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World Customs Journal

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Editorial



The WCO SAFE Framework of Standards to Secure and Facilitate Global Trade (the SAFE Framework) has proved to be a significant catalyst in international customs reform, the key elements of which are the concepts of Authorised Economic Operator and Mutual Recognition. The key to its success has been the dynamic nature of the instrument. Since its introduction in 2005, substantial revisions were made in 2007, 2010, 2012 and 2015, reflecting the WCO's commitment to ensure its ongoing relevance.

From its beginnings as a narrowly-formulated multilateral response to the risk of terrorism to the international supply chain, it has evolved into a much broader risk mitigation strategy. As such, the original focus on a new societal risk (i.e. terrorism) has evolved to include pecuniary risk (cost of theft, diversion, insurance) to business, and further to include the risk of infringing customs laws generally.

Implementation has, however, been inconsistent around the globe, with a key concern of the international trading community being the paucity of tangible, documented, meaningful, measurable and reportable benefits.

The Special Report in this edition of the Journal contains the WCO's announcement of its next iteration of the SAFE Framework, which will likely be implemented in June this year. Among other things, SAFE 2018 will introduce a requirement for the provision of certain minimum tangible benefits for AEOs, something that is already reflected in the WTO Trade Facilitation Agreement. Such developments are to be welcomed, and will hopefully go some way to addressing private sector concerns.

The Editorial Board looks forward to the adoption of SAFE 2018, and would welcome articles for publication in the Journal that address the way in which it is implemented around the world.

A handwritten signature in blue ink, appearing to read 'D. Widdowson'. The signature is stylized and fluid, with a large loop at the beginning.

David Widdowson
Editor-in-Chief



Section 1

Academic Contributions

Does e-commerce and the growing availability of trade data mean that the customs declaration may no longer be required?

Geoff Bowering

Abstract

This research examines whether the growth in the availability of trade and logistics data, and the ability of customs authorities to access it, means that the import declaration is no longer required. A literature review explored existing trade data, relevant technology and recent trade-data-related initiatives. Case studies of the role of the import declaration identified how it is used for customs border management and the data required. The analysis shows that an effective Authorised Economic Operator (AEO) program, combined with separately sourced data, may remove the need for an import declaration from compliant traders.

1. Introduction

Trade facilitation measures reduce the cost of conducting international trade by minimising or streamlining interactions with government to limit their impact on business and stimulate international trade (Grainger, 2008, p. 20). Common approaches include replacing documentary processes with electronic ones, such as through electronic customs systems; aggregating separate transactions with different agencies into one transaction, such as through single window systems; or reducing the complexity of those interactions, through the use of harmonised data sets (Choi, 2011, pp. 6–18).

Initiatives supporting the data pipeline concept seek to make greater use of supply chain data to increase accuracy and provide operators, including customs authorities, with greater visibility (Hesketh, 2015, paras 1–5). At the same time, Customs reuses industry-generated data to reduce the reporting burden on supply chain operators.

Previous initiatives have sought to change the way that declarations to customs authorities are made. However, developments in technology and data availability may offer opportunities to remove the need for these declarations altogether.

This paper explores the trade and logistics data that is generated and used by supply chain operators, and how it is used by customs authorities. It considers whether current and emerging technology can be used to remove the need for customs declarations, specifically the import declaration.

The research question that this paper aims to address is: Does e-commerce and the growing availability of trade data mean that the customs declaration may no longer be required?

This question will be explored through consideration of three key areas of study in the literature-based research:

1. The current state of trade and logistics data availability and the initiatives that have leveraged this in the past.
2. The data, regulatory and procedural requirements that the import declaration satisfies.
3. The issues that exist beyond the data requirements of import declarations, which must be addressed to remove the import declaration.

2. Literature review

The ‘data pipeline’ concept, as described by Hesketh (2009, 2010) and detailed further by Van Stijn et al. (2011), changes the nature of the traditional customs declaration. It allows trade and logistics data to be shared and reused throughout the supply chain and be available to the origin or destination customs authorities from the moment that it is created. It has also been the subject of a number of proofs of concept and trials by customs administrations, in particular in the European Union (EU) through the Common Assessment and Analysis of Risk in Global Supply Chains (CASSANDRA) and Consistently Optimised Resilient Secure Global Supply Chains (CORE) projects.

Data pipeline initiatives piggyback on the data available in the enterprise resource planning (ERP) systems of operators in the supply chain (Tan, Bjørn-Andersen, Klien, & Rukanova, 2010). ERP systems share data between different areas within an organisation—including finance, operations and logistics—to maximise efficiency through data reuse. They facilitate the sharing of data between vendors, suppliers and customers (Madu & Kuei, 2005, pp. 1–5), and are ‘the digital backbone for information in supply chains’ (Wang, Hulstijn, & Tan, 2016, p. 3).

Data sourced directly from ERP systems will be of a higher quality than the equivalent obtained by customs through other means (Henningsson, Gal, Bjorn-Andersen, & Tan, 2011; Tan et al., 2010). By linking supply-chain actors in real time and establishing an audit trail, ERP systems reduce data inaccuracies and the potential for fraudulent activity (Kloeden, 2007, p. 13). This includes real-time detection through the continuous monitoring of transactions (Stanton, 2012, pp. 12–13) and data validation to identify and remove inconsistencies before reporting documents to customs (Ernst & Young, 2006, p. 34). Customs may also ‘pull’ this data directly from ERP systems, rather than wait for it to be ‘pushed’ to them as formal reports or declarations (Hofman, 2011).

‘Pulling’ this data, though, can neglect benefits of receiving data through formal declarations. Parties making declarations to customs are required to attach their signature to that declaration to confirm their identity; demonstrate that they approve of and accept the contents of the declarations; and prevent later deniability of that declaration (‘non-repudiation’) (Reed, 2000; Lim, 2002). That signature can take many forms, from the name at the end of an email, a password or personal identification number (PIN), through to biometric identifiers or cryptographic signatures (Vaduva, 2014). The use of cryptographic signatures, supported by public key infrastructure (PKI), can replicate signatures used on traditional documentation and, in a technical sense, will be even more secure (Chukwuma, 2013).

Data from declarations or ERP systems can be supplemented to increase visibility along the supply chain. Supply chain visibility is the knowledge of ‘the identity, location and status of entities transiting the supply chain, captured in timely messages about events, along with the planned and actual dates/times for these events’ (Francis, 2008, p. 182). Container security devices (CSDs) and related technologies provide supply chain visibility for cargo transported at the shipping container level. These devices can use global positioning system (GPS) or mobile telephone technology to record and transmit the location of a container at given intervals to interested parties. Some devices are also able to report whether the container has been opened, or monitor the temperature, humidity and shock that the container has been subjected to (Scholliers, Permala, Toivonen, & Salmela, 2016). Track and trace technologies, used by logistics operators to provide real-time awareness of an article’s location, also support supply chain

visibility (Shamsuzzoha & Helo, 2011). Scans of barcodes and radio frequency identification (RFID) devices generate large amounts of data that can inform the logistics provider and others about where a consignment is, or was, when it arrived and departed, and even who was responsible for its delivery or acceptance.

Port community systems (PCS) act as hubs for a significant amount of logistics data, linking transport and regulatory documents. By integrating with customs systems and container integrity systems that track container movements, PCSs are able to provide visibility down to the level of the individual container within the port environment (Van Oosterhout, Veenstra, Meijer, Popal, & Van den Berg, 2007).

Direct access to commercial data offers real-time supply chain visibility, letting regulatory authorities proactively address emerging supply chain risks (Widdowson & Holloway, 2009; Klievink et al., 2012). Accessing supporting data along the supply chain in near-real-time, such as that available from CSDs, gives Customs much greater capacity to determine the risk of interference in the consignment and respond appropriately (Altemöller, 2016, p. 28). Greater supply chain visibility increases the integrity of the supply chain and reduces its susceptibility to be used to traffic illicit commodities (Hintsä, Männistö, Urciuoli, & Ahokas, 2012).

While traditional customs risk assessment relies upon consignment data from customs declarations, a better picture of the supply chain is available with the addition of third-party logistics and trade data (Inter-American Development Bank, 2010, p. 38). Risk assessment commences when the consignment commences and occurs along the supply chain. However, this does complicate the task by requiring continual reassessment and integrating multiple data sources along the supply chain (Greis & Nogueira, 2011).

A current initiative to develop a secure open interface by shipping line, AP Moller Maersk, and IBM—a shipping information pipeline (SIP)—uses blockchain technology to facilitate the sharing of logistics data between supply chain parties, while maintaining the security and integrity of that data (IBMBlockchain, 2017). This initiative aims to provide supply chain actors with an end-to-end visibility of consignments and access to relevant logistics documents or supply chain events. It is also intended to give customs ‘real time visibility, significantly improving the information available for risk analysis and targeting’ (IBM, 2017, para 9).

A blockchain is a ‘list (“chain”) of groups (“blocks”) of transactions’ (Staples et al., 2017, p. 2). Rather than being centrally stored in a traditional database, these blocks are replicated across all systems participating in the blockchain. This data replication prevents a participant from tampering with records on the blockchain. Users digitally sign data before adding them to the blockchain to maintain data integrity and security. The use of a blockchain also establishes a mechanism for data to be shared across a number of parties without the need for a centralised controlling authority (Hackius & Petersen, 2017). Chukwuma (2013) criticises the use of electronic data, compared to paper documents, as it can be secretly manipulated or corrupted. The use of an immutable blockchain record would overcome that concern.

The World Customs Organization’s (WCO) Framework of Standards to Secure and Facilitate Trade (SAFE Framework) provides a mechanism for supply chain integrity through authorised economic operators (AEOs), with supply chain security and trade compliance processes validated by Customs, connected across countries participating in mutual recognition agreements (MRAs; WCO, 2015). Where AEOs make their logistics data (such as that from in their ERP systems), available to Customs, greater supply chain visibility is possible, risk assessment is improved and the trust between customs and industry increased (Henningsson et al., 2011; den Butter, Liu, & Tan, 2012).

Making a data pipeline viable is complicated by conflicts around the sharing of data, adoption of standards and the level of participation required from the large number of supply chain operators involved (Rukanova, Henningsson, Henriksen, & Tan, 2017), as was borne out by the CASSANDRA

initiative (Zomer, Tan & Hofman, 2014). To succeed, a data pipeline requires a governance structure in place with a lead organisation (such as in the IBM/Maersk SIP); considerable sharing of data (e.g. CASSANDRA), or a strong sense of collaboration between participants (Hulstijn, Hofman, Zomer, & Tan 2016). Reducing the number of required participants while simplifying the mechanism for sharing data could improve the chances of realising trade facilitation benefits sooner.

3. The purpose of the import declaration

Import declarations are used by customs authorities to meet a variety of purposes. Two case studies—Australia and the United States—supported by WCO recommendations, will draw out these purposes and the data required for the import declaration to fulfil them.

3.1 Australia

In Australia, the Department of Home Affairs and its operational arm, the Australian Border Force (ABF), perform the customs function. In the international trade context, ABF ‘facilitates legitimate trade while remaining vigilant to attempts to circumvent trade regulations and processes’ (Department of Immigration and Border Protection [DIBP], 2016, p. 25). The information on the import declaration is used to determine duties, taxes and charges payable; whether the goods are subject to controls, such as requiring a permission or being prohibited; and as the basis for compiling international merchandise trade statistics (DIBP, 2009; Australian Bureau of Statistics, 2017).

The import declaration requires the person lodging it to provide the information, including: the overseas supplier and the importer; the Harmonized System (HS) code, quantities, origin and customs value of the goods; any applicable duty preference schemes; and any required permits, licences and certificates. The import declaration also requires the transport details of the consignment, such vessel or flight, container number, air waybills or bills of lading (Australian Customs and Border Protection Service [ACBPS], 2013, pp. 4–30).

Importantly, a person making an import declaration to ABF must provide evidence of identity (EoI) to verify their identity with ABF. Where a broker lodges an import declaration on behalf of the importer, the broker will have provided EoI to ABF in the past and will have procedures in place to establish the identity of the importer (ACBPS, 2013, p. 2). Where brokers or importers lodge import declarations electronically via the Integrated Cargo System (ICS), they will establish their identity with a digitally signed certificate using PKI. This certificate is also used to secure the electronic message to prevent non-repudiation by the sender and tampering of the message in transit (ABF, n.d., paras 1–2).

3.2 The United States

The United States Customs and Border Protection (CBP) describes its mission as ‘[t]o safeguard America’s borders thereby protecting the public from dangerous people and materials while enhancing the Nation’s global economic competitiveness by enabling legitimate trade and travel’ (CBP, n.d., para 4).

To obtain release from Customs of imported goods, the importer must make an ‘entry filing’ to CBP. This may be submitted prior to the goods arrival, and will be comprised of supporting documents to allow CBP to make a risk assessment of the goods and determine the amount of revenue payable. These may include a bill of lading or air waybill, a commercial invoice, a packing list, evidence that any duties can be paid, and any import permits required (Jones & Rosenblum, 2013, pp. 18–19). The entry filing also requires details about the vessel or flight importing the goods, including shipping document numbers; identification of the importer and consignee; and a description, HS code and country of origin of the goods (Brew & Jenkins, 2004, pp. 8–9).

The entry filing also requires evidence that a bond has been established with CBP to secure the revenue payable on the goods being imported (CBP, 2016, p. 1). Therefore, this entry filing is not used for the basis of calculating the revenue payable in the goods (other than to provide guidance that the bond is sufficient to cover the revenue payable), and is used principally for the determination of risk of the consignment. Following the release of the goods, the 'entry summary' is lodged by the importer or broker, which contains much of the information of the entry filing, with more detailed information about the goods to allow CBP to make an accurate assessment of the revenue payable for the consignment (CBP, 2006, p. 13).

EDI submissions to the automated commercial environment (ACE) are through a virtual private network, which offers the security of transmission, and users are identified through unique message queues and an EDI password (CBP, 2010, p. 26).

3.3 World Customs Organization

The WCO's Revised International Convention on the Simplification and Harmonization of Customs procedures (Revised Kyoto Convention; RKC) is a set of standards for customs procedures designed to promote the facilitation of international trade while maintaining the integrity of the border and the collection of revenue (Yasui, 2010, p. 2). With regard to the making of a goods declaration to a customs authority, the RKC recommends that:

- the party making the declaration is held accountable for the quality of data in the declaration
- the declaration data should be limited to that required for calculation of revenue payable and the collection of statistics, although supporting documentation may be submitted to ensure that all customs laws are met
- it should be possible to lodge the declaration and supporting documentation before the arrival of the goods
- it should be possible to lodge declarations electronically, and customs authorities should make use of e-commerce as much as possible to enhance customs control (WCO, 2006, pp. 6–25).

The information required on the declaration will include 'importer, description, quantity, valuation, classification, supplier, origin and any licensing requirements' (WCO, 2000, p. 19). The WCO also recommends that the need for supporting documents, such as invoices and transport documents, be eliminated where possible and otherwise provided electronically. This allows for the 'release and clearance of cargo based only on electronic declaration and automated verification' (WCO, 2012, p. 2).

3.4 Import declaration functions

Based on the Australian and United States case studies, the import declaration supports the following functions:

- risk assessment of goods crossing the border, to identify illicit goods
- calculation of revenue payable
- determination of whether permits and licences etc. are required and to communicate their existence to customs
- collection of trade statistics.

Ideally, the declaration will be communicated electronically before the arrival of the goods in the importing country. It will contain information regarding the parties in the transaction, such as the exporter and importer; details of the goods in the consignment; the conveyance that carried the goods, such as vessel or flight; and evidence of any required permits or licences.

The party making the declaration is held accountable for the accuracy of the importation supplied to customs, so therefore must be reliably identified. When communications with customs authorities are electronic, this is through a form of electronic signature.

4. An alternative to the data pipeline

The data pipeline and the initiatives to develop it further—CASSANDRA and CORE—offer trade facilitation benefits to supply chain participants through reduced reporting burden and greater supply chain visibility. They also offer customs authorities a wider range of data earlier in the supply chain, strengthening risk assessment capabilities.

However, supply chains involve a large number of parties that must coordinate their activities to expedite international trade. While not all of these parties will contribute data to the pipeline—only four messages were used in the CORE initiative—the active participation of all necessary parties is required for the success of a data pipeline. In addition, the ‘network effect’ of these initiatives means that, until the scope of participants is large enough to provide net benefits to new participants, growth will be slow (Rukanova et al., 2017, p. 196).

To offer the benefits of a data pipeline to supply chain operators and customs authorities, an alternative could involve using supply chain and supporting data while requiring the active participation of fewer supply chain participants. With fewer required participants, the negative impacts of the network effect are minimised and the chance for initial success and future growth is increased.

Trade facilitation benefits of a data pipeline arise from the simplification of reporting to customs authorities, as this reduces the cost of a trade transaction to industry. Rather than simplifying this transaction, a greater trade facilitation benefit could be obtained from removing this requirement completely. To do so would require using various supply chain data sources and technology for customs authorities to access and manage it.

5. Opportunities to remove the import declaration

5.1 Using the SAFE Framework to remove the import declaration

The SAFE Framework supports the risk assessment of entities operating in the supply chain, rather than their individual consignments. Where trading partners engage in MRAs, it is possible to secure the end-to-end supply chain—an ‘authorized supply chain’ (WCO, 2015, p. 12) or ‘trusted trade lane’ (Hulstijn et al., 2016, pp. 304–305)—and treat the goods as consistently low risk.

A condition of the SAFE Framework is that AEOs have demonstrated compliance with customs requirements (WCO, 2015, p. IV/3). Depending upon the national customs legislation, this may include compliance with requirements to obtain permissions and licences for border clearance. Where this is the case, rather than use the import declaration to determine whether import permits are required, the importer can be expected to manage this.

Without an import declaration, the statistical data it provides must come from another source. A possibility is for the exporting country’s customs authority to provide this from their export declaration.

The ‘authorized supply chain’ concept recommends the use of the export declaration to meet the import declaration requirements. This requires the export declaration to contain enough information to meet the importing country’s statistical purposes. In practice, though, export declaration data can be less detailed than that for the import declaration (ACBPS, 2009, pp. 4–5).

More complete and accurate data will be available from the exporter's ERP system. In addition to being capable of providing the required statistical data, this data will identify the parties in the transaction to confirm that they are low risk.

Trade and logistics information, such as invoices and packing lists, are increasingly stored and shared electronically between parties through ERP systems, rather than by paper. Where documents have a legal basis, such as bills of lading, they can be securely transacted using frameworks such as the Bolero system (Bolero International Limited, n.d.). In addition to statistical data, the ERP systems of traders and service providers offer a source of logistics data to support risk management and assure customs authorities that the entities have well-managed business processes (Wang et al., 2016). ERP systems have the potential to be an alternative source of the data provided by importers on, or in addition to, the import declaration.

Data from the exporter's ERP system informs the beginning of the supply chain. The CORE initiative made use of data from the exporter at the consignment completion point (CCP). This data was followed by carriage data provided after departure and logistics data provided prior to arrival, allowing the consignment to be identified—logically and physically—along the supply chain (Hesketh, 2015). Pulling data from PCSs, CSDs, track and trace systems and other sources can provide real-time visibility.

Even if the entities in the supply chain are low risk, the importer must be held accountable if illicit goods are detected. If the only data available is that provided originally by the exporter, the importer may be able to deny knowledge of any illicit goods. To prevent this, a mechanism by which the importer takes responsibility is necessary.

A suitable technology for this is a blockchain. Rather than use a blockchain to receive, store and provide all data within a transaction, which could be considerable, only the data required to describe the transaction and to establish the exporter's and the importer's responsibility for the consignment is required. A purchase order or similar commercial document would establish the counterparties in the transaction, confirmed by the attachment of their digital signatures to the document through the blockchain. With the identities of the counterparties and their relationship to the consignment established immutably by blockchain and a digital certificate, the importer could be held responsible for the consignment even without having provided data to the destination country's customs authority.

The SAFE Framework recommends that AEOs have internal systems that secure the information contained therein, and can communicate electronically with customs authorities (WCO, 2015, p. IV/7). There is no requirement, however, for AEOs to have modern ERP systems and to integrate them with their supply chains. This requirement would need to either be established within the SAFE Framework or established separately within the AEO programs used for this process. However, this may limit the size and sophistication of traders who can participate in this solution. While the SAFE Framework requires that AEOs comply with customs requirements, this needs to be confirmed to include compliance with all border-related laws, including requirements to obtain necessary permissions and licences to import (or export) goods.

The Australian import declaration is not only used as a mechanism to determine whether an import permit or licence is required, but also as a vehicle for reporting some of those permits to the government. While an AEO can be relied upon to obtain all of the necessary permits prior to importation and meet all legislative requirements, without the import declaration an alternative way to report any permits is needed.

5.2 Removing the import declaration without the SAFE Framework

Without being able to rely upon the security and trade compliance requirements of AEO programs, and the availability of trade and logistics data from an AEO's ERP system, the ability to remove the import declaration is more complicated. The destination country's customs authority is unable to rely upon the data from the exporter's ERP system; there may not be the MRA relationship that allows the data to be shared; and the parties in the supply chain are unknown and therefore of unknown risk.

A means of achieving the removal of the import declaration within this context could build upon the previous solution—counterparties digitally signing a trade contract immutably recorded on a blockchain—to maintain consistency of approach. The use of a PKI-based digital certificate establishes identity.

Without an AEO relationship between the exporter and the exporting country's Customs, there can be no expectation of obtaining trade data from an ERP system. Instead, the initial data for the consignment may be drawn from the export declaration and placed on the blockchain to be digitally signed by both the exporter and importer. This may not be sufficient for an import declaration (ACBPS, 2009, p. 4), but will be sufficient to create an initial record of the consignment and to establish liability for data accuracy.

The destination country's customs authority can use this information to make an initial decision about the risk assessment about the consignment, supported by data obtained throughout the supply chain. This includes transactional data from the buyer, seller and their intermediaries; physical data from supply chain monitoring technologies; and risk management data from quality control checks and standards (Klievink, Aldewereld, Knol, & Tan, 2014, p. 10).

There are many third-party sources of trade and logistics data: the International Air Transport Association's (IATA's) e-freight initiative seeks to make air waybills and other air cargo documents fully electronic (International Air Transport Association, 2017, paras 2–4); Bolero hosts a system to manage legally acceptable electronic bills of lading (Bolero, n.d., pp. 1–2); GS1 has information frameworks that identify goods at greater levels of granularity than HS codes, and facilitate the sharing of detailed event and tracking data (GS1 US, 2012, p. 1; Good, Gahan, Butar, & Dehghan, 2015, p. 2) and supply chain data integrators, such as Buy Sell Move, use the cloud to share goods, transport and other supply chain data between parties (BSM Global, 2017, paras 1–5).

However, rather than require specific messaging that needs to align to all messages for a consignment within the supply chain, as per the CORE initiative, customs authorities can instead pull this data from available systems as the goods progress along the supply chain. In doing so, they can build a complete picture of the consignment and the risk that it poses to the border. This reduces the burden on the supply chain parties to send messages to one or more customs authorities.

Where enough data becomes available for customs to make a decision that the goods do not pose a risk to the border, the customs release may be communicated to the importer. Even when the traders involved in the consignment are not AEOs, they are able to benefit from greater availability of supply chain data.

The SAFE Framework requires that AEOs have measures in place to secure the cargo and conveyances in their supply chains, and for their service providers to maintain supply chain security (WCO, 2015, pp. IV/8–IV/13). Where the supply chain operates outside of the SAFE Framework, other means to secure the supply chain will be required.

Using CSDs with the functionality to provide the real-time container tracking allow the importing country's customs authorities to track the location and status of the container. They can identify any movements inconsistent with those expected from the movement data received from other sources, or if the container has been accessed. Alternatively, the use of track and trace technology can provide a degree

of supply chain visibility. However, each data source needs to be secure and trusted as accurate, in order to be relied upon by customs.

This approach can provide data sufficient for risk assessment and providing visibility across the supply chain, assuming the required data sources are in place and can be trusted. While data would be pulled from the required systems, each data provider must have the necessary infrastructure in place to allow data to be accessed. However, the need to involve numerous data providers complicates the implementation and operation of this approach. As per the CASSANDRA and CORE initiatives, the network effect may limit early adoption.

The legislative compliance that AEOs must have in the approach under the SAFE Framework does not exist here. While there may be sufficient data for the import country's customs to determine if an import permit or licence is required for the consignment, they will be unable to confirm if such a permit or licence exists.

Further, without AEO compliance requirements Customs is unable to trust the importer to calculate revenue liabilities correctly. While simple consignments with, for example, a transaction valuation may mean that their revenue to be calculated fairly easily from export declaration data, more complex valuation methods or the use of preferential duty rates could not be supported through this approach.

6. Conclusion

The import declaration serves a number of purposes for customs authorities: risk assessment; revenue calculation; determination of permit and licence requirements; and the collection of statistical data. Any approach seeking to remove the import declaration must also be capable of meeting these requirements. It must also have a mechanism to hold the importer responsible for the data reported to customs.

New and existing sources of trade and logistics data can be leveraged to provide the data that would otherwise be supplied to a customs authority through the import declaration. When available to Customs, data used to provide supply chain visibility, such as that from CSDs, can help mitigate supply chain risks.

The SAFE Framework allows customs authorities to trust operators in the supply chain, and therefore rely upon the importer meeting many of the requirements of the import declaration independently. When original data comes from a trusted exporter in the country of origin, this data can be taken to be correct. It can be assumed that the importer will pay the correct amount of revenue, have all necessary permits and licences, and not pose a risk to the border. The destination country's customs authority provides an import clearance much earlier, giving the importer certainty in the operation of their supply chain, and reduces the burden of submitting documentation. As long as this data is sufficient for statistical collection purposes, it could meet all of the requirements of an import declaration.

Where the operators in the supply chain do not participate in an AEO program, it is not possible to meet the requirements of the import declaration with third-party data sources and supply chain technology. Receiving the export declaration from the customs authority in the origin country is unlikely to be sufficient to meet the data requirements of the import declaration, although it can be supplemented with other data gathered along the supply chain. This may be sufficient for risk assessment purposes and for the collection of statistical data. While this data may be used to determine whether a permit or licence is required, it can't confirm that the permission exists. It also can't be relied upon to determine the correct duty payable.

Where the exporter and importer are AEOs and an MRA exists between the relevant customs authority, there is potential to remove the need for an import declaration, although some enhancements to the SAFE Framework may be required. However, without the trust established through an AEO program and an MRA relationship between trading partners, the removal of the import declaration is unrealistic.

To further this possible solution, the scope of the data to be initially stored on the blockchain and countersigned by the traders involved must be confirmed. In particular, it must contain enough data to meet the statistical data collection requirements of the importing country. It must be available to the exporter at the CCP so that it can be provided to the destination country's customs authority.

It will also need to be determined whether a digital signature attached by the importer to the trade data supplied to the blockchain by the exporter is sufficient to establish a legal liability for that data upon the importer. Finally, the potential for data provided by the exporter on the blockchain to meet the requirements of the import declaration would need to be tested in practice to determine whether this approach provides tangible trade facilitation benefits to make participation in this solution worthwhile.

