The Establishment and Application of the DNA of Customs Law and Practice

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Abstract

This article is a synthesis of the author's previously published books and theses (see Walsh, 1986; Walsh, 1996; Walsh, 2015, Walsh, 2020). Notwithstanding the findings of the Irish Commission on Taxation in 1985 (see Irish Government, 1985) (to the effect that they found customs law and administration to be "impenetrable" owing to its antiquity), the author takes the contrary view, which is that customs law, generally, has a perceptible pattern that can be traced and explained in a simple and straightforward manner to yield its raison d'être (its DNA). His particular premise is that identifiable and immutable principles of taxation and administration are at the heart of customs procedures and practices; that these principles of taxation and customs control determine the broad framework of customs legislation generally; and this has been the position from time immemorial, right up to the present day. To validate this premise, he has identified and distilled these formulating principles as they evolved over the centuries in Irish (and English) law. Having done so, he further goes on to house them within the framework of Adam Smith's so-called canons of taxation (see Smith, 1776)[1] to make them more meaningful in the overall scheme of taxation. It is worth noting that Smith was once a Commissioner of Customs in Scotland.

At the same time, the author demonstrates that these principles are enshrined in the customs law of the European Union (EU) and have been influential in the formulation of the original, overarching Kyoto Convention on the Simplification and Harmonisation of Customs Procedures, and its successor, the Revised Kyoto Convention. During its *Comparative Studies of Customs Procedures* undertaken in the 1950s and 1960s (see Customs Co-operation Council, n.d.), the then Customs Co-operation Council (CCC – now the World Customs Organization) independently came to the same broad conclusion – albeit without identifying or specifying the underpinning individual principles involved. The studies covered the entire spectrum of customs law and embraced the procedures and practices in force in all the then Council member countries. The studies covered the following customs procedures:

(a) Study No. 1 (1957) – Importation by Sea: Formalities on Arrival of Ships, prior to Unloading

(b) Study No. 2 (1957) – Importation by Sea: Unloading

(c) Study No. 3 (1958) – Importation by inland frontiers: Formalities on arrival up to presentation of goods declaration

(d) Study No. 4 (1959) – Importation by Air: Formalities on arrival of aircraft, up to presentation of goods declaration

(e) Study No. 5 – (Date Unknown) – Clearance of Goods for Home Use

(f) Study No. 6 (1964) – Customs transit of imported goods

(g) Study No. 7 (1965) – Customs warehousing procedure

(h) Study No. 8 (1966) – Temporary Admission

(i) Study No. 9 (1968) – Drawback

(j) Study No. 10 (1966) – The right of appeal in customs matters

(k) Study No. 11 (1968) – Rail traffic.

1. Introduction

Asakura (2003) is the best reference for a detailed understanding of the world history of customs and tariffs.

In an Irish/English context, customs duties are believed to be so-called because they were originally 'customary' duties of a common-law character, extracted by prerogative of the King (of England). One of the earliest references in Ireland to a specific customs duty dates to 1177, and consisted, in essence, of taking one-ninth of a cargo of wine for the King's use. Having been prised from imported cargo, the duty was called 'prisage' or 'prizage' (from medieval Latin, 'prisagium') (see Reamonn, 1981).

In earlier times, the collection of customs duties in both Ireland and England was 'farmed' out (collected) and appropriated by private individuals under royal licence. This concession was normally granted in return for an agreed sum of customs duties to be paid annually to the King, or advanced to him as a loan when he was in financial difficulties. McCoy (1938) defined "Farmers of the Revenue" as "Persons to whom the rights of levying Customs and Excise duties were let or sold for a term of years for a specified sum. The farming of Customs duties ceased in 1671 and Excise duties in 1683. Since then, the duties have been managed and collected by Commissioners."

Two particular points of interest present themselves. Firstly, the 'farmers' were often continentals (Italian). In 1275, the 'farmers' in Ireland were Luke of Lucca and his partners, Merchants of Lucca and Bonasius Bonacui, and his partners, Merchants of Florence (see Great Britain, 1875–86).[2] This, in turn, must have introduced some (unknown) continental customs control regimes into Ireland/England. Secondly, EU Member States are now, in effect, the 'farmers' of customs duties in the EU. They are legally empowered, and obliged, to collect, and return, a fixed percentage of all customs duties and like charges collected on foreign goods entering the EU.

As with the imposition of all customs duties, there were inevitable disputes and court cases. In 1305 there is a recorded case in Cork, Ireland, between Peter de Blayne, Merchant of the Duchy of Aquitaine, and the Mayor and Bailiffs (Customs) of Cork, concerning the taking of prises over and above the new customs (duty) of 2/ – per tun on wine (butlerage). The court found that de Blayne, 'being a merchant stranger', and having paid 2/ – per tun, should "be quit of prises", and that the illegal extraction should be restored to him without delay (Great Britain, 1905).It needs to be recalled that the sensitivities concerning customs duties in England and Ireland were so great that the first English Bill of Rights, *Magna Carta 1215*, prohibited illegal duty impositions:

> 41. All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs.

The provisions of *Magna Carta* were transposed into Ireland by the Great Charter of Ireland 1216. Its most important human rights provisions were subsequently enacted in Ireland on independence from England by the Constitution of the Irish Free State (Saorstat Eireann) Act, 1922. Article 35 of the Act, in line with *Magna Carta*, reserved the right of the imposition, repeal, remission, alteration or regulation of taxes (including customs duties) to the parliament – not to government, as sometimes mistakenly assumed in some countries with tripartite constitutions. The latter assumption can, and has, resulted in countries enacting unconstitutional customs tariffs.

2. Principles of taxation and customs administration

2.1 Introduction

Crombie (1962) posed, and answered, the following administrative question regarding customs duties:

> By what standards shall be judged in administration that which is worth preserving and that which should be changed? That the amount payable, the time and manner shall be known, that there shall be equitable assessment between different taxpayers according to the goods they import; that duties shall be as painlessly extracted as may be; and that thrift in collection is a good thing – these are propositions, commonsense, yet difficult to put into effect, that appear as certainty, equality, convenience and economy when elevated into canons [maxims] of taxation by Adam Smith or his supporters.

