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INCU (www.incu.org) is an international not-for-profit association that aims to raise the academic standing of the customs profession through the development and promotion of educational programs, providing academic and applied research, and intellectual input to strategic decision-making.

Contents

Editorial

This year's WCO Technology Conference and Exhibition, which is being held in Maastricht, has the theme 'Driving Customs performance with data and technology in the changing landscape of global trade'. As in previous years, this event will no doubt highlight the opportunities and challenges that new technologies bring to the border management landscape, which are currently front of mind for both regulators and the international trading community.

The conference closely follows the launch of a new edition of the WCO/WTO Study Report on Disruptive Technologies, which explores those technologies that are reshaping the way in which trade and trade regulation is carried out. In a similar fashion to the way in which containerisation transformed the physical movement of goods in the 1950s, the use of big data, data analytics, artificial intelligence, machine learning, the Internet of Things, blockchain, biometrics and other technologies are revolutionising the way in which information is being used.

These pivotal issues will also be addressed by several speakers at December's Partnership in Customs Academic Research and Development (PICARD) conference, to be held in Brussels, under the themes of 'disruptive technology and enforcement', 'data sharing and analysis' and 'digital technologies to enhance regulatory performance'.

In light of the emerging opportunities and threats posed by these new and emerging technologies, the Editorial Board would welcome articles from both academics and practitioners for publication in future editions of the *World Customs Journal*.

Finally, it is heartening to note that, despite the current circumstances under which they are currently living and working, our Ukrainian colleagues are continuing to contribute to the body of academic knowledge in the field of customs and border management, and it is a pleasure to be able to publish two of their research papers in the current edition of the *Journal*.

Professor David Widdowson AM
Editor-in-Chief

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Section 1

Academic Contributions

The changes and impact of China's tariff concession policy in the context of the Regional Comprehensive Economic Partnership Agreement

Qiang Dong and Jing Cheng

Abstract

The COVID-19 outbreak and the Russia-Ukraine conflict are significant economic challenges for China. Meanwhile, the Regional Comprehensive Economic Partnership Agreement (RCEP) entered into force on 1 January 2022, establishing the world's largest free trade zone with the world's largest population, the most diverse mix of members, and the highest development potential for reviving China's economy. The RCEP's second chapter goes beyond current global and regional free trade agreements, stipulating tariff reductions and their methods, which have had a noticeable impact on member countries' imports and exports. This study investigates the impact of RCEP tariff concessions on China's imports and exports, as well as industry development, by examining the various types of tariff concessions and tax cuts available.

Keywords: RCEP, China, tariff concession, tariff policy, foreign trade

1. Introduction

China has become the world's second largest recipient of foreign direct investment (FDI) and the largest investor, with outward FDI amounting to USD133 billion, according to the *World Investment Report 2021* (2021, p. 5) released by the United Nations Conference on Trade and Development (UNCTAD). China has also become the world's largest goods trader and the second largest consumer market according to Wang (2022). In 2022, however, the Chinese economy faces tough challenges posed by the outbreak of the Russia-Ukraine conflict and the raging COVID-19 pandemic.

Against a backdrop of such risks, the Regional Comprehensive Economic Partnership (RCEP) Agreement came into effect on 1 January 2022, marking the formation of the world's largest free trade area with the largest population and trade volume, the most diverse mix of members and the highest potential for development. A key question is how to make the best of the RCEP, a landmark in the development of the Asia-Pacific region, and meet the opportunities and challenges it brings to reduce the uncertainty caused by complexity in the regional economy. This has become an important question for China regarding further opening up and domestic economic growth. Currently, research on the RCEP is gathering momentum in academia. For example, Wang and Zhou (2022) analysed the impact of the RCEP on China as well as global economy and trade; Li and Li (2022) compared the RCEP and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); and Gaur (2020) analysed the domestic and international factors leading to India's withdrawal from the RCEP. Tariff issues related to the RCEP have seldom been discussed by researchers. Therefore, this paper

focuses on the implications of the RCEP to China's and even the world's trade in goods, and it explores the changes and impact of China's tariff concession policy to predict and access possible changes in China's tariffs in the future.