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How do the changing international trade relations impact on public administration?¹

Frank Altemöller

Abstract

Seldom has world trade policy been the focus of such controversial public debate as it is today—and it is now accompanied by changes to practical trade policy that are more far reaching than any we've seen before. First, there was the formation of the contentious free trade agreements, such as the Comprehensive Economic and Trade Agreement (CETA), Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), and the ensuing worldwide protests over the exclusion of the public from the associated negotiations. Then came the surprise announcement from the new US presidency of the intention to step away from the TPP and TTIP—even though the USA had previously campaigned particularly strongly for those agreements. This development is accompanied by a far-reaching stagnation of current multilateral negotiations, as they exist within the framework of the world trade system. These issues all occupy places in the current political discussion around trade liberalisation.

However, this contribution goes further, to focus on an equally important issue that is much less acknowledged in the public sphere, and that relates to the interdependence of the regulatory framework for economic integration with civil society, business and the administration. Free trade agreements—such as the World Trade Organization (WTO) Agreement on Trade Facilitation—can be looked on as models of international governance, exerting a considerable influence on the players in the member states. The author argues that business and the administration are then called to the task of devising and implementing appropriate strategies and following up with any necessary adaptations. He demonstrates that, for the stakeholders involved, economic integration simultaneously represents challenge, an intention to change and the opportunity for renewal.

1. Emerging trends in international trade policy

In the course of recent developments, international trade policy faces fundamental changes. The current world trade system essentially has its foundations in the Uruguay round of 1995. The founding of the WTO was accompanied by substantial tariff reductions based on the former General Agreement on Tariffs and Trade (GATT). At the same time, further important trade agreements were put in place, such as the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of International Property Rights (TRIPS) and an agreement over dispute settlement within the framework of the WTO. Although there were high expectations when the following round of negotiations (the Doha Round), was launched in 2001, it proved to be less successful. Negotiations stagnated and, to this day,

they have not been concluded. In fact, the outcomes of the WTO ministerial conferences in Bali and Nairobi in 2014 and 2015 have demonstrated that significant further steps towards liberalisation within the framework of the world trade system are not achievable at this time.²

Notwithstanding, there has been ongoing development in international trade relations in the intervening 15 years. However, these developments have taken place to a substantial degree outside of the multilateral system of the WTO, in the form of free trade agreements and other regional and interregional trade agreements for economic integration (see, for example, Hoekman, 2015; Neue Zürcher Zeitung, 2017). Building on the foundations of the world trade system, increasingly concentrated economic areas are emerging to facilitate trade and economic integration amongst a limited number of selected stakeholders. It appears that, by following this path, a higher level of integration can be attained than would be achievable among the many participating states of the multilateral system.³ Examples of such agreements include the North American Free Trade Agreement (NAFTA), Association of Southeast Asian Nations (ASEAN) and CETA. The negotiations on the TPP and TTIP can also be viewed as examples of this development—notwithstanding their initial rejection by the new US presidency or the likelihood of their being renegotiated.⁴

2. Changes in trade policy governance: From multilateral integration to free trade agreements

The growing appeal of free trade agreements and customs unions can be explained by the important advantages offered to the participants in relation to third countries.

Incentives favouring the formation of free trade agreements

The purpose of free trade agreements is to make trade more favourable among their member states. The progressive or even immediate abolition of all duties promotes the tendency for increased trade among the members, though at the expense of trade with third countries. This is how free trade agreements and customs unions dynamise trade: they generate institutionalised incentives towards increased intra-bloc trade (for background, see Schiff & Winters, 2003). This allows member states to enjoy the advantages of a preferential environment amongst themselves. In contrast, potential, sometimes substantial, disadvantages may arise for third country suppliers who operate on international markets worldwide and would seem to have, in principle, great competitive global opportunities. The ramifications of this effect are felt, for example, in the automobile industry.

Strategic design of the external tariff, in particular, can have a strong influence on diverting demand. The external tariff offers fundamental steering opportunities for the regulation of trade flows. Prior to the US decision to withdraw from negotiations, the office of the US Trade Commissioner pointed to an example from the automotive industry: the TPP would eliminate up to 70 per cent of the tariffs on automobiles to which US manufacturers are currently exposed when they export to TPP member states. In addition, the TPP, in a former negotiated form, allowed for the extensive elimination of non-tariff trade barriers among the member states, further exacerbating the effects described (The Office of the United States Trade Representative, 2016).

Complete trade agreements

An essential characteristic of the newer free trade agreements is that they consider themselves to be providing a complete set of rules; they strive to be agreements that regulate all matters concerned with trade, not just isolated issues. This approach includes, for example, broadening market access and standardising rules and regulations, especially those regarding common rules of origin and the protection

and preservation of competition through a competitive order. Investment rules facilitate investment activity, especially among member states, particularly through free access, protection of investments and rules on non-discrimination. Free trade agreements additionally include rules for the protection of intellectual property rights and rules that stipulate the common coordination of labor market policies. The agreements also make provision for rules aimed at preventing discrimination in public procurement contracts and the non-discriminatory application of national legislation. Characteristically, there are also regulations for the protection of human health and the protection of animal rights. Some of the regulations mentioned have their counterparts in WTO treaty texts.⁵ However, the complementary rules in the free trade agreements are not just an inconsequential duplication. When bound in partnership with a smaller number of actors, participants have a greater incentive and thus renewed interest in enforcing the corresponding rules (Altemöller, 2016).

We can observe from the free trade agreements already negotiated that they are often linked to geographic proximity (regional free trade agreements). However, being in the same regional vicinity is by no means a requirement. As demonstrated by CETA and TTIP, the structural similarity of trading partners can be just as important. Nonetheless, the integration of some Eastern European countries (Romania, for example) into the European Union and its common market illustrates that considerable incentives for collaboration can also be found within combinations of developed and economically less advanced countries.

Structuring and differentiating trade relations

Through being embedded in the multilateral trade system, free trade agreements promote and, at the same time, limit trade liberalisation—in whichever ways best serve the interests of the participants. In this sense free trade agreements, in contrast to the multilateral system, can be regarded as tiered structures that differentiate the degree of integration of global trade, both spatially and objectively (Altemöller, 2016). However, the restrained pace of development of the multilateral system throughout the current Doha Round does not mean that there will be no further reshaping and liberalisation of international trade. This is certainly taking place, but on a different level. Building on the foundations of the world trade system, consolidated economic areas are being created, within which trade and economic integration between limited numbers of selected members is facilitated. Here, it appears that far greater integration is achievable than could be accomplished among the many participating states within the multilateral system.⁶

In this light, free trade agreements can be understood as renewed forms of economic and trade policy governance. Free trade agreements are not new—they have been concluded many times in the past and were even being reached hundreds of years ago. However, we can regard their current, specific design as being something new in the way they allow trade between the parties to be organised according to the principles of structuring and dynamisation, privilege and marginalisation, liberalisation and protection (Altemöller, 2015; for background, see Horn, Mavroidis, & Sapir, 2009; Antimiani & Salvatici, 2016; Ismail, 2017; Lester, Mercurio, & Bartels, 2016).

3. New bilateralism

Current trade practice reveals that WTO member states are not only increasingly closing free trade agreements with multiple partners but, simultaneously, that bilateral agreements are also becoming increasingly important. It is not only the pronouncements of the new US presidency towards placing trade relations more and more on a bilateral basis that underlines this.⁷ In fact, the EU and other countries have long since concluded a number of important bilateral agreements, such as the EU–South Korea Free Trade Agreement.

As areas of more selectively concentrated integration, bilateral agreements—as compared with the multilateral system and other free trade agreements—offer the possibility of even more differentiated trade arrangements. This not only enables the parties to tailor highly individual trade relations for individual sectors, but economically and politically stronger states can also exploit their asymmetric power positions over the smaller parties, both in the negotiations over bilateral agreements and in the subsequent implementation. Thus, for those stronger states, considerable incentive can lie in the fact that the conditions of bilateralism can allow them to obtain advantages that could not be realised under the terms of an agreement reached at a regional or multilateral level. In addition, a bilateral agreement makes it easier than might be possible in a larger grouping for a contracting party to adapt the terms of the contract in its own favour when the environment changes, or to even selectively withdraw from the agreement. On the other hand, Switzerland, for example, demonstrates that bilateral agreements can also offer advantages for smaller countries if integration into larger political communities is not desired.

Bilateral agreements often make trade relations more complicated. Increased bilateralism implies an increasingly complex network of trade relations, involving lengthy individual negotiations for each agreement. Significantly, although bilateral agreements involve only two parties, this apparent simplicity conceals a new level of complexity as the states participating in the bilateral agreements will be already bound up in numerous other agreements. It is difficult in the bilateral framework to make provision for the significant interdependency this creates. We see examples of this in international production and supply chains. To incorporate such international systems requires the states to bring the bilateral agreements they wish to conclude into harmony. This highly complex process is made even more difficult as the agreements have been negotiated at staggered points in time.

4. Trade agreements must be legitimised by the rule of law

International trade rules characteristically consist of common instruments of market liberalisation, such as the abolition or reduction of customs duties, import and export bans, as well as prohibitions on quantitative restrictions and prevention of discrimination. These purely market–economic approaches are increasingly being expanded. Trade rules require validation beyond the liberalisation goals proposed in the treaty texts: the overarching principles of international law require that supranational treaties gain legitimacy by placing trade liberalisation rules in an encompassing context of responsibility. This is the approach taken, for example, within the WTO treaties, in the preamble to the Marrakech Agreement Establishing the World Trade Organization. The overarching objectives expressed here, such as prosperity, security, full employment or, for example, sustainable development, make it clear that market liberalisation and trade are not ends in themselves, but are instead integrated into the service of the encompassing goals of the international community. Numerous other international agreements further substantiate these goals, common to the international community, and together form an overall connected system (Zürn, 2017).

Nevertheless, until they are appropriately implemented, these goals remain abstract. There are, therefore, many accompanying measures that need to be brought into play to implement the agreements and achieve the intended overarching objectives. This requires the formation and development of structures that will ensure the rule of law. The WTO Agreement on Trade Facilitation, for example, requires member states to introduce transparent processes that include the guarantee of judicial safeguards. The design of these processes should include, for example, setting up appropriate websites to ensure that relevant information is easily accessible to all stakeholders. This facilitates parity in competition and avoids particular actors gaining an unfair advantage.

The respective trade agreements may be international, European or regional. Necessarily, though, the place of their implementation will of course be within each individual member state. Thus, the trade rules need to be transferred from the supranational level to the national level: this is a transformation

task that, ultimately, can only be achieved within the sphere of each participating member. However, while the rules themselves are uniform, they encounter a range of different conditions in the member states. Those member states will sometimes differ substantially in terms of political structure, economic size, technological development, resources and financial capacity. Therefore, the implementation of trade rules demands a considerable degree of adaptation to match the asymmetric conditions within the member states. When trade agreements are concluded, there is a transfer of political and legal rights, and this must be adapted to the form of integration agreed to by the member states. This generally requires a conceptual adjustment or reorganisation of national policies, economic restructuring and comprehensive legislative adjustments: economic integration demands substantial change (Altemöller, 2015; for further examples see Widdowson, 2016; Grainger, 2016; and for background see Wolfgang & Harden, 2016; and Baldwin, 2010).

The greater the asymmetries, the greater will be the demands associated with the change process required for achieving a successful adaptation of the new economic and legal framework.⁸ In the course of implementation, comprehensive adaptation processes are required, and the appropriate processes of change demand specialised knowledge and the knowledge management to carry them out. This also calls for modernisation of the public management, customs administration as well as further associated institutional renewal.⁹ The challenges outlined here essentially apply to all areas of economic integration: they are equally relevant to European integration as they are to multilateral integration within the framework of the world trade system.¹⁰ Currently, China is in the process of embarking on a visionary economic integration project by way of the Silk Road Economic Belt and the 21st Century Maritime Silk Road initiatives ('One Belt and One Road'). China's plan is to connect large economic zones through the participation of a large number of countries and to create concentrated regions of integration along the belt and road right through to Europe (The State Council of the Peoples Republic of China, 2017).

A further example of this type of transformation process is the integration of Eastern European states into the EU. Before their admission to the EU, these countries had administrations that were bound up in their integration within the Eastern bloc. When they entered the EU, there was a complete transformation of the political and legal environment. Just as these countries were admitted as members of the European customs union, they also formed the external border of the EU. New EU border posts had to be established and they had to be integrated, not only into each national customs administration, but also into the European institutions. It was clear that those countries had to undergo complete and profound structural change (for background, see Cyzowicz, 2014).

The increasing numbers of free trade agreements, particularly bilateral agreements, is making the framework conditions for public authorities and companies ever more complex. This affects, for example, the specific features to be observed in customs procedures, the application of rules of origin and questions of competing standards when areas of law applying to free trade agreements overlap. The successful implementation of the goals of economic integration cannot set out by approaching single issues. Rather, it demands an overarching vision. This vision must have a perspective that anticipates the benefits that will be achieved through integration. Past experience reveals that change often encounters considerable resistance. Overcoming this resistance requires specialised knowledge and abilities to implement the corresponding change processes. Success in carrying this through rests on the stakeholders' ability to communicate their positive visions. Only then will the power and motivation needed to tackle the challenges be unfolded.

5. Special focus: Leadership and management development

Trade negotiations frequently include assertions of vital ‘national interests’ or the preservation of state sovereignty, along with environmental and consumer protection, broad-scale social issues and ‘fair and just solutions’ for those involved. However, there is an altogether different issue that is much less in the public eye. This concerns what happens after the agreements have been negotiated and then adopted in the member states. Ultimately, the success of economic integration agreements depends not only on their substantive content. An equally important question concerns the preparedness of the parties, and how they succeed in taking on and integrating the relevant provisions into their legal, economic and administrative practice. In the past, the challenge of implementation has not been adequately taken into account, but it is gaining greater attention in the current debate. The frequently used slogan, ‘success is in the doing’, hardly addresses the increased importance of this issue. It requires highly developed scientific procedures and their proving in practice, and then their subsequent adjustment and optimisation. This important issue stands at the interface between the policies and the legal framework and their implementation. At this juncture, economic integration requires complex management, and here leadership and management development gains a central role (for background see Carmichael et al., 2012; Myers, Hulks, & Wiggins, 2012; Ingraham, 2005; Coleman, Boyatzis, & McKee, 2002; Lynn, 2011; Gilardi & Radelli, 2011; Veljanowski, 2012).

The starting point for the implementation of knowledge management in economic integration processes are transfer scenarios. These are policies or sets of rules developed and set up by the respective responsible institutions. The uniform rules that have been agreed upon must be implemented in the different member states. The implementation of leadership and management development is a fundamental strategy for empowering member states to competently develop transfer scenarios under the varying conditions they encounter. Some examples of existing legal frameworks developed in the context of such transformation processes include the WTO Agreement on Trade Facilitation and the strategies for securing international container traffic after the 9/11 attacks (Altemöller, 2011).

The process of economic integration is bound up with questions of economic and social governance. This means that economic integration opens up substantial opportunities, but it is also often controversial. The struggle that goes into concluding trade agreements within the WTO framework or, for example, the discussions centred on the trade agreement negotiations between Canada and the EU (within CETA), or on TTIP and the TPP, illustrate the often highly contentious issues involved here. Probably the most incisive example is the exit of Great Britain from the EU (Altemöller, 2015).

Such experiences illustrate that free trade agreements cannot be seen as unconditional guarantors of successful economic integration. The current discussion around the nature and extent of economic integration emphasises that the development of leadership and management is bound to topics with a focus on implementation. If the participants are convinced that they have finally found fair solutions, then it now depends on how the member states structure economic integration and how they carry it through. The discussion on the reorganisation of trade policy, initiated by the new US presidency, poses many unanswered questions for trading partners, political institutions, and for business and administration: the associated challenges—just like the resultant adjustments and changes—are being renewed.

6. Summary

This contribution has presented a discussion on the effects of the emerging trends in international trade policy governance on business, public management and customs administrations. After outlining the current situation in trade policy, the author has discussed the development towards new forms of trade policy governance: alongside the world trade system, free trade agreements (particularly bilateral agreements), are increasingly forming regions of more condensed and differentiated integration. The corresponding implementation frequently demands fundamental adjustment and change processes in the participating countries, presenting many challenges for the stakeholders involved.

The author argues that international trade policy is experiencing a period of upheaval such as has been rarely witnessed in recent decades, and that it demands a repositioning: changes in forms of trade governance require more than just the legitimacy of the rule of law. In practical terms, they also demand extensive change processes that are accompanied by innovative leadership and management directed towards new goals. Only in this way can the various stakeholders fully realise the advantages contained in the challenges that lie ahead.

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Notes

- 1 A modified version of this text has been published under: Wirtschaftliche Integration: Herausforderung und Chance für die öffentliche Verwaltung, in: Niedostadek (Ed.), Wirtschaftsrecht und Verwaltungspraxis, Schriftenreihe der Hochschule Harz. *Forschungsbeiträge zum Public Management 10*: 403–422.
- 2 In summary, they reflect an exhaustion of the multilateral dynamic, a state which is now alluded to for the first time in a WTO ministerial declaration: *While we concur that officials should prioritize work where results have not yet been achieved, some wish to identify and discuss other issues for negotiation; others do not. Any decision to launch negotiations multilaterally on such issues would need to be agreed by all Members.* (Nairobi Ministerial Declaration Adopted on 19 December 2015, WTO document WT/MIN (15)/DEC, 21 December 2015, note 33). Despite the difficulty of the negotiations, the Ministerial Declaration clearly supports the continuation of the Doha Agenda (Nairobi Ministerial Declaration Adopted on 19 December 2015, WTO document WT/MIN (15)/DEC, 21 December 2015, note 31).
- 3 The world trade system attempts to control the formation of free trade agreements and customs unions. This is made clear in Art. XXIV GATT. The ministerial declaration of Nairobi expressed it this way: *‘We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral system.’* (Nairobi Ministerial Declaration Adopted on 19 December 2015, WTO document WT/MIN (15)/DEC, 21 December 2015, note 28).
- 4 In light of the US withdrawal, ministers from the remaining 11 members affirmed the economic and strategic importance of the TPP. On 23 January 2018, negotiations were concluded on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership CPTPP (see New Zealand, Ministry of Foreign Affairs and Trade, Trans-Pacific Partnership).
- 5 This particularly concerns the agreements on trade facilitation, technical barriers to trade, sanitary and phytosanitary measures, public procurement and trade related aspects of intellectual property rights.
- 6 The world trade system attempts to control the formation of free trade agreements and customs unions. This is made clear in Art. XXIV GATT. The ministerial declaration of Nairobi expressed it this way: *‘We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral system.’* (Nairobi Ministerial Declaration Adopted on 19 December 2015, WTO document WT/MIN (15)/DEC, 21 December 2015, note 28); on WTO conformity of regional trade agreements see Senti, 2013, and Bartels & Ortino, 2006.
- 7 For background see, e.g. Evenett & Fritz (2017), Bown (2017) and better.gop (2016) (better.gop is a portal initiated by Speaker Paul Ryan). For commentary see, e.g. Auerbach et al. (2017).
- 8 This also applies to the content-related aspects of the liberalisation rules. The focus of the discussion here is how well the liberalisation rules fit the interests and needs of individual countries. This question becomes ever more important as the structural differences between the participating member states increase (for background see Mavroidis, 2012; Gantz, 2013; Narlikar, Daunton & Stern (2012).
- 9 National and international organisations arrange numerous education programs to support the relevant countries. These include, for example, the Leadership and Management Development Programme of the WCO, see Altemöller, 2015.
- 10 Also relevant here is the controversial integration of Ukraine into the EU. For an overview see Academy of Customs Service of Ukraine, 2012.

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National committees on trade facilitation

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Abstract

The World Trade Organization's (WTO) Trade Facilitation Agreement (TFA) includes a specific requirement that national committees on trade facilitation (NCTFs) be established 'to facilitate both domestic coordination and implementation of the provisions of this Agreement' (WTO, 2014, Art 23.2).

This paper, which is based on the findings of a comprehensive review of Australia's National Committee on Trade Facilitation (Widdowson et al., 2017), provides an overview of relevant international policies, recommendations, trends and developments, as well as identified industry priorities and ambitions from an Australian perspective in relation to the facilitation of international trade within the scope of the TFA.

The research identifies ways to enhance the ability of such committees to influence a meaningful trade facilitation agenda that reflects the needs and aspirations of a country's international trading community.

Background

In November 2014, World Trade Organization (WTO) members adopted a Protocol of Amendment to insert the Trade Facilitation Agreement (TFA) into Annex 1A of the WTO Agreement, and in February 2017, the TFA entered into force upon two-thirds of the WTO's members, having completed their domestic ratification process.

The TFA contains provisions for expediting the movement, release and clearance of goods, including goods in transit, and includes a specific requirement that national committees on trade facilitation (NCTFs) be established. In this regard Section III, Article 23.2 of the TFA states:

Each Member shall establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the provisions of this Agreement.

In addition, Section III, Article 23.1.4 provides that the WTO's Committee on Trade Facilitation (CTF) 'shall develop procedures for the sharing by Members of relevant information and best practices as appropriate'.

Australia established its NCTF (the ANCTF), prior to the entry into force of the TFA, with its stated purpose (as reflected in its initial terms of reference) being to 'fulfil the obligations required by the World Trade Organization's Agreement on Trade Facilitation by providing the forum to facilitate both domestic coordination and implementation of the provisions of the World Trade Organization Agreement on Trade Facilitation'. The ANCTF is made up of representatives from a mix of Australian government agencies and private sector interests, the latter consisting primarily of not-for-profit organisations.

This paper explores findings from a recently completed research project focused on an evaluation of the ANCTF against the background of international best practice, the relevant provisions of the TFA, and the views of Australia's trade stakeholders. The review's mission was to enhance the ANCTF's ability to align with international best practice and the TFA's prescriptions, and to highlight key factors in creating a meaningful trade facilitation agenda that reflects the needs and aspirations of Australia's international trading community. The review was funded by the Australian International Trade & Transport Industry Development Fund (AITTIDF), with the support of the Australian Federation of International Forwarders (AFIF), the Customs Brokers and Forwarders Council of Australia Inc. (CBFCA), the Export Council of Australia (ECA), the Conference of Asia Pacific Express Carriers (CAPEC) and Shipping Australia Ltd. (SAL), with the input of a range of other private sector associations and companies involved in exporting and importing. The full report of the review was presented by the AITTIDF to the Australian Government as a consensus industry position on the membership, mandate and governance arrangements of the ANCTF in early 2018.

For several decades, a number of major international organisations have been active in the promotion of trade (and transport) facilitation concepts which include the design, implementation and operation of national trade facilitation bodies, especially in the context of developing countries. Many of these concepts are reflected in the TFA's prescriptions, and our review validated the importance of looking to these very clear common themes, which span the work of the respective international organisations and can, in relation to some aspects of national trade facilitation bodies, be deemed consensus best practice, instructive in considering the development and operation of any NCTF. Moreover, our review validated that private sector trade stakeholders place a high priority on NCTF critical success factors which are closely aligned to the themes in focus as consensus best practice.

International guidance

The United Nations Economic Commission for Europe (UNECE) first published its Recommendation No. 4 (National Trade Facilitation Bodies) in 1974. The Recommendation was revised in 2015 (UNECE, 2015) in light of the adoption of the TFA by the WTO, and integrates guidelines that provide a detailed description of the steps for establishing a national trade facilitation body (NTFB) as well as model terms of reference (TOR) for an NTFB, which countries may use or customise based on their national context.

It should be noted that UNECE Recommendation No. 4 deals with the broader concept of a national trade facilitation *body*—not just a national *committee* on trade facilitation established by a WTO member pursuant to Article 23.2 of the TFA. Its broad scope and many of its principles were developed in the context of an era when the virtues of trade facilitation were advocated on their own merits, without the imprimatur of the WTO's TFA or the binding obligation on contracting states to the TFA to establish NCTFs. Accordingly, the role anticipated by the Recommendation for NTFBs is, arguably, wider than the role of NCTFs under the TFA.

In 2007, the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) published its *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* (UNESCAP, 2007), reporting on progress on such mechanisms. In 2011, UNESCAP published its *Guidelines on establishing and strengthening national coordination mechanisms for trade and transport facilitation in the ESCAP region* (UNESCAP, 2011). The main purpose of the guidelines is to help countries of the ESCAP region establish national coordination institutions for trade and transport facilitation in the countries where such institutions do not exist, and to reinforce them where they do exist. The guidelines aim to propose common baseline/requirements for an effective and efficient coordination institution, which can be adapted and used depending on the national requirements.

In 2006, the United Nations Conference on Trade and Development (UNCTAD) published its *Trade facilitation handbook: Part I – National facilitation bodies: Lessons from experience* (UNCTAD, 2006). Part I of this handbook guides users in creating the institutional structure for processing trade facilitation measures. It focuses on the trade facilitation body—in the form of an interdisciplinary committee where private sector managers, public sector administrators and policy makers can work together towards the effective implementation of trade facilitation measures.

UNCTAD has prepared the following list of the different types of trade facilitation bodies that exist around the world:

- National trade facilitation bodies (often called PRO or ‘procedural’ committees): Based on UNECE Recommendation No. 4, pro-committees deal with the facilitation of trade procedures and identify bottlenecks to trade and promote solutions.
- National trade and transport facilitation committees: These consultative inter-institutional bodies promote trade facilitation, study international trade and transport regulations, prepare recommendations and create transparency on major trade and transport issues.
- National trade facilitation committees: Established as a coordination mechanism, they are advocated to streamline trade procedures and implement trade facilitation measures at national level.
- WTO Negotiations on Trade Facilitation Support Group: Created to support negotiators based in Geneva or delegates from capitals during the negotiations of the WTO Agreement of Trade Facilitation.
- WTO TFA national trade facilitation committees: Created on the basis of Article 23.2 of the WTO Trade Facilitation Agreement. (UNCTAD, 2006)

In 2014, UNCTAD published its *National Trade Facilitation Bodies in the World* report. This publication, based on an in-depth analysis of 50 trade facilitation bodies, provides a quantitative analysis of existing NTFBs and a set of recommendations extracted from the experiences of participating stakeholders.

In 2015, the International Trade Centre (ITC), in collaboration with UNCTAD and UNECE, published its report, *National Trade Facilitation Committees – Moving Towards Implementation* (ITC, 2015). It is designed to provide developing countries with a step-by-step approach to evaluate policy, organisational and funding options to create a detailed roadmap to set up NCTFs. The guide notes that the stated aim in the Article 23.2 of the TFA is to facilitate ‘domestic coordination’ and ‘implementation of provisions of this Agreement’.

We should also note that UNCTAD very recently published the results of a study, *National Trade Facilitation Committees: Beyond Compliance with the WTO Trade Facilitation Agreement?*, covering 59 countries focused on quantitative and qualitative analyses of existing NTFs following the entry into force of the TFA, intended to provide insights into their implementation and operation and how countries are interpreting and applying Article 23.2 of the TFA (UNCTAD, 2017).

In March 2016, the World Customs Organization (WCO) published *National committees on trade facilitation: A WCO guidance*, which is part of the WCO package of recommendations and guidance to its members in their efforts to implement the TFA (WCO, n.d.c). The WCO NCTF guidance document highlights ‘the need for Customs to be involved and take a prominent role in NCTFs’ (WCO, 2016, p. 8), and proceeds to cite a number of justifications for Customs to take a leading role in such national committees, including in an expanded Annex III dedicated to that subject.