2.2 Adam Smith's principles were part of the DNA of customs law from ancient times

The author's overriding premise is that Smith did not invent the principles (maxims) of taxation that underpin customs law and control systems. Smith merely identified and labelled them in 1776 as being common to all taxes, including customs duties. For example, the first substantive Irish Customs Act in 1662 featured Smith's four 'maxims' (canons) in practice – 114 years before Smith formulated them, *inter alia,* in a customs duty context.

Section 1 of the Irish Customs Act 1662 Act provided:

- for a new book of rates (tariff) to make **certain** the uncertainty surrounding the duties lawfully payable
- that duties were to be applied **equally** to every Merchant, natural born subject, Denizens and Aliens, and **equally** to imports and exports
- for "the advancement of trade and the encouragement of merchants" (**trade facilitation**)

- for "the **just** payment of their Customs duties" (no unjust extortions)
- the duties were imposed by parliament (**constitutional requirement**)
- officers were to "faithfully manage (**economy**) their duties and **trusts**" (no discretion regarding the imposition or remission of customs duties).

Section 2 opened with a national **safety and security** measure, "for the better guarding and defending of the seas against all persons intending, or that may intend, the disturbance of the intercourse of the trade of this your Majesties realm.*"*

A sister act, the Customs Act 1662, dealing with import excise duty, consolidated the deferred payment "**convenience**" principle with the creation of duty-suspension/duty-free warehousing facilities.

If only to demonstrate how these historic principles of taxation and customs administration have survived throughout time, it is worth recording that particular provisions of the Irish Customs Act 1662 are still extant – 358 years later.

2.3 Smith's principles of taxation relating to customs duties

2.3.1 Certainty

Tridimas (2007) underlined the particular importance of the principle of legal certainty in a customs law context as follows:

> Legal certainty requires that the effect of Community legislation must be clear and predictable. The aim of the principle is to ensure that situations and legal relationships governed by Community law remain foreseeable. Obligations imposed on the individual must be clear and understandable…. The Court [ECJ] has held, in particular, that rules imposing charges on a taxpayer must be clear and precise so that he may be able to ascertain unequivocally his rights and obligations. The principle has found fruitful ground for its application in customs law. In relation to the Common Customs Tariff, for example, it has been consistently held that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is to be sought in their objective characteristics and properties, as defined in the Common Customs Tariff.

The first formal Tariff in England, Book of Rates 1507, acknowledged the principle of legal certainty by declaring that duties may be charged only on those goods that are "authorised [by parliament] and notoriously known*"* (Crombie, 1962).

As for the need for taxation measures to be 'set in stone', the surviving Palmyrian Tariff dating from 137AD was literally inscribed in stone. It detailed the rates of duties on enumerated import and export goods. According to Matthews (1984), "The council of the city of Palmyra in Syria (then part of the Roman empire) agreed to revise and publish the tariff and regulations according to which dues were levied on goods brought into and exported from the city, and services provided within it. This was done in order to avert in future the disputes that had arisen between the tax collectors and the merchants, tradesmen and others from whom taxes were due, and to make the situation absolutely clear, the council ordered to be inscribed (in stone) and displayed in a public place both the new regulations and the old ones which preceded them."

The historical European context of tariff classification is best evidenced by the following case record:

> In 1364 you had a Court case dealing with yet another facet of the problems associated with the levying of customs duties. There were 'certain base wools that did not pay cocket duties by special charter'. Coarse wool, 'Cogwolle' and 'Refus', came within this exempt category. However, an exportation of such wool was seized in the Staple port of Calais for failure to pay the cocket duties. The French Court found that the 'Cogwolle' of Ireland fell into the exempt category. Consequently, it was 'customable but not cockettable'. As "the master has faithfully paid custom in Dublin (Ireland) for it", it was not liable to the cocket duties. (Great Britain, 1910).

2.3.2 Equality

According to Smith (1776), "taxation (including customs duties) should be equitable, that is, there should be equality of treatment for everyone." To that end, the European Court of Justice (ECJ)/Court of Justice of the European Union (CJEU) has repeatedly held in customs cases that the "principle of equal treatment" (non-discrimination) requires that comparable situations should not be treated differently, unless such a difference in treatment is objectively justified. The CJEU added the further requirement of "the need for the uniform application of EU (customs) law."

2.3.3 Convenience

Smith's maxim of taxation of convenience requires that: "Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it." Being indirect taxes that are borne by the ultimate consumer through the (duty inclusive) purchase price of the imported goods, 'convenience' has particular relevance in the case of customs duties. In recognition of this fact, the payment of customs duties on goods imported into the EU is deferred for an average period of 30 days following their release for free circulation. During this period, the importer has an opportunity to recoup the duties due through the sale of the goods.

This principle of deferred payment for a customs duty was first recognised in Ireland as far back as 1302, when payment of the duty due on imported wine was allowed to be deferred for 40 days (see Great Britain, 1875−86). In time (1660), the grant of the deferred payment of duty facility was extended in England to goods intended for re-exportation to facilitate the entrepôt trade – thereby anticipating warehousing (Crombie, 1962). This 'bonding' arrangement was, in turn (1662), converted, in Ireland, into a formal bonded warehousing regime thus making it "convenient for the storing and laying up of commodities … brought in with intent again for supply of foreign markets, by which much benefit and advantage may arise to His Majesty and people to be afterwards carried out(re-exported) without any payment of any duties (inwards or) outwards" (Excise Import Act 1662).The degree of 'convenience' provided by full warehousing facilities was best summarised by Crombie (1962):

> The warehouse system greatly assists the competitive position of the owner of the goods. By the deferment to the latest possible time of the duty point, duty is charged on what actually goes into home consumption, so allowing for natural losses, their scale depending on the methods employed, in storage and permitted operations. Capital is not locked up on duty payments for goods that are eventually exported, and both interest and insurance payments in respect of duty are reduced by the mark-time. So that a small trader may hold larger stocks. Moreover, traders can make large purchases at favourable prices and then await favourable selling markets: while sales are encouraged by the facility of exposing goods for sale and of drawing trade samples. The importer enjoys two great advantages of postponing payment of duty, and of retaining the option, to the very last moment, between entering the goods for home consumption and dispatching them for a foreign market.