2. Background and significance of the RCEP

The RCEP can be traced back to as early as 2001, when China requested and was granted permission to begin negotiations with the Association of Southeast Asian Nations (ASEAN) on a '10+1' free trade zone. Soon after, China, Japan, South Korea, Australia and New Zealand began multilateral negotiations with ASEAN. Following the global financial crisis in 2008, both China and ASEAN sought to expand bilateral trade and investment liberalisation, and the '10 +1' agreement was signed. Following the failure of the US-dominated Trans-Pacific Partnership Agreement (TPP), the 10 ASEAN countries proposed the '10+6' RCEP initiative in February 2011 to create a larger and better regional free trade zone for eliminating tariff and non-tariff barriers. After months of negotiations, the 10 ASEAN countries formally signed the RCEP Agreement with China, Japan, South Korea, Australia and New Zealand on 5 November 2020. The RCEP came into effect on 1 January 2022 as stipulated.

In terms of population and gross domestic product (GDP), the RCEP surpassed both the North American Free Trade Agreement (NAFTA) and the European Union (EU). To demonstrate this, data from 2019 prior to the COVID-19 outbreak is used for compassion (Table 1).

Table 1: Population and GDP covered by RCEP, NAFTA and the EU

FTA	Population (100 million people)	GDP (USD trillion)	Trade volume as percentage of the world total (%)
RCEP	22.75	26.2	28.87
NAFTA	4.93	24.44	15.76
EU	4.48	15.63	29.56

Source: Frenkel, M., & Ngo, T. (2021). Das RCEP-Abkommen und dessen Bedeutung für die EU [The RCEP and its relevance to the EU]. Wirtschaftsdienst, 101(6), 432–438. https://doi.org/10.1007/s10273-021-2938-x

It is safe to conclude that the RCEP has a significant impact on the Asia-Pacific region's economic and trade landscape, and possibly the entire world. The RCEP is a more open, flexible, and inclusive free trade agreement that prioritises future trade opportunities (Lee, 2016; Oba, 2016).

3. Summary of the RCEP and implications for China

3.1. Summary of the RCEP

The RCEP Agreement consists of a preamble, 20 specific chapters and four annexes, covering a wide range of topics, including commodity trade, service trade, rules of origin, e-commerce, temporary movement of natural persons, government procurement, competition and dispute settlement, with the following characteristics:

- establishing fundamental principles for the parties to achieve high levels of trade liberalisation, such as national treatment of goods from other parties, tariff reduction or elimination, temporary admission of goods without payment of import duties and taxes, and more favourable market access conditions for parties
- clarifying issues such as certificates of origin, declarations of origin, back-to-back evidence of origin, and others by considering the geographical characteristics of parties
- making higher commitments than those in the WTO Agreement on Trade Facilitation and strengthening trade facilitation to facilitate the effective administration of customs procedures and expedite clearance of goods
- setting conditions and transitional mechanisms for trade remedies and other safeguard measures
- requiring the parties to make commitments related to market access, national treatment, most-favoured-nation treatment and local presence in trade in services
- clarifying the four pillar provisions on investment, that is, protection, liberalisation, promotion and facilitation and defining the obligations of the parties in terms of national treatment, most-favoured-nation treatment and investment treatment
- encouraging the parties to improve trade administration and procedures through electronic means, and requiring the parties to create a favourable legal framework for the development of e-commerce and to maintain the current practice of imposing no tariffs on e-commerce
- clarifying methods and means of resolving trade disputes among parties.

3.2. Implications of the RCEP for China

3.2.1. Implications for the Chinese economy

The signing of the RCEP marked a new stage in China's pursuance of its free trade area strategy, reflected in the following actions:

1. In 2020, the Chinese government formulated the *14th Five-Year Plan (2021−2025) for National Economic and Social Development*, requiring implementation of a strategy for upgrading free trade zones and building a global network of high-standard free trade zones.
2. The key to implementing the upgrading strategy of free trade zones lies in 'expansion', 'improvement' and 'efficiency' to realise all-round upgrading.
3. China's signing of the RCEP was another major achievement of opening up after China's accession to the WTO and is expected to benefit extension of China's industrial chain and the promotion of its value chain, and move China's role from the low end to the high end in the international division of labour.