The WCO document is intended to provide practical advice to WCO members on implementation of their NCTFs, and also includes annexes which outline a draft NCTF TOR document (Annex VI), a draft NCTF agenda (Annex VII), and a template for a ‘national roadmap to TFA implementation’.

The document does not extensively reference the provisions of the TFA itself nor the work of the United Nations (UN), and instead appears to have the purpose of providing the WCO's member organisations with some concrete recommendations on how to utilise an NCTF as a way of furthering selected goals of the WCO, both in terms of keeping Customs in a prominent role as well as in certain IT-related initiatives.

In terms of the WTO itself, guidance on NCTFs, or even in regard to the substantive provisions of TFA Section I in general, very little has been on offer since the conclusion of the TFA in Bali in 2013. This is not particularly surprising, since the TFA only went into effect in early 2017, it is in the early stage of implementation in most countries, and there has been no opportunity as yet to bring issues of interpretation of TFA provisions to the attention of panels or utilise the WTO dispute resolution process to make determinations. The WTO Trade Facilitation Committee was constituted in mid-May 2017, and has so far been focused on procedural aspects of the committee itself (see WTO, n.d.b). Until such point as the new committee has agreed on its rules of procedure, and can live up to its 'purpose of affording Members the opportunity to consult on any matters related to the operation of this Agreement or the furtherance of its objectives' (WTO, 2014), little substantive guidance on how to interpret provisions of the TFA, including in reference to NCTFs, is to be expected.

Nevertheless, the WTO Secretariat recognised that establishment of NCTFs under Article 23.2 presents a set of challenges for countries looking to implement the TFA (particularly developing countries that may not have a robust tradition of constructive public-private sector collaboration on trade facilitation), and it conducted a workshop in June 2016 on this subject, and also conducted a survey of members' practices on NCTFs. In June 2017, it launched a new *Trade facilitation: Experience sharing series* of publications with a document entitled *National committees on trade facilitation: Current practices and challenges* (WTO, 2017), which focuses on the outcomes of the workshop and the survey, and constitutes a source for 'best practices' for NCTFs which are, at least tacitly, endorsed by the WTO. This document provides some very useful insights into expectations for NCTFs in the TFA context, and is divided into topic areas which closely parallel those focused on by international organisations. A summary of these topics follows below.

Membership—public sector

A consistent theme is the need for involvement of the key trade—and border-focused government agencies and for there to be an appropriate balance of public sector and private sector members.

UNECE Recommendation No.4 notes that one of the three main actors in an NCTF is the public sector—'all relevant government trade-related agencies'—specifically:

- commerce or trade and their agencies (for example export development agency);
- transport/roads/railways/waterways/ infrastructure and their agencies, including sea and land port agencies and others;
- finance/planning/economic development/industry ministries and their agencies, including central banks and others;
- customs agencies;
- government foreign trade institutes and think tanks; and
- standards and accreditation organisations. (UNECE, 2015)

UNESCAP'S 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* recommends that the membership of the coordination mechanism comprise representatives of all organisations involved in international trade and transport. These organisations, from the public sector, could include (but not necessarily be restricted to):

- trade regulatory authority (most often, ministry of commerce or trade);
- transport regulatory authority (most often, ministries of transport); and
- other government regulatory or planning authorities (e.g. ministry of finance, ministry of planning, ministry of interior, ministry of defence, ministry of agriculture, ministry of health, ministry of industry, ministry for ICT, customs authority, immigration authority, border guards, traffic police, transport management authority, authorities for quarantine/product quality control, central bank). (UNESCAP, 2007)

The WTO notes that it is important to secure the right membership for an NCTF and, in terms of public sector members, those seen as most important were reflected in the WTO survey results, which indicated that agencies in NCTFs almost always include customs, agriculture, foreign trade and finance, with most countries also including transport/infrastructure, health (animal/plant/human), and the government agency responsible for commerce/industry.

Membership—private sector

Another consistent theme is that it is essential to involve the private sector—for example, Recommendation 10 of the 2014 UNCTAD *National trade facilitation bodies in the world* report is 'Always involve the private sector'.

UNECE Recommendation No.4 notes that the main actors in an NTFB include:

- private sector traders who can benefit from such solutions in their international trade transactions, specifically: importers and their associations; exporters and their associations
- private sector trade services providers who can offer market-oriented trade and transport solutions within the framework of national and international trade and transport practices, obligations and laws, specifically: carriers or transporters; freight forwarders; chambers of commerce and their federations; private laboratories or certification agencies; technical software providers; banks, insurance companies; customs agents; in all the cases above, their associations; academic institutions, non-public Think Tanks. (UNECE, 2015b)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* recommends that the membership of the coordination mechanism include the business sector, specifically chambers of commerce, transport associations, trading banks, and associations of insurance companies, customs agents and freight forwarders.

The WTO survey notes that 98 per cent of members responding indicated that their NCTFs involved the private sector, including both traders (importers, exporters) and service providers (e.g. forwarders, transport providers, brokers). The WTO also noted that an inclusive approach to allowing stakeholders to take part appears to be a success factor in NCTFs, but cautions on going too far in terms of inclusiveness, as this can have a negative impact on the NCTF's level of efficiency, and impede the committee in its ability to reach consensus on decisions.

Mandate

The ITC *National trade facilitation committees – Moving towards implementation* publication provides developing countries with a step-by-step approach to evaluate policy, organisational and funding options to create a detailed roadmap to set up NCTFs pursuant to Article 23.2 of the TFA (ITC, 2015). After noting that the stated aim of Article 23.2 is to facilitate ‘domestic coordination’ and ‘implementation of provisions of this Agreement’, the guide provides the following explanations of those aims:

The purpose of ‘domestic coordination’ is to bring border agencies together so border management policy and practice are genuinely linked. Such coordination would ensure that in matters of border management, the relevant agencies discuss proposals with each other so duplicate or unnecessary procedures are avoided, and the border process is streamlined, e.g. through data and inspection sharing. Although this can be done without the participation of traders, they should be involved. Traders are affected by border controls and can see – in ways that border agencies may not be able to see – how processes could be enhanced to reduce compliance costs while improving levels of compliance.

The second function is ‘to facilitate the implementation of provisions of this Agreement’. This is important, because full implementation of the TFA would bring significant benefits to implementing governments, traders, consumers and the multilateral trading system. NTFBs play a key role in aiding the implementation of the TFA, as in many measures require inter-agency and public-private coordination for effective implementation in a way that promotes trade and development. The TFA will be a legally binding WTO agreement. The NTFB’s role in facilitating implementation is therefore particularly important to prevent possible future disputes or other negative consequences associated with non-implementation.

One of the primary aims of an NTFB is to bring government and business closer together to discuss and apply trade facilitation measures. This means the most effective NTFBs involve the private sector. Indeed, in some countries, the private sector leads these bodies. (ITC, 2015)

That description helps define the minimum mandate for an NCTF. However, the ITC makes the salient point that such a minimum mandate should not necessarily suffice. The first of its recommended steps in forming an NCTF is to define the mandate:

It is important to understand from the outset why the NTFB is being established. It may be purely to fulfil the obligation in the TFA, but this could be a somewhat passive approach, if its purpose is to primarily tick the box of compliance with Article 23.2. While the TFA mandates the creation of an NTFB, the body can – and should – perform many other useful functions related to trade facilitation. This is important because the implementation of the TFA has a determinable timeframe and because trade facilitation reform is a continuous activity. In addition, pursuing a wider agenda of trade facilitation will enhance the NTFB’s reputation and enable it to deliver tangible benefits to government and the business community.

An NTFB must have a clear mandate and ambition to deliver worthwhile outputs. The key purpose of NTFB ... is to act as an open forum to promote trade facilitation, facilitate inter-agency coordination and provide directives on major trade facilitation issues. This should include both the goal of engagement with government and business, and institutional mechanisms for engagement. It must also be able to deliver well-considered recommendations and proposals. (ITC, 2015)

NTFBs, with their ‘Article 23.2 Plus’ roles as discussed by international organisations such as UNECE, UNCTAD and UNESCAP, pre-date the TFA. Accordingly, the mandate of many of those bodies does not necessarily reflect the terms of Article 23.3, unless expressly updated in recent years to do so. This fact establishes, however, that, even before Article 23.2 required the creation of NCTFs by WTO members,

there were sound reasons for international organisations to promote, and for numerous countries to create, NTFBs. The mandates of those NTFBs therefore warrant consideration in the context of potential mandates for NCTFs.

UNECE's Recommendation No. 4 describes the overarching role of an NTFB in the following terms:

4. An NTFB encompasses all trade facilitation issues including regulatory, operational, customs, multimodal transport, transit, logistics, banking and finance, agriculture, sanitary and phytosanitary, health, and electronic business issues, among other related topics. Key success factors for establishing an NTFB include (but are not limited to) favourable government policies for economic development and trade; a robust and dynamic private sector; the availability of human and financial resources; and a strong political will to improve the performance of international trade transactions and supply chains.

5. Trade facilitation bodies, in addition to providing an inclusive and constructive consultation process, will give stakeholders the opportunity and means to voice their viewpoints, clarify issues, and engage in meaningful dialogue. Within a Government's overall national trade policy framework, the NTFB can coordinate the relevant stakeholders in order to devise a strategy that offers a holistic approach to national trade facilitation activities including coordination at a policy level, the development of trade simplification measures and proposals for action plans. The NTFB can present this strategy to the relevant government institutions for endorsement, for support and in order to obtain a mandate for implementation of the strategy.

7. An NTFB can establish collaboration between the public and private sectors for the design of measures to eliminate or drastically reduce the barriers to efficient and effective trading processes. This approach to solving problems in the international supply chain is greatly improved if the NTFB works with similar organizations at the regional, sub-regional and international levels, and participates in the work of international bodies dedicated to trade facilitation and to the development of international trading standards. (UNECE, 2015b)

The Recommendation describes the purpose of an NTFB in the following paragraphs:

21. An NTFB acts as an open forum to promote trade facilitation, encourage inter-agency coordination, and provide directives on major trade facilitation issues. The success and sustainability of an NTFB relies on its reflecting the interests, objectives and activities of the national stakeholders over the long run.

22. Depending on the national context, the specific purposes of the NTFB could entail, among others, to:

- Facilitate inter-agency coordination;
- Provide directives on major trade facilitation issues;
- Champion the national strategic trade priorities;
- Develop new national policies mapped against existing international, standardized and harmonized methods;
- Promote existing facilitation solutions and help implement them;
- Participate actively in the creation and maintenance of trade facilitation measures internationally;
- Contribute to the work of established international organizations such as UN working parties, WCO committees, the WTO under the framework of the Trade Facilitation Agreement and other recognized international bodies. (UNECE, 2015b)

UNCTAD's 2014 publication, *National trade facilitation bodies in the world*, notes its first recommendation as:

Be SMART when setting up the objectives and scope of a national trade facilitation body. The objectives and scope of a trade facilitation body will determine the goals pursued when establishing the group as well as the main functions allocated to it. The objectives contemplated by the trade facilitation body should be SMART, that is, sustainable, measurable, attainable, realistic and time-bound, and not expressed in terms of to-do lists or activities, as is currently often done (Doran, 1981). The ability of a trade facilitation body to prioritize and thereafter monitor trade facilitation reforms – above and beyond implementing the World Trade Organization Agreement on Trade Facilitation – is essential to its sustainability and relevance. (UNCTAD, 2014)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* incorporates several recommendations including the following:

Purpose

It is recommended that the national facilitation coordination mechanisms cooperate, coordinate, propose and implement arrangements for improvement of the effectiveness and efficiency of international trade and transport.

Role

Ideally, national coordination mechanisms should be established with a role to review, assess, propose and take action for the facilitation of international trade and transport.

Functions

The main functions of national trade/transport facilitation coordination mechanisms should include, but not necessarily be limited to, the following:

- (a) To continuously monitor and assess the quantity flows of trade and transport across national borders;
- (b) To identify bottlenecks in the entire process of international trade and transport (using the UNESCAP Trade Facilitation Framework and Time/Cost-Distance Model, as appropriate)
- (c) To review and assess the adequacy of international trade and transport-related infrastructure (including seaports, airports, roads, railways, river ports and inland cargo storage facilities), and propose investment projects, as necessary;
- (d) To study and propose measures for improving the operational performance of international trade and transport;
- (e) To coordinate to establish harmonized documentation and procedures for international trade and transport;
- (f) To identify, propose and follow through changes to border control procedures and documentation needed to improve trade/transport efficiency and reduce costs;
- (g) To coordinate and cooperate for implementation of Single Window clearances and Single Stop inspections at border crossings;
- (h) To promote the application of information and communication technology to documentation and procedures in the management of international trade and transport operations;
- (i) To coordinate the national positions in negotiation of agreements on international trade and transport with multi-sectoral nature;

- (j) To identify, propose and follow through changes in trade and/or transport policies and in the bilateral or multilateral agreements through which these policies are enforced, when such changes are required to improve trade/transport performance;
- (k) To coordinate the implementation of agreements on international trade and transport with multi-sectoral nature;
- (l) To review the international conventions relating to trade and transport facilitation and provide advice to national government on accession to the conventions;
- (m) To monitor and coordinate the implementation of the acceded international conventions relating to trade and transport facilitation;
- (n) To monitor the dissemination of information to the trading and transport communities on changes or revisions to border control procedures and documentation;
- (o) To organize workshops and seminars on facilitation of international trade and transport; and
- (p) To serve as national focal points for international facilitation programmes and assistance. (UNESCAP, 2007)

The WTO provides the following guidance on the issue of NCTF mandate and scope of activity:

Having a clear mandate from the outset, which establishes the NCTF as the coordinating body for the implementation of the TFA and clearly identifies its objectives, saves the NCTF time and effort by creating understanding among the members of the committee as to its purpose. This, in turn, can assist committee members when articulating the objectives of the NCTF to their own constituencies. Once a clear mandate is in place and all actors coalesce their efforts around it, devising a clear structure and roadmap becomes easier, which in turn contributes to a well-functioning NCTF. (WTO, 2017, p. 9)

Whether an NCTF's mandate should be limited to the member's TFA activities, or extends to a broader agenda, is a question which the WTO has looked at, and appears to be neutral on, while noting that members that have already implemented most of the TFA's Section I obligations will have an easier time dealing with a broader agenda than will those members who have not yet done so (WTO, 2017, p. 9). The WTO's survey results do, however, indicate that a majority of members have implemented a mandate for their NCTF, which goes beyond the TFA.

The Australian study found that private sector stakeholders generally support a wider trade facilitation agenda than just TFA implementation (Widdowson et al., 2017) and do not wish to see an NCTF being straightjacketed by its member agencies and the scope of the TFA. In this regard, they note that some significant issues that impact trade and its facilitation are seen to fall outside those parameters and are likely to be overlooked without the active participation of responsible agencies. One such issue is trade and transport infrastructure, particularly around ports and airports.

A key issue noted from an Australian industry perspective is the need to focus on streamlining and simplifying end-to-end import and export processes, including in cooperation with countries at the other end of particular international trade lanes. Simplified import entry and genuine self-assessed clearance arrangements were also identified as matters of interest, which may involve a simplified entry or the elimination of entries, possibly incorporated into a broader consideration of Authorised Economic Operator (AEO) programs. Such initiatives were seen by industry as being too readily placed by government in the 'too hard' or the 'let's wait and see what the rest of the world does' basket. Industry-initiated thoughts on ways in which government agencies could better cooperate and coordinate their activities are also considered to be of value to the NCTF agenda, rather than simply receiving briefings on what agencies themselves are doing to achieve this.

Work plan

UNECE's Recommendation No. 4 promotes the need for a focused work program covering all aspects of international trade transactions and supply chains:

The development of the work programme should be undertaken in consultation with all stakeholders and other interested parties. These actors should be encouraged to formulate their views using tried-and-tested techniques such as workshops, seminars, or 'brainstorming' sessions. The results would then be presented to the NTFB. The work programme needs to be flexible enough to take into account issues that might arise which could not have been anticipated. (UNECE, 2015b)

UNESCAP's 2017 *Study on National Coordination Mechanisms for Trade and Transport Facilitation in the UNESCAP Region* included the following recommendation in relation to work programs:

It is recommended that each facilitation body have a detailed annual work programme setting out the objectives, expected outputs and schedule of its major activities. (UNESCAP, 2007)

Chapter 3 of the 2015 ITC report *National Trade Facilitation Committees – Moving Towards Implementation* provides a detailed step-by-step approach to creating an NTFB in a developing country. Step 7 involves establishing a clear business or work plan of activities:

A work plan is ... a key need for any NTFB, because it must be clear why the NTFB is working on particular priorities and how these are relevant to business needs and global border-management developments.

What an NTFB does and how it performs goes to the very heart of its external reputation. The business plan is therefore linked closely to reputation. This means a good work programme should include realistic timeframes and schedules to achieve goals, as well as concrete actions and initiatives to meet the goals, with clear responsibilities for all members. (ITC, 2015)

The WTO notes that maintaining NCTF momentum over time is linked to having a roadmap, which can be defined as '...an action plan containing clear goals and describing the tasks, timeframes, allocation of responsibilities, necessary resources and associated risks involved in achieving those goals within a given period of time' (WTO, 2017, p. 21). The WTO also notes '... that it is vital to set achievable, realistic targets that will result in success', and also notes the importance of strategy in tackling issues (WTO, 2017, p. 21).

The Australian private sector indicated support for the development of a clear agenda that supports a long-term strategic perspective for the ANCTF. More fundamentally, based on the premise that the *raison d'être* of an NCTF is to 'facilitate both domestic coordination and implementation of the provisions', industry representatives took the position that it is essential that an NCTF must clearly identify whether and to what extent the country complies with each of the articles of the TFA, including those provisions that are mandatory, 'best endeavours' and 'alternative approaches' (Widdowson et al., 2017).

Outcomes

UNCTAD's 2014 publication *National trade facilitation bodies in the world* includes the following recommendation:

Establish monitoring and evaluating mechanisms to measure results. For a well-functioning trade facilitation body, presenting concrete results and/or monitoring results is considered essential. However, only a few trade facilitation bodies use these kinds of tools in a systematic way. There is a need, therefore, to develop evaluation and monitoring techniques adapted to the needs of trade facilitation bodies. (UNCTAD, 2014)

The WTO notes the importance of showing accountability for the success of an NCTF, suggesting that ‘concretely demonstrating that the national committee is having a positive impact on trade facilitation reform and delivering benefits for stakeholders’ is critical to the success of the committee; this includes instituting a ‘results-based ethos into committee members from the outset and to include an effective system of measurement and monitoring as an important part of the committee’s operational procedures’ (WTO, 2017, p. 24).

Constitution/legal base

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, notes that:

A Government must be politically committed to establishing and supporting a trade facilitation committee as a national forum for promoting trade facilitation measures. The committee should be established by decree or within a legal framework, as appropriate. (UNCTAD, 2006)

The 2014 UNCTAD publication, *National trade facilitation bodies in the world*, includes the following recommendation:

Make it official – give the national trade facilitation body a strong legal backing. As trade facilitation is a policy area that includes different public stakeholders, institutionalization at the governmental level may be beneficial, in order to prevent conflicts of interest and in order to increase participation and ensure high-level political commitment. The implementation in national law of the World Trade Organization Agreement on Trade Facilitation may be a good starting point. (UNCTAD, 2014)

The 2011 UNESCAP *Guidelines on establishing and strengthening national coordination mechanisms for trade and transport facilitation in the ESCAP region* notes that it is desirable to have an appropriate mandate in the form of a legal basis for these institutions to be effective and sustainable over time. Experience has shown that without an appropriate legal basis, these institutions may have difficulty in sustaining themselves for a long period of time:

Trade and transport facilitation initiatives may result in redistribution or even loss of authority of some agencies over certain processes, causing conflict of interests and leading to efforts to block the implementation of such initiatives. Having an appropriate legal backing can prevent blockage of the implementation of reform measures by the vested interests. Moreover, presence of strong political will as manifested by instituting legal basis for the coordination institution gives a clear signal to the stakeholders within and outside the country about the commitment given to the trade and transport facilitation efforts and in this regard ensures continuity of efforts. A legal basis for the national coordination institution can increase its effectiveness and sustainability. (UNESCAP, 2011)

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, comments on defining the governance and legal structure:

To cement the continued existence of an NTFB, it should ideally be enshrined in a legal framework. An NTFB may be established by ministerial or cabinet decree, but this would expose it to the risk of being wound up on the basis of a political decision. Since the maintenance of an NTFB is now an internationally binding obligation under WTO law, the national processes for implementing the TFA should provide an ideal opportunity to include a legal mechanism that sets out legally binding terms of reference, accountability lines including its independent status, decision-making rules and the role of individual stakeholder groups, including the private sector. (ITC, 2015)

The WTO highlighted the need for a strong institutional framework for the NCTF, but stated that the legal basis for the ANCTF is in large part a function of the country's overall cultural and legal framework; of the WTO survey respondents, a minority had anchored their NCTF formally in law, while in a substantial proportion the NCTF had been instituted by decree or other ministerial actions (WTO, 2017, p. 12).

Form

The UNECE's Recommendation No. 4 proposes a three-tier organisational structure—strategic, operational and technical:

At the strategic level would be the *Board* of the NTFB. They would be responsible for implementing the trade facilitation plan (policy and priorities) advised by the Lead Agency that established the NTFB, whether this be from the government (as envisaged by the World Trade Organization in its Trade Facilitation Agreement – Article 23.2), the private sector or a partnership between trade and government. The Board would set the work programme of the NTFB and report back to the Lead Agency on its activities with any proposals, recommendations or other outcomes;

At the operational level, the *NTFB* would prepare reports, develop proposals and offer recommendations for achieving the objective of the trade facilitation plan. These activities would be undertaken by permanent NTFB staff (in senior and managerial positions, including a secretariat) plus any seconded staff from the public or private sector. The results of this work would be presented to the Board for strategic consideration;

At the technical level, *ad hoc Working Groups* (either permanent or temporary) could be formed to undertake specific tasks defined by the NTFB. The composition of the Working Groups should include representatives from trade and industry sectors, relevant consultants and individual trade experts. This approach should ensure the quality of input into the process and that outcomes/outputs presented to the NTFB at the operational level would be constructive and valuable. (UNECE, 2015b)

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, recommends a three-tiered structure comprised of the main or whole committee, the steering committee and working group(s).

Members of the main committee should represent all trade and transport operators and public agencies interested in trade facilitation. The steering committee should have a limited membership comprising officials with decision-making power, who can devote the necessary time to guiding the activities of the working groups. The main committee should meet at least once a year for programme and budget approval, while the steering committee should meet every three months to provide guidelines for the working group(s) and to consider and approve recommendations. The formation of working group(s) will be dictated by the work programme in question and may be on an ad hoc basis. Any output of the working group(s) should be presented to the steering committee for endorsement and submission to the appropriate government agency for implementation. The steering committee could assume the role of an advisory council. (UNCTAD, 2006)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* includes the following recommendation relating to form:

It is recommended that national coordination mechanisms take the form of regulatory and advisory bodies, which are charged with the coordination and implementation of actions to facilitate efficient international trade and transport and propose facilitation measures to government. (UNESCAP, 2007)

The study also recommends that the organisational structure of the national trade/transport facilitation coordination mechanism be adapted from multilevel structures featuring, in some cases, a national trade and transport facilitation body, trade and transport facilitation sub-bodies, and specialist working groups.

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, comments:

Based on the UNECE Recommendation No. 4, one of the most successful models is a three-tiered structure comprising a board at the strategic level to advise the NTFB, the general members (all members of NTFB) at an operational level to carry out the regular activities, and ad-hoc working groups at a technical level to undertake specific tasks decided by the NTFB. (ITC, 2015)

Aside from the comments on institutional structure captured in the previous section (relating to membership and legal basis) and below, the WTO has not issued any firm recommendations on form of the NCTF.

Terms of reference

The 2014 UNCTAD publication, *National trade facilitation bodies in the world*, recommends:

Set clear game rules – define terms of reference in a comprehensive and inclusive way. Terms of reference should be defined and used as a tool to support the sustainability and efficient work of the trade facilitation body. They should be concrete but flexible and be agreed by all involved stakeholders. (UNCTAD, 2014)

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, discusses the importance of establishing clear TOR, including the extent of the body's independence:

It is vitally important that an NTFB has clear terms of reference, providing a commonly understood basis of what the NTFB aims to achieve and how it is expected to operate.

A key issue concerns the independence of the NTFB. Ideally, an NTFB should be independent of government, free to express its own views and challenge government where necessary. At the same time, it should not be purely a business lobby, as that would also potentially devalue its impact as an honest broker. It must be able, where necessary, to understand and explain government requirements to businesses that fail (deliberately or otherwise) to see the purpose of particular new compliance requirements.

The challenge with genuine independence goes partly to the issue of funding, which is closely linked to accountability. An NTFB that is funded by government should account for its activities to the ministry that provides the funding. If funding is drawn primarily from the private sector, there could be a perception that it focusses excessively on business interests at the expense of other policy and regulatory objectives.

To be effective, an NTFB must be truly independent, every time. Independence can be reinforced by being located away from a government ministry building. (ITC, 2015)

Aside from the comments on mandate captured above, the WTO has not issued any firm recommendations on NCTF TOR.

Chair

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, recommends:

The chair should be a senior and influential government official with the necessary inter-agency networking capacity, or the president of a business association who has a voice in the industry. If the private sector is to take the lead, the legal framework for formalizing the committee should be in place. The tenure of the chair should be a minimum period of three years. To ensure stability and long-term perspectives, an ‘extended chair system’, consisting of the incumbent, the previous chair and a vice chair who would succeed the chair, is advisable. (UNCTAD, 2006)

The 2011 UNESCAP *Guidelines on establishing and strengthening national coordination mechanisms for trade and transport facilitation in the ESCAP region* indicates that it is advisable that the chairperson be the minister for transport or commerce (UNESCAP, 2011).

The 2014 UNCTAD publication, *National trade facilitation bodies in the world*, recommends:

Provide the national trade facilitation body with a permanent secretariat. Countries should consider whether the Ministry of Trade should assume the role of coordinating agency or whether this role may be shared with other public organizations (e.g. customs authorities) essential for trade facilitation or with the private sector (e.g. chamber of commerce). Resources should be allocated to the establishment of a permanent secretariat. (UNCTAD, 2014)

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, notes that:

Aside from building a rationale for the establishment of an NTFB, the two most crucial issues are who should lead it and how should it be funded. Without a committed champion, an NTFB may quickly lose its sense of purpose and support. It must be driven by a strong leader who believes in the cause of trade facilitation. Without adequate funding, an NTFB can do nothing, and may not even get off the drawing board ... Identify a champion and ensure strong leadership ... Ensure the right balance between public and private stakeholders – Some process or mechanism for the rotation of chairs or co-chairs may also be helpful, to ensure that all key stakeholders are included. (ITC, 2015)

The WTO dedicates a good deal of discussion to the importance of NCTF leadership. The WTO points out that the NCTF chair should ‘be a robust champion for the committee’ and set a clear direction, as ‘competing priorities and rivalries can have an extremely negative impact on a committee, paralysing its work and diminishing the chances of generating the cross-agency cooperation necessary for the implementation of the TFA’. The chair acts also as a champion to promote the NCTF and its work, and plays a key role in establishing linkages, ‘to ensure visibility and public awareness of the NCTF’s role, both nationally and internationally’ (WTO, 2017, pp. 16–24).