Convenience should be viewed both in terms of Smith's maxim of taxation, and in the wider context of trade facilitation. While suspending the duty date, the introduction of the following customs regimes was also a response to proven trade needs:

- Temporary storage regime: no later than 1500, ships discharging foreign goods in Ireland could not 'break bulk' (land the goods) prior to making entry of the goods to customs. However, importers were unable to make entry on arrival of the ship as the documents required to support the entry (such as invoices, bill of lading and packing lists) accompanied the goods, and were carried in the 'ship's bag.' To circumvent the law, customs created the legal fiction in 1662 that a 'transit shed' (temporary storage building) was a part of the ship's hold – thus allowing the goods to be

discharged directly from the ship into temporary storage pending the preparation and presentation of the entry declaration and supporting documentation to the customs authorities. Some countries went as far as to enact the fiction of the temporary storage area being part of the ship's hold, for example Section 26 of the East African Customs Management Act 2004

- customs warehousing (long-term duty-free storage regime, 1662)
- inland clearance depots – referred to as dry ports in some countries – (designed to move goods away from congested borders, introduced in Ireland in 1967)
- inward processing (duty-free processing and manufacturing regimes,1558)
- free zones (duty-free storage primarily for entrepôt trade, from 12th century)
- removal of goods from the port of importation for clearance at the importers' own premises (1789) – forerunner of the approved consignee and Authorised Economic Operator concept
- transit (warehousing on wheels,1353)
- transhipment (1480)
- transire (allowed the duty-free movement of goods coastwise, 1346).

Each move to defer the duty point was driven by convenience and trade facilitation considerations. Specifically, minor operations on the goods (preservation and preparation of the goods for sale) were allowed in temporary storage and customs warehousing facilities. Further, customs warehousing facilities provided for the remission of duties on *bona fide* losses of goods in warehouse – whether due to approved operations, unavoidable accidental losses, or destructions and natural losses (wastage) due to the inherent nature of the goods (1602).

For their part, 'open' warehouses (not customs locked, and without a permanent customs presence) were created to give a warehouse keeper unrestricted access to his goods in the warehouse during normal working hours.

'Constructive warehousing' was established (no later than 1853) to obviate double handling of warehouse goods that were intended for direct delivery for home consumption. The system allowed goods imported for warehousing to be delivered for home consumption ex-ship, and the transaction to be processed through the warehouse records as if the goods were actually warehoused. In modern terminology the arrangement would be characterised as virtual warehousing, and probably seen as a business innovation.

Equally important from a trade facilitation standpoint, customs warehousing was a procedure (concept) that did not necessarily have to involve a structure of any kind –a warehouse could be delineated by a line drawn on a factory floor or an open space, if the circumstance warranted such an arrangement.

Inward processing relief provided for duty-free manufacturing/processing operations in operators' own premises.

On a larger economic scale, free zones provided for duty-free storage of goods in defined geographic areas – mainly to serve the entrepôt trade. From the late 1950s onwards manufacturing/processing operations became an additional feature of free zone development. This in turn gave rise to a proliferation of new titles around the emerging zones, for example foreign trade zone, export-processing zone, special economic zone, enterprise zone, investment free zone and bonded zone. Although the different zone titles probably reflected differing objectives and activities, the nomenclature frequently reflected the implementing authorities' linguistic preferences rather than any functional differences between different kinds of zones.

2.3.4 Economy

The following abridged version of Smith's fourth maxim of taxation unmistakably refers to customs duties – the only reference to a particular tax in all his maxims:

> IV. Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the state. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the public treasury, in the four following ways.
>
> First, the levying of it may require a great number of officers.
>
> Thirdly, by the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capitals. An injudicious tax offers a great temptation to smuggling. But the penalties of smuggling must rise in proportion to the temptation.

From the earliest times, customs controls were specifically designed to ensure the economical and efficient collection of customs duties. The nuclei of these controls were both simple and straightforward. In the main, they consisted of canalisation, concentration, prior notification and legally binding declarations. An Irish Act of 1611 encapsulated these administrative principles:

> As by reason the King has not provided in any port of Ireland any certain quay, etc., or beam provided for weighing and trying the goods of the merchants resorting thither, nor for landing them as he has in England, so as every man discharges his goods when he likes without order, insomuch as the searcher cannot be present in more places than one, and is thereby sometimes enforced to take the merchant's word for the nature of the goods, which no doubt redounds oftentimes to the King's prejudice; it is fit that in the greatest and best ports there should be a convenient quay, crane, store house, and beam to weigh and try all merchants goods, whether imported or deported; to end no wrong may be done to the King in his custom.

When it came to the practice of 'economy', Ireland's judicious use of the principles of taxation and customs control managed to fuse the competing needs of maximum revenue collection, on the one hand, with the requirement of minimum interference with legitimate trade on the other. On accession to the European Economic Community (EEC) in 1973, Ireland, in common with other Member States, was allowed retain 10 per cent of the customs duties collected on behalf of the EU to cover their administrative costs. Their known actual cost per year during the period 1978 to 1983 were 2.593, 2.515, 2.198, 2.358, 2.463, and 2.612 per cent, respectively (Irish Government, 1984). The amount each Member State was allowed retain as the cost of collection was raised to 25 per cent in 2000, reduced to 20 per cent in 2001, and will revert to 25 per cent from 2021. It is worth noting that Smith recorded the annual cost of collecting the customs duties in England for 1755 to be 10 per cent of net revenue (exclusive of drawbacks).

3. Goal of the customs administration

Broadly speaking, the overarching goal of a traditional customs administration is to achieve the following, competing objectives:

i. the collection of duties and like charges through effective and economic administration of the law

ii. minimum interference with legal trade

iii. equal treatment of traders and other persons affected by the controls.

It is worth noting that customs controls have always applied equally to prohibited and restricted goods, and terrorism. Customs were traditionally regarded as gatekeepers or defenders of the realm – hence the portcullis ('portcolys defensable') emblem in the crests of some national customs services symbolising their role and responsibility for the gates through which international trade must pass. As early as 1215 there are recorded payments of 'customs' duties for "the protection of the ship of Gerrard Mercer of Waterford (Ireland), his wife Eve, and all of their goods and chattels on board, and with the liberty of free traffic throughout the King's domain" (Great Britain, 1875−86) (goods in free circulation).