After the implementation of the RCEP, China now has signed 19 free trade agreements and has 26 free trade partners. The coverage of China's free trade agreements has increased from 27 per cent to 35 per cent, that is, one-third of China's trade volume.

3.2.2. Implications for Chinese enterprises

The RCEP facilitates the free flow of production factors of Chinese enterprises in the region and makes clear the division of production among the parties for further development of supply chain production.

Take tariff concessions for example. China has offered zero tariffs on 90.5 per cent of 10 ASEAN countries' imports, 90 per cent of Australian products, 90 per cent of New Zealand products, 86 per cent of Japanese products and 86 per cent of South Korean products. Other countries' tariffs on China have been reduced by more than 90 per cent on average. Tariffs are expected to gradually decline after 2032. In this context, China's importers and exporters will take advantage of both domestic and international market opportunities, as well as those provided by the RCEP and low or zero tariff policies, to further reduce production costs and improve product competitiveness in the global market.

The RCEP also provides a larger platform for Chinese small and medium enterprises and those engaged in cross-border e-commerce, drives trade and goods movement among region countries, allows them to share more RCEP benefits, and thus promotes the healthy development of emerging industries and trade fields.

4. China's tariff policy and tariff concessions under the RCEP

4.1. China's tariff policy

At present, China's overall tariff level remains at 7.5 per cent, higher than those of developed countries in Europe and the United States, but lower than those of most developing countries. The global level is moderate to low.

China's tariff rates are divided into five categories:

- Most-favoured-nation (MFN) rates: these rates are mainly applicable to imports originating in WTO members or countries and territories that have signed bilateral trade agreements with China granting MFN treatment to each other.
- Agreement rates: these rates are mainly applicable to imports from countries and territories that have signed regional trade agreements with China providing for favourable tariffs.
- Provisional rates: these rates are effective for a certain period and generally revised annually.
- Preferential rates: these rates are applicable under trade agreements with China providing for preferential rates.
- General rates: these rates are applicable to imports not covered by the rates above.

4.2. Types of tariff concessions under the RCEP

The second chapter of the RCEP, 'Trade in Goods', deals with tariffs with provisions on tariff reduction. Specifically, there are two main categories of tariff concessions under the RCEP:

1. Unified concessions: that is, the same tax reduction arrangement applies to other parties for the same product. This mode is adopted by eight parties, Australia, New Zealand, Malaysia, Singapore, Brunei, Cambodia, Laos and Myanmar. Each of these parties has only one schedule of tariff commitments. That is, the same products from different parties to the RCEP are subject to the same tariff rate when imported by the party.
2. Tariff differentials: different tax reduction arrangements are applied to different parties. This mode is adopted by South Korea, Japan, Indonesia, Vietnam, Thailand, the Philippines and China. It means that the same products from different parties to the RCEP are subject to different tariff rates when imported by one of these parties. As a result, China and Japan, South Korea, Australia, New Zealand and ASEAN have reached separate tariff commitments on trade in goods, so China has five schedules of tariff commitments.

4.3 Tariff reduction models under the RCEP

There are four main models of tariff reduction under the RCEP, that is, zero tariffs effective immediately upon the RCEP taking effect, reduction to zero during the transition period, partial reduction and exceptions. The transition periods are 10 years, 15 years and 20 years. The four main models are:

- Immediate reduction to zero upon the RCEP taking effect: zero tariff is immediately applied to originating goods to a party in the first year following the effective date of the RCEP for the party.
- Reduction to zero during the transition period: the tariff rates applicable to originating goods are reduced to zero in a linear or nonlinear manner from the base rates during the transition period from the effective date of the RCEP for the party.
- Partial reduction: the tariff rates applicable to originating goods are reduced to a certain extent, but not to zero.
- Exceptions: the provisions of reduction or elimination of customs duties do not apply to certain goods after the RCEP takes effect. In the schedules of tariff commitments, the agreement rates of such goods are indicated with the letter ‘U’.