Hosting

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, comments on the need to choose appropriate accommodation that reflects the body’s independence:

[L]ocating an independent NTFB within the sponsoring government ministry risks compromising the perception of its real independence, as it will be seen as hardly indistinguishable from its sponsor. The same could be said of housing an NTFB in a chamber of commerce. (ITC, 2015)

Accountability/Reporting

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* recommended:

... that national coordination mechanism be made accountable to officials at the high level of national government, be they Deputy Prime Minister or Minister. The mechanism would ideally be chaired by a Deputy Minister, Permanent Secretary, Secretary or other appropriate senior official of trade/commerce or transport. (UNESCAP, 2007)

Closely tied with the issue of NCTF leadership, the WTO notes the importance of accountability and reporting in the general sense, for example to the public, but does not go into detail about how the NCTF should formally report within a national governmental structure (WTO, 2017, p. 24).

Funding

The UNECE's Recommendation No. 4 notes that one of the prerequisites for an NTFB is the availability of resources (both human and financial) to support the implementation of agreed measures.

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, notes that:

Financial support from the Government, be it in the form of regular budgetary contributions or grants, is vital to sustaining the committee in its early development and throughout its existence. However, complementary income-earning activities are needed to bolster financial soundness – e.g. paid training courses, workshops, publication of reports, sale of forms and technical material. (UNCTAD, 2006)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* recommended:

... that the public and private sector resources be mobilized to finance the operations and activities of the national coordination mechanisms. It is further recommended that international assistance be sought to finance initial operation and some subsequent activities of the national coordination mechanisms. (UNESCAP, 2007)

The 2015 ITC report, *National trade facilitation committees – moving towards implementation*, notes that:

Without sufficient funding, the NTFB will not last long. An NTFB must be financed adequately to fulfil its mandated functions, as set out in annual and five-year business plans, and sustainably to ensure its longevity. Business plans must be matched to the available funding. (ITC, 2015)

The WTO notes that funding is important for the continuity of an NCTF, especially in the context of developing countries, and provides those countries guidance on obtaining funding (WTO, 2017, p. 28); nevertheless the WTO survey indicated that almost half (47%) of the NCTFs did not have a permanent source of funding, but of those that did, most came from the national government (WTO, 2017, p. 18).

Meeting frequency

The 2014 UNCTAD publication, *National trade facilitation bodies in the world*, recommends:

Meet regularly. The regularity and frequency of meetings can contribute to the sustainability of a trade facilitation body. Establishing that the body will meet on the first Wednesday of each quarter, for instance, will help members to plan their calendars based on fixed dates and ensure that they are present for each session of the working group. The regularity of meetings is essential for monitoring and following up on the activities of the trade facilitation body, which was noted by respondents as an important success factor. (UNCTAD, 2014)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* recommended the following in respect of meeting frequency:

It is recommended that the joint facilitation body or inter-agency bodies and advisory body meet quarterly. Additional special meetings should be convened if necessary. The working groups may meet monthly. The task forces meet on an 'as required' basis determined by the specific requests of their working groups. (UNESCAP, 2007)

The WTO included the topic of meeting frequency in the survey of its members; the results indicated the majority scheduled meetings at least quarterly (WTO, 2017, p. 25).

Communication

The UNECE's Recommendation No. 4 notes that one of the prerequisites for an NTFB is to 'Provide a national focal point for the collection and dissemination of information on best practices in international trade facilitation' (UNECE, 2015b).

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, notes that:

Nationwide recognition of the committee is essential. It needs to be publicized as the focal point of all trade-facilitation-related activities in order to give it the political edge and credibility to pursue the implementation of reforms. (UNCTAD, 2006)

The 2014 UNCTAD publication, *National trade facilitation bodies in the world*, recommends:

Take every opportunity to raise awareness about trade facilitation. The establishment of a website may be a useful tool for strengthening the trade facilitation body as a platform for dialogue with the private sector, as well as for coordination, awareness raising and information sharing. Donors that wish to assist least developed countries in this task should take into consideration potential challenges, such as a high level of computer illiteracy among trade facilitation body members or the lack of Internet access in many agencies. Additional training and resources should be allocated to address these possible challenges. Trade facilitation reforms can have profound implications for the general public and certain stakeholders. Trade facilitation bodies should therefore contemplate a strategy to communicate with these audiences if deemed necessary. For instance, additional events may be organized to inform other stakeholders that are not necessarily members of the body but might be concerned by forthcoming trade facilitation reforms. (UNCTAD, 2014)

The WTO notes that public communication of NCTF's activity is essential, and states that 'Having a communication strategy in place from the outset allows committees to immediately and consistently communicate positive results and showcase the benefits of the committee's work' (WTO, 2017, p. 27).

Collaboration with regional NCTFs

The UNECE's Recommendation No. 4 proposes the formation of a regional trade facilitation organisation constituted by representatives of national bodies. It suggests that the TOR could include:

- monitor regional progress in trade and transport facilitation and to coordinate regional awareness raising activities;
- identify common barriers and inhibitors (technical, institutional or commercial);
- identify common solutions and regional action required to solve existing problems; and
- support the region-wide use of trade related standards, recommendations, tariff structures, electronic data interchange and other simplification tools and techniques. (UNECE, 2015b)

The 2006 UNCTAD publication, *Trade facilitation handbook: Part 1 – National facilitation bodies: Lessons from experience*, notes that:

A trade facilitation body cannot be a stand-alone institution but needs to be linked with national, regional and international institutions. It is more likely to be effective in the context of a regional programme ...

... Establishing formal and informal relations with similar or regional bodies will assist the committee in accumulating experience as well as pave the way for bilateral and regional cooperation of mutual benefit. (UNCTAD, 2006)

UNESCAP's 2007 *Study on national coordination mechanisms for trade and transport facilitation in the UNESCAP region* includes the following recommendations:

Coordination with other national trade and transport facilitation coordination mechanisms of the region/sub-region or along specific transport corridors.

In order to ensure the smooth movement of goods and people and the harmonization and standardization of border crossing documentation and procedures between the countries, it is recommended that national bodies establish permanent links and a schedule of meetings with their counterpart bodies in other countries, within the subregion or along specific transport corridors.

Where sub-regional facilitation mechanisms are in place, it is recommended that these mechanisms be used as forums for the exchange of information and experience in relation to trade and transport facilitation, and also as a means of achieving the harmonization of documentation and procedures.

It is recommended that a regional forum on trade and transport facilitation be established to provide an opportunity for the national facilitation bodies to meet and exchange information and experience and exploration of opportunity of international assistance. The forum may meet every two years. These meetings will involve the participation of all national trade/transport facilitation bodies from the region, all international, regional and subregional organizations and international financial institutions as well as selected countries outside the region with expertise in the field of trade and transport facilitation. (UNESCAP, 2007)

While Article 23 of the TFA strongly implies that one of the roles of the NCTF is to coordinate national TFA-related activities to the WTO's own Trade Facilitation Committee, the WTO in its guidance to date does not focus on collaboration between the NCTFs of different members, while noting that they can play a role in regional economic integration (WTO, 2017, p. 18).

Notably, the Australian private sector indicated a strong interest in its NCTF actively liaising with NCTF counterparts in key trading partner countries and with relevant regional committees for trade facilitation. This was seen as a good way to enhance the visibility of issues in goods flows between countries, and such an approach could initially focus on significant trading partners that are jointly identified by government and industry.

Conclusion

As noted above, the researchers' review of the international guidance revealed a significant level of uniformity in the approaches of the main international bodies to the key topics bearing on the membership, mandate and governance of NCTFs – a level of uniformity which could be argued to constitute a consensus best practice. The researchers' analysis confirmed that many of these approaches are reflected in the terms of the TFA's prescriptions. The conclusions which follow derive primarily from that international guidance and the terms of the TFA.

The researchers' investigations of the views of the private sector were, by virtue of the TOR set by the AITTIDF for the research project, limited to the Australian context – i.e. the features of the existing ANCTF set against the background of Australia's international trade regulatory environment. Accordingly, they do not warrant detailed recitation in the context of the wider international focus of this article, but may be of interest as emblematic of the concerns of developed country trade stakeholders in reference to NCTF-related factors (see Widdowson et al., 2017). To the extent such private sector views collected in the Australian context were considered likely to be consistent with the views of the private sector at a more global level, they have helped inform the development of the below conclusions.

The establishment of an NCTF provides an ideal opportunity for a country to reconsider its approach to facilitating international trade, including domestic coordination and implementation of the provisions of the TFA. International organisations such as the WTO, UNECE, UNCTAD, WCO and ITC, among others, have for several years been active in the promotion of trade and transport facilitation including the design, implementation and operation of national trade facilitation bodies. Some clear common threads can be found in the work of these organisations that can be usefully applied in the development and operation of NCTFs.

As a starting point, it is incumbent upon an NCTF to provide clear evidence of how its country complies with each of the articles of the TFA, including those provisions that are mandatory, 'best endeavours' and 'alternative approaches'. Without such evidence, it is not possible for the NCTF to 'facilitate both domestic coordination and implementation of the provisions' of the TFA, which is its essential purpose, nor can it appropriately identify those areas which require further effort.

Having undertaken this fundamental task, an NCTF should reflect on its mandate in order to maximise its contribution to trade facilitation in the medium-to-long-term. A review of the committee's mandate will allow it to determine its priorities and translate those priorities into an effective work plan that defines the scope of work to be undertaken, allocates appropriate resources and sets deadlines for completion of the work. High-quality outcomes will help ensure the sustainability of the NCTF, provided that they are appropriately delivered and communicated to the wider public and private sector audiences involved in international trade.

In terms of the NCTF's constitutional basis, consideration should be given to formalising the basis for its existence, but a legislative basis is not considered necessary.

Arrangements for chairing the committee should not result in, or lead to the perception that it is a 'customs' committee, thereby unnecessarily narrowing its focus or remit. Recognising that many of the articles of the TFA fall squarely within the area of customs management, many others are either the responsibility of other agencies or the joint or interacting responsibilities of Customs and those other

agencies. As a key objective of the TFA is to ensure more efficient communication and coordination between all relevant border agencies, it is argued that it may be inappropriate to vest responsibility for the management of that process in one of the key operational agencies involved.

As such, it may be more fitting for the role of NCTF chair to be the responsibility of an agency that does not have an operational role at the border. The chair should bring a broad perspective to bear in the deliberations of the NCTF, including consideration of issues that fall outside the remit of the various border management agencies, such as infrastructure, which is regarded by the trading community to be an essential element of trade facilitation. Similarly, a 'neutral' agency would arguably be better placed to oversee issues on which operational agencies may have differing viewpoints, and would remove the risk of the NCTF being perceived as a narrowly focused creation of an operational department.

There is also a need for the accountabilities, responsibilities and decision-making capacity of the NCTF and its members to be clearly identified, and for the lines of reporting within and across agencies and industry to be transparent and properly observed.

Finally, the research points to the need for an NCTF to consider the benefits of collaborating with its counterparts in other countries.

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Notes

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Interagency coordination in the implementation of single window: Lessons and good practice from Korea

*Feiyi Wang**

Abstract

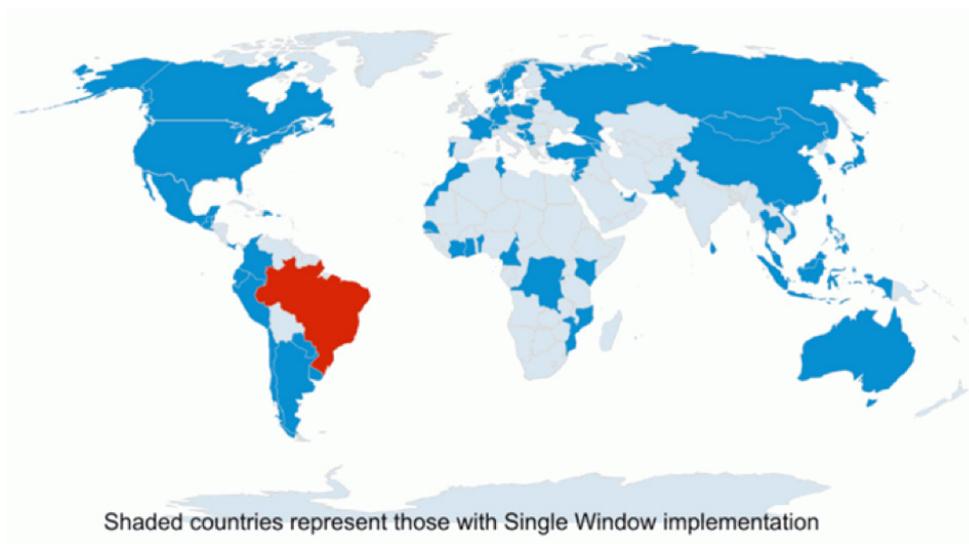
A single window is an organic mix of the collaborative efforts of all the parties involved in a nation's international trade activities. For most customs administrations, implementing a single window is a pressing project, which may take several years in planning and developing, while involving many stakeholders, including those from the public and private sectors. The biggest issue in securing a single window is interagency collaboration and coordination in the area of public administration. This paper traces the development of the single window system in Korea, using it as a case study to highlight the need for improved and institutionalised interagency coordination to promote its development. The research has developed a preliminary typology of interagency coordination to gain insights into how interagency coordination is established and maintained. It also offers some practical ideas for policy makers and project managers.

1. Introduction

Interagency coordination has traditionally been an important and difficult issue of public administration. Since customs administrations operate in a complex environment of constant change, they are required to respond with efficient regulation to international trade and to comply with regional, national and international obligations. To accommodate changes in these areas, it is important to construct interagency coordination regimes to implement change processes. Lessons and experiences shared among agencies foster organisational flexibility to adapt to changes and deal with complexity. However, in sharp contrast, there is a lack of analysis of interagency coordination, which is required to appropriately promote efficient regulation of international trade and functioning of customs administrations.

In seeking to reduce regulatory inefficiencies, Customs and other border agencies have long deliberated on a concept called single window, which means that economic operators would only have to submit border regulatory information once, rather than on several occasions to several agencies. In essence, single window is about improving coordinated border management. The World Customs Organization (WCO) has long touted the benefits of introducing single window and many WCO members have worked to establish single window in their countries. In the late 1980s, Singapore pioneered a successful single window. Since then, both developed and developing countries have followed Singapore's lead, enhancing border administration processes through a single window system and other automated solutions. According to the World Bank's *Doing Business Report 2014*, 73 countries have reported implementing a single window system (World Bank, 2013; see Figure 1.)

Figure 1: Countries with single window systems



Source: World Bank, Doing Business 2014: Understanding regulations for small and medium-size Enterprises.

The development of single windows involves overcoming overwhelming implementation challenges due to its inter-organisational nature and the involvement of many stakeholders. As single window is a mechanism to integrate the services of regulatory requirements handled by various government agencies, and unless convinced otherwise, some government agencies may perceive it as a possible threat to their authority over relevant regulatory processes in international trade, and subsequent downsizing of human resources. Complicated challenges include ones that are related to organisational, managerial, financial, legal and political aspects (Aichholzer & Schmutzer, 2002; Gil-Garcia & Pardo, 2005). The challenges are normally associated with creating political will; gaining management commitment and full support; establishing an institutional platform for collaboration; managing stakeholders' expectations and perceptions; deriving acceptable business and architectural models; and implementing the necessary business and regulatory reforms (Byungsoo & Min-Jeong, 2006; Phuaphanthon, Bui, & Keretho, 2009).

The single window concept is a well-documented topic in the area of Customs, with many scholars undertaking research from different viewpoints. Most of the previous studies have been from the perspective of information and communication technology (ICT), with emphasis on the role of ICT in responding to the demands of increased volumes of international trade and related documents, as well as developing single window systems (Ahn & Han, 2007; Hesketh, 2009; Pugliatti, 2011; Ndonga, 2013). In spite of the rising popularity of the single window concept, there is little research in this area by scholars of public administration, and researchers have neglected to illuminate what possible related variables lead to effective implementation of a single window. Research and evaluation of interagency coordination will be discussed in detail later. However, it is important to note that research on the coordination aspects of single window in Korea have not been addressed in the literature.

Research on the development of a single window needs an integrated approach because it requires the combined effort and efficiency of a number of government agencies as well as the private sector. On the one hand, the regulatory inefficiencies on international trade are a motivating factor behind the need

for better coordination. Finding mechanisms that can facilitate and enhance coordinated action among agencies will allow for a more rational and effective approach to the implementation of single windows. On the other hand, interagency coordination among various agencies is difficult but necessary as the failure to coordinate brings with it significant consequences.

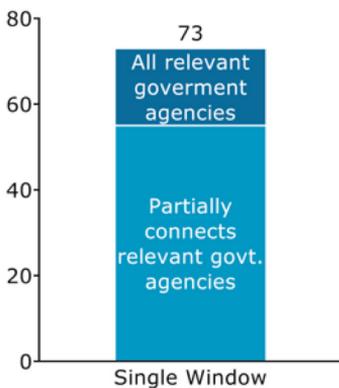
The main purpose of this paper is to offer a framework of interagency coordination for implementation of a single window in its practical and operational dimensions. The organisation of the paper is as follows: section 2 introduces single window in a global context, with special focus on the case of Korea; section 3 illuminates issues in developing interagency coordination, touching upon definitions and patterns; and section 4 analyses the interagency coordination practices in the development of the Korean single window. Crucial factors affecting coordination are also summarised to provide insights into how interagency coordination is established and maintained, and conclusions are offered.

2. Single window, globally and in Korea

The WCO recommends the implementation of the single window concept through its revised Kyoto Convention, the UN/CEFACT Recommendation 33 and the WCO SAFE Framework of Standards to Secure and Facilitate Global Trade. The single window, as stated by the UN/CEFACT is ‘A facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export and transit regulatory requirements. If information is electronic, then individual data elements should only be submitted once.’¹ It aims to simplify border formalities for traders and other economic operators by arranging for a single electronic submission of information to fulfill all cross-border regulatory requirements (Choi, 2011).

A number of international organisations, such as the WCO (WCO, 2007, 2008), World Trade Organization (WTO) and United Nations (UN) (UNCEFACT, 2005; UNECE, 2010), have promoted the benefits of single window. In the 73 countries that have implemented single windows, most have implemented a first-stage single window that connects only customs administrations and a few other government agencies (see Figure 2), while 18 countries have established single windows with interfaces to all relevant government agencies, and the concept of one entry point for documentation (World Bank, 2014). Therefore, there is a need to further study which factors lead to the difference in the developmental stage of the various single windows systems.

Figure 2: Numbers of countries with single windows implemented



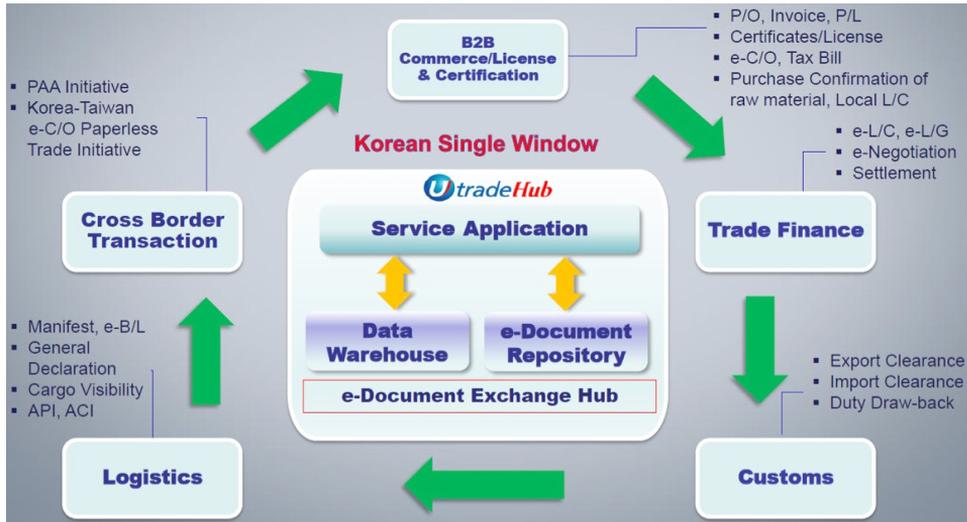
Source: World Bank, Doing Business Report 2014: Understanding Regulations for Small and Medium-Size Enterprises.

A single window is made up of an organic mixture of the collaborative efforts of all parties involved in a nation's international trade activities. The complex nature of international trade interactions and regulations developed over the past decades present a number of challenges. Therefore, with the help of many international organisations, numerous countries have adopted new ways to achieve outstanding trade practices through the design and development of automated systems, and the establishment of information and data requirements that are often achieved by way of coordination among regulatory agencies. The single window concept provided opportunities for all stakeholders, whether they are large or small, from the public or private sector, traders, transport entities, vendors, or cross-border regulatory agencies. This wide ambit of interest encompasses policy issues, technical issues, administration and law (WCO, 2008). The major types of organisations that are active in single window applications are:

- importers, exporters (consignors and consignees)
- trade professionals (freight forwarders, customs brokers and shipping agents)
- shipping companies, airlines, road, rail and inland waterways, duty free zones, dry ports and multimodal cargo depot and dry ports
- ports and airports, container terminals, bulk terminals, port gate operations and local port road and rail transport
- Customs and other governments agencies, which typically include all agencies that have a trade compliance responsibility, licensing, permit issuing and/or inspection responsibilities, principally including ministries of trade (and economy), health and transport; food and drug agencies, quarantine agencies and banks.

In January 2001, the Korean Single Electronic Window Master Plan, within the framework of the 'Reinventing Government and Cyber Governance' program was launched by the President of Korea. With the active support of Korea's national government, Korea's single window system (known as uTradeHub), was launched online in 2008, interconnecting the customs administration system and the systems of 56 public agencies (Kim, 2004). The single window is composed of various components and modules that interact and operate as one living organism to provide efficient regulation of international trade (see Figure 3). As an e-business portal for inter-organisational information-sharing and document exchange, it connects trading partners in order to streamline their logistics, financial transactions and customs-clearance processes, making it unnecessary for agents to visit financial institutions and government bodies before products can move from Korea to other countries.

Figure 3: Framework of Korean single window



Source: Korea Trade Network (2015). Korean Experience with paperless trade system, In the Occasion of VII Meeting of the Inter-American Network of International Trade Single Windows (Brasilia, Brazil, May 21–22, 2015)

Facilitating a wide range of transactions—from licensing to shipping, to customs clearance and payments—uTradeHub automates otherwise complex processes and makes required information accessible to stakeholders in real time. This simplifies their transactions and also makes them traceable (UNECE, 2011). The major users of uTradeHub are trading companies, but many private intermediaries, such as forwarders, logistics companies, customs brokers and financial institutions, also use it. Consequently, a wide range of international trade-related services, such as logistics, customs-clearance and licensing and certification processes, are available through uTradeHub (Wang & Pettit, 2016, p. 422).

Korea's single window system has been recognised internationally (having been mentioned as Best Practice by the World Bank), and the *Doing Business Report for Trading Across Borders* has evaluated the Korean time for import processing to be two days, and for exports to be three days, which is much lower than the OECD average. Even now, many customs authorities around the world working to improve trade facilitation by introducing a single window are visiting Korea to benchmark the successful single window implementation case study. Among them is Ecuador, which with the help of Korea Customs UNI-PASS Information Association (CUPIA)² successfully completed the development of an electronic single window for foreign trade, based on the Korean single window model. In addition, in December 2014 the State Customs Committee of the Republic of Uzbekistan signed a contract with CUPIA to develop a single window system.

There is no doubt that interagency coordination is critical for project success. The Korea Customs Service (KCS) opted for a phased implementation because otherwise it would have taken too long for numerous government agencies to consult among themselves and to develop a system currently. It is important to note, however, that spontaneous interagency coordination, under Korea's administrative culture, has been very difficult to realise among public agencies. As policy making is often a top-down process, spontaneous interagency coordination faced an uncertain environment due to its lack of commitment from above.

3. Interagency coordination in the implementation of single window: An analytical framework

3.1 Conception of interagency coordination

While there is some variation in how coordination is defined, there is general agreement in the literature that coordination involves:

the instruments and mechanisms that aim to enhance the voluntary or forced alignment of tasks and efforts of organizations within public actors. These mechanisms are used in order to create a greater coherence, and to reduce redundancy, lacunae and contradictions within and between policies, implementation and management. (Bouckaert, Peters, & Verhoest, 2010, p. 16)

There is a consistent understanding of coordination as an interaction between two agencies, and general agreement about agencies working together to accomplish common goals, either implicitly or explicitly (Alter & Hage, 1993; Bardach, 1998; Sullivan & Skelcher, 2002; Ervin, 2004; Foster-Fishman, Salem, Allen, & Fahrbach, 2001). The literature on interagency coordination utilises a range of similar terminologies that are used to describe this general definition: interagency cooperation (Thomas, 2003); interagency or inter-organisational collaboration (Harley, Donnell, & Rainey, 2003; Ervin, 2004; Foster-Fishman et al., 2001; Nysten, 2007); inter-organisational relationships (Levine & White, 1961; Aldrich, 1976; Hall, Clark, Giordano, Johnson, & Van Roekel, 1977; Van de Ven & Walker, 1984; Mulford, 1984; Ring & Van de Ven, 1994; Isett & Provan, 2005); multi-agency coordination (Curnin & Owen, 2013). These terms are generally used synonymously and interchangeably, and, at a high level, seemingly describe the same general concepts.

There are abundant typologies of coordination that distinguish among mechanisms of coordination (Bouckaert et al., 2010), levels of coordination (Metcalf, 1994) or moments of policy process in which coordination takes place (Craswell, & Davis, 1994; Peters, 2015).

Interagency coordination raises the question of what roles and authorities should be assigned to participating agencies individually and cooperatively. Some scholars (Van de Ven & Walker, 1984; Mulford, 1984; Harley, Donnell, & Rainey, 2003; Isett & Provan, 2005) argue that multi-organisational arrangements are solutions for inter-organisational problems that cannot be achieved by a single organisation working alone. The implementation of a single window system needs to take into account the adaptive capacity of single units and effective coordination of multilevel governmental agencies. Interagency coordination sometimes happens spontaneously, but it is often the product of purposeful effort by policy makers (Ansell & Gash 2008; Koontz et al., 2004).

Inclusion of interagency coordination into the research of single window is evidence that public policies employed during a time of globalisation require better coordination across all elements of governmental agencies. The creation of interagency coordination can therefore be viewed as a policy tool for altering the structure and function of single window systems. Currently, sharing roles and responsibilities among different levels of government and agencies is increasingly being favoured (Craswell & Davis, 1994; Pollitt, 2003). This blending of roles and responsibilities is reshaping leadership, management, and service delivery challenges in the implementation of single window systems. Interagency coordination which plays an important role in the establishment of single window will consequently contribute to the effectiveness, efficiency and coordination of customs activities in the long run.

Three questions are often posed in relation to interagency coordination: why interagency coordination is needed; what operational areas are in need of interagency coordination; and how interagency coordination can be carried out in the establishment and implementation of single window systems. The first question

refers to the motivation of promoting interagency coordination; the last two questions are directly related to interagency coordination mechanisms, which need to be intensively analysed on the base of typology of interagency coordination.

