Associate, Barcelona

**01**

# Trade Wars

# Section 301 Duties on Products of China

“Retaliatory” Duties imposed on Chinese products based on a finding under section 301 of the Trade Act of 1974 that China’s intellectual property and technology transfer policies are unreasonable and discriminatory, and burden and restrict U.S. commerce

- 4 Rounds of Section 301 duties, affecting approximately \$500 billion in merchandise imported from China
- Lists 1-3 products subject to 25% ad valorem duties; List 4A products subject to 7.5% ad valorem duties

Judicial challenge to the Section 301 duties on List 3 (and 4A) products: HMTX Industries v. United States, filed September 10, 2020

- Section 301 does not authorize imposition of duties on list 3 products absent a predicate finding
- Imposition of the duties was untimely, as the statute requires the USTR to take action within 1 year
- Imposition of duties did not conform to the procedure requirements of the Administration Procedures Act

# Hong Kong Normalization Executive Order

U.S. Government finding that Hong Kong is no longer autonomous, as provided in the United States-Hong Kong Policy Act of 1992

- Executive Order 13963 (July 14, 2020) directs the suspension (and then termination) of Hong Kong's special status with respect to trade and investment
- Changes in United States export controls and export licensing requirements to conform to restrictions applicable to China
- Modification of U.S. country of origin marking requirements under section 304 of the Tariff Act
  - Hong Kong made products must be marked as "products of China"
  - Pending: Whether the section 301 duties on "products of China" will apply to Hong Kong made products

# Section 301 Actions Involving Digital Services Taxes

**France:** USTR finding that the French Digital Services Tax is unreasonable or discriminatory and burdens or restrictions U.S. commerce under section 301 of the Trade Act of 1974

- July 10, 2020, the USTR announced the imposition of 25% ad valorem duties on \$1.3 billion worth of imported French products
  - Primarily beauty products and handbags: HS 3304, 3401 and 4202
  - Effective date delayed by 180 days until January 6, 2021

## Other Countries Digital Services Taxes

- June 5, 2020 announcement of commencement of investigation under section 301 of digital services taxes proposed or enacted by Austria, Brazil, Czech Republic, European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom
- Issues:
  - Discrimination against U.S. companies
  - Retroactivity
  - Divergence from norms of international tax system
  - Penalizing U.S. technologies for their commercial success

# The Trade War Narrative

Prepare for more uncertainty

## Volatile

Tariffs up to **25%**

Applicable to goods valued at over  
**US\$ 600 billion**

Growing list of **blacklisted companies**  
and **restricted products**

### What's at stake?



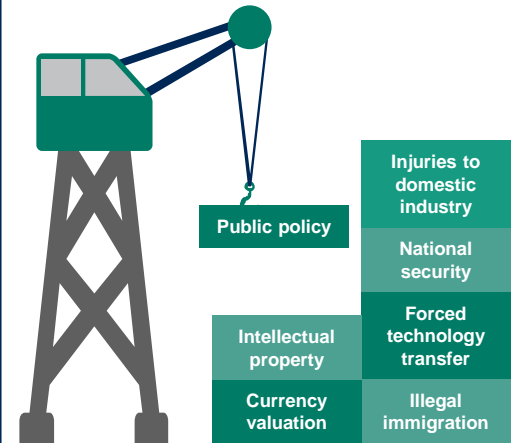
## Unpredictable

No country, region, or industry is immune



## Complex

Trade deficit is not the only focus:



# EU Response to US Trade Measures



**1**

Introduction of retaliatory duties under the WTO Safeguards Agreement

**2**

Imposition of 'safeguard' measures on steel

**3**

Launch of a WTO dispute challenging US steel and aluminum tariffs

**4**

Consultation on further retaliatory duties against US



**02**

# **Update on USMCA**

# USMCA Implementation Nightmares

It shouldn't be too difficult since the underlying ROO is not changing...right?

