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Customs Valuation Treatment of International Marketing Fee of Multinational Enterprises and its BEPS Implications: Focusing on the Adidas Case of the Supreme Court of Korea*

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Abstract

There have been a number of court cases in Korea concerning customs valuation treatment of international marketing activities of MNEs. In customs valuation cases, substance-over-form rule should apply as ordinary tax cases, with all relevant facts and circumstances being considered, including the general rights and obligations of trademark owner and licensee, details of the specific license agreement between the parties and the practical aspects, and special characteristics of the parties.

In the Adidas case of the Supreme Court, it is reasonable to regard the international marketing activities as contributing to enhancing or at least maintaining the brand value by repeatedly exposing the brand through various media rather than as advertising or promoting for individual products. Thus, there is no denying that global marketing conducted by MNE headquarters supports and enhances the brand value, and allocating the international marketing expenses to local distributors under their responsibilities cannot be easily reconciled with the essential nature of trademarks. In this sense, the Supreme Court is right to find that the substance of international marketing fee is royalty for trademark license, and the same reasoning was correctly applied to subsequent Supreme Court cases involving global marketing activities of MNEs.

From the perspective of Base Erosion and Profit Shifting (BEPS) in international taxation, the international marketing fee cases of the Supreme Court signify that anti-BEPS Actions and their implementation in the customs area is becoming ever more important for customs policy and administration in dealing with global customs strategy and practices of MNEs.

Key Words: Customs valuation, International marketing fee, trademark, trademark license, royalty, BEPS, OECD transfer pricing guidelines

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I. Introduction

It is characteristic of Multinational Enterprises (MNEs) to focus on supply chain management in which product design, research and development (R&D), materials sourcing, production, and distribution activities are executed from the perspective of one value cycle. Thus, from the international tax planning perspective, MNEs generally consider a range of issues that may arise with regard to tax-efficient supply chain management in all areas of taxation—from direct tax, indirect tax, and customs duty to transfer pricing.[1)]

For most MNEs, developing, enhancing, maintaining, protecting and exploiting intangibles[2)] or intellectual property(IP) such as patent, trademark or knowhow have always been core business functions, on which a revised and enlarged chapter was adopted and included in the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (hereinafter "TPG (2017)") under OECD/G20 Base Erosion and Profit Shifting (BEPS) project launched in 2013.[3)]

In the case of Korea, in line with the global trend, the proportion of intangibles trade in international business transactions continues to rise.[4)] With respect to royalties derived from intangibles transactions, there are two aspects of taxation. First, for income tax purposes, transfer pricing

1) IBFD, Taxation of Supply Chain Management and Business Restructuring, https://www.ibfd.org/sites/ibfd.org/files/content/ita/pdf/program/AP14TSCM1%20-%20Program%20web.pdf

2) For transfer pricing purposes, intangible means something that is not a physical or financial asset, which is capable of being owned or controlled for use in commercial activities, and whose use or transfer would be compensated had it occurred in a transaction between independent parties in comparable circumstances. TPG(2017), para. 6.6.

3) Base erosion and profit shifting (BEPS) refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. For details of BEPS Actions, please refer to http://www.oecd.org/tax/beps/beps-actions.htm.

4) In 2015, Korea's technology trade volume reached 26.8 billion USD, up 6% from 2014.

issues and the application of tax treaty[5] or domestic tax law[6] are significant. Second, for customs purposes, customs valuation of intangibles-related goods is involved. More specifically, when trademark, patent, or any other intangibles are embodied or incorporated in imported goods and the payment of royalty is a condition of sale of the goods, its amount should be added to the customs value of the goods.

In Korea, unlike most other countries, many high-profile customs duty-related cases have been deliberated and decided at the Supreme Court. In particular, with respect to customs valuation, a number of important decisions have been rendered recently, some of which concerned the allocation of international marketing fees borne by MNEs to local distributors.

This paper selects and reviews one such Supreme Court decision on customs valuation (Judgement of Aug. 30, 2016, 2015Du52098, hereinafter "Adidas case") (II, III), and discusses its impact on other related and subsequent customs valuation and international tax cases followed by comments (IV). For these cases, the author attempts to emphasize that both the international tax planning and global customs duty planning of MNEs should be understood from the BEPS perspective, particularly with respect to transactions of intangibles. V concludes.

II. The Adidas Case

1. Facts

P is a Korean subsidiary of Adidas AG (hereinafter "aAG"), a Germany-based multinational sports apparel and equipment company. In January 2003, P entered into a trademark license agreement with aAG under which P paid an amount of 8.5~10% on the net sales of Adidas branded goods as "composite charge,"[7] and included this charge in the customs value of the

5) As of the time that this article is written, Korea has 93 tax treaties in force.

6) Sodeuksebeob (Income Tax Act) and Beobinsebeob (Corporate Tax Act).

7) Art. 7.2 of the License Agreement reads as follows: The following benefits are covered by the composite charge stated above:

imported goods.

In January 2009, P entered into a new license agreement with aAG under which P obtained a right to use the Adidas brand for a royalty of 10% on net sales of Adidas branded goods while additionally paying to aAG an International Marketing Fee (hereinafter "IMF") of 4% on the net sales of the goods.

During 2009, P imported sportswear and shoes marked with Adidas[8] and sold them in the domestic market. In P's import declaration, the import price of the goods included trademark license fee (royalty) but not the IMF.

In January 2011, Korea Customs Service (KCS) audited the customs declaration of P and considered the IMF to be royalty[9] in substance. Consequently, on the premise that the amount of 4% on the net sales derived from the imported goods should be added to the customs value of the goods, the KCS levied additional customs duties, value added tax, and penalty tax on P.

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a. right to use the Marks within the Territory
b. right the use the Knowhow within the Territory
c. exclusive right to distribute within the Territory
d. right to conclude promotional agreements within the Territory
e. right to use the endorsement, logos, and/or symbols of certain international athletes, clubs, federations and/or organizations that have been provided or arranged by the Licensor
f. the organization by the Licensor of global brand events on the occasion of the Olympics, the Worldcup, and the Track and Field World Championships and the goodwill and enhancement of the Marks resulting therefrom
g. quality control information
h. marketing support related to the launch of new products and Adidas brand-related concepts
i. benefits from Licensor's organization of and/or participation in international trade fairs and marketing meetings
j. worldwide communications programs related to the Adidas brand
k. access to new Adidas brand and product concepts developed or supported by the Licensor

8) The goods were manufactured on a contract basis in Vietnam under the direction of aITBV, a Netherlands company associated with aAG.