3.2 Typology of interagency coordination strategies

Single window is a solution that is essential, rational and intuitive to achieve trade facilitation. It is also the most rational solution that provides for connectivity and interoperability to cross-border regulatory agencies and trade – related stakeholders. The establishment of effective mechanisms for interagency coordination is critical to the implementation of a single window. From the organisational literature, five types of interagency coordination strategies have been identified (see Table 1).

Table 1: Typology of interagency coordination

Typology	Patterns
Structural coordination	Vertical coordination
	Horizontal coordination
Public-private coordination	Coordination between public and private sectors
Procedural coordination	Procedural arrangements and standardised work-procedures
Technical coordination	Technical arrangements and tools
International coordination	Application of international standards or rules

Source: Compiled by the author

First, **structural coordination**, that is, the various organisations' structures of roles that enable work differentiation and interactions among agencies. More specifically, the design of the organisational structure in terms of hierarchy, and lateral relationships between organisational sub-units, can be seen as the basis for structural coordination. The essential idea is that, with changes to the structure of units and sub-units and the more permanent relationships between them, the pattern of adjustments and unifications is also changed. In this way, the classical organisational forms, such as functional hierarchy, product hierarchy or matrix organisation, are considered alternative ways to achieve structural coordination. Innovations such as cross-functional teams, taskforces, and project managers work within the vertical structure but provide a means to increase horizontal communication and cooperation.

Second, **public-private coordination** is the coordination between public and private sectors in the implementation of single window systems, often known as public-private partnerships (PPPs). As argued by John Mein (2014), there is a growing awareness of the importance for government authorities—specifically Customs—to work with the private sector through regular and systematic consultation at both the strategic and technical levels. Single window is a useful attempt to achieve coordination at the technical levels.

As the implementation of single window is rather complex, requiring substantial investments, specific technologies, knowledge and skills, governments often seek partnerships with the private sector. One typical case is Singapore, one of the first countries to establish a single window system. CrimsonLogic, a private IT company, was selected through an open competitive tender to develop, operate and maintain TradeNet (Singapore's single window). The PPP model enables Singapore Customs to leverage its IT partner's expertise to build and operate the system, and consequently Singapore involved the

private sector in the implementation process. It created three subcommittees during implementation, covering sea shipping, air shipping and government agencies. Their mandate was to specify functional requirements and propose data standards to improve export and import processes. Each subcommittee developed profiles of essential trade documentation activities and succeeded in whittling down the more than 20 forms used in international trade to a single online form. This form served as the core of the new computerised system. Moreover, several working groups were formed, with representatives from relevant government agencies and private sector stakeholders, such as exporters, importers, terminal operators, shipping agents and freight forwarders.

Third, **procedural coordination**, which includes mechanisms for managing work by specification and resolution, like standardised work procedures, outcome and process standards, project plans and schedules designed to coordinate work. Procedural coordination accepts the organisational structure as a given fact and deals with purposeful adjustment between the sub-units of the organisation. Mintzberg (1979, p. 3) mentions five coordination mechanisms: mutual adjustment, direct supervision, standardisation of work processes, standardisation of work outputs and standardisation of worker skills (Harris, Bennett, & Preedy, 1997, p. 8). In Thailand, interagency coordination for National Single Window (Thailand's single window) implementation was arranged through various resolutions. These resolutions served as mechanisms to coordinate the efforts of stakeholders from both the public and private sectors. They not only legitimised the establishment of necessary interagency coordination mechanisms, but also provided mandates to designated organisations and gave them the authority to put a National Single Window in place.

Fourth, projects are increasingly supported by sophisticated **technical coordination** mechanisms, such as planning and control software, packaged project management tools, workflow systems, computer-supported collaborative tools and electronic media (Lundin & Hartman, 2000, p. 48). IT infrastructure, including network, hardware and software, is indispensable for single window systems.

Fifth, **international coordination** means every country that has established or wishes to implement a single window cannot neglect international standards or trends from international organisations such as WTO, WCO and the United Nations Economic Commission for Europe (UNECE).

It is important to note that these mechanisms of interagency coordination are connected, complementary and interchangeable. For example, plans and standards (procedural coordination) are developed and institutionalised through structural mechanisms such as steering committees (structural coordination). They are also communicated through a combination of structural and information technology arrangements, known as technical coordination. On the other hand, problems in developing standards, as in the case of uncertain or complex work, may be ameliorated by either the use of close managerial supervision (structural coordination) or adoption of international standards (international coordination).

4. Interagency coordination in the implementation of the Korean single window

4.1 Interagency coordination of single window: Korea

Until recently, 38 agencies and 55 report forms were involved in the Korea (see Figure 4), and so drawing the various regulatory agencies under the umbrella of a single window required a great deal of time, energy and patience. In particular, agencies with their own well-developed systems were reluctant to participate because they believed that by joining they would lose their identity and their reason for existence.

Figure 4: Organizations linked to the clearance single window in Korea



Source: Single Window Korean Model, www.unipass.or.kr

In Korea, a formal interagency coordination platform through a mandated designation was established at the operational level. The establishment of the Korea Paperless Trade Facilitation Center and the appointment of lead agencies were critical requirements that kept interagency coordination working (see Table 2).

Table 2: Practice of interagency coordination in the implementation of Korean single window

Typology	Patterns	Practices of Korea
Structural coordination	Vertical coordination	Appointing lead agencies
	Horizontal coordination	Task force team
Public-private coordination	Coordination between public and private sectors	Korea Paperless Trade Facilitation Center
Procedural coordination	Procedural arrangements	Plans and standards, working-level meetings, informal meeting and dialogue create mutual trust and understanding
Technical coordination	Technical tools	Korea e-Trade System, ASP, BRP, ISP, verification system, Customs Data Warehouse
International coordination	Application of international standards	International standards such as the WCO DM 3.0, UN codes, etc. and open technology standards

Source: Compiled by the author

First, Korea promoted structural coordination by appointing lead agencies and establishing a taskforce. To overcome the initial barriers, the Korean Customs Service (KCS) and the Presidential Committee on Government Innovation and Decentralization took the initiative and exercised strong leadership. The lead agency continued to persuade related agencies to take part in the single window project and actively coordinated their interests. This afforded the crucial basis for the success of single window implementation.

Table 3: Lead agencies of single window projects

Country	Lead agency	Institutional mechanisms
Singapore	Trade Development Board	TradeNet Steering Committee
Korea	Ministry of Knowledge Economy	Korea Paperless Trade Facilitation Center
Japan	Ministry of Finance	Shoikawa Initiatives
Thailand	Thailand Customs Department	National Committee on Logistics Development ³
Vietnam	General Department of Vietnam Customs	National Steering Committee
Indonesia	Indonesia Customs	INSW Preparation Team
Malaysia	Ministry of International Trade and Industry	National Single Window Committee
Kenya	Kenya Trade Agency	NSWS Steering Committee

Source: Compiled by the author.

The KCS Management Planning Division created a taskforce that consisted of customs officers, business consultants, and software engineers to develop a single window. Taskforce members represented their departments and shared information that enabled coordination. It is generally recognised that customs administrations, being one of the cross-border regulatory agencies, have a pivotal role in single window development (WCO, 2008), and this was the case in Korea. Most of the development work was finished in 2008, and since then KCS has focused on increasing the number of participating agencies.

Enlistment of agencies in the single window project, however, did not mean automatic completion; a challenging process still remained, which involved coordinating the related agencies. Many agencies had their own computerised systems and used different data formats for their own purposes. And even though

the implementation of a single window did not require border and licensing agencies to demolish or merge their computerised systems, participating agencies had concerns about the survival of their systems. Such concerns arose because coordinating the business processes of the agencies and harmonising their data formats was necessary. Thus, to address agencies’ concerns about the single window, KCS and eight major border and licensing agencies formed a taskforce to coordinate each agency’s business processes and data format. The taskforce held more than 16 rounds of working meetings. As a result, the taskforce ensured the participating agencies considered the implications of a single window, which led to the revision of seven relevant laws and the modification of 10 application and declaration forms related to eight agencies (Cantens, Ireland, & Raballand, 2012).

Second, the public-private coordination was led by the Public-Private e-Trade Center, which had experience in interagency coordination in the area of single windows to promote active collaboration with the private sector. The Korea Paperless Trade Office of Korea International Trade Association (KITA) was devoted to consolidating opinions for setting up and implementing policies, and configuring practical cooperating mechanisms among trading firms, banks and shipping lines, so that paperless trade could be widely implemented in B2B sectors. Public-private coordination in the areas of legislative review and adjustments among stakeholders, budgetary allocation, systems development, and user training for realising single window was essential.

Table 4: Practices of public-private coordination in Korea

Category	Public sector	Private sector
Revision of law and legislation	MOTIE, Korea Customs Service, Bank of Korea, etc.	KITA, chamber of commerce, Korea Federation of Bank, etc.
Adjustment of stakeholders	National e-Trade Committee	Private e-trade committee
Budgetary allocation	Government Fund	Trade promotion fund
Standardisation	Korea Agency for Technology and Standards	National IT promotion agency
System development	UNI-PASS (Korea Customs Service)	uTradeHub (KINET)
User training	Governments and other government agencies	Trading communities
Global cooperation	MOTIE, KCS etc.	KITA, KINET etc.

Source: Compiled by the author

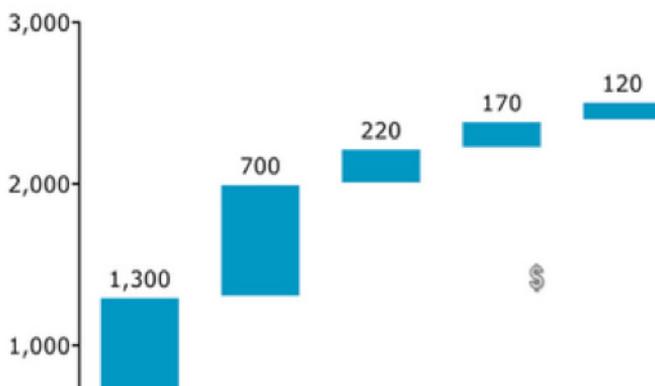
Third, formal or informal procedural arrangements are required to be put in place to facilitate the participation of all stakeholders in the development of a single window, including relevant government agencies and private sector representatives. KCS designed the single window as an independent system that respected each agency's legacy system. KCS did not rush to increase the number of participating agencies. Rather, KCS encouraged customers who experienced advantages with the single window (for example, traders, freight forwarders and customs brokers) to persuade non-participating agencies to join.

Fourth, KCS made full use of technical instruments to increase the usage rate and the number of participating agencies of single window, such as an application service provider (ASP) system, business process reengineering (BPR), information strategic planning (ISP), customs data warehouse (CDW) and verification system. In this regard, information technology has been identified as one of the most encouraging factors in successfully linking related agencies of international trade. As a first step, KCS conducted BPR and ISP from November 2003 to June 2004. Since the single window was able to cover all kinds of clearance-related processes, KCS needed to understand other trade-related agencies' business processes. KCS officers and business consultants undertook BPR and ISP because it was thought that streamlining redundant processes would lead to stakeholder conflict (Cantens et al., 2012, p. 144).

Connecting all these agencies was not a straightforward process, given that each was following its own stage of automation and electronic procedure adoption. For example, some participating agencies lacked a computerised verification system. To encompass these agencies in single window, KCS developed a verification system so that agencies without their own structure could electronically manage verifications through the single window. This meant that the number of connected agencies could be extended more easily, without the need to develop new individual systems. Korea was able to streamline license approval time to mere hours, contributing to a 25–33 per cent reduction in total export time (Korea Customs Service, 2010). The overall changes from single window implementation have also allowed Korea to save \$2.1 billion per year in costs of freight, inventory, labor and other aspects, according to a 2010 World Bank study.

Figure 5: Annual savings from single window in Korea

\$ million



Source: World Bank, Doing Business data, 2014

Last, considering the rising need of interconnectivity with neighbouring countries and foreign customs in achieving a global single window, the UNI-PASS system applies international standards (such as the WCO DM 3.0 and UN codes), and open technology standards. The application of international standards is especially important for the future development of Korea’s single window.

4.2 Factors affecting interagency coordination

Several factors have made it possible for Korea’s single window to rapidly grow in the past years. One of the factors is that key players and drivers for the system have helped to strengthen effective interagency coordination. Those factors that affect interagency coordination are outlined below.

First, having a legal mandate and high-level political commitment improved interagency coordination from the central government. At the beginning, the Korean government had already discovered the importance of central steering for the establishment and implementation of a single window, which finally played a key role in interagency coordination affairs and activities. As in many other countries, the initial stage of single window implementation experienced significant strain due to insufficient attention and difficulty in coordinating the interests of different organisations. As set out in Table 5, there are three levels of steering for single window implementation, which Korea appropriately addressed.

Table 5: Steering of single window implementation and practice of Korea

Steering level	Single window leader	Comments	Korean practices
High government level	Office of the Head of State or Prime Minister	When the single window is steered under the leadership of the president of the Republic or the prime minister, adherence of public administrative bodies is almost guaranteed.	Presidential Committee on Government Innovation and Decentralization
Ministerial level	Ministry of Finance	The Ministry of Finance, to which Customs report, is the department most likely to ensure the steering of the single window project.	Ministry of Knowledge Economy
	Ministry of Commerce	The vision of a high-performance trade without constraints is more often built at the ministry in charge of commerce.	
	Ministry of Transport	When the single window is oriented to port logistics, this ministry can be on the forefront in the implementation.	
Public administration or ad hoc entity	Customs, Port, department in charge of trade, other ad hoc bodies	When an administrative body is on the forefront, there is a high risk of low adherence by other administrative entities.	Korea Customs Service

Source: Adapted from African Alliance for e-Commerce (AAEC), Guidelines for Single Window Implementation in Africa, April 2013

The second factor is the strong policy driven by the central government. At the centre of the National e-Trade Committee lies the Ministry of Knowledge Economy, which has formed a strong partnership with the e-Trade Facilitation Committee to cooperate in establishing and carrying out trade-related policies. In particular, in order to cope with the ninth-biggest trade transaction volume in the world and enable entirety of the trading process to be operated electronically in a seamless way, collaboration across government agencies was sought in order to interface with other critical systems, such as the integrated national information system of logistics built by the Ministry of Land, Transport and Maritime Affairs and KCS's UNI-PASS electronic customs clearance system.

Third, the KCS single window has been superimposed over legacy systems of the licensing and customs agencies. In other words, it connects and respects the legacy systems of these agencies. Thus, licensing agencies have not been required to dismantle or give up their legacy systems to participate in single window; they have merely needed to adjust their business procedures slightly (Cantens et al., 2012, p. 147). Customs is the largest and most important cross-border regulatory agency in terms of its intrusion into trade transactions, its information gathering and the scope of its business activity. As such, governments usually see Customs as the natural agency to be the focus of single window development. This does not necessarily imply that single window will be owned or maintained by Customs, but even if that is the case, Customs will be the major stakeholders purely owing to its extensive responsibility at international borders (WCO, 2008).

Fourth, public-private coordination is indispensable for the implementation of a single window. The participation of the private sector, as the ultimate user of the services provided by single window, is crucial to gain information from the user perspective. The administrative structure of Paperless Trade in Korea is generally based on a public-private coordination system with the National e-Trade Committee at the centre. The National e-Trade Committee, chaired by the Minister of Knowledge Economy of the Korean government, works to establish policies regarding paperless trade. In parallel, the private sector e-Trade Facilitation Committee consolidates the views and requirements of the private sector, including trading firms, banks and shipping lines.

Fifth, more attention needs to be paid to international coordination in terms of using international standards. A one-stop service can be provided through data harmonisation; reducing the number of data fields required to apply for the regulatory requirements, and customs declaration. Analysis performed on all required documents and through a process of simplification, the data fields are optimised and integrated in e-documents created by using international standards. As a future initiative for the development of the single window, KCS is currently working to lead the establishment of a global single window, that will allow for the exchange of data with other countries.

5. Conclusion: Lessons from Korea

Single window is an attempt to overcome the fragmentation in government activities that has plagued customs administrations and the private sector across the world. It does so by fostering coordination among ministries and levels of government; by promoting information sharing among different agencies; and by creating policy integration to achieve more encompassing objectives.

Research on the implementation of single window needs an integrated approach because it requires the combined effort and efficiency of a number of government agencies as well as the private sector. In theory, the logic of interagency coordination is not only the summary and advancement of innovative practices in the context of a new era, but also a hybrid product of traditional research and wisdom, and represents a combination of different theories. In order to offer a conceptual framework, this paper focuses on interagency coordination of major policy and management issues in the implementation of single windows, using the case study of Korea. The main findings of this paper are as follows:

- Customs administrations appear to be a dominant single window service provider either alone or in collaboration with other government agencies in many countries. Single window implementation in Korea was led by its customs service, backed by strong political will and budget allocation, as well as a national trade committee with participants from private industry associations, including those from small and medium-sized enterprises.
- Interagency coordination at the policy-making level provides a channel to uphold political will and support for the project. To be more specific, the lead agency should set up and chair an interagency steering committee with private sector representation as early as possible. The steering committee will consider policy issues and set the direction for the subcommittees to construct the necessary procedures and implement the single window system (Koh, 2013). This will ensure the private sector's support and usage of the new system upon completion. And this kind of steering committee may draw its membership from a national trade facilitation body, as was the case in Korea.
- A taskforce for coordinating different agencies related to a single window is important for its establishment, especially in the initial stage. It minimises trial and error during the implementation by formulating the overarching strategy, which encompasses the goal and objectives of the single window project, the roles and responsibilities of involved parties, and the timeframe and roadmap for the project. In determining the needs of all participating agencies and stakeholders, a full appreciation and clear understanding of the other agencies is required. Organisations strive to maintain their interests, policies and core values. These must be taken into consideration in order to facilitate interagency coordination.
- Purposeful interagency coordination is essential for promoting the development of single windows. Proper institutional arrangements are necessary, but are not sufficient. They provide frameworks for coordination, but not the engines that drive coordination toward its goal. Therefore, an interagency coordination strategy is extremely important, including structural coordination, procedural coordination, public-private coordination, technical coordination and international coordination.

The creation of such interagency coordination mechanisms does not, however, ensure seamless interagency coordination, especially for crosscutting issues emerging from the implementation of single windows. Consequently, it is necessary for countries that have established or wish to establish single windows to make full use of the procedural arrangements and technical instruments available to facilitate interagency coordination. In addition, formal institutional arrangements should be put in place to facilitate the participation of all stakeholders in the development of a single window, including relevant government agencies and private sector representatives.

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Notes

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- 1 But in the case of Korea, a more comprehensive concept of single window was adopted and more functions were added to it. In addition to regulatory procedures that are usually managed by government authorities, Korea included some private business areas in the concept of single window. For example, the banking sector which performs such the role of trade financing and payment is included in Korea's model. Also, Korean traders have connection to logistics areas through the single entry point. Eventually, global trading partners will be a target of single entry point connection in Korea's model.
 - 2 Established by Korea Customs Service, CUIA is a leading promotion association specialising in the customs information technology sector in order to implement efficient and effective computerised customs administration system for foreign customs. CUIA's areas of focus include the operation and maintenance of Korea Customs e-clearance system, UNI-PASS; R&D for customs standardisation; client services (help-desk call center of Korea Customs Service) customs modernisation and customs computerisation consultancy; technology assessment; project management; international customs information analysis and service; and promotion of UNI-PASS system and its technology. CUIA aims to provide efficient and useful Korea Customs e-clearance system for the advancement of customs information and communication technologies. Its purpose is to contribute the advancement of ICT, the promotion of UNI-PASS and the development of customs modernisation and computerisation for foreign customs by providing the latest Korea Customs technological advances and international recommendations needed for the planning, design and operation of global customs administration system and related customs information services, in close collaboration with customs, governmental organisations, companies and groups, etc.
 - 3 In Thailand, the Cabinet appointed the National Committee on Logistics Development (NCLD). It consists of permanent secretaries from economic-related ministers and representatives from trade-related associations. While the engagement of the National Competitiveness Development Committee (NCDC) in the project reinforced strategic integration and thus mutual commitment among high-level decision-makers, the appointment of NCLD brought together the high-level management to plan and monitor single window implementation. See Untied National Economic Commission for Europe, Single Window Implementation Framework, United Nations, Geneva and New York, 2011.

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Intangible assets and customs valuation

Erkan Erturk

Abstract

This paper focuses on determining the customs value of intangible assets by using a transactional profit split method. In this paper we explain how to determine the customs value of related inter-company transactions; summarise the relationship between the arm's length principle and customs valuation; explain how the customs value of intangible assets can be determined by using a profit split method; and discuss the developments related to reconciliation of customs valuation with transfer pricing and the proposed solutions.

1. Introduction

Academic studies show that the share of trade carried out by multinational corporations (MNC) is about 60–70 per cent of total trade volume. Today, most commercial goods are produced using intangible assets, such as patents, know-how, brands and designs, with intangible assets contributing as much as 75 per cent of consolidated profits (Frisch, 1989).

Intangible assets differentiate goods from others and add value to them. However, the intangible assets are generally unique, making it virtually impossible to use comparable goods at customs valuation. For this reason, there is a need to develop and standardise specific methods related to the valuation of goods produced using intangible assets.

The Organisation of Economic Co-operation and Development (OECD) adopted a transactional profit split method for valuation of intangible assets in 1994. In contrast, the General Agreement on Tariffs and Trade (GATT) agreement on customs valuation (ACV) deals with intangible assets within the scope of the sales price of the goods to which they relate, and therefore custom administrations examine whether these rights are included in the price paid or payable. In other words, the transactional profit split method for the valuation of intangible assets is not used to determine customs value, but the problem is reduced to the extent of determining whether or not the relationship between the seller and the buyer affects selling price.

Since the valuation of unique intangible assets is very difficult, MNCs can easily avoid taxation. Therefore, customs administrations must be equipped with means to accurately determine the value of the goods in question. For this reason, only looking at the transfer pricing documents will not be enough because tax administrations and customs administrations have different perspectives.

2. Determination of customs value of related party transactions

In foreign trade transactions, there should be no relationship between the buyer and the seller when accepting the sales price. However, in valuation law, the existence of a relationship between the buyer and the seller does not constitute sufficient reason to reject the application of the sales price method. If it is determined that the relationship between the buyer and the seller has not affected the price, it is possible to prescribe the sales price to the customs value of the goods.

To determine whether the selling price would be an acceptable basis for the transaction value, two tests are used: (1) the ‘circumstances of sale’ test to determine whether the relationship influences the price; and (2) the ‘test values’ test to determine whether the transaction value closely approximates one of three types of test values. The circumstances of the sale test, which is more commonly used, is broad and the provisions strikingly concise (Ping & Silberstein, 2007).

Under the sale test, relevant aspects of the transaction are analysed—such as the way in which the buyer and the seller organise their commercial relations, and the way in which the price in question is arrived at—in order to determine whether the relationship influences the price.

Under this test, the price will be accepted provided that:

- a. The price was settled in a manner consistent with the normal pricing practices of the industry in question (i.e. the industry that produces goods of the same class or kind). This test does not focus on the function performed by the parties, as transfer pricing rules do.
- b. The price was settled in a manner consistent with the way the seller settles prices for sales to buyers who are not related to it. This test is equivalent to comparable uncontrolled price in transfer pricing rules.
- c. The price was adequate to ensure recovery of all costs plus a profit that is equivalent to the firm’s overall profit realised over a representative period of time in sales of merchandise of the same class or kind. This test is equivalent to the cost plus profit method in transfer pricing rules, but focuses on merchandise of the same class or kind, not in the functions performed by the parties.

The ‘test values’ test is met (and where met, the price declared is accepted as a basis for transaction value) when the price declared closely approximates one of the following values:

- a. the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation
- b. the deductive value of identical or similar goods
- c. the computed value of identical or similar goods occurring at or about the same time (or, in the United States, at the time of exportation) (Marsilla, 2008).

When applying the test values, the differences in commercial levels, quantity levels and requirements in Article 8 of the ACV, as well as costs incurred that would not occur in sales between related parties, shall be taken into account. The tests are to be used at the initiative of the importer and only for comparison purposes, meaning that the compared value cannot be used as a substitute value.

The second and third test values require previous determinations of value of identical or similar goods, which must have been accepted by the customs authority and are therefore acceptable under Article 1 of the ACV. The tests provide a basis for comparison of an actual customs value already accepted by customs. Consequently, if there is no parallel import into the same customs territory by buyers not related to the seller, the test values cannot be used.

Certain factors need to be taken into consideration to determine if the transaction value ‘closely approximates’ the test value. Such factors include the nature of the imported goods, the nature of the industry itself, the season in which the goods are imported and whether or not the difference in values is commercially significant (Malm, 2009).

It is clear from the foregoing explanations that test values must be found in the determination of the customs value of related party transactions. However, if traded goods are unique and transactions are carried out only between related parties, the use of test values is not possible.

3. Determination of customs value of related party transactions and arm's length principle

Enforced by revenue authorities, transfer pricing is grounded in Article 9 of the OECD and United Nations (UN) Model Tax Conventions, which establish the arm's length principle. All cross-border commercial and financial transactions between associated enterprises (goods, services, intangibles, financial transactions) are within the scope of transfer pricing.

The arm's length principle requires a comparison of the conditions of a taxpayer's controlled transactions with the conditions of comparable uncontrolled transactions. Two transactions are regarded as comparable where either there are no material differences between them or reasonably accurate adjustments can be made to eliminate the effect of any such differences (Ping & Silberstein, 2007).

The relationship between the seller and the buyer and international/cross-border transactions were managed separately in the past. This means that transfer pricing was, and still is, regarded as a matter of direct taxation. Customs, on the other hand, being a harmonised indirect tax, has been regarded as a matter of logistics. Today, the two situations are more commonly linked due to the increased expansion of multinational groups and cross-border transactions.

The wording in Article 1.2 (a) of the ACV, stating 'that the relationship [of the related parties] did not influence the price', is similar to the OECD concept of the arm's length principle. The fact that 'the circumstances surrounding the sale shall be examined' in order to find out if the relationship between the related parties has influenced the customs value, is as close as customs valuation regulations come to providing an arm's length test. It is, therefore, clear that both sets of rules share the requirement of using an arm's length standard when establishing the price for cross-border transactions between related parties.

Even if the OECD transfer pricing guidelines explicitly discuss comparability, the ACV does not make any reference to a comparability analysis. The Interpretative Note to Article 1.2 states that '[w]here it can be shown that the buyer and seller, although related [...], buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship'. This statement indicates that there is a clear similarity between the comparability analysis for transfer pricing purposes and demonstration of correct prices for customs valuation purposes. The idea of comparability is clearly present in the provisions of the ACV, simply not explicitly stated (Malm, 2009, pp. 12–13).

The arm's length principle is applied, broadly speaking, by many customs administrations as a principle of comparison between the value attributable to goods imported by associated enterprises, which may be affected by the special relationship between them, and the value for similar goods imported by independent enterprises. Valuation methods for customs purposes, however, may not be aligned with the OECD's recognised transfer pricing methods. Nevertheless, customs valuations may be useful to tax administrations in evaluating the arm's length character of a controlled transaction transfer price and vice versa. In particular, customs officials may have contemporaneous information regarding the transaction that could be relevant for transfer pricing purposes, especially if prepared by the taxpayer, while tax authorities may have transfer pricing documentation, which provides detailed information on the circumstances of the transaction.

