

THE CHANGING ROLE OF CUSTOMS: EVOLUTION OR REVOLUTION?

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Abstract

Customs has traditionally been responsible for implementing a wide range of border management policies, often on behalf of other government agencies. The role of Customs has, however, changed significantly in recent times, and what may represent core business for one administration may fall outside the sphere of responsibility of another. This is reflective of the changing environment in which customs authorities operate, and the corresponding changes in government priorities. The World Trade Organization, World Customs Organization and other international bodies are responding through the development of global standards that recognise the changing nature of border management.

The role of Customs

The responsibilities of customs administrations vary from country to country, and are often the subject of regular review and modification to ensure their ongoing relevance in a constantly changing world. Traditionally, however, Customs has been responsible for implementing a wide range of government policies, spanning areas as diverse as revenue collection, trade compliance and facilitation, interdiction of prohibited substances, protection of cultural heritage and enforcement of intellectual property laws.

This breadth of responsibility reflects the fact that customs authorities have long been entrusted with administering matters for which other government ministries and agencies have policy responsibility, such as health, agriculture, environment, trade statistics and in some cases, immigration. This is generally achieved through the implementation of a diverse range of service level agreements, with Customs having regulatory responsibility at the point of importation and exportation. Such border management responsibilities stem from the more traditional customs role of collecting duties on internationally traded commodities, a common extension of which is the collection other forms of tax, such as Value Added Tax (VAT) and excise duties.

In many developing and least developed countries, import duties and related taxes represent a significant proportion of the national revenue. Because of this, the main focus for their customs authority is, understandably, revenue collection. In developed countries, on the other hand, with relatively little reliance on imports as a source of government revenue, there is an increasing focus on border protection, with particular emphasis on the enforcement of import and export prohibitions and restrictions, including those arising from Free Trade Agreements. Nevertheless, the current trend towards global free trade and the recent heightening of international terrorism concerns have seen border security emerge as a priority across all economies.

A general indication of a government's view of the role of their customs authority can often be gleaned from the manner in which administrative responsibilities are structured. For example, where revenue collection is the main focus, the customs administration generally forms part of the Treasury or Finance portfolio. Similarly, those administrations that are primarily seen to play a border protection role are likely to be aligned with other agencies that have a border management focus.

For example, prior to 12 December 2003, the customs authority in Canada formed part of the Canada Customs and Revenue Agency. At that time it became part of the newly created Canada Border Services Agency (CBSA), which in turn formed part of the new portfolio of Public Safety and Emergency Preparedness (since renamed Public Safety Canada). This portfolio now combines the functions of customs, food inspection and immigration, together with those of emergency preparedness, crisis management, national security, corrections, policing and crime prevention.¹

Consequently, while the traditional role of Customs is multifarious, the trend in recent times has been to assign regulatory responsibilities in a way which reflects government priorities, rather than tradition. While this is simply reflective of good governance, it brings with it a challenge to regulatory convention.

Indeed, it is becoming increasingly evident that no two customs administrations necessarily look alike. What may be core business to one may fall outside the sphere of responsibility of another, and this is simply a reflection of differing government priorities, the way in which a particular country manages the business of government and the manner in which the associated administrative arrangements are established. In this regard, even some of the more traditionally core customs activities are occasionally the primary domain of another government agency. For example, in Hong Kong, due to its free port status, tariff classification and valuation are more relevant to the Census and Statistics Department than to the Customs and Excise Department.

Consequently, if several people were asked to describe the role of Customs, the result is likely to be reminiscent of the six blind men who formed completely different perceptions of what an elephant might look like, having touched different parts of the animal such as the tusk, trunk and tail.²

Changing expectations

For several decades now, there has been mounting pressure from the international trading community to minimise government intervention in commercial transactions, and a growing expectation for customs authorities worldwide to place an increasing emphasis on the facilitation of trade.