9) Hereinafter, royalty and trademark license fee are used interchangeably.

2. Lower Court Decisions

The decisions of Seoul Administrative Court (first-tier level) and Seoul High Court (appellate level) differed, with P prevailing in the first court and the KCS prevailing in the second court.

1) The Argument of P

P argued that, in this case, the IMF should not be included in the customs value as prescribed in Art. 30, para. 1-4 of the Gwansebeob (Customs Act). Basically, P was of the view that since the IMF is, unlike domestic marketing, an expenditure related to international marketing activities, each local distributor entered into a contract with the trademark owner and bore its own share of the international marketing burden. Therefore, according to P, there is no implication of trademark license fee or royalty in this case.

P further argued that the IMF is not related to the imported goods and the payment of the IMF is not a condition of sale of the goods being valued. First, on the question of "related to the goods," although international marketing activities conducted by aAG bring an indirect advertisement effect on the imported goods, they are not advertisements that are specifically targeted to individual goods. Second, there is no "condition of sale" element in the goods transaction because the payment of the IMF to aAG is done independently of the import of goods from third party contract manufacturers abroad.

2) Decision of Seoul Administrative Court(SAC)[10]: P loses

The SAC regarded the IMF in this case as royalty paid for the increased value of the trademark resulting from the international marketing activities of aAG rather than as sharing of advertisement costs pertaining to the international marketing of aAG. The court referred to the following aspects as grounds for its decision. First, aAG, as trademark owner and licensor, is responsible for the trademark image and carries out the international

10) Judgement of Sept. 2, 2014, 2013 Guhab57372.

marketing activities under this responsibility. Second, as a consequence of the international marketing activities, the value of Adidas' trademark increases and local distributors around the world benefit from this increased value for which the IMF is paid. Third, the basis for calculation of the IMF is not on the actual marketing expenditures but on the net sales of the local distributors.

Furthermore, given the fact that the goods are imported with the Adidas brand attached and P cannot import and use the Adidas trademark for marketing in Korea without paying the IMF, the SAC concluded that the IMF was related to the goods and its payment was conditional on the sale of the goods.

3) Decision of Seoul High Court (SHC)[11]*: P prevails*

P appealed against the SAC decision, and the SHC decided that the IMF in this case cannot be likened to royalty. Basically, the High Court was of the view that local distributors like P were responsible for their share of the marketing expenditure related to the international promotion, advertisement, and sponsorship carried out by aAG as headquarters, and this sharing of the international marketing fee does not pertain to individual goods being imported. Further, the high court opined that a direct effect of the international marketing by aAG was an increase in revenue for P while enhancement of brand image or trademark value was a collateral effect.

3. Decision of the Supreme Court[12]

Reversing the decision of the Seoul High Court, the Supreme Court of Korea decided for the KCS in the following manner (summary of the decision):

1) The Customs Act provides that the customs value of imported goods shall be determined by the transaction value calculated by adding or adjusting for fees for using trademark or any similar right to the price actually paid or payable by the buyer (Customs Act Art. 30, para. 1-4).

11) Judgement of Aug. 27, 2015, 2014 Nu65495.

12) Judgement of Aug. 30, 2016, 2015 Du52098.

In addition, provisions related to tax base under tax law shall apply in view of the substance of any income, profits, property, action, or transaction regardless of their designations or forms (Basic Tax Act Art. 14, para. 2), which is also the case for interpretation or application of the Customs Act. Therefore, whether the amount the buyer paid to the trademark owner is payment for consideration for the use of the trademark or similar rights that shall be added to customs value should be judged not from the formal designation of the payment but from the substance of the question of whether the payment is in the nature of fees for the use of trademark or other similar rights.

2) In this case, where P pays international marketing fee (IMF) as well as royalties under a license agreement with aAG, owner of the trademark, and imports sportswear and shoes with the Adidas brand attached without including the IMF in the customs value in its customs declaration, and the customs authority assesses additional duties by adding the IMF to the customs value of the imported goods, taking into account the fact that the IMF is part of the expenditure of aAG to expose its own trademark and logo to the public through star players, top-notch sports team, or international athletic event rather than being a payment for the separate sales promotion through advertising P's imported goods, it is safe for the Court to assume that the IMF, whatever its designation, is in substance a payment of royalty to aAG from P as buyer of the imported goods. Therefore, the High Court, in contradiction with the above reasoning that in consideration of the substance of the transactions the IMF should be regarded as part of royalty, erred in its decision otherwise.

III. Review of the Adidas Case

1. Some Preliminary Issues

1) Customs Valuation Issues of Royalties and License Fees

(1) General Customs Valuation

Customs duties are levied on imported goods,[13] and the tax base of customs duties is the price (for ad valorem duty) or amount (for specific duty) of the imported goods.[14] Customs valuation is a customs procedure for ad valorem duty to determine the customs value of the imported goods. Like other countries, Korea's customs valuation system is based on the World Trade Organization (WTO)'s Customs Valuation Agreement.[15]

(2) Transaction Value and Addition of Royalties

As with the Customs Valuation Agreement Art. 8, para. 1, the Customs Act provides that customs value of imported goods shall be the transaction

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13) Customs Act Art. 14.

14) Customs Act Art. 15.

15) Specifically, Korea reflects the Customs Valuation Agreement in its Customs Act system, namely, Art. 27 to 37-2 of the Customs Act, Art. 15 to 31, 31-4, 31-5 of the Enforcement Decree, and Art. 2 to 7 of the Enforcement Regulation.