In 1299 there was a prohibition on the exportation of the "King's money or any other pure silver" and on the importation of "false money." The penalty for importing false money was "forfeiture of life and goods" (Customs Act 1299).[3]

It is also worth recording that the historical fiscal limits of ports (laid down in 1559) were associated with the defence of the realm, and threats from acts of piracy. The limits were set at three miles, which is said to have originated with the cannon-shot rule, "The rule by which a state has territorial sovereignty of that coastal sea within three miles of land. Its name derives from the fact that in the 17th century this limit roughly corresponded to the outer range of coastal artillery weapons, and therefore reflected the principle *terrae dominum finitur, ubi finitur armorium* (the dominion of the land ends where the range of weapons ends)" (Oxford University Press, 2021).

4. Principles and objectives of customs control

4.1 Principles of customs control

As stated previously, the then Customs Co-operation Council (CCC), in its *Comparative Studies of Customs Procedures* (CCC, n.d.) undertaken in the 1950s and 1960s, concluded that the principles of customs control were broadly consistent with the principles underpinning the Revised Kyoto Convention –without identifying or specifying the underpinning principles involved. The CCC study reports were based on responses to questionnaires completed by the 27 customs administrations of the founding members (including Ireland) on 11 specific aspects of customs practices and procedures. In the study report dealing with *Importation by Sea: Formalities on Arrival of Ships prior to Unloading*, the CCC concluded, *inter alia*, that the various practices and procedures in force throughout the then member countries were based on the same "basic underpinning principles of Customs control over ships and cargo":

> National legislation concerning importation by sea is generally very old, and overlaid with custom. Woven as it is into the pattern of maritime commerce, it reflects conditions – local, geographical and even historical – which may vary from country to country, and, at times, from port to port; procedures devised to meet conditions in the Baltic would not be suitable for use in the Aegean; and those applied to short sea journeys in the English Channel or the Mediterranean would be inappropriate in deep – sea Atlantic trade. Whilst uniformity, except on the broadest general lines, cannot therefore be looked for, this study nevertheless shows not only that the Customs and the countries concerned are generally in agreement on the basic principles of control of ships and cargo arriving from abroad, but, in many respects, their procedures, if different in detail, are comparable in purpose and method. (CCC, 1957)

4.2 Objectives of customs control

Customs control objectives are achieved using several basic principles of administration. For illustrative purposes, some of the more important ones are set out hereunder in the context of the importation of goods by ship.

4.2.1 Onus

There is an onus on the carrier to bring the goods without delay, by a specified route, to an approved customs area, and to report/declare the cargo within the prescribed hours at a designated customs office. The importer/declarant must make the requisite, legally binding declaration and, where appropriate, assess and declare the duties or levies properly payable; present the goods to customs, and, when called on, render all required assistance, including the provision of any special examination facilities. Failure to comply with any of the foregoing requirements can lead to penalties, and/or forfeiture of the goods.

There is also an onus on the carrier/importer/declarant to notify customs of any unavoidable accidents, or losses, to goods prior to their release for free circulation, and to satisfy customs that any goods deficient did not go into home consumption.

By the same token, the onus is invariably on the importer to prove that duty on imported goods has been paid. This requirement dates to 1303.

4.2.2 Concentration and canalisation

To concentrate foreign trade through prescribed channels, and thereby enable customs control to be applied effectively and economically, customs legislation provides that the authorities may appoint certain ports through which all foreign trade must pass (1222). They may also define the fiscal boundaries of such ports for customs purposes (1559), and they may further concentrate traffic within the port by appointing specified legal quays at which the goods must be unloaded (1559). They may also appoint sufferance wharves in lieu of legal quays (1695). Once ports, legal quays and sufferance wharves have been appointed, it follows that importation by vessels using routes and places not appointed is automatically illegal.

Further concentration is achieved by placing restrictions on the minimum size of vessels allowed to be used in the transport of import goods. In this way trade in high duty goods is concentrated into the bigger ports where the necessary staff and facilities are available to deal with the consignments (1464).

The principle of canalisation is centuries old. For example, in 1222 the King of England decreed that "no subject can erect a port or place of landing of merchandises, at least unless it be for his own ship or vessels, without the King's licence" (Hale, 1976).

The principle of canalisation is flexible and may also be adopted to meet official requirements in other directions. For example, the principle is very much in evidence at land borders where designated traffic lanes for different categories/types of vehicles are used for orderly traffic flows; at ferry terminals and airports where the use of red/green channels for processing travellers is a standard feature, and the way postal traffic is streamed through designated parcel post facilities.

4.2.3 Declaration

A declaration or 'entry' is a document containing the particulars of goods in a prescribed form which an importer, or his agent (1303), is required to pass through customs before foreign goods are landed or discharged from an importing ship. The document varies in form according to the nature of the goods,

and the purpose for which they have been imported. Nearly every facet of customs administration involves a legally binding declaration in some form or another. This applies to the carrier of the imported goods, the importer himself, his authorised representative, or a traveller arriving from foreign.

Notwithstanding changes in modes of transport and importation, this position is grounded in long-standing historical custom and practice. Carson (1972) neatly captured the facility of customs to cope with new situations in terms of old established principles, stating that on 25 July 1909, "Louis Bleriot, the French Airman made his historic flight across the English Channel and landed in a field near Dover. On the arrival of the monoplane from Calais, the preventive man in charge interviewed M. Bleriot and issued him with a Quarantine Certificate, thereby treating it as a yacht, and the aviator as master and owner. The Collector of Customs for the area reported to the Board of Commissioners that "a time might come when the Department would have to treat the arrival of aircraft seriously, and take steps to ensure that no opportunity be given for revenue interests to suffer through indiscriminative landings of airships in this country".

4.2.4 Differentiation

The selection of imported goods for physical examination is primarily based on risk analysis. A range of risk factors feed into the risk analysis system to better inform the selection process. The nature and extent of the physical examination of goods varies according to the duty risk involved. Accordingly, an examination may be either full or partial, depending on the customs risk rating of the goods. The EU does not prescribe the proportion of consignments to be examined, or the scales of internal examination to be carried out by customs administrations. Ideally such measures need to be prescribed if all the Member States are to operate as a uniform Customs Union.