This is in no small part due to the changing environment in which customs authorities operate. For example, the emergence of wide-bodied aircraft, shipping containers, e-commerce and the increasing complexities of international trade agreements have all impacted on the way in which regulatory authorities have fulfilled their responsibilities, and customs administrations world-wide have seen a dramatic increase in workload across all areas of activity, fuelled by the advent of the global marketplace and the technological advances that have revolutionised trade and transport.

For centuries, the customs role has been one of 'gatekeeper', with customs authorities representing a barrier through which international trade must pass, in an effort to protect the interests of the nation. The essence of this role is reflected in the traditional customs symbol, the portcullis, which is a symbolic representation of a nation's ports.³ Such a role is often manifested by regulatory intervention in commercial transactions simply for the sake of intervention. Customs has the authority to do so, and no one is keen to question that authority. In this day and age, however, social expectations no longer accept the concept of intervention for intervention's sake. Rather, the current catch-cry is 'intervention by exception', that is, intervention when there is a legitimate need to do so; intervention based on identified risk.

The changing expectations of the international trading community are based on the commercial realities of its own operating environment. It is looking for the simplest, quickest, cheapest and most reliable way of getting goods into and out of the country. It seeks certainty, clarity, flexibility and timeliness in its dealings with government. Driven by commercial imperatives, it is also looking for the most cost-effective ways of doing business.

Trade facilitation

The trade facilitation agenda is gaining increasing momentum as the Doha Ministerial Declaration and subsequent decisions of the General Council of the WTO have sought to intensify international commitment to further expedite the movement, release and clearance of internationally traded goods, including goods in transit. The success of the agenda is heavily reliant on the ability of Customs to raise the portcullis in an effort to achieve an effective balance between trade facilitation and regulatory intervention.

Achieving such a balance can provide significant flow-on benefits for national economies, and the issue of trade facilitation has consequently been added to the WTO agenda, with many countries now re-assessing their legislative and administrative approach to the regulation of international trade. Specifically, the Singapore Ministerial Declaration directed the Council for Trade in Goods to ‘undertake exploratory and analytical work, drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area’.⁴

Following extensive consultation with commerce and industry, the WTO identified the following broad areas of concern at the international level:⁵

- excessive government documentation requirements
- lack of automation and insignificant use of information-technology
- lack of transparency; unclear and unspecified import and export requirements
- inadequate customs procedures; particularly audit-based controls and risk-assessment techniques
- lack of co-operation and modernisation amongst customs and other government agencies, which impedes efforts to deal effectively with increased trade flows.

The concerns identified by the WTO serve to highlight a number of potential weaknesses in the way in which governments, and more specifically customs administrations, approach the task of monitoring and regulating international trade. According to the WTO, the costs of import tariffs are often exceeded by the losses incurred by the international trading community as a result of slow clearance procedures, opaque and unnecessary documentary requirements and lack of automated procedural requirements.⁶

Recognising that the policies and procedures of a number of agencies impact on the processing and clearance of international cargo, the WTO has actively encouraged agencies other than Customs to participate in the negotiations on trade facilitation, in order to ensure a meaningful outcome. The WTO Trade Facilitation Negotiations Support Guide highlights the need for appropriate coordination among the relevant agencies in the context of the negotiations:

In many countries, multiple government agencies have an interest in the movement of goods, including agencies responsible for health and safety, food inspection, import licensing, tax collection, quality inspection and enforcement. In the absence of an effective coordination mechanism, the negotiators must attempt to interface with each of the agencies individually. The time spent on such a task would impact significantly on their ability to participate effectively in negotiations.⁷

Further, Annex D of The WTO ‘July Package’ – the decision adopted by the WTO General Council on 1 August 2004, which addresses the modalities for progressing the negotiations on trade facilitation – identifies the need for ‘effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues’.⁸