- Mexico
  - Adoption of 6th amendment to Harmonized System by Mexico, effective as of December 28, 2020.
    - Potential consequence: difference in tariff classification used by US or Canadian exporter/producer and classification that must be declared in Mexican import entry.
  - New USMCA certification of origin as of July 1, 2020 and Blanket ("yearly") NAFTA certificates of origin issued on January 1, 2020.
- United States
  - Final rules implementing the USMCA & General Note 11, incorporating the USMCA rules of origin, both issued on June 30, 2020, one day before the implementation day (July 1, 2020) (same as in Mexico).
  - CBP updated its suggested certification of origin template for trade agreements to include the USMCA on August 14, 2020, 1.5 months after the implementation day.

# Certification of Origin

- NAFTA Certificates of Origin are no longer acceptable.
- USMCA requires a Certification of Origin, in no prescribed format, but covering nine specific data elements (ANNEX 5-A of the USMCA).
- As with NAFTA, a certification of origin must be in the importer's possession at the time the USMCA preference claim is made.
- Templates / Examples
  - US – “Certification of Origin Template” (<https://www.cbp.gov/document/guidance/certification-origin-template>)
  - Canada – “Example of a valid certification of origin” (<https://www.cbsa-asfc.gc.ca/services/cusma-aceum/cog-com-eng.html>)

# Certification of Origin

- Under USMCA, **Producers, Exporters** and **Importers** can all complete a certification of origin on the basis of “information, including documents, that demonstrate the good is originating.”
- Additionally, **Exporters** who are not the Producer of the goods may complete a certification of origin based on the Producer’s “written representation” that the good is originating.
- Importers are responsible for exercising reasonable care concerning the accuracy of all documentation and declarations submitted to CBP. Practically speaking, better for an importer to rely on an Exporter / Producer Certification of Origin than its own Importer Certification of Origin?
- As with NAFTA, false certifications are subject to penalties.
- Any party issuing an Exporter or Producer Certification of Origin is obligated, under local law, to maintain all records to demonstrate status as originating for 5 years from Certification. So what types of records should be maintained (next slide)?

**World**

**Foreign Material 1**  
**Foreign Material 2**

**Domestic Material 3**

- PO
- Invoice
- Payment
- COO/Affidavit (If applicable)
- Bill of Lading (Direct Shipment)

**Domestic Material 4**



- PO
- Invoice
- Payment
- COO/Affidavit (If applicable)
- Import Entry (7501)
- Bill of Lading (Direct Shipment)

**Production Records**

- Location of manufacturing facility
- Production Process
- Incorporation of materials into production