16) WTO Customs Valuation Agreement Art. 1, para. 1 provides that 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 adjusted in accordance with Article 8. Art. 8, para. 1 of the Customs Valuation Agreement reads

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing, whether for labor or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods;

value[16), 17)] determined by adding certain specific amounts to the price actually paid or payable for the imported goods, and that the additions shall be made only on the basis of objective and quantifiable data.[18)] Here, "the price actually paid or payable" includes all payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller.[19)]

As one element of addition to the transaction value, royalties and license fees are amounts paid as consideration for the use of patent, utility model right, design right, trademark and other similar rights, calculated by the method prescribed in the Enforcement Decree of the Customs Act.[20)] The reason why these royalties and license fees are added to the customs value is relatively simple. Where intangibles like patents are embodied in the imported goods, unless the royalties are added to the customs value, the price of the goods may be declared low while heightening the royalties, thereby leading to avoidance of paying the correct amount of customs duties. Here is an example on the import of branded sneakers. Suppose that importer I imports and resells in Korea branded sneakers made in Vietnam based on a contract with T, the trademark owner, and I pays royalty of 5% on the net sales to T. For general consumers, the qualities of branded and unbranded sneakers are indifferent, but they are willing to pay more for branded sneakers because the value of the trademark is reflected in the

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(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, plans and sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;[1]
(c) royalties and license fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;
(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

17) When the transaction value cannot be used because of certain conditions such as related party transactions, there are five alternative methods of customs valuation as provided in Art. 31 to 35 of the Customs Act.

18) Customs Act Art. 30, para. 1.

19) WTO Customs Valuation Agreement Annex 3, para. 7.

20) Customs Act Art. 30, para. 1-4.

goods.

Generally, for the addition of royalties and license fees to customs value, the royalties need to be related to the goods and the buyer must pay them directly or indirectly as condition of sale of the goods.[21] The two requirements for the addition are further discussed in III. 4. In Korea, in addition to the intangibles mentioned above, other similar rights include legal rights including copyrights and non-legal rights with economic value such as knowhow, and other useful technical or managerial information and business secrets.[22]

2) Marketing and International Marketing

Although there are various definitions, marketing is generally defined as the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large.[23] However, for customs valuation purposes, marketing can be understood as related to sales or advertisements and as a broader concept than simple physical movement or distributions of goods.[24]

International marketing is the application of marketing principles to satisfy the varied needs and wants of different people residing across national borders and is often referred to as global marketing.[25] International marketing is normally carried out by MNEs.

3) Trademark and Trademark License Agreement

Trademark[26] is a sign capable of distinguishing the goods or services of

21) WTO Customs Valuation Agreement Art. 8, para. 1c).

22) Enforcement Decree of Customs Act Art. 19, para. 1.

23) American Marketing Association, approved July 2013. https://www.ama.org/AboutAMA/Pages/Definition-of-marketing.aspx

24) See Pablo Bianchi & Juan Marino, The Customs Valuation Treatment of Advertisement with regard to Imported Goods, Global Trade and Customs Journal, Vol. 10(11-12), 2015, p. 408

25) https://businessjargons.com/international-marketing.html

26) Occasionally, the term "brand" is used interchangeably with the term "trademark," but, generally, brand is a trademark imbued with social and commercial significance. *See* TPG(2017), para. 6.23. In this paper, brand and trademark are used to mean the same.

one enterprise from those of other enterprises.[27] Trademark protection can be obtained through registration, which will confer an exclusive right to the use of the registered trademark or to license it to another party for use in return for payment.

Use of trademark includes indication of the mark, and transfer and export/import of the goods with the mark indicated. In a trademark licensing agreement, a trademark owner (Licensor) grants permission to another (Licensee) to use that trademark on mutually agreed terms and conditions for which exclusive[28] and non-exclusive[29] licenses are possible. Normally, a trademark license agreement includes the mark, licensor and licensee, territory, goods or services to use the mark, duration, exclusivity of the license, method of indication of the mark, quality control, warranties, registration and protection, royalty calculation, and termination.

One core element of the license agreement is quality control of the trademark. In the absence of substantial and effective control by the licensor, the trademark will no longer symbolize a particular source and, as a result, the licensor may no longer have a protectable interest or exclusive rights in the licensed trademark.[30] Quality control is normally done in terms of two aspects, that is, the use of the marks and inspection of the premises.[31]

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27) An exclusive trademark license provides the licensee with the right to use trademark to the exclusion of all, including the licensor. Thus, the trademark owner cannot use the trademark himself nor can he license any rights to others. The licensee remains the only user of that mark in the relevant market. http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf

28) An exclusive trademark license provides the licensee with the right to use trademark to the exclusion of all, including the licensor. Id.

29) A non-exclusive license grants to the licensee the right to use a trademark according to the grant, and the licensor may continue to use the trademark himself as well as grant other licenses. Id.

30) http://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_12_learning_points.pdf

31) Art. 7 (Quality) of Sample Trademark License Agreement of WIPO has the following provisions:

7.1 The Licensor authorizes Licensee to use the Marks in association with the Wares and/or Services so long as the use by the Licensee is in accordance with the instructions, standards of quality, and trade-mark specifications set by and approved by Licensor from time to time.

2. Nature of the International Marketing Fee in this Case

This case is essentially about whether the IMF paid to aAG can be regarded in substance as part of royalty. If the IMF is found as royalty, the next question is whether the royalty paid to the trademark owner apart from the sales contract can be added to the customs value.

At this stage, it should be noted that, in general, the IMF cannot be treated *a priori* as either royalty or simple sharing of the international marketing expenses. Rather, since the substance-over-form rule in tax law applies equally to the Customs Act,[32] this case should be analyzed by comprehensive consideration of all the relevant facts and circumstances, including the general rights and obligations of trademark licensor and licensee, the specific aspects of the trademark licensing fees and the IMF in the previous and new agreements, the characteristics of the parties to the transaction, and the practical implementation of the agreement.

1) Comparison between Previous New Agreements

Based on available facts, the previous and new license agreements can be compared in the following manner:

7.2 The Licensee undertakes to use the Marks in strict accordance with the instructions, standards of quality and trade-mark specifications supplied by the Licensor from time to time, and to use each of the Marks only in association with [the Wares and/or the Services] now set out in Schedule "A," which may be amended to add or delete Marks as Licensor in sole discretion shall decide.