Customs blueprint

In recent years these issues have been high on the agenda of the World Customs Organization, which has developed the revised International Convention on the Simplification and Harmonization of Customs Procedures – the Revised Kyoto Convention – in an effort to promote the achievement of a highly facilitative international travel and trading environment while maintaining appropriate levels of

regulatory control. The Revised Kyoto Convention entered into force on 3 February 2006, and as at 10 January 2007, fifty two economies were contracting parties to the Convention.⁹

According to the WCO, the Convention represents the international blueprint for prudent, innovative customs management, and is designed to maintain the relevance of customs procedures at a time when technological developments are revolutionising the world of international trade and travel.¹⁰ Essentially, the Convention is intended to promote the achievement of a highly facilitative international travel and trading environment while maintaining appropriate levels of regulatory control across all member administrations. It is designed to provide the underlying conditions and instruments to help contracting parties to achieve a modern customs administration and to make a major contribution to the facilitation of international trade by:

- eliminating divergence between the customs procedures and practices of contracting parties that can hamper international trade and other international exchanges
- meeting the needs of both international trade and customs authorities for facilitation, simplification and harmonisation of customs procedures and practices
- ensuring appropriate standards of customs control
- enabling customs authorities to respond to major changes in business and administrative methods and techniques
- ensuring that the core principles for simplification and harmonisation are made obligatory on contracting parties
- providing customs authorities with efficient procedures, supported by appropriate and effective control methods.¹¹

The Revised Kyoto Convention incorporates important concepts of contemporary compliance management. These include the application of new technology, the implementation of new philosophies on customs control and the willingness of private sector partners to engage with customs authorities in mutually beneficial alliances. Central to the new governing principles of the Revised Kyoto Convention is a required commitment by customs administrations to provide transparency and predictability for all those involved in aspects of international trade. In addition, administrations are required to:

- commit to adopt the use of risk management techniques
- co-operate with other relevant authorities and trade communities
- maximise the use of information technology
- implement appropriate international standards.

The Convention also recognises the emerging whole-of-government approach to border management and the need for other areas of government to become actively involved in the global trade facilitation agenda. It requires that the conditions to be fulfilled and customs formalities to be accomplished for procedures and practices in its General and Specific Annexes 'shall be specified in national legislation and shall be as simple as possible'.¹² In this context, the Convention defines 'national legislation' to mean 'laws, regulations and other measures imposed by a competent authority of a Contracting Party and applicable throughout the territory of the Contracting Party concerned, or treaties in force by which that Party is bound'.¹³

It is evident that this definition is not restricted to legislation administered by the economy's customs authority. Rather, it is purposely broad, encompassing the operational procedures, administrative instructions and other forms of documentation that relate to the regulation of international trade, regardless of which government authority is responsible for its administration.¹⁴

The WCO was also an early proponent of the need for customs authorities to reconsider their traditional approach to international trade control, and to abandon the 'gatekeeper' mentality that has traditionally dominated their thinking.¹⁵ Through the provisions of the Revised Kyoto Convention, the WCO is essentially attempting to achieve a general adoption of a risk-managed style of regulatory compliance.

In relation to the concept of customs control, the WCO states:

The principle of Customs control is the proper application of Customs laws and compliance with other legal and regulatory requirements, with maximum facilitation of international trade and travel.

Customs controls should therefore be kept to the minimum necessary to meet the main objectives and should be carried out on a selective basis using risk management techniques to the greatest extent possible.

Application of the principle of Customs controls will allow Customs administrations to:

- focus on high-risk areas and therefore ensure more effective use of available resources,
- increase ability to detect offences and non-compliant traders and travellers,
- offer compliant traders and travellers greater facilitation, and
- expedite trade and travel.¹⁶

It is considered that the WTO trade facilitation agenda and the Standards of the Revised Kyoto Convention are fully compatible. As stated by the WCO:

All the legal provisions and the principles in the WCO instruments are compatible with, and complementary to, the three GATT Articles referred to in the context of trade facilitation in the Doha Ministerial Declaration. There is a clear recognition that Customs procedures and their implementation exert a great impact on world trade and the international movement of goods across borders.