It has been pointed out that there are marked similarities between the World Trade Organization (WTO) and OECD methods for customs valuation and transfer pricing respectively. For example, the WTO deductive method (Article 5) is based on the resale price of the goods as is the OECD resale price method; the WTO computed value method (Article 6) is based on a value built up from materials and manufacturing costs, plus profit, similar to the OECD cost plus method. However, although this is of

interest, it is not directly relevant to the issue at hand; Customs' focus is on the transaction value method and whether or not the declared price has been influenced when the buyer and seller are related. Customs, therefore, will in the main be examining transfer pricing data in this context and not in relation to the use of other WTO methods (WCO, 2015).

4. Customs valuation and intangibles

The effect of intangible assets on customs valuation is to the extent of the amount of royalty and licence fees paid or to be paid. In other words, royalty or licence fees that are paid for the sale of the goods and are not included in the actual price paid or payable should be included in the customs value.

The source of such legal arrangements is based on the agreement on the application of Article VII of the GATT. This issue is regulated in Article 8 (c) of the Treaty.

Typical examples include the manufacture and/or sale for export of imported goods (e.g. patents, designs, models and manufacturing know-how, trademarks) and the use or resale of imported goods (in particular, copyright, manufacturing processes inseparably embodied in the imported goods). The manufacturing term in this definition means that materials are partly or completely altered, or processed by means of machines, devices, workbenches, tools or hand tools, or are a new product developed by loading a function to a product.

According to the definitions, royalty or licence fees are made on the basis of goods imported under the names of patent, design, know-how, trademark, model, registered design, copyright and manufacturing processes.

There are two basic conditions for the inclusion of royalty or licence fees in customs valuation. These are that the payment must be:

- a. related to the goods to be valued
- b. made on the condition of sale of these goods.

The royalty or licence fees bearing both of these conditions must be added to the customs value of the imported goods.

As can be understood from these provisions, the royalty and licence fees are evaluated only for inclusion in the customs value of the imported goods because of the usage price of intangible assets. The amount of royalty and licence fees are considered to be the cost of using these assets. However, in the ACV, there are no assessments of whether the royalty and licence fees paid for the imported goods are in accordance with the arm's length principle, and of what these payments should actually be if there is no comparable transaction. Unlike transfer pricing methods, the value of intangible assets in customs valuations is assessed in terms of whether those assets are included in the price actually paid or payable for the imported goods. This makes it nearly impossible to determine the customs value of the intangible assets used in the imported goods, especially in the case of incomparable transactions.

5. Profit split method in OECD transfer pricing guidelines

Both the transactional net margin method (TNMM) and profit split method in OECD transfer pricing guidelines were developed for income tax purposes, and even though the problem posed by intangible valuation is a growing concern in Customs, they have not been widely adopted outside the income tax context. Customs is resistant to them.

Intangibles are problematic because they have few (if any) comparable items and they are frequently subject to adjustments based on future events and commercial practice if they are non-routine. The impact of intangibles on customs is no less significant than their impact on income tax, but the valuation system is not designed to easily accommodate either voluntary or audit-based intangible adjustments.

This complicating factor makes applying traditional transfer pricing methods problematic. For example, if:

- a. the intangible is truly unique, then comparable uncontrolled price (CUP/CUT) methods (by definition) are not available (the intangible would not be unique if there was comparable)
- b. the intangible asset is not resold (and this would be the normal case with an intangible asset purchased by a bank, financial or insurance company), then resale price valuations cannot be performed (there are no resales)
- c. the cost of producing the intangible asset is not controlled by the purchaser, then cost plus (C+) methods are difficult to perform (because the data needed to perform analysis are under the seller's control, not the buyer's control).

Of all the traditional methods, only the C+ method can be realistically applied, and this would be a difficult application (Ainsworth, 2007).

To be understood, the presence of the intangible for one party or both parties in the trade between the related parties would make it very difficult to determine the customs value of the goods. In these situations, there will usually be no comparable item, and problems will become more complicated because the profit-based methods used in transfer pricing are not included in the customs valuation methods.

In transfer pricing, residual analysis (which is one of the profit split methods), is generally used in profit sharing between related entities. Under the residual analysis, the combined profits from the controlled transactions are allocated between the associated enterprises based on a two-step approach:

Step 1: allocation of sufficient profit to each enterprise to provide a basic compensation for routine contributions. This basic compensation does not include a return for possible valuable intangible assets owned by the associated enterprises. The basic compensation is determined based on the returns earned by comparable independent enterprises for comparable transactions or, more frequently, functions. In practice, TNMM is used to determine the appropriate return in step 1 of the residual analysis.

Step 2: allocation of residual profit (i.e. profit remaining after step 1) between the associated enterprises based on the facts and circumstances. If the residual profit is attributable to intangible property, then the allocation of this profit should be based on the relative value of each enterprise's contributions of intangible property (United Nations, 2001).

5.1 Application Example¹

Company A manufactures product X in Country A, and sells it to Company B in Country B. Company B sells a value-added product to local consumers after it has been involved in various manufacturing activities for this product. Both A and B companies are involved in research and development (R&D) activities for the development of this product. Also, Company B has valuable intangible assets developed in its home country for the marketing of products. In this case, we can explain how the customs value of the goods can be determined by using residual analysis and the data in Table 1.

a) Companies A and B Profit & Loss

Table 1: Income and expenses for companies A and B

	Company A ^b	Company B ^b
Sales	80 CU	150 CU
Raw materials	(10) CU	(80) CU
Production costs	(25) CU	(20) CU
Gross profit	45 CU	50 CU
R&D costs ^a	(30) CU	(10) CU
Marketing expenses ^a	—	(20) CU
Other operation expenses	(15) CU	(10) CU
Net profit	0 CU	10 CU

^a It is assumed that all costs are due to intangible assets

^b CU denotes currency units

As can be seen in Table 1 above, the sales (80 CU) of Company A constitute the costs of Company B. The total profit of the company A and B is 10 CU.

b) Determining the routine profit in the productions of companies A and B and calculating the total residual profit

Suppose Company A and Company B will each make a profit of 10 per cent (ratio of net profit to direct and indirect production costs) of their production costs (except for the raw materials) if they do not have any unique intangible assets (10% profitability is assumed to be the average routine profit of the industry). Since Company A's production cost is 25 CU, the return on production cost of Company A will be 2.5 CU. Since Company B's production cost is 20 CU, the return on production cost of company B will be 2.0 CU. In this case, the residual profit will be calculated as 5.5 CU [$10 - (2.5 + 2.0) = \text{CU } 5.5$].

c) Splitting the residual profit

In the first allocation, 2.5 CU is given to Company A and 2.0 CU to the Company B because of the production function. However, the relative contribution of intangible assets related to R&D and marketing was not taken into account in this allocation. For this reason, 5.5 CU residual profit will be distributed according to the relative contributions of the research and development expenses and the marketing

expenses of the Company A and Company B. Here, it is assumed that the companies contributed to the technological innovation and marketing of the products, to the extent of the expenses they have made. According to this explanation: the share of A is $5.5 \times 30/60 = 2.75$ CU, the share of B is $5.5 \times (10 + 20) / 60 = 2.75$ CU.

d) Recalculation of the profit

The net profit of A will be $2.5 + 2.75 = 5.25$ CU and the net profit of B will be $2.0 + 2.75 = 4.75$ CU. This recalculation is shown in Table 2. Accordingly, the profit of Company A will be 5.25 CU and the profit of Company B will be 4.75 CU. In other words, by using intangible assets, company B's net profit decreases from 10 CU to 4.75, CU while company A's net profit increases from 0 CU to 5.2 CU.

Table 2. Rearranged income and expenses table for companies A and B

	Company A	Company B
Sales	85.25 CU	150.00 CU
Raw materials	(10) CU	(85.25) CU
Production costs	(25) CU	(20) CU
Gross profit	50.25 CU	44.75 CU
R&D costs	(30) CU	(10) CU
Marketing expenses	–	(20) CU
Other operation expenses	(15) CU	(10) CU
Net profit	5.25 CU	4.75 CU

In the absence of any royalty or licence payments in accordance with Table 2, the value of the goods in Company B rose from 80 CU to 85.25 CU. For this reason, the sale price of the good should be accepted as 85.25 CU.

However, associates, who usually use intangible assets in the present, pay royalty and licence fees to the parent company to which they are entitled. If it is required to determine the profitability appropriately for the residual profit distribution, according to Table 1, the royalty and licence fees to be paid to Company A by Company B will have to be 5.25 CU. Thus, the profit of Company A will increase to 5.25 CU while the profit of Company B will decrease to 4.75 CU.

Multinational companies can separately determine both the amount of royalty and licence fees to be paid and the resources of these fees as part of their tax planning activities in their contracts. For example, the royalties amount to be paid in the above example can be set as 1.00 CU or 8.00 CU instead of 5.25 CU. In this case, it will not be possible to determine the royalty and licence fees that must actually be paid unless the profit split method is used. On the other hand, the inclusion of royalty and licence fees to the customs value requires that such a payment be related to the goods to be assessed and this payment be made on the condition of sale. Customs valuation methods do not make any determination as to what 'actually paid' should be. In the existence of intangible assets in both companies, the relative contribution of these intangible assets and consequently the profits of each company can only be determined by the

profit split method. Only if the intangible asset was found in Company A, the customs value of imported goods of the company B could be determined by the reduction method. In this situation, the customs administration would be able to determine the customs value of the goods, taking into account the profitability rate and the overall costs of an independent operator similar to Company B.

In some cases, the MNCs may license their intangible assets related to the marketing of their brand to their subsidiaries operating in another country, and in return, the subsidiary may pay royalty and licence fees to the parent company. For example, while a famous mobile phone company exports its products under its own brand to its subsidiary in another country, the parent company also may give some marketing rights (such as store design, employee training, product presentation) to introduce products under the licence. Here, the customs valuation methods are insufficient because there is no comparable transaction in determining how much of the payment is related to the brand and how much of the payment is related to marketing. In this case, the only solution would be to use the profit split method. Knowing whether the relationship influences the price or not would not be beneficial to the customs authorities. Even if there is a transfer pricing report that shows that the royalties paid are consistent with the arm's length principle, this information will not show us how much of the licence fee is for the brand and how much for the marketing intangibles (royalties for marketing is not included in the customs value). The tax administration will just look at the total amount paid, not to whether the royalties paid are related to marketing or branding.

For example, suppose that in the above example, Company A licenses only intellectual property for marketing to Company B, and Company B does not have a R&D facility. In this case, Company A has only intangible assets related to R&D, and marketing rights given under its own licence to Company B (expenses incurred for activities related to intangible asset related to marketing are 20 CU). So, the profit of Company B in Table 1 will increase to 20 CU and the residual profit will be 15.5 CU [$20 - (2.0 + 2.5)$]. Since total 50 CU ($30 + 20$) intangible assets belong to Company A, all residual profit will be the profit of Company A. The remaining 9.3 CU [$15.5 * (30/50)$] of the residual profit will be related to the share of the R&D expenditure, while the remaining 6.2 CU of the residual profit will be related to the marketing licence. If Company B pays a royalty and licence fee of 15.5 CU, royalty and licence fees for R&D expenses of Company A will be 9.3 CU, and royalty and licence fees for marketing expenses of Company A will be 6.2 CU. For this reason, royalty and licence fees to be added to the customs value will be 9.3 CU instead of 15.5 CU. As can be seen from this example, the amount of royalties on marketing would only be confirmed by the profit split method. While it is sufficient to pay royalties of 15.5 CU for tax administration, it is more important for the customs administration to know how much of this payment is related to R&D expenditures.

6. Attempts to reconcile values/prices

Valuation of related party transactions for transfer pricing, customs and VAT purposes was the subject of two major conferences organised jointly by the World Customs Organization (WCO) and the OECD in May 2006 and May 2007 (Ping & Silberztein, 2007).

Specialists from customs and tax administrations and the private sector presented and discussed various viewpoints and proposals regarding issues such as the scope for greater alignment and other technical aspects. Following the second conference in 2007, a focus group was established (again comprising customs and tax officials and business representatives) to consider the key themes that emerged during the conferences. The focus group has met once to date, on 26 October 2007 (WCO, 2015, p. 56).

Three issues concerning the way to minimise the gap between transfer pricing for tax and customs purposes were discussed at the conferences. The first issue was the usefulness of transfer pricing documents (TPDs) for customs purposes. A company's TPDs could be useful for the customs authority since it often

provides extensive information about the company's transfer pricing compliance requirements and could serve a dual purpose, especially if the TPDs address the company's customs valuation requirements. The second issue was the development of a joint advance customs valuation agreement (ACVA) and advance price agreement (APA). This possible development was seen at the conference as promising, despite limited and contrasting experiences in countries so far. The use of a ruling involving both the revenue and customs authorities opens up the prospect of an effective, coordinated dispute-prevention mechanism. The third issue was the possible development of joint customs and transfer pricing audits. The objectives are that it would reduce the time and effort spent on audits by the taxpayer and the authorities, and to arrive to the extent possible at a common determination of the valuation of related party transactions that would be acceptable for both customs and tax authorities (Malm, 2009).

Some commentators have suggested that there should be a formal alignment or merger of the two methodologies. It became clear following the joint conferences and focus group meeting, however, that such harmonisation was not a realistic proposition, particularly as the application of the methodology contained in the WTO valuation agreement is an obligation for a WTO member country and it is not expected to be amended/updated in the short to medium term. Therefore, the challenge is to consider what is possible within the constraints of the existing WTO agreement provisions.

It was recognised that the test values option in Article 1.2 (b) and (c) for examining related party transactions was not likely to be useful for MNCs that typically sell unique goods. In other words, it is unlikely that such test values, based on the strict criteria of identical or similar goods provided in the agreement, will be available, and so the focus was on the analysis of the circumstances surrounding the sale provision.

The key progress made to date has been the adoption of Commentary 23.1, an instrument of the Technical Committee on Customs Valuation (TCCV) that acknowledges that a transfer pricing study may be of use in the examination of related party transactions for customs value purposes, on a case-by-case basis. This instrument confirms the principle that transfer pricing studies are a source of information that can be considered by customs and so provides an important first step (WCO, 2015, pp. 56–57). However, neither the WCO nor the OECD has proposed concrete instructions or guidelines thus far (Kim, 2009).

7. Conclusion

In a world where MNCs have increasing transaction volumes and intangible assets make a huge contribution to the profitability of the company, valuation of intangible assets is at the top of the debate on taxation. The valuation of intangible assets has been standardised within transfer pricing methods to some extent, although some subjective assessments are required.

Although the provisions of the ACV for related party transactions are quite similar to the arm's length principle, the methods based on profit are not included in the customs valuation methods. In the absence of comparable goods due to the use of intangible assets, customs valuation methods do not provide an explicit solution to the issue of related party transactions. The only solution proposed by the ACV is to investigate the conditions for sale.

In this regard, the recommended way to investigate the conditions for sale was to use the transfer pricing documentation to determine whether the relationship affected the price. The TPDs are often said to provide comprehensive information about the company's compliance with transfer pricing and to serve both tax and customs purposes. However, royalty and licence fees related to intangible assets to be included in the customs value should be related to the imported goods and should be made subject to sales conditions. For these reasons, it is considered that the usefulness of these documents is significantly limited.

TPDs are not sufficient for customs purposes, especially when intangible assets exist for marketing activities. In other words, the profit in compliance with the arm's length principle does not provide sufficient guidance to the customs authorities on whether the price is influenced by relationship. For this reason, the author believes that it is important to update the valuation agreement to add profit-based methods to the existing methods.

In the case of adopting profit-based methods, the declared value during import would be provisional, and the customs value under the profit split method would be subsequently adjusted.

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Notes

- 1 In the development of the application example, the OECD's 2015 publication, *BEPS action 10: Discussion draft on the use of profit splits in the context of global value chains*, (pp. 24–30), was used.

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Section 2

Practitioner Contributions

Rules of obtaining binding tariff information in the EU—analysis of selected problems

Mirosława Laszuk

Abstract

The institution of binding tariff information (BTI) has been present in the European Union (EU) since 1991. The importance of BTI continues to increase, which is confirmed by the number of issued decisions. Technological advances contribute to new products, making it difficult to determine the correct tariff code. Therefore, it is essential for entities trading in goods on the international level to apply for BTI decisions. Despite its increasing importance and the relatively lengthy existence of this institution, the provisions of the law concerning BTI include solutions that make it difficult for entrepreneurs and issuing authorities to use it.

1. Introduction

The member states of the EU constitute a customs union. This implies that the countries have common rules that apply to the international trade in goods, and that they apply identical provisions in relation to entrepreneurs from different member states involved in international trade. Thus, customs authorities are obliged to apply the provisions of the customs code uniformly.

The new EU customs code regulations have been in force since 1 May 2016. They include the Union Customs Code,¹ the Delegated Regulation,² and the Implementing Regulation.³ The new regulations introduced changes in scope of binding tariff information. However, despite changes, there are still some solutions that might cause problems in issuing BTI decisions, both from the perspective of an applicant and customs authorities. Taking this into account, the purpose of this article is to indicate these incorrect solutions and the direction of changes.

2. Concept and role of BTI

BTI refers to the classification of goods. Generally speaking, it is a written decision of an authority that specifies a relevant code of the customs tariff for a specific product. BTI strives to eliminate classification mistakes, which benefits both importers and customs authorities (Naruszewicz & Laszuk, 2005, pp. 111–112). It should be noted that the classification of goods creates many problems, even for specialised entities and authorities. Although establishing a relevant combined nomenclature (CN) code can be extremely difficult, it is a crucial calculation element that has an impact on both the amount of customs duties on imports and the scope of commercial policy measures in international trade of goods.

It is not obligatory to have BTI to be able to import or export goods, but it does give legal certainty about how Customs will treat your goods. It is not a licence, nor does it confer any special status on the goods to which it refers. It is simply a decision given by Customs to a single trader stating the tariff classification of specific goods (Valentine, 2008, p. 414).

Since the introduction of BTI in 1991, there has been steady growth in the numbers of BTI decisions issued annually. This is because holding a BIT decision:

- gives certainty about the correct tariff classification of goods
- gives a commodity code for goods imported or exported
- assists in determining customs duties, export refunds, licensing requirements, quotas and other restrictions in advance.

Information concerning all BTI decisions issued in EU member states is stored in the system of the European BTI (EBTI), owned by the European Commission (EC). Pursuant to Article 17 of the Implementing Regulation, customs administrations are legally bound to consult the EBTI database and keep a record of such consultations. This is aimed at ensuring a uniform tariff classification of goods in the EU and thus limiting the potential risk of issuing BTI divergent decisions. Besides, this activity is necessary in relation to combating BTI shopping (Article 16 section 4 of the Implementing Regulation).

Table 1. Number of BTI decisions issued in individual EU member states

Country	BTI decision	
	Total	Since 1 Jan 2014
Austria	3,712	2,706
Belgium	2,378	1,651
Bulgaria	1,120	924
Croatia	388	358
Cyprus	373	265
Czech Republic	5,972	4,752
Denmark	1,878	1,198
Estonia	40	28
Finland	1,069	689
France	37,703	31,977
Germany	127,306	92,619
Greece	311	224
Hungary	1,709	1,268
Ireland	4,065	2,912
Italy	2,813	1,979

Latvia	351	192
Lithuania	262	189
Luxembourg	34	29
Malta	199	101
The Netherlands	11,125	7,157
Poland	8,734	6,229
Portugal	256	142
Romania	1,311	944
Slovakia	1,687	1,129
Slovenia	973	653
Spain (excluding XC XL)	4,520	3,360
Sweden	4,447	3,253
United Kingdom	26,202	15,981
TOTAL	250,938	182,909

Source: The European Binding Tariff Information

Table 1 shows that the largest number of BTI decisions were issued in Germany, France, Great Britain and The Netherlands. However, it is worth noting that these are countries that have been part of the EU for a long time and have been using BTI since it was introduced. Among countries that joined on or after 1 May 2004, the largest number of BTI decisions were issued in Poland and the Czech Republic. The number of issued decisions is closely connected with the product turnover made by the countries. The largest importer among EU member states is Germany. Import to Germany accounts for almost one-fifth of imports to the whole EU—18.9 per cent. Other significant importers in the EU are the United Kingdom (14.8% of total import to the EU), The Netherlands (14.7% of total import to the EU) and France (9.0% of total import to the EU) (Eurostat, 2017).

Luxembourg and Estonia have the least number of issued BTI decisions. These are small countries in terms of the area and population and their international turnover is significantly smaller.

In Table 1 the number of issued certificates is indicated from 1 January 2014. Since member states joined at different times, the number of issued certificates will be different. However, the period analysed in the last part of the table includes all 28 countries. It should be noted that this part confirms a tendency indicated in relation to all years, namely, the largest number of BTI decisions is issued by the customs authorities of countries where import is significant.

3. The rules for obtaining BTI decisions

According to Article 33 the Union Customs Code (UCC) ‘the customs authorities shall, upon application, take decisions relating to binding tariff information (BTI decisions), or decisions relating to binding origin information (BOI decisions)’. It means that individual member states decide independently which customs authorities are responsible for issuing a BTI decisions. Most member states have appointed only one authority competent to conduct proceedings and issue BTI decisions (except Belgium, Denmark and Finland). The purpose of appointing only one authority in a country is to ensure the highest competence and knowledge of people who make binding classification decisions and consistency of those decisions. The list of authorities designated by member states to receive applications for, or issue BTI, has been published in Official Journal C 261(2015/C 261/05) of 8 August 2015 (European Union, 2015).

In Poland, for example, the authority competent to conduct proceedings in the first instance relating to BTI, pursuant to Section 1.2 of the Regulation of the Minister of Economic Development and Finance, is the Director of Revenue Administration Chamber in Warsaw.⁴ The Regulation was issued on the basis of Article 70 section 3 of the Customs Law Act.⁵ The appeal authority (in the second instance) is a minister competent for public finances.

Decisions relating to BTI only take place when a concerned party submits an application to a competent authority. The application should be submitted in a country in which the entity is legally established or where it intends to import or export goods. This is not an absolute principle, as the applications may be submitted in other countries. However, in the case of receiving a BTI application from an applicant from another member state, customs authorities should be aware that ‘BTI shopping’ may occur. It should be noted that the customs authority that accepts the application must notify the customs authority in the country in which the applicant is based within seven days of its acceptance. The customs authority that receives such notification may, within 30 days, transmit information that it considers relevant for the issuance of the BTI to the customs authority conducting proceedings. Entrepreneurs that are based outside the EU may also submit applications for the issuance of a BTI decision to the customs administrations. In this case the application should be submitted to the customs authority that assigned the applicant’s Economic Operator Registration and Identification (EORI) number.

The application may relate to only one type of goods, classified according to the customs tariff and should include:

- the customs nomenclature in which classification is to be made
- a precise description of the goods, which will enable their identification and classification in customs nomenclature
- specification of product composition or material used to make it
- expected classification
- any information considered confidential.

If it is relevant to a product classification, the applicant should submit product samples, photographs, catalogues, and quality or quantity certificates and any other required documents. It should be stressed that the applicant is responsible for submission of all necessary information required to classify the goods.

Pursuant to Article 33 of the UCC, the application will not be accepted if it is made, or has already been made, at the same or another office issuing BTI decisions, by or on behalf of the holder of a valid decision in respect of the same goods, or if the application does not relate to any intended use of the BTI decision. In other cases, the application is accepted and a decision is issued. Although decisions are issued free of charge, where the issuing authority considers that correct classification requires them to conduct examinations, analysis and sampling, then costs of the above procedures will be covered by the applicant.

All BTI applications that have been correctly completed must be entered into the EBTI database, even if some data is unavailable or the application is withdrawn at a later stage. No circumstances exclude this obligation.

A BTI decision specifies the correct classification of goods according to CN and indicates the eight-digit code of the customs tariff. Its basic purpose is to ensure:

- transparency of customs information
- the uniform application of the Common Customs Tariff (CCT)
- that differences in tariff classification in EU member states are eliminated
- equality and legal protection of economic entities within the EU.

A BTI decision should be granted without delay, no later than within three months from the date of submission of a completed application. If the decision is not issued within this period, the authority providing information is obliged to inform the applicant and specify the reason for the delay and the date on which the decision relating to BTI will be issued. If an applicant is not satisfied with the decision, they may lodge an appeal to a relevant minister in charge of public finances within 14 days from the date of its delivery. However, a correctly issued decision will not be changed.

Within the shortest possible period of time, a copy of the BTI should be transferred to the EC by the authorities in the relevant member state. Information transfer is made electronically. In the case of divergence between two or more BTIs, the Commission, on its own initiative or at the request of the representative of a member state, will transfer the case to the deliberations of the Customs Code Committee. It should be noted that the EC should, as quickly as possible (not later than within 6 months after the date of deliberations), undertake measures that ensure uniform application of provisions concerning CNs. A solution adopted by the legal regulations allows unification of decisions classifying goods according to CNs issued by member states.

As previously noted, information supplied for the purposes of obtaining a BTI will be stored on the EBTI and may be used by customs authorities throughout the EU to ensure uniform application of the customs tariff. However, any information in respect of which confidentiality is sought will be included in the database but not disclosed to the public or customs administrations of other member states.

A BTI decision is valid for a period of three years from the date on which the decision takes effect. It is binding in the scope of tariff classification on both customs authorities and the entity at the request of which it was issued. The authorities are bound by their decision as against the holder of the decision, only in respect of goods for which customs formalities are completed after the date on which the decision takes effect. As regards the entity at the request of which the BTI was issued, the decision is binding as against the customs authorities, only with effect from the date on which they receive, or are deemed to have received, notification of the decision.

Pursuant to Article 34 section 1 of the UCC, a BTI decision shall cease to be valid before the end of the period of three years; where it no longer conforms to the law; or as a result of either the adoption of an amendment to the nomenclatures, or the adoption of measures in order to specify tariff classification of goods.

A BTI decision may also be cancelled where it is based on inaccurate or incomplete information from the applicants.

Further, customs authorities shall revoke BTI decisions where they are no longer compatible with the interpretation of any of the nomenclatures⁶ resulting from explanatory notes; a judgment of the Court of Justice of the European Union; and classification decisions, or classification opinions or amendments of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System (Article 34(7) UCC). However, a BTI decision may still be used in respect of binding contracts that were based upon that decision and were concluded before it ceased to be valid or was revoked (Article 34(9) UCC).

4. Problems in the functioning of BTI

The customs regulations specify timeframes for issuing BTI decisions. The legislator specifies deadlines concerning authorities' activities connected with processing applications, consultations among member states and issuing BTI decisions. A BTI decision must be issued, at the latest, within 120 days from the date of the acceptance of the application. However, if customs authorities are not able to issue the decision within the specified time limit, they should notify the applicant of that fact before the expiry date and explain the reason for the delay. The additional time limit for issuing the decision should not exceed 30 days. However, this may be exceeded where it is not possible to complete the required analysis within that time.

It should also be noted that Article 20 of the Commission Delegated Regulation (EU) 2015/2446 provides for a special situation when the Commission suspends issuing a BTI decision in relation to goods without the correct and uniform tariff classification. In such a case, the time limit for issuing BTI is further extended until the EC notifies the customs authorities that the correct and uniform tariff classification is ensured. The additional extension shall not exceed 10 months or, in exceptional circumstances, 15 months.