7.3 For as long as the Licensee uses the Marks, the Licensor shall have the right to inspect the premises of Licensee from time to time during normal business hours, upon reasonable notice and to take samples, at the Licensee's expense, of any Wares sold or to be sold in association with the Marks by Licensee. For as long as the Licensee uses the Marks, the Licensor shall have the right to inspect the premises of the Licensee from time to time during normal business hours, upon reasonable notice, and to observe the performance of the Services.

32) It is a common view in Korea that although no such provision representing substance-over-form rule prescribed in Art. 14 of Gugsegibonbeob (Basic Tax Act) is contained in the Customs Act, the substance-over-form rule is innate in all tax law including the Customs Act. The Korean Supreme Court also affirmed that substance-over-form rule applies to the Customs Act in its Judgement of April 11, 2003, 2002Du8442.

	Previous Agreement	New Agreement
Duration	Jan. 2003 to Dec. 2008	Jan. 2009 ~
Parties	P, aAG	
Fee Rate and Base	Composite Charge: 8.5~10% X Net Sales	Royalties: 10% X Net Sales IMF: 4% X Net Sales
P's Position	All included in customs value	Only royalties included in customs value
Activities Covered For the Payments	- Right to use Marks, Knowhow in the Territory - Right to distribute (exclusive), conclude promotional agreements in the Territory	O Royalties (Art. 8.2) - Right to use Marks, Knowhow in the Territory - Right to distribute (exclusive), conclude sports marketing agreements in the Territory - Non-exclusive right to manufacture in the Territory
	- Right to use endorsement, logos/symbols of certain international athletes, clubs, federations/organizations arranged by the Licensor - Organization by Licensor of global events like Olympics, World Cup, Track, and Field World Championships, and the goodwill and enhancement of Marks therefrom - Quality control information - Marketing support related to new product and Adidas brand-related concepts - Benefits from Licensor's organization of/ participation in international trade fairs and marketing meetings - Worldwide communications programs related to Adidas brand	O IMF (Art. 5.2) - Signing and managing contracts with athletes, teams, and sports federations whose reputation can be exploited in the Territory in promoting local sale and distribution, and providing materials and opportunities featuring athletes, teams, and federations - Signing and managing contracts for sponsorship of events whose reputation can be exploited in the Territory - Creating concepts for global and regional advertising campaigns and slogans, and providing associated materials and other support for the advertising of Products in the Territory - Creating and maintaining a Reebok website, which may be accessed in the Territory - Benefits from the Licensor's organization of/participation in international trade fairs and marketing meetings O (Art. 5.5) The activities listed above are in the sole discretion of Licensor and Licensor shall not be required to provide details on the actual or planned expenditure incurred in performing the activities.

As for domestic marketing by P, the licensee, both agreements contain the same provisions which include the obligation of the licensee to submit detailed business and marketing plan as part of annual budget process, details of marketing policies, promotional programs, advertisement concepts and campaigns, to comply with the licensor's reasonable directions as to the marketing and advertising of products, and to spend an annual amount of marketing budget.

With respect to the activities covered, the two agreements are rather similar than different in substance, in that the activities covered by royalties and the IMF in the right column correspond respectively to those in the left column. In short, although the composite charge in the left column is divided into royalties and the IMF, the activities covered remain almost the same.

2) Analysis of the International Marketing Fee

(1) The Rights and Obligations of Parties to Trademark License Agreement Regarding International and Domestic Marketing

It is difficult to describe how international marketing on a specific brand or mark will be addressed in a trademark license agreement in general because there are substantial variations in the agreements in terms of the characteristics of the products and marks, and the relations of the parties. However, in general, the trademark owner is responsible for maintenance and warranty of the value of the marks, quality control, and prevention of infringement against the marks while the licensee is entitled to manufacture and distribute (including advertisement and marketing) the products with the mark attached.

In view of the general understanding above on the trademark owner's obligation to maintain and ensure the value of the mark, when it comes to international or global marketing, the owner is primarily responsible for this kind of activity and any increase in value of the marks will likely lead to a raise in royalties. On the other hand, as for domestic marketing, as evidenced in the two agreements, it is the licensee that is generally responsible for the planning and budgeting of the marketing, promotion, and advertisements of the products in the licensed territory under the direction of the licensor.

(2) Some Reflections on OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

Having been designed to apply to income tax, the OECD TPG deals with transactions involving marketing intangibles[33] such as trademark, which may be useful in analyzing this case. Unlike patents, the legal creation of a new trademark is not expensive; however, it will be often an expensive business to make it valuable and maintain and increase its value.[34] Intensive and expensive advertising campaigns and other marketing activities will ordinarily be necessary as will expenditure on the quality control of the trademarked product.[35]

Thus, the arm's length principle should apply to MNEs' trademark license transactions and appropriate remuneration will be determined accordingly. More specifically, identification of legal ownership, combined with the identification and compensation of relevant functions performed, assets used, and risks assumed by all contributing members, provides the analytical framework for identifying arm's length prices and other conditions for transactions involving intangibles.[36] For legal owners of intangibles like trademark, the legal ownership in itself does not confer any right to ultimately retain returns derived by the MNE group from exploiting the intangible, even though such returns may initially accrue to the owner.[37] In certain circumstances, a compensation issue may arise where the licensee associated with the trademark owner performs marketing or sales functions that benefit the owner through a marketing/distribution arrangement.[38]

In view of the relevant parts of the OECD TPG above, P's domestic

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33) Marketing Intangibles are defined in the following manner: An intangible that relates to marketing activities aids in the commercial exploitation of a product or service and/or has an important promotional value for the product concerned. Depending on the context, marketing intangibles may include trademarks, trade names, customer lists, customer relationships, and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers. OECD TPG (2017), p. 27.

34) See TPG (2010), para. 6.9.

35) Id.

36) TPG (2017), para. 6.43.

37) Id., para. 6.42.

38) See Id., para. 6.76.

marketing may have helped increase the value of Adidas brand and it may be argued that aAG should provide some compensation for the local marketing done by P under the arm's length principle, and likewise P may claim some reduction of the royalty rates corresponding to its share of the IMF when the value of the trademark increases from the global marketing.