5. China’s tariff commitments and measures

5.1. Tariff commitments between China and other parties

China and other parties to the RCEP have successively signed six preferential trade agreements, that is, the Asia-Pacific Trade Agreement, the China-ASEAN Free Trade Agreement (Upgraded), the China-New Zealand Free Trade Agreement, the China-Singapore Free Trade Agreement, the China-South Korea Free Trade Agreement and the China-Australia Free Trade Agreement (for details see Table 2).

Table 2: List of tariff reductions of China applicable to other parties

Tariff reduction model		Japan	South Korea	ASEAN	Australia	New Zealand
Immediate reduction to zero upon RCEP taking effect (%)		25	38.6	67.9	65.8	66.1
Reduction to zero during the transition period (%)	Reduction to zero in 10 years	46.5	41	12.7	14.2	13.9
	Reduction to zero in 15 years	11.5	3.1	3	0	0
	Reduction to zero in 20 years	3	3.2	6.9	10	10
Percentage of zero tariff (%)		86	86	90.5	90	90
Partial reduction (%)		0.4	1	5.4	5.5	5.6
Exceptions (%)		13.6	13	4.1	4.5	4.4

Source: Han, J., Yang, K. and Zou, R. (2021). 自由贸易区提升战略下RCEP原产地规则利用研究 [Research on the utilisation of RCEP's Rules of Origin under the upgrading strategy of FTA]. *Intertrade, 03,* 66-77. https://doi.org/10.14114/j.cnki.itrade.2021.03.009

As shown in Table 2, China will eventually reduce tariffs to zero on 86 per cent of Japanese and South Korean products, and on 90 per cent of goods from ASEAN, Australia and New Zealand.

On the other hand, other parties will also reduce their tariffs on goods from China, as shown in Table 3.

Table 3: List of tariff reductions of other parties applicable to China

Tariff reduction model	Japan	South Korea	ASEAN		Australia	New Zealand
			Malaysia, Vietnam, Singapore, Thailand, Indonesia, Philippines and Brunei	Laos, Cambodia and Myanmar (least developed countries)		
Immediate reduction to zero upon RCEP taking effect (%)	57	50.4	74.9	29.9	75.3	65.4
Percentage of zero tariff (%)	88	86	90.5	86.3	98.2	91.8
Partial reduction (%)	0	1.1	5.5	0	1.1	8.2
Exceptions (%)	12	12.9	4	13.7	0.7	0

Source: Han, J., Yang, K. and Zou, R. (2021). 自由贸易区提升战略下RCEP原产地规则利用研究 [Research on the utilisation of RCEP's Rules of Origin under the upgrading strategy of FTA]. *Intertrade, 03,* 66-77. https://doi.org/10.14114/j.cnki.itrade.2021.03.009

As shown in Table 3, other countries will eventually reduce tariffs on over 85 per cent of goods from China.

5.2. Policy effect of China's tariff concessions

In response to the RCEP, the Chinese government issued a series of supporting policies targeted at stimulating industrial development. The Ministry of Commerce, the General Administration of Customs and another four ministries in China announced Guidelines on High-Quality Implementation of Regional Comprehensive Economic Partnership (RCEP) Agreement on 24 January 2022. The recommendations urge for strong actions based on the responsibilities of government departments to accomplish all RCEP implementation tasks and achieve effective results.