It is clear that established time periods are lengthy—in particular the time limit for issuing a decision concerning the correct and uniform tariff classification. It should be noted that the problem with the correct tariff classification of goods occurs frequently. Such a long waiting period may result in significant delays for imports, which may have negative consequences for entrepreneurs. For example, in the United States the initial time limit for issuing binding information is 30 days, and in cases when sampling or other consultations are necessary the maximum period is 90 days, which is shorter than the initial period established in the EU regulations.

The next problem relates to the required intention to import goods. There is no clear regulation requiring proof of intention to import. While Article 19 section 1 of the Commission Delegated Regulation (EU) 2015/2446 states, 'an application for a BTI decision may be submitted to the competent customs authority in the Member State in which the information is to be used', this cannot refer to hypothetical situations. There are also no regulations that would explain how the intention to import goods should be proved. This gives customs authorities of the member states considerable freedom in specifying the evidence required to confirm such intention. However, obtaining information concerning the classification of goods, and hence the amounts due, is a matter of great importance when making a decision relating to planned transactions and determining the risk level, therefore limiting the possibility of obtaining BTI to actual situations only is unjustified. After obtaining the information, an entity may withdraw from a planned transaction due to unfavourable conditions of applied classification.

The intention to import goods is not a requirement in many countries. For example, regulations in the United States stipulate the necessity to submit confirmed information (e.g. name, addresses, email addresses and a producer's code), if it is known, together with the application for BTI. Therefore, it should be interpreted that a BIT decision may also refer to future and uncertain events.

Another issue is the prohibition of BTI shopping, which is specified in the EU's customs regulations. Pursuant to Article 16 of the Commission Implementing Regulation (EU) 2015/2447, in case of receiving an application for a decision relating to BTI from the applicant established in another member state, the customs authority shall notify the customs authority of the member state where the applicant is established within seven days. Such an obligation is connected with the prohibition of BTI shopping. BTI shopping is an illegal practice consisting of submitting more than one application for the same product, usually in customs administrations of different member states. Therefore, it is important for the authority to check the database to ensure that the same applicant did not submit an application or receive a BTI decision for identical or similar goods in a different member state. Such a database search should include applications submitted and decisions issued in all EU member states.

Risk indicators regarding BTI shopping may include situations where:

- more than one tariff item deserves consideration
- significant differences in customs duty or tax rates are visible which result from different tariff items deserving consideration
- other EU measures apply (e.g. import permit, tariff quota or antidumping customs duty).

The above situation in practice results in the possibility of submitting applications for BTI decisions by the entities (e.g. companies that function within an international holding) only in a country where they have their head office. It constitutes a freedom limitation for entities which may run their international business activity in every member state. As EBTI serves to eliminate discrepancies, prohibition of BTI shopping introduced by the EU customs code is not understandable. It should be underlined that the name itself is misleading as to the situation it specifies, which has nothing in common with 'shopping'.

Analysing the issue of the EBTI database searching, it shall be indicated that member states' authorities are obliged to include in the EBTI database BTI decisions in the language of the country that issued it. Only key words are translated, which are very general, and so do not enable the precise classification of goods, and complicates the work of customs authorities in the scope of data check. Thus, consideration should be given to extending the scope of translated data included in the EBTI database.

It should also be noted that customs authorities of member states issuing BTI decisions use descriptions of goods that are not very precise, and that they seldom include additional documentation in the form of photographs. This significantly impedes the work of other customs authorities and therefore it is suggested that in legal regulations the data scope that customs authorities should include in the BTI decision should be adjusted.

The introduction of relevant legal solutions is recommended, which would significantly improve the functioning of the BTI institution for both entrepreneurs and customs authorities. It would also be appropriate to consider a principle change that a BTI decision is issued only in relation to one entity. On the other hand, entities that have an analogous situation also have to submit applications to customs authorities for BTI decisions. This represents a situation of issuing a decision in relation to the same factual condition. Taking the above into account, it should be indicated that information about issued BTI decisions should be included in the TARIC, and also a decision issued with reference to a specific product should be recognised by other authorities.

5. Conclusions

The number of issued BTIs is increasing because there is now a larger number of member states and because new technologies and new commodities, which are difficult to classify, have emerged. Assigning adequate CN codes is problematic, despite the existence of the General Rules for the Interpretation of the Combined Nomenclature. As indicated above, most BTIs are issued in the countries that have a significantly high level of international trade in goods. BTI directed at importers and exporters facilitates running a business, but also provides legal certainty in relation to the classification. However, achieving this certainty is based on conditions that are not always favourable to an entrepreneur.

Although BTI has been functioning in the EU since 1991, there are still problems with its application, such as the long waiting period for a BTI decision to be issued, which might lead to negative consequences for entrepreneurs. Introducing the obligation to confirm an intention to import a commodity in the procedure of applying for BTI is also an unfavourable solution for entities trading in goods with other countries. Another concern is the BTI provision in the UCC that is intended to avoid 'BTI shopping', which inhibits the freedom of the entities that conduct their activity in scope of international trade in each member state. Addressing problems described in the article by introducing changes to the regulations would be beneficial for both entrepreneurs and customs authorities and may, in the longer term, contribute to an increase in trade facilitation.

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Notes

- 1 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 *Laying down the Union Customs Code*, OJ L 269, 10.10.2013, p. 1–101
- 2 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 *Supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code*, OJ L 343, 29.12.2015, p. 1–557
- 3 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 *Laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code*, OJ L 343, 29.12.2015, p. 558–893
- 4 Regulation of the Minister of Economic Development and Finance of 1 February 2017 *On appointing the Director of Revenue Administration Chamber in Warsaw to conduct certain customs matters* (Journal of Laws of 2017, item 228)
- 5 The Act of 19 March 2004 *the Customs Law* (Journal of Laws of 2016, item 1880)
- 6 The Combined Nomenclature of goods and any other nomenclature which is wholly or partly based on the Combined Nomenclature or which provides for further subdivisions to it, and which is established by Union provisions governing specific fields with a view to the application of tariff measures relating to trade in goods.

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Post-clearance amendment of customs declarations and repayment of customs duties and VAT in the context of EU law

Hara Strati

Abstract

The present paper examines whether it is possible to amend a customs declaration filed with respect to goods that are brought into the European Union (EU) customs territory, once such goods have been cleared and released by the customs authorities. Furthermore, it examines whether this amendment could lead to a repayment of customs duties and/or value added tax (VAT) that has been overcharged, upon request of the declarant. Finally, the paper focuses on the rights of the declarant at the stage of examination of their application for repayment of overcharged amounts and upon a potential rejection of such application by the customs authorities.

1. Introduction

Under the provisions of the Union Customs Code (UCC), goods that are brought into the customs territory of the EU must be presented to Customs immediately upon their arrival at the designated customs office or other place designated or approved by the customs authorities (Article 139(1) UCC). Upon the arrival of the goods, a customs declaration is lodged, in order for such goods to be assigned a customs procedure (Article 158(1) UCC). On the basis of Article 5(12), ‘customs declaration’ means the act whereby a person indicates, in the prescribed form and manner, a wish to place the goods under a given customs procedure, with an indication, where appropriate, of any specific arrangements to be applied.

The customs declaration is, in principle, immediately accepted by the competent customs authorities, provided that the goods that are covered by the declaration have been presented to Customs (Article 172(1) UCC). In this respect, it cannot be excluded that the customs declaration contains an error or omission that was not detected upon its filing but at a later stage, once the goods have already been released. Furthermore, even if the customs declaration was accurate when it was filed, a change in the legal situation may also take place following the release of the goods. This could be the case if, for instance, binding tariff information (BTI) is changed and the customs cleared goods are to be classified under a different tariff subheading granting a lower tariff rate.

In cases like this, it is possible that an amount of customs duty and/or VAT has been overcharged, as a result of an error or omission that took place when the customs declaration was completed, or as a result of a subsequent change in the legal situation. The question arises as to whether the declarant is entitled to amend the customs declaration after the release of the goods. In this context, it should be noted that, once the goods have been released, and are no longer at the customs office where they were cleared, there are fewer opportunities to ensure that the declaration lodged matches the actual transaction.

To the extent the post-clearance amendment of the customs declaration is possible, the exact procedure to be followed by the declarant must be determined. As there are no specific rules in EU customs law, such procedure is determined by the national legislation of the member state concerned.

Another question is whether the declarant is entitled to apply for a refund of any overcharged amounts of customs duties and/or VAT, and what legal remedies are available in case of rejection of the relevant application.

2. Submission of customs declaration and release of the goods

As outlined in Section 1, when goods are brought in the customs territory of the EU, such goods must in principle be presented to the competent customs office and a customs declaration is lodged in order for such goods to be placed under a customs procedure.

When a declarant (or their representative) lodges a customs declaration, they are responsible for the accuracy of the information in the declaration, the authenticity of any documents attached to it, and compliance with all the obligations relating to the entry of the goods in respect of the procedure in question. Furthermore, the declarant is one of the persons who may be made liable for the customs debt (Article 77(3) UCC; Lions, 2008, p. 331).

A customs declaration that complies with the requirements set forth in the law is in principle accepted by the customs authorities immediately, provided that the goods to which it refers have been presented to Customs (Article 172(1) UCC). The date of acceptance of the customs declaration by the customs authorities shall in principle be the date used for the application of the provisions governing the customs procedure declared (Article 172(2) UCC).

As soon as the particulars contained in the customs declaration have been verified or accepted without verification, the goods may be released by the customs authorities, provided that no prohibitions or restrictions apply (Article 194 UCC). In the event the placing the goods under a customs procedure gives rise to a customs debt, the release of goods shall be conditional upon the payment of the amount of duty corresponding to the customs debt, or the provision of a guarantee to cover that debt (Article 195(1) UCC). This is the case with the release of goods for free circulation, which in principle gives rise to the obligation for payment of customs duty (Article 201 UCC). Furthermore, the release of goods for free circulation in the EU gives rise to an obligation for payment of VAT (Article 70 VAT Directive).

3. Amendment of the customs declaration

3.1 Amendment of the customs declaration under the rules of CCC

Before the UCC entered into force on 1 May 2016, the rules relating to the amendment of customs declarations after such declarations had been accepted by Customs were provided by Articles 65 and 78 of the Community Customs Code (CCC). That is, the CCC distinguished between cases where amendment of the customs declaration was requested before or after the release of the goods.

On the basis of Article 65 CCC, the declarant was entitled to request the amendment of the customs declaration after it had been accepted, but before the release of the goods, to the extent the amendment did not render the declaration applicable to goods other than those that were originally covered. In order to prevent the risk of fraud, Article 65 CCC did not allow such amendment in situations where the customs authorities had informed the declarant that they intended to examine the goods, or if they had established that the particulars in question were incorrect. Furthermore, declarants could no longer request rectification once the goods were released (see Article 65(c) CCC and Advocate General Poiares Maduro's Opinion in *Overland Footwear* case, para 4).

By way of exception, Article 78 CCC, under the heading ‘Post-clearance examination of declarations’, provided that the customs authorities may, on their own initiative or at the request of the declarant, amend the customs declaration after the release of the goods. Furthermore, on the basis of Article 78(3) CCC, in cases where the revision of the declaration or post-clearance examination indicated that the provisions governing the customs procedure concerned had been applied on the basis of incorrect or incomplete information, the customs authorities could take the measures necessary to regularise the situation, taking account of the new information available to them.

The above article imposed more restrictions on the amendment of customs declarations following release of the goods than Article 65 CCC. This is because, once the goods have been released, the opportunities to ensure that the declarations lodged match the actual transactions are lessened, as the goods are no longer at the office they were cleared. This is why, although the customs authorities were obliged to correct declarations pursuant to Article 65 CCC, they had broad discretion in applying Article 78 (see Advocate General Poiares Maduro’s Opinion, *Overland Footwear* case, para 35).

3.1.1 Case law of CJEU on the interpretation of article 78 CCC

The possibility to amend a customs declaration after the goods have been released has been examined by the Court of Justice of the European Union (CJEU) in several cases. In *Overland Footwear* (C-468/03), the court dealt with the following issues: (i) whether the customs authorities, when presented with an application for revision of a customs declaration after the release of imported goods are required to carry out such revision, and (ii) whether the customs authorities, if they find the declared customs value mistakenly includes a buying commission, are required to regularise the situation by reimbursing the import duties applied to that commission.

In this respect, CJEU ruled that where the declarant applies for a revision, his application must be examined by the customs authorities, at least in relation to the question of whether or not there is a cause to carry out such revision. For example, they may refuse to carry out a revision where the facts to be verified require physical verification and, following the release of the goods, the goods can no longer be presented to them. If on the other hand, the verifications to be carried out do not require physical examination, a revision is possible in principle (see paras 46–49 of the judgment). This is the case, for example, where the application for revision envisages only the examination of accounting or contractual documents.

It follows from the above that the first assessment to be made by the customs authorities is whether the revision of the customs declaration should be carried out. Such assessment is made on the basis of the factual circumstances of each case, taking into account whether or not such revision requires the physical presence of the goods (which may no longer be possible).

At the conclusion of their assessment, the customs authorities must either reject the declarant’s application by reasoned decision, or carry out the requested revision. If the application is accepted, they re-examine the declaration and assess whether the declarant’s claims are well founded in the light of the facts notified (paras 50–51). In this respect it is noted that in certain cases the exercise of this power by the customs authorities should be by way of correction of the customs declaration (see para 55, Judgment of the Court (First Chamber) of 12 July 2012 in joint cases of *Südzucker AG* (C-608/10), *WEGO Landwirtschaftliche Schlachtstellen GmbH* (C-10/11) and *Fleischkontor Moxsel GmbH* (C-23/11)).

If the revision indicates that the customs procedure in question has been applied on the basis of incorrect or incomplete information, the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them (para 52).

In this respect it is noted that, in the aforementioned case, CJEU ruled that article 78 CCC does not make a distinction between errors or omissions that are capable of correction and those that are not. The words ‘incorrect or incomplete information’ must be interpreted as covering both technical errors or

omissions and errors of interpretation of the applicable law (para 63). Thus, if the revision of the customs declaration by the customs authorities leads to the conclusion that the provisions governing the customs procedure concerned have been applied based on incorrect or incomplete information, then they must take the necessary measures to regularise the situation.

In this context, where it becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can only be the reimbursement of the overpaid amount (para 53).

In joint cases *Terex* (C-430/08) and *FG Wilson and Caterpillar* (C-431/08), the court considered whether article 78 CCC permits the revision of customs declarations in order to correct the customs procedure code used and, if so, whether the customs authorities are required to amend the declarations and to regularise the situation.

In the cases at hand, certain goods that had been imported under the inward processing procedure and re-exported following their processing in the EU, were declared as exported community goods rather than re-exported goods for which duties were suspended.

In the aforementioned joint cases, CJEU ruled that Article 78 CCC permits the amendment of the export declaration of the goods in order to correct the customs code given to them by the declarant. In this respect, the customs authorities are obliged first to determine whether (i) the rules governing the customs procedure concerned have been based on incorrect or incomplete information, and (ii) the objectives of the inward processing scheme have not been threatened (in particular that the goods subject to such customs procedure have actually been re-exported). Second, where appropriate, the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them.

In joint cases *Südzucker AG* (C-608/10), *WEGO Landwirtschaftliche Schlachtstellen GmbH* (C-10/11) and *Fleischkontor Moksel GmbH* (C-23/11), CJEU addressed the question whether Articles 78(1) and (3) CCC permit the post-clearance revision of a customs declaration in order to change the name of the exporter featuring in the box provided for that purpose. Furthermore, the court examined whether, in such case, the customs authorities are obliged to regularise the situation and grant the requested export refund to that exporter.

The court repeated the line of reasoning followed in the aforementioned joint cases *Terex* and *FG Wilson and Caterpillar*, concluding that the aforementioned revision is possible. Furthermore, the court ruled that if the revision of an export customs declaration indicates that the objectives of the respective customs procedure are not threatened (in particular that the goods covered by such procedure have actually been exported), the customs authorities must take the measures necessary to regularise the situation, taking into account the new information available to them. And this should be possible even if the declarant, by his conduct, has directly affected the ability of customs authorities to carry out controls.

3.2 Amendment of the customs declaration under the UCC rules

As a preliminary remark it should be noted that the amendment of a customs declaration after it has been accepted by Customs is still possible under the rules of UCC. This latter code distinguishes between the situation where the relevant amendment takes place before or after the release of the goods, as was the case under the previous legal framework.

On the basis of paragraphs 1 and 2 of article 173 UCC, if the declarant requests an amendment to the customs declaration after a declaration has been accepted by Customs and the request concerns the goods originally covered by the declaration, the relevant request must be accepted, unless the customs authorities have informed the declarant that they intend to examine the goods, established that the customs declaration is incorrect, or released the goods.

The wording of the above provisions is similar to the wording of Article 65 CCC.

By way of exception from the above rule, Article 173 (3) UCC provides that the customs declaration may be amended, upon application by the declarant, after release of the goods, in order for the declarant to comply with their obligations relating to the placing of goods under the customs procedure concerned.

The wording of the above provision is not identical to that of Article 78 CCC. However, both provisions allow the amendment of customs declarations after the release of goods and mention that such amendment must be relevant to the application of the provisions relating to the placing of goods under the customs procedure concerned.

In this respect it is noted that, according to the *Guidance Document of Customs Code Committee on Customs Formalities on entry and import into the European Union* (European Commission, 2016, p. 38), as a general principle, the declarant may request an amendment of the customs declaration under the UCC, whenever an invalidation of the customs declaration is not required. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights. In this respect, it should be noted that the aforementioned guidance is not legally binding (European Commission, 2016, p. 2). However, such guidance could be used as a tool for the interpretation of the applicable provisions of UCC.

Where a customs declaration may be invalidated after the release of goods (and therefore the customs declaration is not to be amended), the following should be noted: on the basis of Article 148 of the Delegated Act (DA), such invalidation is possible in certain cases that are enumerated in the law and requires the fulfillment of certain conditions, as the case may be.

Cases where the invalidation of the customs declaration is possible include cases where:

- it is established that goods have been declared in error for a customs procedure under which a customs debt is incurred instead of being declared for another customs procedure
- it is established that the goods have been declared in error instead of other goods, for a customs procedure for which a customs debt on import is incurred
- goods that have been sold under a distance contract, as defined in Article 2(7) of Directive 2011/83/EU
- goods have been released for free circulation and are returned
- goods have been released for export, re-export or outward processing and have not left the customs territory of the EU (Directive 2011/83/EU amended Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council)
- goods have been declared in error for a customs procedure applicable to non-union goods, and their customs status as union goods has been proved afterwards by means of a T2L, T2LF or a customs goods manifest
- goods have been erroneously declared in more than one customs declaration.

It follows from the above, the amendment of a customs declaration after the release of the goods on the basis of the provisions of Article 173(3) UCC should be permitted in situations where the relevant customs procedure has been applied on the basis of incorrect or incomplete information, as it was the case with Article 78 CCC. Namely, the amendment of the customs declaration after the release of the goods on the basis of Article 173(3) UCC should be possible in principle where an invalidation of the customs declaration is not required. In this respect, the case law mentioned in Section 3.1.1. could be invoked and applied by analogy in situations where the amendment of the customs declaration is possible under the current rules of UCC.

Indicatively, the amendment of a customs declaration on the basis of article 173(3) UCC may take place in the following cases (European Commission, 2016):

1. Binding tariff information is invalidated or changed and goods are to be classified as a result under a tariff subheading granting a lower tariff rate.
2. Pursuant to the change in binding tariff information the origin of goods is established to be in a country whose originating goods are subject to a more beneficial customs duty regime.
3. A certificate of origin has been annulled and the goods initially declared have to be reclassified and the duties paid adjusted.

Another situation where the amendment of the customs declaration after the release of the goods should be possible is where the name of the importer or the exporter has been incorrectly declared, to the extent there is sufficient evidence in relation to the correct identity of the declarant and the objectives of the respective customs procedure are not threatened.

3.2.1 Time limit for the amendment of customs declarations after the release of the goods

On the basis of Article 173(3) UCC, the amendment of a customs declaration after the release of goods is subject to time restrictions. More specifically, the relevant application of the declarant may be filed within three years from the date of acceptance of the customs declaration (i.e. the date used for the application of the provisions governing the customs procedure declared and for all other import or export formalities), which is the date used for the application of the provisions governing the customs procedure declared (Article 172(2) UCC).

Before the UCC entered in force, the three-year time limit was not directly provided by Article 78 CCC. However, article 236(2) CCC provided that the repayment of import or export duties could only be requested within three years from the date on which the amount of those duties was communicated to the debtor. In this respect, before the UCC there was also a time limit for the declarant to apply for the amendment of the customs declaration. Otherwise, the repayment of customs duties as a result of the requested amendment in such declaration would not be possible.

3.2.2 Procedure for the post clearance amendment of the customs declaration

On the basis of Article 158 UCC, the placement of goods under a customs procedure, other than free zones, requires the filing of a customs declaration. Such declaration must be filed using electronic data processing means (Article 6(1) UCC).

However, EU customs law does not provide for a specific procedure that could be followed by the declarants to amend a customs declaration, when this is possible according to the law, leaving this at the discretion of the member states. Depending on the applicable national rules of the member state concerned, it could be possible for a declarant to amend a customs declaration themselves by accessing the relevant electronic platform/system that is used for the filing of customs declarations and amend it, where the relevant conditions are fulfilled. In member states where the above option is not available, it could be possible for the declarant to file an application for such amendment in writing and, following the approval of such application, the customs authorities could proceed with the respective amendment in their relevant systems by themselves.

In case none of the above options is available and the declarant would be entitled to a repayment of customs duties (and possibly also import VAT) due to a mistake that should give rise to the amendment of the customs declaration, the declarant could explore the possibility of proceeding directly with the submission of an application for the refund of the overpaid amount of customs duties (see Section 4, below). However, this option should not be exercised without consulting the competent authorities and trying to exhaust all possible means for the amendment of the customs declaration according to the applicable rules and administrative guidelines of the national authorities. This is because, in certain

cases, the amendment of the customs declaration may be a prerequisite for the refund of the requested amount of customs duties and taxes. It should be noted that, in joint cases *Südzucker AG (C-608/10)*, *WEGO Landwirtschaftliche Schlachtstellen GmbH (C-10/11)* and *Fleischkontor Moksel GmbH (C-23/11)*, the court dealt with the question of whether the customs authorities could grant an export refund to a holder of an export licence whose details were not entered in box 2 of the customs declaration. The court ruled that the granting of an export refund was not possible without the prior amendment of the customs declaration (para 56).

4. Repayment of customs duties and VAT following the amendment of the customs declaration

This section focuses on the repayment of customs duties and VAT that have been overcharged following the amendment of a customs declaration that has been requested by the declarant. Other cases where the repayment of duties and taxes is possible are not further examined.

4.1 Repayment of customs duties

As explained in Section 3 above, the customs declaration can be amended under the provisions of UCC, even if the goods that were the object of such customs declaration have been released. Considering that the post-clearance amendment of customs declarations was also provided by 78 CCC, it could be supported that the case law of CJEU in relation to the interpretation of this article should still apply by analogy (see Section 3.1.1 above for further analysis).

In such situations, to the extent the amount of customs duties paid by the declarant exceeds the amount legally owed at the time of their payment, the declarant should be entitled to request the repayment of the amount of customs duties that has been paid in excess. This is also evident from the guidance document of the Customs Code Committee on customs formalities on entry and import into the EU, which states:

The amendment of the customs declaration could lead to a repayment or remission of customs duties. In these cases, the conditions applicable for repayment and remission of customs duties should be examined on the basis of the amended customs declaration. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights. (European Commission, 2016, p. 38)

To the extent that the conditions for the amendment of the customs declaration are fulfilled, it could be supported that the case law of CJEU in relation to the interpretation of Article 78 CCC, prior to the entry in force of the UCC, should be applied by analogy with respect to the right of the declarant to request the repayment of customs duties that have been paid in excess.

More specifically, in *Overland Footwear (C-468/03)*, CJEU ruled that

Where it finally becomes apparent that the import duties paid by the declarant exceed those that were legally owed at the time of their payment, the measure necessary to regularise the situation can consist only in the reimbursement of the overpaid amount. (para 53)

The same conclusion was reached by CJEU in joint cases *Terex (C-430/08)* and *FG Wilson and Caterpillar (C-431/08)*, where the court examined the possibility of post-clearance amendment of customs declarations in order to correct the customs procedure code used.

Furthermore, in joint cases *Südzucker AG (C-608/10)*, *WEGO Landwirtschaftliche Schlachtstellen GmbH (C-10/11)* and *Fleischkontor Moksel GmbH (C-23/11)*, the CJEU concluded that the post-clearance amendment of a customs declaration with respect to the correction of the name of the exporter has a binding effect for the customs authorities that are responsible for paying the export refund. More specifically, the court ruled that,

In the light of all the foregoing considerations, the answer to the third question in case C-23/11 is that Article 5(7) of Regulation No 800/1999 and the custom legislation of the European Union must be interpreted as meaning that the customs office responsible for paying the export refund is not entitled, in a case such as the present one, and if it is not bound under national law by the revision made by the customs office of export, to take at face value the reference in box 2 of the export declaration and to refuse an application for an export refund on the ground that the party making that application is not the exporter of the goods covered by that application. By contrast, if the competent customs office grants the application for amendment and validly rectifies the exporter's name, the customs office responsible for paying the export refund is bound by that decision. (para 76)

4.2 Formalities and conditions for repayment of customs duties

4.2.1 Conditions and restrictions for repayment

In the light of the analysis made in the above sections, it can be validly supported that the repayment of overcharged amounts of customs duties after a post-clearance amendment of the customs declaration is possible under the rules of the UCC (Articles 116(1) and 117). However, the relevant repayment is subject to the following restrictions and conditions:

- (i) the situation which led to the notification of the customs debt must not have resulted from the deception of the declarant (Article 116(5));
- (ii) the goods must be presented to the customs authorities. In cases where the goods cannot be presented, repayment is possible only where there is evidence showing that the goods in question are the goods in respect of which the repayment has been requested (Article 173 IA);
- (iii) the goods for which the repayment is requested should normally not be transferred to a location other than that specified in the relevant application, unless the applicant notifies the competent customs authorities in advance (Article 174 IA); and
- (iv) where the repayment of import or export duties is subject to the prior completion of certain customs formalities, such formalities should be completed within the time limit set to this end by the competent customs authority (Articles 176 and 177 IA).

4.2.1.1 Procedural formalities of the relevant application

From a procedural perspective, the application for repayment of customs duties must be filed by the person who has paid or was liable to pay the amount of import or export duty that is being requested, or by a person who has succeeded them in their rights and obligations (Article 172 IA).

Furthermore, it may be required for the applicant to be registered with the customs authorities responsible for the place where they are established, or in case the applicant is not established within the EU, with the customs authorities responsible for the place where they lodged the relevant application (Article 11(1) (a) DA and Article 9 UCC). In this respect it is noted that, where required under the procedure which the application concerns, the applicant must be established in the EU customs territory (Article 11(1)(b) DA).

The relevant application must be submitted to the competent customs authority of the member state where the customs debt was notified. The application may be filed either electronically or by other means, depending on the national procedures of the member state concerned (Article 92 DA).