(3) Sub-conclusion

Taking into account the general nature of trademark license agreement and the relevant parts of the OECD TPG, the legal ownership of a trademark in itself does not entitle the owner to receive the royalties periodically without investing in marketing activities to enhance the trademark value. Moreover, local marketing tends to contribute to the increase in the trademark value, which, in certain situations, requires appropriate remuneration from the owner. To sum it up, the global marketing of a trademark owner is indispensable to the maintenance or increase in the value of the trademark, and in terms of transfer pricing, such global marketing is the responsibility of the trademark owner, normally the MNE headquarters, failing which the payment of current royalties is not justified or warranted.

3. Analysis of the Nature of the IMF

1) Arguments of the Parties

(1) P: No Royalty Implication

This argument is based on the presumption that the international or global marketing fee is to be shared among local distributors because its fundamental nature is to promote local sales and marketing, and the IMF is paid irrespective of the individual import of goods.

First, the contract in itself should be respected in that the new agreement clarifies and modifies the prior one and the IMF should be differentiated from royalties. The composite charge under the prior agreement covered benefits not only from the trademark license but from the international marketing carried out by aAG. However, the new agreement divides the two charges according to their different characteristics.

Second, the IMF is computed as 4% on the net sales of P, which is within

5.6~6% on the net sales of aAG spent on its global marketing.

Third, since the value of a brand cannot grow in a short period of time, treating the IMF as part of royalties makes little sense.

(2) KCS: Royalty Implication

KCS argues that the primary focus of international marketing is not on the marketing of specific product lines but on the trademark *per se*, whose purpose and effect is the enhanced value of the brand.

First, the new agreement indicates the primary responsibility of aAG for the brand image, and enumerates promotions on athletes and teams, brand communications, sports marketing, protection of the intellectual property and legal support. In fact, Art. 5.2 of the new agreement covering the IMF only specifies such responsibilities of aAG.

Second, P has primary rights and obligations relating only to domestic marketing, and no promotion out of the territory is possible without prior approval of aAG. Art. 5.5 of the new agreement provides that international marketing is done under the sole discretion of aAG, which is not required to provide details of the expenditure. Given this contractual relationship, there is no reason for P to take the IMF as its obligation. Therefore, if global marketing expenditure of aAG is increased, such an increase should be reflected in royalty rather than in the form of a separate IMF payment.

Third, there is an income tax aspect that is not compatible with the customs valuation in this case. P booked both royalty (10%) and IMF (4%) as royalty (14%) for income tax purposes and applied the withholding rate of 10% on the amount (royalty + IMF) under the Korea-Germany tax treaty Art. 12 (Royalties). However, royalties and service fees (IMF) are different in nature for income tax purposes, and royalties are subject to withholding tax while service fees are not.[39] Thus, with respect to the IMF, P's corporate tax return was contradictory to its customs declaration.

39) If such a service fee amount is appropriate in terms of cost sharing arrangement or intra-group service under the arm's length principle, the expenditure can be allowed as expenses under corporate tax law.

2) Analysis

(1) Ambivalent Nature of International Marketing Fee

In view of the discussions above, the IMF in and of itself does not solely target the enhancement of a brand value or the sales promotion of local distributors. Rather, the brand value and sales promotion interact with each other so that one cannot be the cause or effect of the other. What is crucial in this case is to find the substantive nature of the IMF considering all the relevant facts and circumstances including the general nature of trademark license, the peculiar nature of the trademark (i.e., sportswear brand), the details of the license agreement, the relationship between the parties, and the application of the arm's length principle.

(2) Obligation of Trademark Owners regarding the Maintenance and Enhancement of Brand Value

In general, as well as in the trademark license agreement of this case, the trademark owner is primarily responsible for maintaining the brand value. In this regard, the trademark owner normally takes care of international marketing, while the licensee carries out domestic marketing; this implies that, apart from application of the arm's length principle, there is no sharing or allocation of the marketing expenditure, whether it is international or domestic. In this regard, it is worth noting that unlike patents that require substantial development costs, the creation of trademarks *per se* is not expensive, but maintaining and enhancing their value necessitates more spending on a regular basis.[40)]

(3) Peculiar Nature of Sportswear Brand

For multinational sportswear companies such as Nike,[41)] Adidas, and Puma, intangibles including its brand and knowhow are core assets. Hence, the headquarters of these companies seek to constantly maintain and promote their brand value through international or global marketing. In

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40) Seolah Park, A Study on transfer Pricing of AMP Expenses, Journal of IFA Korea, 34(1), 2018, p. 61.

41) According to Forbes, the brand value of Nike is 29.6 billion dollars in 2017, ranked 16th in the world. https://www.forbes.com/pictures/591c87fc31358e03e5593101/16-nike/#6489f56b3bca

this regard, it is worth noting that in the “Puma case”[42] of the Supreme Court (Judgement of Sept. 30, 2016, 2015Du58591), Memorandum of Understanding between Puma Korea and Puma headquarters in Germany indicated the following reason for sharing international marketing fund: Despite the increase in marketing activities of the headquarters which benefit Puma Korea, there was no increase in trademark royalties paid by Puma Korea.

(4) Doubt on the Decision of Seoul High Court

The basic presumption of Seoul High Court was that since local distributors like P were not able to undertake global marketing activities independently, they were obligated to take the burden of the IMF allocated by aAG. However, this presumption implies that the headquarters and local subsidiaries of MNEs are like one economic entity, which contradicts the arm’s length principle in terms of taxation of MNEs. Furthermore, according to the new agreement, P is responsible only for domestic marketing in its territory, not for international marketing and does not have any such authority. For example, one may argue that when headquarters produce promotion materials featuring famous athletes and transmit them to local distributors, the local distributors who benefit from the international marketing should take their allocated share of the IMF. However, if the IMF is the true allocation of the marketing expenses, there should be an appropriate settlement of the expenses under the arm’s length principle among the related entities of the MNEs.[43]

(5) The Compensation for the Local Marketing of P

Although P argues that the IMF is the allocation of the international marketing expenses which contribute to local sales promotion, it is the local marketing done by P that is more effective in domestic sales promotion, which then leads to increase in the brand value of Adidas. If P’s argument is accepted, we may obtain a strange conclusion that trademark owners

42) For details, please see IV. 1. 1)

43) According to the new agreement,, the international marketing of aAG is in its sole discretion and there is no obligation for aAG to provide details of such marketing activities and plans. Further, the calculation method of the IMF is the same as that of royalty.