Simultaneously, the General Administration of Customs has been working hard to improve the efficiency of tariff collection and administration, which has benefited import and export businesses. Consider the customs area in Shanghai. When the RCEP entered into force on 1 January 2022,

the trade of commodities in the customs area moved smoothly, and overall work performance was satisfactory. As of 15 February 2022, the Shanghai Customs area had approved 466 RCEP import declarations totalling RMB638.6 million, resulting in a duty reduction of RMB11.73 million. Shanghai Customs actively publicised relevant policies to enterprises under its jurisdiction and provided 'one-on-one' coaching to assist key enterprises in understanding all applicable preferential tariff concession policies to ensure effective implementation of RCEP tariff reduction measures. Furthermore, Shanghai Customs has offered 'enterprise-specific policies' and guided them on how to benefit from tariff reduction policies in accordance with applicable laws and regulations in conjunction with the 'Global Operator Program' (GOP) and initiatives launched by the China (Shanghai) Pilot Free Trade Zone.

According to statistics (Gu, 2022), the RCEP tariff reductions have aided over 200 enterprises in the Shanghai Customs region. The RCEP has benefited both Chinese and foreign-invested enterprises. For example, following the implementation of the RCEP, Fujifilm (Shanghai, China) Investment Co, Ltd was able to benefit from tariff reductions, and in certain cases, zero tariffs, on some Japanese imports. As a result of these efforts, the corporation could save more than RMB5 million each year.

6. Discussion and conclusion

6.1. Impact of RCEP tariff concessions on China's imports and exports

To boost imports and exports, China has actively adjusted its tariff policy to cope with the new trade rules under the RCEP. Generally, the marginal effect of the RCEP is limited because China already has existing bilateral free trade agreements with ASEAN, South Korea, Australia and New Zealand. The impact of tariff changes mainly lies between China and Japan as there was no free trade agreement between the two countries. For this reason, the tariff reduction arrangement between China and Japan is the biggest highlight of the RCEP, which is good news for Chinese exporters of motors, mechanical equipment and parts, chemicals and textiles.

China applies zero tariffs to about 8 per cent of goods from Japan at present. As required by the RCEP, China will remove tariffs on about 86 per cent of industrial products from Japan gradually, mainly involving chemicals, optical products, rubber products, steel products and autoparts. For industrial products, China grants the widest range of concessions to autoparts, covering about 87 per cent of autoparts exported by Japan to China. In addition, China will also remove tariffs on other industrial products from Japan gradually, such as silicon dioxide (desiccant) and antibiotics in the chemicals category; denim, non-woven fabrics, regenerated or semi-synthetic long fibre threads (acetate fibre, rayon, etc.) in the category of fibre products; plastic extrusion granulators, elevator parts and bulldozers in the category of household appliances and machinery; nickel, certain alloys, most hot-drawn steel plates, stainless steel ingots and semi-finished products; dental micro-motors and camera parts in the category of precision instruments; cathode copper, sulfur, some semi-finished products of platinum, cosmetic cotton; and other commodities.

As Japan has already reduced tariffs on most industrial products from China to zero, the new tariff reductions granted by Japan are focused on agricultural products, food, clothing and chemical products, involving lamp oil, light petroleum, biofuels, fur and leather, leather products, silk fabrics, fibre products and some non-ferrous metals. It is worth mentioning that Japan previously imposed additional 4.4−13.4 per cent tariff rates on clothing from China. These tariff rates will also be lowered gradually, finally to zero, under the RCEP.

6.2. Impact of RCEP tariff concessions on rules of origin

6.2.1. Calculation of regional value content (RVC)

The criteria of RVC are important elements of the rules of origin and a major way of determining origin in the background of globalisation. In contrast with China's other previous bilateral free trade agreements, the RCEP allows determination of RVC with either the build-down or the build-up formula. If the calculated RVC is no less than 40 per cent, the origin of goods will be recognised. The differences between the RCEP and other trade agreements in RVC recognition are summarised below:

1. Compared with variable percentages of 30−60 per cent for RVC under other free trade agreements, the proportion of RVC recognition is set to 40 per cent in all cases.
2. Differences also lie in calculation methods. Either the build-down or the build-up formula may apply under the RCEP. That is, RVC = (FOB – VNM) ÷ FOB × 100 per cent > 40 per cent, or RVC = (VOM + Direct Labour Cost + Direct Overhead Cost + Profit + Other Cost) ÷ FOB × 100 per cent > 40 per cent, where RVC, regional value content; FOB, free on board; VNM, value of non-originating materials; VOM, value of originating materials. If either formula is established, the criteria of RVC are met.