4.2.5 Verification

In the past, physical checks were the primary method of customs control. The checks ranged from verification of the trader's self-assessment or declaration (whether written or otherwise) to counting or weighing the goods. The accuracy of a ship's report could be verified by the simple expedient of 'tallying' the goods on landing (now an outdated concept). Likewise, the veracity of the importer's entry declaration could be verified by the physical examination of the goods to ensure conformity with the legally binding entry declaration. The removal of goods from official storage places is challenged to verify that they have been properly cleared by customs and are covered by an official clearance docket (out of charge note).

Today's heightened challenges to customs administrations are, however, much more multifaceted and stem from many sources. Among these are the globalisation of trade, fraud and the threat from terrorism through the international supply chain; the increased volume of trade and just-in time delivery: the sophisticated nature of products and transport services; and the growth of electronic commerce. These new challenges necessarily required a change in the working methods of customs administrations, with the focus shifting from physical examinations to post-importation audits at the importer's own premises. Here again, however, this was not a new departure for customs. As far back as the Tobacco Act of 1789, Adam Smith's proposed new excise warehousing system for home-manufactured tobacco was both adopted and applied to tobacco imports. In effect, this gave customs what they characterised as a 'double hold' on the imported goods. The new hybrid control system applied the customs regime up to the point of importation. Following importation, the excise system of controls and checks were applied at the importer's premises, and on his records– in effect, post-importation checks and audits conducted at the importer's own premises (excise survey).

4.2.6 Rights

For obvious reasons, customs administrations always ensure they have the prescribed right to open, examine, sample and take account of goods. This right applies across the board and is not confined to any one aspect of customs control. Furthermore, most customs administrations have what can be loosely termed as 'police' powers that enable them to conduct post-importation verifications and checks at importers' premises. At the same time, they invariably have powers to obtain search warrants to look for (and seize) uncustomed goods, and/or any documents relating to illegal customs transactions.

As a corollary, the customs authorities invariably have powers to investigate and prosecute customs offences, including the power to detain (term of art for 'arrest') suspected offenders, and to seize all conveyances used to import or convey the uncustomed, prohibited or restricted goods.

4.2.7 Lien on uncustomed and prohibited goods

In Ireland and the UK, the rules relating to seizure, and subsequent forfeiture, of goods due to the non-payment of customs duties can be traced back to the 1200s. In his dissertation on the *'Question Concerning Impositions',* Sir John Davies (1569−1626; Attorney-General for Ireland) made the following distinction between customs duties and 'tolls'; "Lastly, if customs be not paid or agreed for before the merchandises be discharged and brought to land, the merchandises are ipso facto forfeited and may presently be seized to the use of the King, but if toll be not paid, the thing sold is not forfeited, only it may be distrained and detained till the toll be paid" (Davies, 1656).

An Ordinance of April 1645 gave "Power to Customs Commissioners and others to search for prohibited goods.; And seize them.; All such seizures made by Commissioners' servants, etc., to be certified to them.; Fraudulent Composition forbidden.; Customs Commissioners may appoint Messengers.; Security, how to be taken.; Assistance.; Indemnity.; This Ord. to be printed and sent to Ports of Kingdom."

4.2.8 Identification

In defined instances, the customs authorities will find it necessary to apply official marks or seals to goods. This can be necessary for both identification purposes, and to ensure the fiscal security of the goods. This practice is a particular feature of the movement of goods in transit, whether in a national or EU context. It generally follows that it is an offence to remove such official marks or seals. Such action normally indicates interference with the goods, with the result that any deficiency found in the goods is liable to be charged with duty. The thinking is that the goods deficient have found their way into home consumption and are, accordingly, liable to duty, unless the loss or deficiency is otherwise accounted for to the satisfaction of the customs authorities.

In Ireland, the origins of the use of marks or seals as a means of identification for customs control purposes can be traced to 1353. At that time, there was 'intra-community' trade between the staple ports in Ireland, England and continental Europe – Bruges and Calais in particular. Wool for export was weighed, inspected and sealed by the mayor of the staple town, and the outward 'custom' paid. The goods were then sent to the linked port of exportation, were examined on arrival there to ensure that the seals were intact, and reweighed as a precautionary check against illegal abstractions or substitutions. In effect, these measures were a sophisticated transit system that safeguarded against illegal extractions and the substitution or addition of undeclared or prohibited goods (Edward III, 1353).

4.2.9 Economic theory

Historically, customs administrations have operated on the premise that duty is not payable on goods that have not gone into home consumption. Consequently, duty is not payable on any goods short-shipped, or lost in transit. Also, where goods are lost prior to clearance for home use because of unavoidable accident or natural wastage due to their inherent nature, the duty is remitted subject to the importer providing satisfactory evidence to the customs authorities that the goods have not gone into home consumption. An Irish Customs Act of 1662 applied the principle in a very 'trader friendly' manner by providing that the duties would be remitted or repaid in the following circumstances:

i. ten per cent allowance for the "leakidge" of wine in cask

ii. duty on "corrupt and unmerchantable" wine was abated, subject to the discretion of Customs – currently this relief measure is conditional on the destruction of the goods under official supervision

iii. the remission of export duties on the re-exportation of goods not sold within 12 months, and exported "without alteration of the property (in the "unaltered state")

iv. drawback of duties on re-exported goods.

The principle also plays an important role in customs valuation. The value of goods that have been damaged, or have deteriorated prior to customs clearance, may be reduced for duty charge purposes. Likewise, customs may, subject to production of supporting evidence (for example, a credit note from the seller, a statement from an independent expert such as a surveyor or loss assessor, or the reimbursement of the repair cost by the seller in accordance with the terms of the warranty) refund duties on goods found to have had latent defects that were not apparent at the time of importation, and only came to light through the course of normal use after clearance by customs. The amount of duty to be refunded may be either: (a) the full amount paid where the defective goods are irreparable, or (b) part of the amount paid where the defective goods are repaired, and the seller reimburses the importer under warranty for the cost of the warranty work carried out. Further, repayment or remission of duties may be allowed in cases where the imported goods are rejected by the importer on the grounds that they are not in accordance with the terms of contract. Further again, regarding tariff classification, if import goods deteriorate or change their characteristics while under customs control, duty is charged in accordance with the changed tariff heading, for example waste intermediate products and by-products resulting from approved customs operations.