Finally, the application for repayment must not concern a decision with the same purpose that was addressed to the same applicant which, during the one-year period preceding the application, was annulled or revoked on the grounds that the applicant failed to fulfill an obligation imposed under that decision (Article 11(1)(d) DA).

In certain cases that are specifically enumerated in the law, the one-year period shall be three years. Indicatively, this is the case where the following conditions are fulfilled:

- (i) the previous decision was taken on the basis of incorrect or incomplete information;
- (ii) the holder of the decision knew or should have known that the information was incorrect or incomplete; and
- (iii) if the information had been correct and complete, the decision would have been different (Article 11(2) DA and article 27(1) UCC).

4.2.1.2 Limitation of repayment of overcharged amounts of customs duties

As noted in Section 3.2.1 above, the application for amendment of a customs declaration after the release of the goods may be filed within three years from the date of acceptance. Note that, on the basis of article 172(2) UCC, the date of acceptance of the customs declaration is the date used for the application of the provisions governing the customs procedure declared and for all other import or export formalities. To the extent the customs declaration is amended and an amount of customs duties has been overcharged, the declarant may, under conditions, apply for repayment of the excess amount. Such application, however, must be filed within three years from the notification of the customs debt (Article 121 UCC).

In this respect it is noted that, in principle, the notification of the customs debt takes place at the time of release of the goods by the customs authorities. This is the case where the amount of import or export duty payable is equal to the amount entered in the customs declaration (Article 102(2) UCC). When this is not the case, the customs debt is notified by the competent customs authorities when they are in a position to determine the amount of import or export duty payable and take a decision thereon. It should also be noted that the time of notification of the customs debt may be deferred in certain cases, where such notification would prejudice a criminal investigation. Finally, provided that the payment has been guaranteed, the customs debt corresponding to the total amount of import or export duty relating to all the goods released to one and the same person during a period fixed by the customs authorities (not exceeding 31 days) may be notified at the end of that period (Articles 102(3) and (4) UCC).

However, the three-year limitation period for the submission of an application for the repayment of overcharged customs duties may be extended. This is the case where the applicant provides evidence that they were prevented from submitting an application due to unforeseeable circumstances or force majeure (Article 121(1) UCC). The concepts of 'unforeseeable circumstances' and 'force majeure' are not further defined in the UCC, thus it is a matter that needs to be evaluated on the basis of the particular circumstances of each case. Furthermore, the national provisions and case law of the member state where the application is filed should also be taken into consideration.

In this respect it is noted that, on the basis of the case of CJEU judgment in *Acciaierie e Ferriere Busseni SpA (C-284/82)*, the concept of 'force majeure' covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable if all due care is taken (see para 11 of the judgment).

Furthermore, in cases *Kingdom of Belgium v Commission (C-242/07P)* and *Bayer v Commission (C-195/91P)*, CJEU made clear that the concepts of force majeure and unforeseeable circumstances contain an objective element relating to abnormal circumstances unconnected with the trader in question, and a subjective element involving the obligation, on their part, to guard against the consequences of

the abnormal event by taking appropriate steps without making unreasonable sacrifices. Specifically, the trader must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time limits.

Indicatively, an example of exceptional or unforeseeable circumstances that was accepted by HM Revenue & Customs in the UK is the destruction of the applicant's records by a flood (for guidance on refunds and waivers in the UK see HM Revenue & Customs, 2016).

4.3 Repayment of import VAT

In the event that a customs declaration for the release of goods for free circulation has been amended and, as a result of such amendment it becomes evident that excessive customs duties have been paid, it will often be the case that VAT has also been overcharged.

In this respect, it should be noted that the imposition of VAT upon importation of goods falls within the scope of the VAT Directive (Article 2(1)(d)), which also provides that taxable persons (i.e. persons whose activities are subject to VAT) are entitled to deduct import VAT from the VAT they are liable to pay (Article 168(e)). However, the VAT Directive does not provide any detailed rules in relation to the procedure to be followed for the repayment of overcharged amounts of import VAT.

In cases where the repayment of an overcharged amount of import VAT is requested as a result of a change in the customs value of the goods, it could be supported that the respective rules of EU customs legislation should apply. This is because, on the basis of Article 85 of the VAT Directive, the taxable value in case of importation of goods shall be the customs value, as determined according to customs legislation.

On the other hand, where the repayment of import VAT is requested for other reasons, the determination of the procedure for such repayment should be subject to the national rules of the competent member state. This is because the VAT Directive does not contain more specific rules in this connection. This could be the case, for instance, where the customs declaration is amended due to a change in binding tariff information concerning the respective goods and a lower tariff rate is applicable.

Indicatively, in Slovenia the procedure for repayment of import VAT is the same as the procedure followed for the repayment of import duties (Ministry of Finance, Republic of Slovenia, 2015). On the other hand, in the UK import VAT that has been overpaid as a result of amendment of the customs declaration after the goods have been released can be reclaimed as input tax. More specifically, the relevant claim for the excess amount of tax must be made on the VAT return of the accounting period of reference (Sections 4.2 and 2.3, VAT Notice 702). Finally, according to the relevant guidelines provided by the Customs Procedure Branch of the Corporate Affairs & Customs Division of Ireland (Section 2.5), the following procedure applies to the repayment of import VAT: the request for amendment of a customs declaration is processed automatically through a special electronic account of the declarant and is reviewed by the competent authorities. To the extent such authorities accept the requested amendment, any overpaid amounts of customs duties and VAT are credited to the declarant's account.

4.3.1 Limitation of repayment of import VAT

As mentioned in Section 4.2 above, the repayment of VAT that has been overcharged following the amendment of a customs declaration is not directly regulated by the rules of UCC, but one has to refer to the VAT Directive. It is noted that the VAT Directive does not contain any rules in relation to the potential limitation of repayment of import VAT that has been overcharged. Accordingly, to the extent that the UCC rules cannot be applied, such as where the customs declaration is amended with respect to the customs value of the goods, one has to refer to the respective national rules of each EU member state.

Indicatively, in Ireland a claim for a refund must be made within four years from the end of the taxable period to which it relates (Customs Procedure Branch of the Corporate Affairs & Customs Division of Ireland, Section 2.5).

4.4 Payment of interest by the customs authorities concerned

The repayment of the customs debt shall not in principle give rise to the payment of interest by the customs authorities concerned. However, where a decision granting repayment is not implemented within three months of the date on which such decision was taken, interest becomes payable, unless the failure to meet the deadline was outside the control of the customs authorities. In such cases, the interest shall be paid from the date of expiry of the three-month period until the date of repayment (Article 116(6) UCC).

The CJEU examined the issue of calculation of interest on the repayment of customs duties in the Wortman KG Internationale Schuhproduktionen case (C-365/15). The dispute in the main proceedings was relevant to the partial annulment of a regulation imposing anti-dumping duties, as a result of which an application for repayment of anti-dumping duties was filed, along with an application for the payment of interest on the sums repaid, which was calculated from the time of payment of the anti-dumping duties. The court ruled that, where taxes or duties have been levied by a member state pursuant to an EU regulation that has been declared invalid or annulled by the EU judicature, the interested parties who have paid the taxes or duties in question have the right, in principle, to obtain not only the repayment of amounts levied but also interest on those amounts (para 37). The Court went even further, concluding that:

In the light of all the foregoing considerations, the answer to the question referred is that where import duties, including anti-dumping duties, are reimbursed on the ground that they have been levied in breach of EU law, this being a matter for the referring court to determine, there is an obligation on Member States, arising from EU law, to pay to individuals with a right to reimbursement the corresponding interest which runs from the date of payment by those individuals of the duties reimbursed. (para 39)

This judgment of CJEU was issued in the context of the provisions of Article 241 CCC, which is no longer in force. However, Article 116 (6) UCC, which is currently applicable, has a similar wording, although it does not provide for the payment of interest in cases where national provisions so stipulate. Given, however, that the judgment of CJEU did not focus on the national provisions of the member state concerned in order to determine whether interest should be paid, the conclusions of such judgment could still be invoked for the implementation of the currently applicable rules of UCC.

It should be noted that the rate of interest for member states whose currency is the Euro is equal to the interest rate as published in the *Official Journal of the European Union*, C series, which the European Central Bank applied to its main refinancing operations on the first day of the month in which the due date fell, increased by one percentage point.

For member states whose currency is not the Euro, the rate of the interest shall be equal to the rate applied on the first day of the month in question by the National Central Bank for its main refinancing operations, increased by one percentage point. Finally, for a member state for which the National Central Bank rate is not available, the rate of the interest shall be the most equivalent rate applied on the first day of the month in question on the member state's money market, increased by one percentage point (see Articles 116(6) and 112(2) UCC).

4.5 Decision of customs authorities on the repayment of overcharged amounts

Where an application is submitted for the repayment of overcharged amounts of customs duties and, where applicable, VAT, the competent authorities must verify without delay whether the conditions for its acceptance are fulfilled. The relevant verification must be made no later than 30 days from the receipt of the relevant application. If the customs authorities establish that the application contains all the information required to make a decision, they shall communicate its acceptance to the applicant within the 30-day period (Article 22(2) UCC).

If the application is accepted, the competent customs authorities shall notify their decision in relation to the repayment of the requested amounts within 120 days from the date of acceptance of the application. Where the customs authorities are unable to comply with the above time limit for taking a decision, they shall inform the applicant before the expiry of that time limit, stating the reasons and indicating a further period of time that they consider necessary in order to take a decision, which in principle shall not exceed 30 days (Article 22(3) UCC).

Where, after the acceptance of the application, the competent customs authorities consider it necessary to request additional information from the applicant in order to reach a decision, they shall set a time limit, which will not exceed 30 days, for the applicant to provide such information. Thus, the 120-day deadline shall be extended by that period and the applicant shall be informed accordingly (Article 13(1) DA).

The above deadline for the notification of the customs authorities' decision to the applicant shall also be extended by 30 days in cases where the applicant is entitled to a prior hearing (Article 13(2) DA). For more information on the right of the applicant to be heard, please refer to Section 5.1 below.

The 120-day deadline may also be extended where the competent customs authority needs to consult with another customs authority, as well as where there are serious grounds for suspecting an infringement of customs legislation and the customs authorities conduct relevant investigations. In such cases, the applicant must be informed of the extension of the time limit for taking a decision (Articles 13 (3) and (4) DA).

Finally, an extension to the 120-day time limit may also be requested by the applicant, in case they need to carry out adjustments in order to ensure the fulfillment of conditions and criteria relating to the respective application. Those adjustments and the further time required shall be communicated to the competent customs authorities, which will decide on the extension (Article 22(3) UCC).

The decision of the customs authorities shall in principle take effect from the date on which the applicant receives it, or is deemed to have received it, and it shall be valid without limitation of time (Articles 22(4) and (5) UCC).

Decisions shall take effect on a different date to that specified above in the following cases:

- a. where the decision will favourably affect the applicant and the applicant has requested a different date of effect. In such case the decision will take effect from the requested date, provided that it is subsequent to the date on which the applicant receives the decision or is deemed to have received it.
- b. where a previous decision has been issued with a limitation of time and the sole aim of the current decision is to extend its validity. In such case the decision shall take effect from the day after the expiry of the validity of the previous decision.

- c. where the effect of the decision is conditional on the completion of certain formalities by the applicant. In such case that decision shall take effect from the day on which the applicant receives, or is deemed to have received, the notification from the competent customs authority stating that the formalities have been satisfactorily completed (Article 14 DA).

5. Right to be heard and legal remedies in case of rejection of the application for repayment of customs duties and VAT

5.1 Right to be heard

Before the customs authorities reject an application for repayment of overcharged amounts of customs duties and, where applicable, VAT, they shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express their point of view within a period of (in principle) 30 days. This period commences from the date on which they received that communication (or are deemed to have received it) (Articles 22(6) UCC and 8(1) DA). The relevant communication shall consist of the following:

- (i) reference to the documents and information on which the customs authorities intend to base their decision;
- (ii) indication of the period within which the applicant shall express their point of view from the date on which they receive that communication or are deemed to have received it; and
- (iii) reference to the right of the applicant to have access to the documents and information referred to in point (i) above (Article 8 IA).

It should be noted that, in certain cases that are specifically enumerated in the law, the customs authorities may require the person concerned to express their point of view within 24 hours. Indicatively, this is the case where the decision of the customs authorities pertains to the results of control for goods for which no summary declaration or re-export declaration has been lodged (Article 8(2) DA). Following the expiry of the above 30-day or 24-hour period, as the case may be, the applicant shall be notified of the respective decision (Articles 22(6) UCC and 8 DA).

The aforementioned right of the applicant to be heard before a rejecting decision is taken by the competent customs authorities is not granted in specific cases that are enumerated in the law (Article 22(6) UCC). Indicatively, this may happen where the nature or the level of a threat to the security and safety of the EU and its residents, to human, animal or plant health, to the environment or to consumers so requires (Article 22(6) UCC). Furthermore, the right to be heard may not be exercised in cases where this would prejudice investigations initiated for the purposes of combating fraud (Article 22(6)(e) UCC).

Finally, to the extent the applicant exercises their right to be heard, or the respective period that they had at their disposal to this end expires without expressing their views, the customs authorities may issue a decision rejecting their application for repayment of overcharged amounts of duties and, where applicable, VAT. The relevant decision, however, must state the grounds on which it is based. Furthermore, the decision must refer to the right of appeal (Article 22(7) UCC).

5.2 Legal remedies to challenge the rejection of the application for repayment of overcharged customs duties and VAT

5.2.1 Legal remedies to challenge the rejection of an application for repayment of overcharged customs duties

In the event that an application for repayment of overcharged amounts of customs duties is rejected by the competent authorities, the applicant has the right to appeal against the relevant decision. Furthermore, an appeal may be filed in cases where the applicant did not obtain a decision in relation to their application by the competent customs authorities within 120 days from the acceptance of their application (Article 44(1) UCC).

The right of appeal may be exercised in at least two steps:

- (i) initially before the customs authorities or a judicial authority or other body designated for that purpose by the member states
- (ii) subsequently, before a higher independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the member state concerned (Article 44(2) UCC).

The relevant appeal must be addressed to the national court of the member state where the decision that is being challenged was taken or was applied for (Article 44(3) UCC). In this respect it is noted that the competent customs authorities and/or the competent court to which the appeal shall be addressed shall be determined by the national rules of the member state concerned. EU customs law does not provide any further guidance in this respect. However, according to the relevant provisions of the UCC, member states must ensure that the appeals procedure provided by their national legislation enables the prompt confirmation or correction of decisions taken by the customs authorities (Article 44(4) UCC).

5.2.2 Legal remedies to challenge the rejection of an application for repayment of overcharged VAT

As explained in Section 4.2 above, the provisions of UCC in relation to the repayment of overcharged amounts of customs duties (Article 116 UCC) do not always apply to VAT, which is regulated by the VAT Directive. Furthermore, the VAT Directive does not contain provisions in relation to the right of the filing of an appeal in order to challenge the rejection of an application for repayment of overcharged VAT. In this respect, in cases where the procedure for the repayment of import VAT is not the same as the procedure to be followed for customs duties, one has to refer to the national provisions of the member state concerned. To the extent, according to such national provisions, that the collection of import VAT falls within the competence of customs authorities and VAT is collected by such authorities together with customs duties, then the legal remedies that are available in order to challenge the rejection of an application for repayment of overcharged customs duties could also be relevant for VAT purposes.

6. Conclusions

Among the issues examined in this paper is whether it is possible to amend a customs declaration once the goods have been released. Article 173 UCC, which has been applicable since 1 May 2016, makes it clear that this is possible, in order for the declarant to comply with their obligations arising from the customs procedure concerned.

In this respect it is noted that the case law of CJEU, which sheds more light on the above issues, has been established on the basis of the provisions of Article 78 CCC, which is no longer in force. According to such case law, when the revision of a customs declaration is requested by the declarant, the competent authorities must first assess whether such revision is possible. To this end, they must take into account the possibility of reviewing the statements contained in the declaration to be revised. If the revision is possible, the customs authorities must either reject the declarant's application or carry out the revision applied for. In certain cases, it is necessary that the exercise of the customs authorities' power should be by way of correction of the customs declaration.

Although the wording of Articles 78 CCC and 173 UCC is not identical, both articles mention that the amendment of the customs declaration after the release of the goods must be relevant to the application of the provisions relating to the placement of the goods under the customs procedure concerned. According to the guidance document of the Customs Code Committee on customs formalities on entry and import into the European Union (European Commission, 2016), the declarant may request an amendment to the customs declaration under the UCC, whenever an invalidation of the customs declaration is not required. The customs authorities should permit such amendments when a change in the legal situation gives rise to legal rights.

In this respect, it could be argued that the amendment of the customs declaration after the release of the goods should still be possible under the conditions that were applicable under the rules of Article 78 CCC, unless the invalidation of such customs declaration is possible. Accordingly, it could be supported that the case law of CJEU is still relevant under the rules of UCC.

With regard to the procedure to be followed for the post clearance amendment of customs declarations, EU customs law does not provide any specific rules in this connection. Accordingly, the relevant procedure should be determined on the basis of the national provisions of the member state concerned. In the absence of such provisions in domestic law, an alternative that could be examined is to directly apply for the repayment of overcharged amounts of customs duties and/or VAT, as the case may be.

Another issue that is examined in this paper is the repayment of overcharged amounts of customs duties, following the amendment of the customs declaration. It is noted that there is established case law of CJEU indicating that such repayment is possible. This is the case where (i) the customs procedure in question has been applied on the basis of incorrect or incomplete information, and (ii) the objectives of the respective customs procedure have not been threatened. This case law is relevant to the amendment of customs declarations under the rules of Article 78 CCC, which is no longer in force. However, in the light of the above analysis, it can be supported that such case law is still applicable, subject to the conditions and restrictions provided by UCC (see Section 4.1.1.1 above).

The above may not be relevant for the repayment of overcharged amounts of import VAT in all cases, since EU customs law is not always applicable in the field of import VAT as this falls within the scope of the VAT Directive (Article 2(11)(d)), which does not contain any specific provisions in relation to the repayment of VAT that has been overcharged following the post clearance amendment of a customs declaration. Accordingly, unless EU customs law is applicable—such as when the amendment of the customs declaration is requested due to a change in the customs value of the imported goods, where article 85 of the VAT Directive could be invoked—one may have to refer to the national rules of the member state concerned.

This paper also examines the legal rights of the declarant regarding the competent authorities during the examination of their application for repayment of overcharged amounts of customs duties and, where applicable, VAT. Namely, the declarant has a right to be heard before the customs authorities issue a rejecting decision in relation to the declarant's application for repayment of overcharged amounts within a specific time frame (in principle 30 days). Once the applicant has expressed their views and, to the extent the customs authorities are not convinced, they may proceed with the rejection of the application, which may, however, be challenged on appeal.

It is noted that EU customs law provides that a right of appeal may be exercised in at least two steps: initially before a customs authority, a judicial authority or other body designated to this end, and then before a higher independent body. Which authorities are determined to be competent to receive and decide on such appeals are decided by the national rules of the member state concerned. While the above rules of EU customs law are not always relevant to applications for repayment of overcharged VAT, the VAT Directive does not provide any relevant rules and, therefore, in the cases where EU customs law is not applicable, one has to refer to the national rules of the member state concerned.

List of abbreviations

EU: European Union.

UCC: Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

DA: Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 of the European Parliament and of the Council regarding detailed rules concerning certain provisions of the Union Customs Code.

IA: Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No. 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

CCC: Council Regulation (ECC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code.

VAT Directive: Council Directive 2006/112/EC of 28 November 2006 on the common system of Value Added Tax.

Member states: The countries that form the customs territory of the European Union on the basis of Article 4 UCC.

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Legislation and case law

1. Regulation (EU) No. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.
2. Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code.
3. Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.
4. Council Regulation (ECC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code.
5. Council Directive 2006/112/EC of 28 November 2006 on the common system of Value Added Tax.
6. Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).
7. Opinion of Advocate General Poiares Maduro in Overland Footwear case (C-408/03), ECLI:EU:C:2005:638.
8. CJEU Case C-468/03 Overland Footwear, ECLI:EU:C:2005:624.
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10. CJEU joined cases C-608/10, C-10/11 and C-23/11 Südzucker AG, WEGO Landwirtschaftliche Schlachtstellen GmbH and Fleischkontor Moksel GmbH, ECLI:EU:C:2012:444.
11. CJEU Case C-242/07P Kingdom of Belgium v Commission, ECLI:EU:C:2007:672.
12. CJEU Case C-195/91P Bayer v Commission, ECLI:EU:C:1994:412.
13. CJEU Case C-365/15 Wortman KG Internationale Schuhproduktionen ECLI:EU:C:2017:19.

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Section 3

Special Report

2018 Edition of the SAFE Framework of Standards

The following announcement was made by the World Customs Organization (WCO) on 27 February 2018.¹

19th Meeting of the SAFE Working Group finalized the 2018 edition of the SAFE Framework of Standards

The 19th meeting of the SAFE Working Group (SWG), held from 21 to 23 February 2018 at the WCO headquarters in Brussels, brought together over 100 delegates from Customs administrations, partner government agencies, the Private Sector Consultative Group (PSCG), international organizations and academia.

In her opening remarks, Ms. Ana B. Hinojosa, WCO Director Compliance and Facilitation, welcomed the new Customs Co-Chairperson Ms. Suzanne Stauffer (the EU) and all the SWG delegates, appreciating their commitment and hard work towards updating the SAFE Framework of Standards and developing new tools over the last two years. Given the global security concerns and the fresh impetus on trade facilitation, she underlined the importance of the SAFE Framework of Standards and associated tools with regard to enhancing supply chain security and facilitation through enhanced partnerships based on trust, transparency and technology.

The key outcome of this concluding meeting of the 2018 review cycle is the finalization of the 2018 SAFE Framework of Standards. Some of the notable features of the updated SAFE Framework include the requirement of advance electronic data on postal items; addition of text on data quality; provision for certain minimum tangible benefits to AEOs; harmonization of data filing requirements and Single Window concept, as well as strengthening of cooperation with other government agencies entrusted with regulatory authorities over certain goods (e.g. weapons, hazardous materials) and passenger control, and revision of the definition of the term ‘Validation’.

Other highlights of this cycle had been the development of AEO and MRA Packages that included a number of new and updated tools (e.g. comprehensive list of AEO benefits; AEO Validator Guidance; Updated AEO Template, MRA Strategy Guide, MRA Implementation Guidance, MRA Templates, FAQ on MRA, and Advance Cargo Information (ACI) Implementation Guidance) to provide guidance and further support to Members and partners stakeholders in effective and harmonized implementation of AEO programmes and MRAs.

The SWG also developed a Trader Identification Number (TIN) Package including a Recommendation and Guidelines that would further facilitate an efficient implementation of MRAs, greatly benefiting traders and Customs administrations.

Furthermore, the SWG discussed and endorsed the AEO Validator’s Training Modules, the Guidance on the use of data analytics, a FAQ on the linkages between the SAFE AEO programme and the WTO Trade Facilitation Agreement (TFA) Article 7.7, and the updated Integrated Supply Chain Management (ISCM) Guidelines.

Throughout the meeting, a number of interesting and very informative presentations and interventions were made by several delegates on the implementation of AEO, MRA, ACI, and data analytics. Delegates also exchanged views on various projects/pilots concerning the implementation of the ISCM concept, such as smart and secure seal pilot, AOLIX project, and PROFILE project.

Finally, the SWG, through a panel discussion, explored and provided suggestions on how the SAFE Framework of Standards and associated tools could further contribute to enhancing supply chain security and facilitation by providing a fair, stable, predictable, secure and sustainable trade environment, in line with the WCO theme of the year: “A secure business environment for economic development.”

The updated SAFE Framework of Standards and the newly developed and updated tools will be presented to June 2018 Policy Commission and the Council for their potential consideration and adoption, before their publication.

Notes

- 1 <http://www.wcoomd.org/en/media/newsroom/2018/february/19th-meeting-of-the-safe-working-group-finalized-the-2018-edition-of-the-safe-framework-of-standards.aspx>



Section 4

Reference Material

Guidelines for Contributors

The *World Customs Journal* invites authors to submit papers that relate to all aspects of customs activity, for example, law, policy, economics, administration, information and communications technologies. The Journal has a multi-dimensional focus on customs issues and the following broad categories should be used as a guide.

Research and theory

The suggested length for articles about research and theory is approximately 5,000 words per article. Longer items will be accepted, however, publication of items of 10,000 or more words may be spread over more than one issue of the Journal.

Original research and theoretical papers submitted will be reviewed using a ‘double blind’ or ‘masked’ process, that is, the identity of author/s and reviewer/s will not be made known to each other. This process may result in delays in publication, especially where modifications to papers are suggested to the author/s by the reviewer/s. Authors submitting original items that relate to research and theory are asked to include the following details separately from the body of the article:

- title of the paper
- names, positions, organisations, and contact details of each author
- bionotes (no more than 100 words for each author) together with a recent, high resolution, colour photograph for possible publication in the Journal
- an abstract of no more than 100 words for papers up to 5,000 words, or for longer papers, a summary of up to 600 words depending on the length and complexity of the paper.

Please note that previously refereed papers will not be refereed by the *World Customs Journal*.

Practical applications, including case studies, issues and solutions

These items are generally between 2,000 and 5,000 words per article. Authors of these items are asked to include bionotes (no more than 100 words for each author) together with a recent, high resolution, colour photograph for possible publication in the Journal. The Editorial Board will review articles that relate to practical applications.

Reviews of books, publications, systems and practices

The suggested length is between 350 and 800 words per review. The Editorial Board will review these items submitted for publication.

Papers published elsewhere

Authors of papers previously published should provide full citations of the publication/s in which their paper/s appeared. Where appropriate, authors are asked to obtain permission from the previous publishers to re-publish these items in the *World Customs Journal*, which will acknowledge the source/s. Copies of permissions obtained should accompany the article submitted for publication in the *World Customs Journal*.

Authors intending to offer their papers for publication elsewhere—in English and/or another language—are asked to advise the Editor-in-Chief of the names of those publications.

Where necessary and appropriate, and to ensure consistency in style, the editors will make any necessary changes in items submitted and accepted for publication, except where those items have been refereed and published elsewhere. Guidance on the editors’ approach to style and referencing is available on the Journal’s website.

Letters to the Editor

We invite Letters to the Editor that address items previously published in the Journal as well as topics related to all aspects of customs activity. Authors of letters are asked to include their name and address (or a pseudonym) for publication in the Journal. As well, authors are asked to provide full contact details so that, should the need arise, the Editor-in-Chief can contact them.

All items should be submitted in Microsoft Word or RTF, as email attachments, to the Editor-in-Chief: editor@worldcustomsjournal.org

Editorial Board

Professor David Widdowson



Charles Sturt University, Australia *Editor-in-Chief*

Professor David Widdowson is Chief Executive Officer of the Centre for Customs & Excise Studies (CCES), Charles Sturt University. He is President of the International Network of Customs Universities (INCU), a member of the WCO's PICARD Advisory Group, and a founding director of the Trusted Trade Alliance. David holds a PhD in Customs Management, and has more than 35 years' experience in his field of expertise, including 21 years with the Australian Customs Service. His research areas include trade facilitation, regulatory compliance management, risk management and supply chain security.

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