In summary, enterprises are more likely to qualify under the originating requirements and integrate industries in the region by combining the RVC criteria with the accumulation rules.

6.2.2. Accumulation rules

The accumulation rules are important elements of the rules of origin. Through the accumulation of originating components from more parties, it is easier to meet the originating requirements for regional value components, and thus allow enterprises to optimise supply chains and reduce procurement costs. Moreover, enterprises may leverage the accumulation rules of RCEP to expand procurement channels of raw materials and parts among the parties, conduct cost control and analysis of procurement among the parties, and enhance flexibility in procurement. In particular, free trade has been realised between China and Japan, and between Japan and South Korea for the first time. Enterprises can flexibly use raw materials, parts and intermediate products originating in Japan and South Korea by leveraging the accumulation rules, give full play to comparative advantages and further integrate industrial supply chains.

6.2.3. Back-to-back proof of origin

The RCEP provides for back-to-back proof of origin, which is not found in China's existing bilateral free trade agreements.

A back-to-back proof of origin is a certificate of origin issued by an intermediate party based on the original certificate of origin issued by the original exporting party. At present, only the movement certificate under the China-ASEAN FTA is similar to the back-to-back proof of origin under the RCEP, which provides for more details, operability and types. A back-to-back proof of origin may be issued either by a certifying agency or by an approved exporter of an intermediary party. In addition, back-to-back proofs of origin may be in the form of either a certificate of origin or a declaration of origin.

According to these rules, importers in RCEP parties can enjoy preferential tariff treatment against back-to-back proofs of origin when importing Chinese goods. This contributes to greater flexibility of enterprises in sales strategies and logistics arrangements. This not only facilitates separation of goods in transportation and logistics among the parties, and coordination and cooperation among the parties, but also further promotes integration of industries in China and even East Asia and Southeast Asia, and coordinated development of the regional economy.

6.2.4. Other supplementary rules

Compared with existing free trade agreements, the RCEP provides for 'unit of qualification' and 'materials used in production'. The RCEP also has slightly different provisions on minimal operations and processes, neutral components, *de minimis* and complete sets of products. The differences are summarised below:

1. Unit of qualification. At present, among China's existing free trade agreements, only the China-Switzerland Free Trade Agreement and the RCEP have 'unit of qualification' provisions, which define the unit for determining the origin of goods. For example, a set of goods to be classified under a single tariff line should be regarded as a single good to determine the qualification of origin.
2. Materials used in production. At present, among China's free trade agreements, only the RCEP provides for 'materials used in production'. In a series of processes, if an intermediate material has qualified as originating according to the rules of origin, the material shall be treated as originating when determining the originating status of the subsequently produced good.

6.3. Impact of RCEP tariff concessions on trade in agricultural products

The tariff concession requirements under the RCEP have a noticeable impact on China's import and export of agricultural products as China is both a major exporter and importer of agricultural products. Among the RCEP parties, Australia and New Zealand export important agricultural products such as beef, mutton and dairy products as well as agricultural raw materials; Japan and South Korea are both agricultural product markets as well as producers of high-end characteristic agricultural products; China and ASEAN countries have large populations, high agricultural production and strong demand for import and export of agricultural products, and represent a large vigorous market of agricultural products with high global potential.

At present, the implementation of tariff concessions under the RCEP has a significant impact on trade of agricultural products between China and Japan. Japan is the largest importer of agricultural products from China. China and Japan have reached bilateral tariff reduction arrangements under the RCEP for goods including agricultural products for the first time with noteworthy breakthroughs. After the RCEP came into effect, many agricultural products with export advantages from China to Japan will benefit from zero tariff preference, such as poultry, shrimp and crabs, potatoes, tomatoes, beans, lettuce and other vegetables, citrus, grapefruit, pears, cherries and other fruits, certain jams, certain juices and nuts, flowers, spices, coffee, wine and other processed foods. China promised to gradually remove tariffs on 86.6 per cent of agricultural products from Japan, including aquatic products, processed foods and specialty wines.