Wolffgang and Harden (2016) have highlighted the cost and confusion surrounding the failure of the EU to legislate for this economic principle (theory) when it came to the construction of the Community Customs Code. What happened in practice was that the EU Commission, in the course of consolidating customs law into the Community Customs Code (1994), appears to have inadvertently omitted to carry forward the following fundamental economic principle into the 'consolidated' legislation, namely, "the reasons for the extinction of a customs debt must be based on the recorded fact that the goods have not been used for the economic purpose which justified the application of import or export duties." The net result was that, contrary to the 'economic theory', the ECJ ruled in a cluster of cases that duty liability turned on the question of whether there was a breach of a regulation that prevented customs exercising a proper (interim) control of the goods, rather than relying on the fact that the goods did not go into home use or consumption (the historical criterion). While the apparent legislative error (omission) was rectified in time, it took 22 years to do so. If nothing else, this experience highlights the advantage of using the fundamental principles of customs taxation and controls as a blueprint when reviewing, revising and drafting customs legislation.

The economic criterion (theory) was also used by the ECJ to determine if drugs were to be regarded as goods for customs tariff purpose. It found that "a customs debt cannot arise upon the importation of drugs which may not be marketed and integrated into the economy of the Community (EU)."

The wider, equitable principle of *force majeure* can be traced back to 1402. The Customs Act 1402 dealing with designated ports– the 'great ports' – decreed that; "Merchandises shall be laden and unladen in the great ports and not in creeks and small arrivals, upon pain of forfeiture of such merchandise to the King, except vessels and merchandise in such creeks by coercion of Tempest."

4.2.10 Minimum interference with legitimate trade

Customs administrations make every reasonable effort to accommodate and adapt their work practices to legitimate trade needs. Accordingly, legal and permitted places and hours of working are set to accommodate normal trade requirements, and working hours may be extended on 'request.' It is worth recording that in 1695, more than three hundred years ago, an English Customs Act 1695 provided that customs officers were to attend "... at times and places not required by law for the reasonable accommodation of trade."

The foregoing provisions are remarkably like those contained in the EU Customs Code Implementing Regulation (European Commission, 1993). According to Article 239 of the regulation:

> The goods shall be examined in the places designated and during the hours appointed for that purpose by the customs authorities. However, the customs authorities may, at the request of the declarant, authorise the examination of goods in places or during hours other than those referred to. (p. 1)

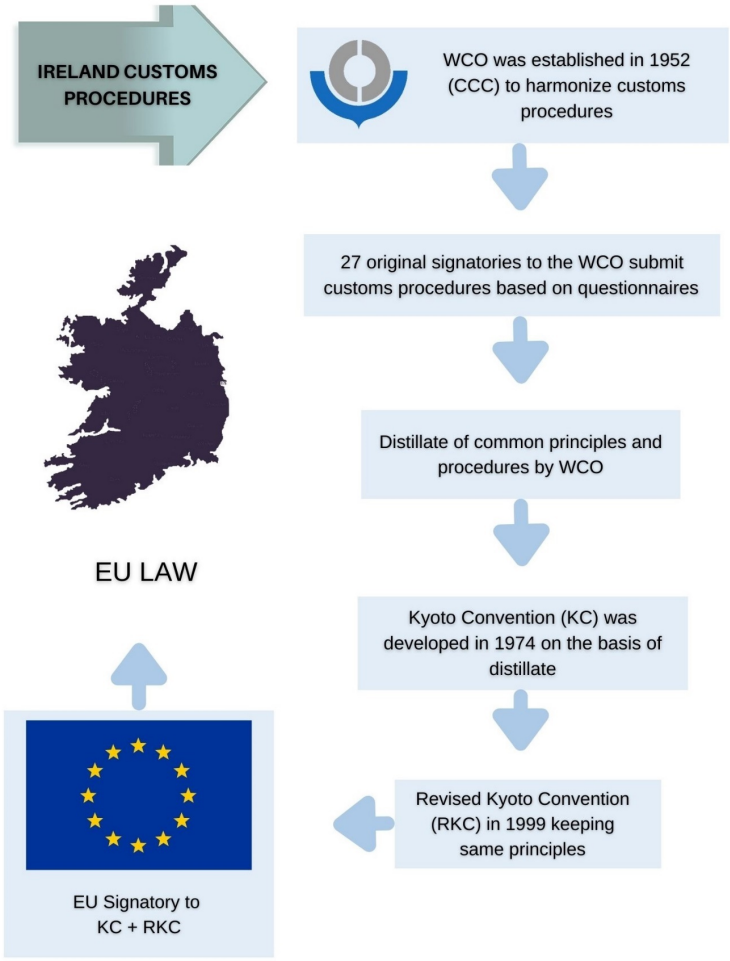
5. Principles underpinning the Kyoto Convention

5.1 Role of the Customs Co-operation Council Member States

The principles underpinning the Kyoto Convention on the Simplification and Harmonisation of Customs Procedures – which were extrapolated from the laws and procedures of the CCC (WCO) founding member countries, including Ireland – help explain the constituent elements of worldwide customs laws and procedures. Further, as far as Ireland and the other CCC (WCO) founding members are concerned, these principles of customs law and practice have merely travelled the full circle. They were conceived, nurtured and developed over the centuries at national level; assembled as best practice in the original and Revised Kyoto Conventions; used to mould, *inter alia*, EU Customs law; and then handed down to Member States, whose laws they originated from, as binding EU law.

The genesis of customs law is set out in Figure 1 below.

Figure 1: The Genesis of Customs law



Source: Walsh, 2020.