The GATT Articles set out the high principles for formalities and procedures for movement of goods, transit of goods and publication and administration of trade regulations. On the other hand, the instruments of the WCO - including the Kyoto Convention through its legal provisions and implementation guidelines - provide the basis and practical guidance and information for the implementation of these high principles.¹⁷

For this reason, a key initiative of many international organisations in their efforts to progress the trade facilitation agenda has been to promote full compliance with and accession to the Revised Kyoto Convention.

Security imperatives

As a direct result of 9/11, supply chain security now consumes regulatory thinking, and with this comes a real danger of focussing on tighter regulatory control at the expense of trade facilitation. In his address to Center for Strategic and International Studies on 17 January 2002, the then US Customs Commissioner, Robert Bonner said:

Immediately following the terrorist attacks on September 11th, at about 10:05 a.m. on September 11, Customs went to a Level 1 alert across the country at all border entry points. Level 1 requires sustained, intensive anti-terrorist questioning, and includes increased inspections of travelers and goods at every port of entry. Because there is a continued terrorist threat, we remain at the Level 1 alert today.

Shortly afterwards, the US Customs Container Security Initiative (CSI) and Customs- Trade Partnership Against Terrorism (C-TPAT) were announced. Primarily designed to protect global supply chains from concealment of terrorist weapons, these initiatives have had a sudden and major impact on the way in which customs and others involved in the international supply chain go about their business.

The idea behind C-TPAT is for US Customs and Border Protection (CBP) to work with those involved in international trade to improve the security of their supply chains. The aim is to provide CBP with a method of identifying and focusing their resources on potentially high-risk consignments, that is, those that do not form part of a supply chain that is assessed to be 'secure'. This approach – the need

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to focus on identifying both compliance and non-compliance – reflects a key element of contemporary compliance management, and is consistent with the provisions of the Revised Kyoto Convention. In this way, the C-TPAT program provides CBP with an opportunity to risk-manage its activities by assessing the integrity its C-TPAT partners' supply chains, and in turn to provide those private sector partners with expedited processing and clearance.

Drawing heavily on the US C-TPAT initiative, the WCO released its Framework of Standards to Secure and Facilitate Global Trade,¹⁸ the intention being to provide 'a regime that will enhance the security and facilitation of international trade'.¹⁹ According to the WCO, the Framework aims to:

- Establish standards that provide supply chain security and facilitation at a global level to promote certainty and predictability.
- Enable integrated supply chain management for all modes of transport.
- Enhance the role, functions and capabilities of Customs to meet the challenges and opportunities of the 21st Century.
- Strengthen co-operation between Customs administrations to improve their capability to detect high-risk consignments.
- Strengthen Customs/Business co-operation.
- Promote the seamless movement of goods through secure international trade supply chains.

Under the Framework, there is a requirement that:

Each Customs administration will establish a partnership with the private sector in order to involve it in ensuring the safety and security of the international trade supply chain. The main focus of this pillar is the creation of an international system for identifying private businesses that offer a high degree of security guarantees in respect of their role in the supply chain. These business partners should receive tangible benefits in such partnerships in the form of expedited processing and other measures.²⁰

There is, however, evidence to suggest that some administrations are seeking to tilt the balance heavily towards regulatory intervention in the name of supply chain security. To some extent this is to be expected in the current climate of heightened security concerns. However, we are witnessing situations in which very high levels of control are being imposed on the international trading community on the incorrect premise that such action is required by initiatives such as CSI and the WCO Framework of Standards.²¹

It is of concern that an administration may seek to impede the facilitation of legitimate trade in such a way, bearing in mind that, in the current international climate, it takes a very brave soul to actively oppose the imposition of regulatory requirements that are allegedly introduced for the purposes of national security.