Aside from existing bilateral free trade agreements, China and South Korea, as well as China and ASEAN, have made commitments to open markets for a variety of agricultural products. China has committed to liberalising agricultural trade with other countries by 92 per cent in general, with 91−93 per cent in Indonesia, Vietnam, and Malaysia, 60 per cent in Myanmar and Laos, 96−99 per cent in Australia and New Zealand, and 60 per cent in Japan and South Korea.

6.4. Conclusion

To summarise, the RCEP tariff concession requirements affect China's imports and exports, rules of origin and agricultural trade, with undeniable benefits for the Chinese economy. Meanwhile, they will also undoubtedly present difficulties. For example, the RCEP necessitates a high level of openness, which somewhat mitigates the potential benefits of free trade zones in China. As a result, Chinese policymakers and leaders should continue to innovate and implement new reform measures to improve the competitiveness and performance of China's free trade zones. In this regard, it is critical to consider how trade rule changes will affect China's existing industrial clusters and industrial supply chains.

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Alcohol policies, consumption and government revenue: Indonesia

Adi Nugroho Nurprasetia

Abstract

Research on alcoholic beverage consumption and related policies in Indonesia is minimal. Therefore, this study examines how policies affect alcohol consumption and government revenue, specifically excise tax revenue. First, this paper discusses the effect of alcohol tax policies and finds that an increase in the excise tax leads to increased product consumption. The implication is that the government must consider reform of the unrecorded alcohol market and alcohol tax. Subsequently, this paper discusses the effects of alcohol policy change and shows that tax changes lead to short-term reductions on alcohol consumption; thus, the government may perform frequent policy changes to reduce consumption. This paper also shows that a total ban negatively affects consumption; however, the reduction only affects the recorded alcohol supply, which is taxed and within government control.

Keywords: alcohol; consumption; tax; policies.

1. Introduction

Alcohol is a substance that has adverse consequences and inherent risks associated with its consumption, such as intoxication and dependency (Babor et al., 2010). Globally, the harmful consumption of alcohol has led to the deaths of around three million people and created 132.6 million disability-adjusted lives in 2016 alone (World Health Organization [WHO], 2018). Indonesia also suffers from these damaging effects, especially due to illicit home-produced alcohol (Uddarojat, 2016). From 2013 to 2018, a total of 648 people died due to 'oplosan' (counterfeit alcohol with dangerous substances) consumption alone (Respatiadi & Tandra, 2018). This illicit alcohol has also harmed foreign visitors to the country through methanol poisoning (Giovanetti, 2013). In fact, harmful cases of alcohol consumption in Indonesia may be much higher if data were available on alcohol-related accidents, diseases and misconduct. In handling these problems, the Indonesian House of Representatives (DPR) tries to restrict alcohol production, consumption and distribution despite the lack of accurate data and studies. Currently, Indonesia imposes taxes on alcoholic beverages, thereby increasing prices. This remains one of the most widely used and cost-effective policy measures employed by governments throughout the world to reduce the harmful use of alcohol (WHO, 2018).