5.2 Principles used to formulate a regional customs code

The true test of all principles is to establish if they work in practice. To that end, the foregoing principles of taxation and customs control were used, *inter alia,* in the construction of the Customs Management Regulations (CMRs), 2009, for the Common Market for Eastern and Southern Africa (COMESA). At the same time, COMESA concluded that they should first establish the core mandatory measures required for a common market customs code. Rather than reinvent the wheel, they looked to see how the EU Customs Code was formulated and perfected over the years. Based on Walsh (1986) and seeing the results put into practice and fused into the EU Community Customs Code in 1994, COMESA designed their CMRs in accordance with the following formula:

> The nucleus of the Community Customs Code (CCC) consists of the sections dealing with the duty elements – classification, valuation and preferential tariff treatment. These elements merge at the duty point i.e. the point at which the duty becomes chargeable on the imported or exported goods, and are of paramount importance in the scheme of the Code. The remaining policing provisions in the Code are largely procedural, and are designed to either, channel the goods to the duty point, to police the goods while they are marking time in a duty suspension regime, or to ensure that conditionally exempt goods are put to their declared end use. In the circumstances, the duty points for the determination of classification and valuation have to be set in stone for the various customs procedures involved. Otherwise import goods could be classified and valued differently throughout the EU, and cause deflections in trade. By the same token, duty refunds, remissions and exemptions have to apply equally throughout the EU. The same considerations apply to the determination of the dates governing the imposition and application of changes in tariff measures. In short, every measure with a bearing on the amount of duties payable, and when they are payable, has to be uniformly interpreted and applied without exception throughout the EU. By the same token, the person or persons liable for the customs debt has to be likewise set out in stone, along with the statutory period of liability, thus satisfying the twin principles of legal certainty and legitimate expectations.
>
> One thing the EU has learned over the years is that customs taxation elements necessarily have to be backed by regulations that had general application, are binding in their entirety, and are directly applicable in all Member States. Legal measures short of regulations were either ignored by Member States, or interpreted and applied by them to their own advantage. Of necessity, these considerations led to the codification of EU customs law in binding legal form, leaving Member States with no measure of discretion on taxation issues and with little or no room in which to manoeuvre. (Walsh, 1986)

5.3 National and regional laws base

COMESA further concluded that the prerequisite national and regional duty elements, together with the supporting framework legislation, were all based on separate international agreements that the countries in question were either a party to, or were in the process of adopting. In furtherance of this premise, COMESA constructed their Common Market CMRs 2009 based on this blueprint. They also used the provisions of the then Community Customs Code to make good the gaps in the Revised Kyoto Convention (RKC) concerning the legal certainty of, *inter alia*, duty points and liabilities, while, at the same time, putting legal flesh on the adopted RKC skeleton provisions – thus aligning (*mutatis mutandis*) the substantive sections of the CMRs with the primary provisions of the Community Customs Code. The net result was that both COMESA and the EU shared the same substantive customs code provisions up to May 2016 when the Union Customs Code entered into force in the EU. The correspondence between the two Customs Unions was designed to ensure that imports and exports between the two regions would be subject to the same legal provisions and, in effect, to the same jurisprudence – thus facilitating the free flow of trade and, at the same time, providing legal certainty for all concerned.

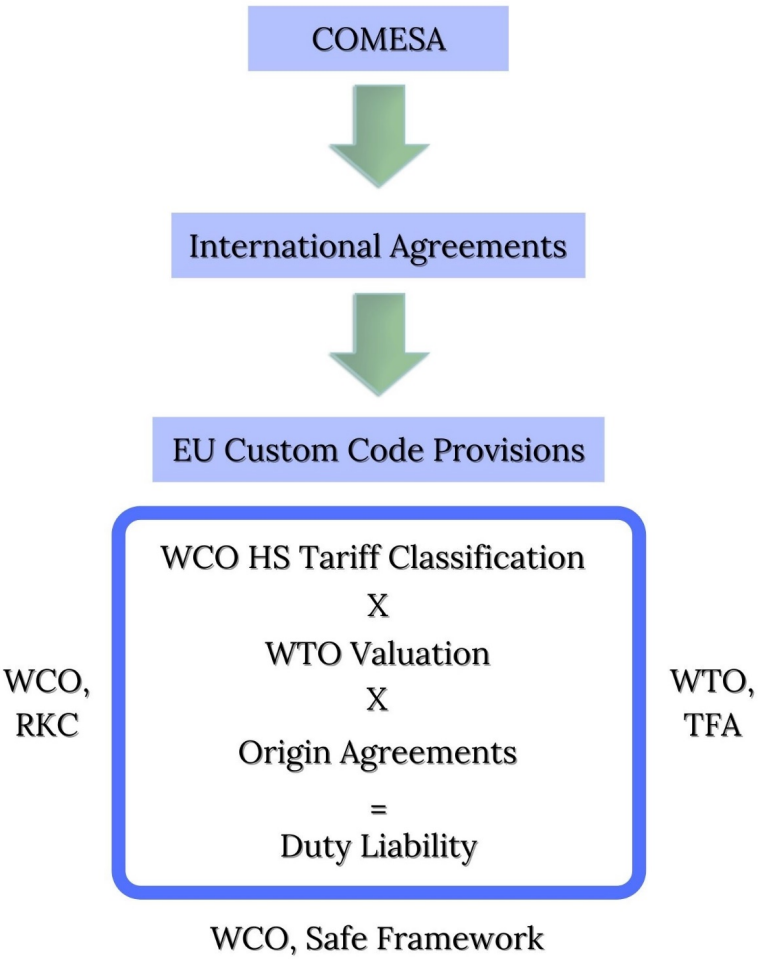
When it came to sensitive sovereign and constitutional considerations, COMESA simply enacted the relevant RKC provisions verbatim on the understanding that they would be treated as ‘directives’, namely, “a directive shall be binding upon each Member State to which it is addressed as to the result to be achieved, but not as to the means of achieving it.” (Treaty Establishing the Common Market for Eastern and Southern Africa, 1993, Art. 10).

The COMESA CMRs also provided the following framework for the use of information technology in promoting efficient administration:

> 55. The competent authorities shall, as far as is practicable, make use of information and communication technology in support of their prevailing customs procedures with a view to attaining: (a) more effective customs controls; (b) more effective customs clearance; (c) uniform application of these regulations; (d) more efficient revenue collection; (e) more effective data analysis; (f) efficient production of external trade statistics; and (g) improved quality of data. (COMESA, 2009)

The construction of the COMESA Common Market CMRs 2009 is illustrated in Figure 2.