(headquarters) will enjoy benefits from the increase in trademark value directly or indirectly from the international marketing funded by local distributors in contravention with their primary responsibilities.

(6) Sub-conclusion

In view of the analysis above, arguably, the IMF in this case should be understood as part of royalty or its increase rather than as a separate kind of service fee. As evidenced in the primary responsibilities of trademark owners in trademark license agreements in general and the new agreement of this case in particular, and the OECD transfer pricing guidelines, the IMF in this case is to be borne by aAG, and P paid the IMF without due obligation, in which case the IMF cannot exist as a separate payment other than part or increase of royalty. In addition, we need to take into account the fact the P filed its corporate tax returns in which the IMF was treated as royalties.

4. Addition of Royalties: Related to Goods and Condition of Sale

1) Related to Goods

Under the Korean Customs Act as well as foreign legislations[44]and World Customs Organization (WCO) rulings,[45] the question of “related to goods” pertains to whether intangibles are embodied or incorporated in the imported goods being valued. There are various ways of embodiment or incorporation depending on the types of intangibles. Specifically, if royalty is paid for the right of trademark, the “related to” requirement is met where the trademark is attached to the imported goods, or the trademark is attached to the imported goods after slight processing such as diluting, mixing, classifying, simple assembling, repacking, etc.[46]

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44) The European Union Customs Code Implementing Act (UCCIA), Article 136 reads: 1. Royalties and license fees are related to the imported goods where, in particular, the rights transferred under the license or royalty agreement are embodied in the goods. The method of calculation of the amount of the royalty or license fee is not the decisive factor.

45) WCO Commentary 25.1, para. 6 reads, “For example, if the imported goods incorporate the trademark for which the royalty or license fee is paid, this would indicate that the fee relates to the imported goods.”

46) Enforcement Decree of Customs Act, Art. 19, para. 3-3.

In this case, the goods were imported with the Adidas brand attached, and as far as the IMF is regarded as royalty, it is related to the goods for customs valuation purposes.

2) Condition of Sale

Even if royalties are related to the imported goods being valued, there is no adding of royalties to the customs value unless they are paid as condition of sale of the goods. The condition of sale requirement means that the import transaction is done on the condition that the royalties are paid. The Enforcement Decree of the Customs Act refers to three cases where this requirement is satisfied.[47)]

On this issue, WCO commentary on customs valuation acknowledges that there can be various situations where payment of royalties or license fees is considered a condition of sale even when they are paid to a third party.[48)] However, each situation must be analyzed based on all the facts surrounding the sale and importation of the goods, including contractual and legal obligations contained in the sales and license agreement.[49)] In the European Union, the Union Customs Code Implementation Act (UCC IA) also provides for situations where the condition of sale is met.[50)]

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47) Enforcement Decree of the Customs Act, Art. 19, para. 5 reads:

In applying the provisions of paragraph (2), the royalty shall be deemed paid according to the conditions of transaction of the relevant goods in cases falling under each of the following subparagraphs:

1. Where a buyer pays the royalty to a seller to purchase imported goods.
2. Where a buyer pays the royalty to a person other than a seller to purchase imported goods according to an agreement between the buyer and the seller.
3. Where a buyer, upon permission of a person other than a seller for the use of a patent right, etc., allows such seller to use such patent right and pays the royalty to the person who is not the seller to purchase imported goods.

48) WCO Commentaries on Customs Valuation 25.1, para. 7.

49) Id.

50) COMMISSION IMPLEMENTING REGULATION (EU) 2015/2447 of November 24, 2015, Art. 136, para. 4.

4. Royalties and license fees are considered to be paid as a condition of sale for the imported goods when any of the following conditions is met:

(a) the seller or a person related to the seller requires the buyer to make this payment;

(b) the payment by the buyer is made to satisfy an obligation of the seller, in accordance with contractual obligations;

In this case, in view of both the relationship between the entities and contents of the license agreement *per se*, the condition of sale requirement appears to be satisfied.

First, the seller (aITBV), aAG (trademark owner) and the importer (P) are all related parties, and in this situation P would not be able to import the goods without paying the IMF.

Second, under the new license agreement, the agreement can be revoked if P is not paying the IMF, and in such case the trademark cannot be used by P. Therefore, the payment of IMF is the condition of sale.

5. Comment on the Case

The Adidas case of the Korean Supreme Court addressed, for the first time, the question of whether the global marketing fee of MNEs borne by local distributors can be regarded as royalty. To the best knowledge of the author, as of this writing, no similar cases have been reported in other countries.

In this case, the Supreme Court appropriately applied the substance-over-form rule to customs valuation and reached a reasonable conclusion by analyzing the substantive nature of the transactions in view of the relevant facts and circumstances of the case. This attitude of the Supreme Court with regard to international marketing activities of MNEs may have significant implications not only for the customs case but also for international income tax cases, as discussed below.

IV. Subsequent Cases and BEPS Implications

The Adidas decision of the Supreme Court has significantly affected subsequent cases involving international marketing of MNEs. From the BEPS perspective, all these cases represent the significance of BEPS Actions for customs policy and administration.

(c) the goods cannot be sold to, or purchased by, the buyer without payment of the royalties or license fees to a licensor

1. Related and Subsequent Customs Valuation Cases

1) Puma Case

This is a case dealing with the same issue as the Adidas case, and the Supreme Court decided that the IMF paid by Puma Korea Limited (hereinafter "P") to Puma SE (Germany) should be treated as royalties to be added to customs value of the goods imported by P.

(1) Facts

P, a 100% Korean subsidiary of Puma SE entered into a trademark license agreement in 2008 with Puma SE under which P imports and distributes Puma brand sportswear and pays 10% on net sales in Korea to its German parent company. Apart from the trademark license agreement, P and Puma SE agreed on a Memorandum of Understanding (MOU) under which P agreed to pay 2% on its net sales as part of "international marketing fund" (IMF) for such marketing activities as sport investment promotion of athletes and teams, and international sport events (World Cup, Olympics, and Motor Sports events).