**Inventory Records**

- Proof of receipt of materials in inventory
- Location of production facilities

**Finished Goods**

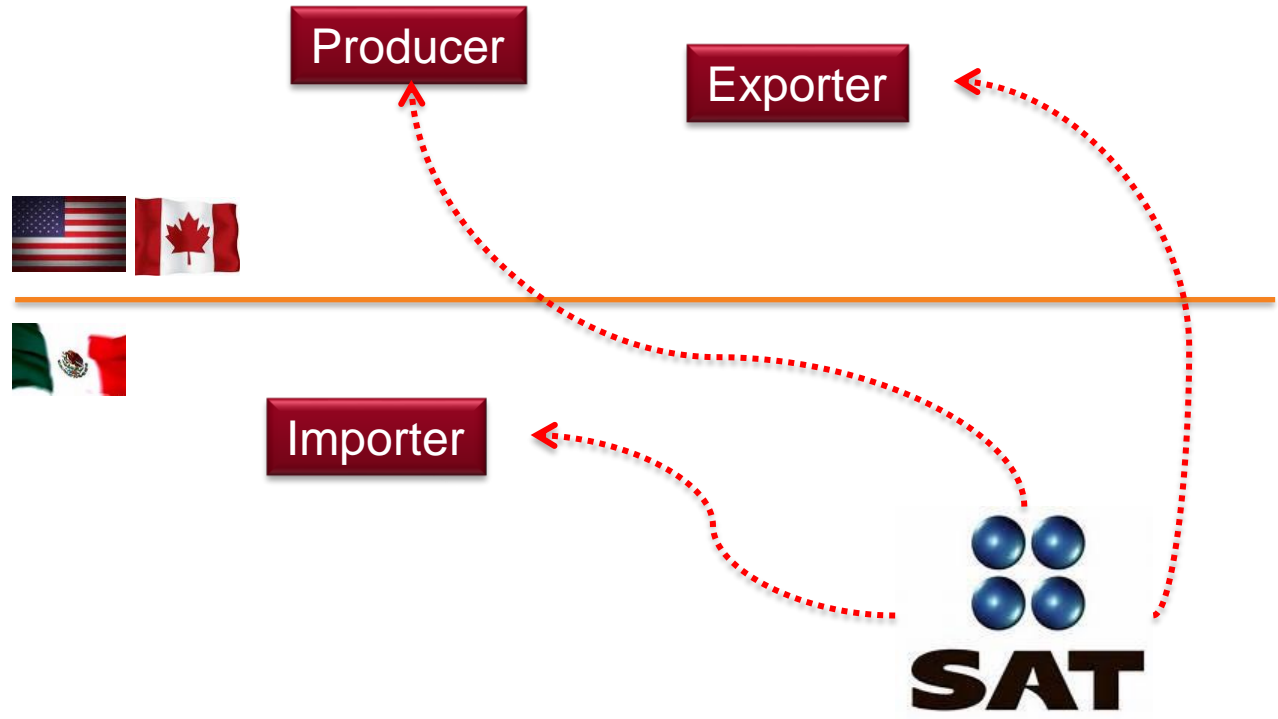
- PO
- Invoice
- Payment
- BOL
- COO

**US**

**Mexico**

**Mexican Importer**

# Origin Verifications



# Origin Verifications



**03**

**Customs Valuation  
Issues**



# Assists, Royalties and License Fees

## Assists art. 71(b) UCC

- In certain situations a seller might obtain inputs that are required for the production of goods for free or at a reduced price;
- It is to be expected that the seller will be in a position to charge a lower price for the finished goods, than if the seller would have incurred the costs to purchase or produce the inputs itself;
- “Assists” can be considered to be a type of indirect payment made by the buyer;
- In this respect, it is relevant to take the value of these assists into consideration for customs valuation purposes.
  - i. materials, components, parts and similar items incorporated into the imported goods;
  - ii. tools, dies, moulds and similar items used in the production of the imported goods;
  - iii. materials consumed in the production of the imported goods
  - iv. engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Union and necessary for the production of the imported goods.

## Royalties and license fees art. 71-72 UCC

1

Royalties are **deemed to be related** to the goods when rights transferred are embodied in the goods

2

**Condition of sale** requirement fulfilled where:

- i. the buyer is required to make the payment by a seller or a person related to the seller;
- ii. the payment is made to satisfy an obligation of the seller in accordance with contractual obligations, and;
- iii. the goods cannot be sold to or purchased by the buyer without payment of the fees to a licensor



Trend: importing goods including free intangibles embodied

# Assists: Case C-509/19 BMW



# Transfer Pricing Adjustments

*“The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation [...] provided that [...] the buyer and seller are not related, or where the buyer and seller are related, [...] the relationship did not influence the price.” art. 1 – VII GATT*

*“ the primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.” art. 70 (1) UCC*

# Transfer Pricing Adjustments

- > No consistency among countries in accepting retroactive TP adjustments after date of import as part of the “transaction value”
- > Some allow upward adjustments to COGS (customs values) only, so that additional duty is owed
- > Some allow no post-importation adjustments, e.g., most of Latin America
- > Others, like the US, Canada, UK and Australia allow both upward and downward adjustments as long as certain criteria are met

# Transfer Pricing Adjustments

C-529/16 Hamamatsu Photonics Deutschland on retroactive TP adjustments:

- Companies cannot use a price that is charged by a related party and is later subject to possible retroactive adjustments as the customs value!
  - Application of alternative valuation methods to form the customs value (e.g. resale-minus, cost plus)? ECJ not clear on this point
  - Possible interpretation of mere wording of the case law: alternative valuation methods are not applicable either. Result: retroactive TP adjustments do not have an impact at all
  - The case is currently pending at the German Federal Finance Court.
- 
- Importer will need to agree with the relevant customs authorities on how to treat such entries and whether / how the final customs value is to be adjusted (supplementary declarations?)