Figure 2: The construction of the COMESA Common Market CMRs



Source: Walsh, 2020.

6. Conclusion

When centuries-old customs law and practice are closely analysed, one is faced with the continuing task of devising a system of customs control that satisfies the competing needs of maximum revenue collection and minimum interference with evolving legitimate trade. In the first instance, the previously unidentified key to this dilemma has always been the availability of the necessary supporting documentation to prepare and lodge the requisite entry declaration to effect customs clearance of the goods. Up to the advent of fax machines the supporting documentation necessarily came in the 'ship's bag'. The restriction on the ship not being allowed 'break bulk' prior to entry of the goods resulted in long and costly delays to shipowners. Not later than 1500, it was enacted that, upon pain of forfeiture of the goods, "no maner of person or persons brings any maner of merchandizes or wares …. into this land, break bulk, or bring any wares out of any ship or ships till the same were entered in the customer's book by the merchant owner of the said wares" (Customs Act 1500). As previously recorded, this conundrum was resolved in an imaginative solution that created the legal fiction that a transit shed (temporary storage area) was an extension of the ship's hold. The sole purpose of the transit shed facility was to give the importer sufficient time to prepare his entry to clear the goods; and, if necessary, to inspect them under a Bill of Sight to make a perfect entry.

Undoubtedly the computerisation of the processes around the entry and clearance of goods has been the most significant development in customs work practice in the past 50 years. Computerisation saw the previously separate and time-consuming entry and processing stages of the physical 'lodgement';'acceptance'; 'passing' and 'screening' of the entry declaration rolled into one, omnibus, instantaneous processing procedure. Further, the entry declaration could be prepared and submitted by a declarant from a terminal anywhere in the country or region. Crucially, computerisation enabled the clearance of goods immediately on completion of the various processing stages.

The position now is that the requisite documentation may be sent electronically in order to be to hand before the goods are physically imported. In recognition of this fact, and to ensure that customs clearance keeps pace with international supply chain demands, it is incumbent on customs administrations to legally provide for such innovations. To that end, the use of electronic documents in lieu of paper documents; the acceptance of such documents as 'originals' for evidential purposes, and the recognition of electronic signatures must be enshrined in law. Further, history has taught us that the earlier duty liability and prohibition dates associated with pre-arrival clearance must be separately legislated for to safeguard against 'forestalling' – bringing the entry acceptance date (such as the date determining the rate of duty) forward to evade any pending new imposition of duties or prohibitions and restrictions.

The acceptance of electronic documents in lieu of paper documents facilitates the prior lodgement, processing and checking of entry declarations. Customs authorities are, in turn, then able to carry out risk assessment, and grant the pre-importation clearance of goods before the arrival of the import conveyance in the customs territory. With containerised sea traffic accounting for more than 70 per cent of global trade, the significance of pre-clearance in terms of the potential savings in time and money is clearly evident.

Of course, temporary storage (transit shed) facilities are not required for goods cleared prior to importation as temporary storage is limited, by law, to uncleared goods. This restriction is necessary to ensure that cleared goods are not used as a cover to remove uncustomed goods.

It is worth noting that these realities were recognised in the COMESA CMRs some ten years ago by providing that the sea (or air) journey time could be used to enter and declare the goods to customs, and where the goods were not selected for examination they could be cleared for delivery for home

use prior to physical importation. Aside from making the goods immediately available for delivery ex-ship, the savings in time (days), and proportionate double handling and storage costs associated with temporary storage, could be very substantial.

This contingency did not arise in cases of land or rail border crossings as customs clearance could be delayed– without impacting on the importer – up to the time of arrival of the conveyance at the border.

It is worth noting that Article 182 (3) of the Union Customs Code allows, subject to conditions, for the concept of pre-arrival clearance of goods by Authorised Economic Operators ('trusted traders') for the same reasons that underpinned the predating CMR provisions.

Regarding the potential danger of undeclared goods being added to goods 'pre-cleared' during the voyage, electronic seals and random spot-checks on selected 'pre-cleared' containers should mitigate this concern. Here again, it is simply a question of applying centuries-old solutions to seemingly new problems in providing adequate 'transit' safeguards against illegal abstractions and insertions during the voyage. Like preventive measures were in force no later than 1735 when an Act of Parliament of that year specifically prohibited the interference with goods – to facilitate smuggling – once the ship came within four leagues (12 miles) of the coast. Territorial waters and the limits of fiscal ports extended to 3 miles only.

Like the Roman god Janus who is portrayed with two faces, one looking to the past and the other to the future, customs law and practice has strong roots in the past, but is now moving rapidly to an electronic future with corresponding changes in work practices. Ultimately we should be looking to create a blueprint for a world customs code based on the shared centuries-old tried and tested principles of taxation and controls. If nothing else, people would know the "what "and the "why" of customs law, which is clearly not the position today throughout the world.

Arguably, you must look backward and forward at the same time to facilitate trade on the one hand, and to maintain the revenue stream on the other. Only the principles remain the same.

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Notes

1 Commonly referred to by the abbreviated title "The Wealth of Nations". All references throughout this article to Smith's principles, maxims or canons of taxation can be attributed to this publication.

2 The original documents are held in the library of University College Cork.

3 The act has an interesting history. It is titled "The Statute of Stepney on Bad Money (Statutum de Falsa Moneta (1299)". Although bearing the form of a statute, it was 'enacted' in the private house of the mayor of London. Accordingly, its official designation is that of a proclamation, and is cited as 27 Ed 1. "Importation and Exportation of Coins" is a modern a adaptation of the title.

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Dr Tom Walsh served as an Irish, Zambian and EuroCustoms official for 32 years. He spent a further 14 years as a Senior Customs and Excise adviser with, respectively, PwC (Ireland) and KPMG (Europe). He has undertaken several assignments concerning customs and excise matters on behalf of the EU and the World Bank in over 30 countries in Europe, Africa and Asia. His most notable assignment was the drafting of the Common Market Customs Management Regulations (2009) for the Common Market Countries of Eastern and Southern Africa (COMESA). He is the author of two books on the Community Customs Code. His LLM and PhD theses are on customs law and practice. He lectured in customs law at the Cork Institute of Technology, Ireland, for three years.