In its import declaration on the Puma brand goods, P did add the trademark license fee (royalty) but not the IMF, which KCS treated as royalty and assessed the customs duties. P appealed against the assessment.[51)]

Both Busan District Court and Busan High Court held in favor of KCS, noting that P's IMF payment was not for sharing the international marketing expenses by Puma SE but for increased trademark value resulting from international marketing done by Puma SE. The lower courts' main reasoning was that since the increase in trademark value derived from international marketing activities is attributed to the trademark owner, the primary reason for international marketing done by MNE headquarters as trademark owner lies in maintaining and expanding the value of its own trademark. In particular, for the lower courts, if the IMF was to be allocated to local distributors, there should have been settlement on the sharing of the fund according to ex-post facto calculation of the

51) Apart from the reassessment of IMF, there are other issues; however, they are irrelevant for this paper's purpose.

marketing expenses, which was not the case in the instant case.

(2) Supreme Court Decision

The Supreme Court held that whether the amount the buyer paid to the trademark owner is the payment for consideration for the use of trademark or similar rights should not be judged from the formal designation of the payment but from the substance on the question of whether the payment is in the nature of fees for the use of trademark or other similar rights, referring to its immediate precedent of the Adidas case (2015Du52098).

Based on this legal reasoning, the Supreme Court upheld the preceding court's decision that the IMF in the instant case should be regarded as royalties paid by P for the use of the trademark owned by Puma SE and be added to the customs value of the imported goods.

(3) Comment

As a matter of fact, in terms of factual aspect and legal issue, the Puma case above is almost identical to the Adidas case. However, Busan High Court(Puma case) and Seoul High Court(Adidas case) concluded in opposite directions, contradicting each other on the legal and substantive natures of the IMF paid by local distributors of sportswear.

The Supreme Court, as final arbiter of law, correctly decided that, in substance, the IMF was part of royalty.

2) Columbia Sportswear Case[52)]

(1) Facts

P is a subsidiary of Columbia Sportswear Co., a U.S. company (hereinafter "Columbia US"), and from April 2008 to December 2009, imported and distributed Columbia brand apparel and other equipment in Korea, which were manufactured by a third party contractor. P and Columbia US entered into an intangible asset transfer agreement under which P is licensed to use the trademark of Columbia US for a specified amount of royalties from 2001 to 2004; thereafter, P and Columbia US reached a cost sharing agreement (CSA) on marketing development

52) Judgement of Oct. 27, 2016, 2016 Du34059.

activities by Columbia US. With the conclusion of the CSA, P was to pay its share of marketing fee based on a specific formula[53)] and there was no more payment of royalties.

KCS, based on the fact that P did not declare sourcing service fee, product development fee, and global marketing fee as included in its customs value of the imported goods, reassessed the customs value by adding the abovementioned fees,[54)] against which P appealed.

Seoul High Court, as with Seoul Administrative Court, held in favor of KCS, noting that P's share of global marketing fee should be regarded as trademark license fee considering that P's participation in the CSA enabled P to use the Columbia trademark. In other words, the High Court indicated that if P did not pay its share of global marketing fee to Columbia US, P could not use the trademark in the import and distribution of the goods. On the "related to" the goods issue, the High Court affirmed by noting that Columbia trademark was attached to the imported goods. On the condition of sale issue, the Court also noted that P had to import goods from the contract manufacturer designated by Columbia US, and without paying the global marketing fee, P could not use the Columbia trademark. Therefore, the Court affirmed that the condition of sale requirement was met.

(2) Supreme Court Decision

The Supreme Court, invoking the immediate precedent of the Adidas case again, affirmed the decision by reiterating the reasoning of the High Court.

(3) Comment

This case is another example of the Supreme Court applying the substance-over-form rule to customs valuation with regard to the global marketing fee borne by local distributors. One peculiar factual aspect of this case is that there was no payment of royalty *per se*, but only sharing of global marketing fee under cost sharing agreement between local

53) The calculation was done in the following manner: P's operating profit/Columbia US's consolidated operating profit X global marketing fee.

54) For the purpose of simplicity, sourcing service fee and product development fee are not discussed in this paper.

distributors and MNE headquarters. Nevertheless, the Supreme Court looked to the substance of the transactions and found that the global marketing fee was in essence a kind of royalty for the trademark.

3) Nike Case

Nike Korea Limited (hereinafter "P") is a subsidiary of Nike Inc., a US company and global headquarters of Nike group. Neon is a Netherlands company that licenses the Nike trademark to local distributors out of the US. In June 2009, P entered into two license agreements (wholesale and retail) with Neon under which P was to pay 10% of its total revenue as royalty.

Apart from the license agreements, P concluded a marketing service agreement with Nike Inc., under which P was to pay relevant expenses of advertising development, promotion, endorsement featuring famous athletes and sports team, and marketing assistance (together called Worldwide Promotion: "WWP") carried out by Nike Inc. P also entered into a regional marketing service agreement with Nike Inc. under which P was to pay for its share of the expenses of such promotions conducted in the Asia Pacific region. These two payments are called "WWP fee."

P imported and distributed Nike brand sportswear in Korea. P's import declaration did not include WWP fee in the customs value. However, KCS reassessed the customs value, viewing that the WWP fee was a payment for activities enhancing the value of trademark, which constitutes royalty to be added to the customs value.

Seoul Administrative Court held that such a WWP was not a kind of royalty, which was reversed by Seoul High Court. Relying much on the Adidas case, the High Court found that the activities covered by (trademark) license agreements and those covered by WWP in this case were not different in nature. Thus, the High Court concluded that WWP fee was paid in substance as part of royalty, which should be added to the customs value of the imported Nike brand goods. The Supreme Court affirmed the High Court's decision without further deliberation (Judgement of Oct. 12, 2017, 2017 Du44879).

2. International Income Tax Implications

When it comes to intangibles transactions, there are always international income tax implications. Indeed, the Adidas case of the Supreme Court began impacting income tax cases of the courts in Korea. Recently, Seoul Administrative and High Courts[55] reaffirmed the precedent of the Adidas case in the MasterCard case, which is briefly introduced here.