# Which Sale?

## Definition of Transaction Value art. 128 (1) IA – UCC

Excerpt of the Current Customs Valuation Guidelines:

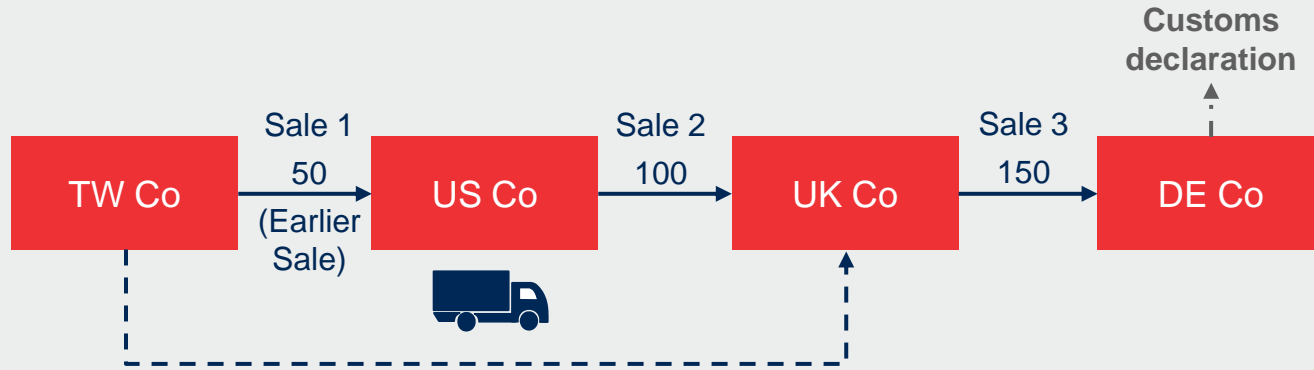
- The relevant sale for goods brought into the Union is the sale when crossing the border, i.e. the ultimate sale taking place at that time;
- A domestic sale (buyer and seller in EU) **NOW** qualify as a sale for export to the EU (new EU guidance published on 17 Sep.);
- Sale in the customs warehouse can be used if there is no sale for export art. 128 (2)

# Which Sale? UCC (IA)

## New definition of transaction value



Example 1 – Which transaction is the basis for the customs value?



- Both Sale 1 and 2 constitute a "sale for export to the EU"
- Sale 1 as "Earlier Sale" is not relevant anymore for the determination of the transaction value under the UCC
- Sale 2 is relevant for the determination of the transaction value
- However, Sale 3 could qualify as "Sale for Export" if occurred before the goods are brought into the EU

# Which Sale? UCC (IA)

## New definition of transaction value

### Example 2 – Customs warehousing



Scenario 1: Sale 1 is concluded before the goods are stored in the customs warehouse. Sale 2 is concluded during the storage of the goods in the customs warehouse.

- Sale 1 is relevant for the determination of the transaction value (Art. 128 (1) IA)
- Sale 2 is not relevant for the determination of the transaction value (Art. 128 (2) IA is not applicable)



The image features a white speech bubble on the left side, containing the word "Questions" in a bold, dark blue font. The background is a dark blue gradient with a glowing teal particle stream or nebula-like structure on the right side, composed of many small, bright teal dots and lines. The overall aesthetic is clean and modern, with a focus on the word "Questions".

**Questions**

# Baker McKenzie.

Baker & McKenzie LLP is a member firm of Baker & McKenzie International, a global law firm with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm. This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

© 2020 Baker & McKenzie LLP