Conclusions

The role of Customs has changed significantly as a result of both evolutionary factors, including the increasing globalisation of trade, and revolutionary factors, such as the terrorist attacks of 9/11. The resultant shift in government policies and the way in which those policies are administered have brought us to a point where it is no longer possible to clearly define the role of 'Customs'. While the responsibilities of border management continue to be carried out, the nature and mix of relevant government agencies is changing. Consequently, what may represent core business for one administration may fall outside the sphere of responsibility of another. Indeed, while the tusk, trunk and tail of customs regulation remain, the organism known as 'Customs' appears destined for extinction. The World Trade Organization, World Customs Organization and other international bodies are responding through the development of global standards that recognise the changing nature of border management.

Endnotes

- ¹ Public Safety Canada's website is <http://www.publicsafety.gc.ca>.
- ² 'The Blind Men and the Elephant' is a poem by the American poet, John Godfrey Saxe (1816-87). It is based on an old Indian fable.
- ³ See, for example, CC Pond 1992, *The portcullis*, Factsheet No. 12, Public Information Office, House of Commons, London.
- ⁴ Paragraph 21 of the Singapore Ministerial Declaration, adopted on 13 December 1996.
- ⁵ Statement by the Chairman of the Council for Trade in Goods on 18 March 1998, summarising the outcome of the WTO Trade Facilitation Symposium held in Geneva, 9-10 March 1998.
- ⁶ World Trade Organization 2002, *Trade facilitation: overview of trade facilitation work*, World Trade Organization, www.wto.org/english/tratop_e/tradfa_e/tradfac2_e.htm.
- ⁷ WTO Document TN/TF/W/51, WTO Trade Facilitation Negotiations Support Guide, submitted by the World Bank.
- ⁸ Annex D, paragraph 1 of the 'July Package' – the Decision Adopted by the WTO General Council on 1 August 2004.
- ⁹ The number of contracting parties is regularly updated on the WCO website, <http://www.wcoomd.org>.
- ¹⁰ World Customs Organization 2002, *Kyoto 2000: The International Convention on the Simplification and Harmonization of Customs procedures (Revised) – Pathway to efficiency and effectiveness in the Customs Environment*, World Customs Organization, Brussels.
- ¹¹ World Customs Organization 1999, *International Convention on the Harmonization and Simplification of Customs Procedures (as amended)*, General Annex, Standard 6.2, Brussels, known as the Revised Kyoto Convention.
- ¹² Revised Kyoto Convention, Standard 1.2.
- ¹³ Revised Kyoto Convention, Article 1.
- ¹⁴ The APEC Sub-Committee on Customs Procedures also contends that the definition includes all relevant provisions, whether administered by Customs or any other government authority. See APEC Secretariat 2003, *The Revised Kyoto Convention: a pathway to accession and implementation*, prepared by the Centre for Customs & Excise Studies, University of Canberra, for and on behalf of the APEC Sub-Committee on Customs Procedures (SCCP), Asia Pacific Economic Cooperation (APEC) Secretariat, Singapore.
- ¹⁵ See, for example, T Hayes 1993, *Can EDI eliminate Customs?* Address by Mr TP Hayes, AO, Secretary General, Customs Co-operation Council, to the Pan-Asian EDI Summit, Kuala Lumpur, Malaysia, July.
- ¹⁶ Revised Kyoto Convention, Ch. 6, p. 9.
- ¹⁷ Trade Facilitation Issues in the Doha Ministerial Declaration Review of the GATT Articles, Article X: Communication from the WCO to the Council for Trade in Goods, dated 11 July 2002.
- ¹⁸ WCO 2005, *Framework of Standards to Secure and Facilitate Global Trade*, World Customs Organization, Brussels.
- ¹⁹ WCO Framework of Standards, p. 6.
- ²⁰ WCO Framework of Standards, p. 13.
- ²¹ For example, in 2005 one administration erroneously advised traders that 100% scanning of containers was mandatory under CSI.

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