Mastercard Inc., trademark owner of Mastercard, and domestic card issuers (financial institutions) entered into an agreement under which domestic card issuers are to pay assessments for their right to issue Mastercard brand credit card to cardholders in Korea. The National Tax Service, considering the assessments as royalties, levied corporate withholding tax on the domestic card issuers (Ps), while Ps argued that the assessments were paid for the marketing services of Mastercard Inc.

Seoul High Court affirmed the decision of Seoul Administrative Court that some of the assessments were paid as part of royalty for trademark in that although those payments contributed to increasing the value of Mastercard trademark, there was no royalty payment by domestic issuers to Mastercard Inc.

3. Policy Implications: BEPS is as much about Customs Duties as about Income Taxes

Customs valuation and transfer pricing have been perceived as two sides of the same coin. This relationship has become more important with the launch of OECD/G20 BEPS project in 2013. With BEPS project Actions at their implementation phase, needless to say there has been a substantial transformation in the international tax landscape for the past five years. With respect to transfer pricing, OECD BEPS Action 8 made a significant update on intangibles, which was reflected in 2017 OECD TPG. This change in the intangibles Chapter means a lot for customs valuation of goods

55) Judgement of Jan. 20, 2017, 2014 Guhab63039 (SAC), Judgement of Feb. 8, 2018, 2017 nu38104 (SHC)

involving intangibles transactions.[56)]

In view of this development, the Adidas case has a special meaning and impact in that MNE's meticulous customs duty avoidance scheme was found to exist, resulting in the upward adjustment of customs duty in respect of royalties. For Korea, whose trade volume is more than 100% of its GDP, with 15 free trade agreements (FTAs) in force covering 52 countries, cases related to customs duty involving MNEs are expected to increase in the future.[57)]

From the policy perspective, applying the substance-over-form rule to deal with customs duty cases of a BEPS nature has been arduous because there were restraints for customs authorities to obtain access to necessary information on related party transactions of MNEs conducting distribution businesses in Korea. For example, for the customs valuation of imported goods, in addition to royalties and license fees, there are a number of items to be added to the price actually paid or payable under Art. 8, para. 1 of the WTO Customs Valuation Agreement.[58)] However, the complex supply chain management of MNEs makes it difficult for the customs authorities to collect relevant information. With the 2016 revision of the Customs Act,[59)] customs authorities can now require the taxpayers to submit relevant information on the pricing in related party transactions, which helps address the asymmetry of information between the customs authorities and taxpayers. This kind of development is much in line with the BEPS Action 13 (Transfer Pricing Documentation and Country-by-Country Reporting), which has been adopted in 2017 OECD TPG Chapter V and is currently being implemented[60)] under the Inclusive Framework[61)] on BEPS. For more

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56) For initial impact of BEPS Action 8 on customs valuation, see EY, Indirect Tax Alert, OECD's recommendations on BEPS project has wider indirect tax implications, Oct. 7, 2015, p. 3.

57) Although customs duties are low or zero under FTAs, with value-added tax being levied on the basis of import price and customs duties, the importance of customs valuation will not be reduced.

58) *See* supra note 16.

59) Art. 37-4 of the Customs Act.

60) For more information, visit http://www.oecd.org/tax/beps/country-by-country-reporting.htm#CbCRImplementation.

61) In response to the call of the G20 Leaders, OECD members and G20 countries have developed an Inclusive Framework on BEPS, which allows interested countries and

complete access to transfer pricing information on MNEs, apart from the master[62] and local[63] files currently available under Customs Act Enforcement Decree Art. 31-5, the customs authorities should be able to obtain country-by-country reporting[64] exchanged between tax authorities under the BEPS Inclusive Framework.

V. Conclusion

As introduced and discussed above, there are a number of legal disputes on customs valuation treatment of international marketing activities of MNEs and the allocation of their expenses to local distributors. When dealing with such cases, as with ordinary tax cases, the substance-over-form rule should apply, and all relevant facts and circumstances should be considered including the general rights and obligations of trademark owner and licensee, details of the specific license agreement between the parties, practical aspects, and special characteristics of the parties.

In the Adidas case, it is reasonable to regard the international marketing activities as contributing to enhancing or at least maintaining the brand value by repeatedly exposing the brand to the public through various media rather than as advertising or promoting for individual products. Thus, there is no denying that global marketing conducted by MNE

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jurisdictions to work with OECD and G20 members on developing standards on BEPS-related issues and reviewing and monitoring the implementation of the entire BEPS Package. *See* http://www.oecd.org/tax/beps/beps-about.htm#monitoring.

62) The master file provides an overview of the MNE group business, its overall transfer pricing policies, and its global allocation of income and economic activity in order to place the MNE group's transfer pricing practices in their global economic, legal, financial, and tax contexts.

63) Local file identifies material related party transactions, the amounts involved in those transactions, and provides the company's analysis of the transfer pricing determinations that have been made with regard to these transactions.

64) CbC reporting includes information on revenue (related and unrelated party), profits, income tax paid and taxes accrued, employees, stated capital and retained earnings, and tangible assets for each tax jurisdiction in which the MNE does business. In addition, the reporting template includes information identifying each entity within the MNE group doing business in a particular tax jurisdiction and the business activities each entity conducts.

headquarters supports and enhances the brand value. Further, allocating the international marketing expenses to local distributors under their responsibilities cannot be easily reconciled with the essential nature of trademarks. If the local distributors were responsible for global marketing activities and specific activities were done by MNE headquarters on their behalf, then the headquarters should have compensated the local distributors for the increase in brand value, which did not happen in the Adidas case. Given this situation, the Supreme Court is right to find that the substance of the international marketing fee is royalty for trademark license and that the two requirements for addition of royalties are satisfied.

From the perspective of BEPS, the Adidas case and subsequent cases discussed above represent the significance of BEPS Actions, particularly Actions 8–10 on transfer pricing and Action 13 on transfer pricing documentation and country-by-country reporting and their implementation with regard to customs duty area. With this new reality in mind, the customs policy and administration should proceed with appropriate measures to address BEPS-related practices for avoiding customs duty by MNEs.