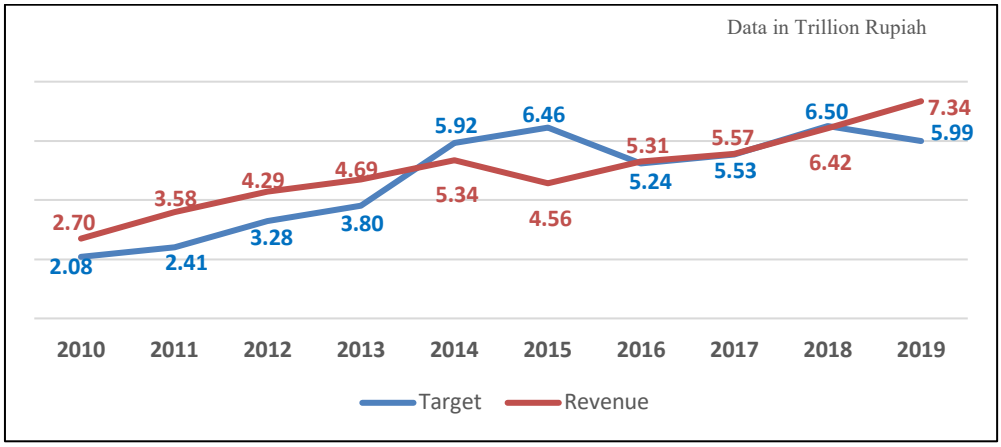
The alcohol consumption level in Indonesia is relatively low but is increasing. Surveys have found that the amount of alcohol (defined as pure alcohol) consumed per capita by people aged 15 years and over has increased slightly from 0.6 litres in 2010 (WHO, 2011) to 0.8 litres in 2016 (WHO, 2018). These levels are still lower than those of neighbouring countries such as Malaysia (0.9 litres), Papua New Guinea (1.2 litres), Singapore (2.0 litres) and Timor-Leste (2.1 litres). The low consumption may relate to the fact that 231 million of the 267 million total Indonesian population follow the Islamic religion (Ministry of Religious Affairs, 2020). Most of the population believe that the consumption of alcoholic beverages is a sin even if it is committed by someone else. Therefore, the government, especially in the

regions, prohibits the sale of these beverages. In addition, the price of alcoholic products in Indonesia is extremely high. Compared to other ASEAN countries, which have a similar income per capita, the beverages in Indonesia are double to triple the price. The World Bank International Comparison Program (2017), as cited in The Global Economy (2022), shows that the price of alcoholic beverages in Indonesia is 183.2 index points (the world average is 100), more than twice that of countries like Vietnam and the Philippines. The price discourages people from consuming alcohol, especially recorded alcohol (i.e. alcohol that is taxed and under government control).

Further, the Indonesian consumption level may continue to witness an increasing trend, as is expected to happen across all Southeast Asian nations (Sornpaisarn et al., 2020). Figure 1 shows a gradual increase in the Indonesian excise tax revenue from alcoholic beverages, at various alcohol levels, during 2010–2019. The tax revenue was IDR2.7 trillion (USD300 million) in 2010 and grew gradually, with a slight decrease in 2015, to almost triple the amount at IDR7.3 trillion (USD528 million) in 2019. The growth occurred despite the lack of change in tariffs, indicating that the consumption level in Indonesia had risen.

This revenue was derived from only recorded alcoholic products and not from home – or informally produced, smuggled, or surrogate alcohol, or alcohol obtained through cross-border shopping. The recorded alcohol levels in Indonesia constitute a small portion of its consumption (WHO, 2018). The WHO found that consumption of recorded levels in 2016 was only 0.3 litres per capita, compared to the unrecorded consumption of 0.5 litres per capita. The recorded number had increased from 0.05 litres per capita in 2010 (WHO, 2011). Despite the increase, it remains inferior to the unrecorded, an accurate measure of which is unattainable due to its illicit nature. Thus, the real total consumption of alcohol in Indonesia is unpredictable.

Figure 1: Target and revenue for Indonesian excise tax on alcoholic beverages 2010–2019[a]



[a] The Indonesian House of Representatives sets a revenue target for the Directorate General of Customs and Excise (DGCE) on customs and excise, including alcohol excise, every year. Data are in IDR.

Source: Data processed from Indonesian Central Government Financial Statements 2010–2020.

Studies on alcoholic beverage consumption, policies or health effects in Indonesia are rather limited. Al-Ansari et al. (2016) found that Muslim majority countries (MMC) such as Indonesia lack literature on how policies affect national alcohol consumption. The available national-level

studies in Indonesia are working papers from Laksmana (2008) and Hulwah et al. (2021) on alcohol production and traffic accidents, respectively. The rest of the alcohol-related studies in Indonesia are at the regional or individual level. Notably, some studies that used multiple countries' data (Clements et al. 2020; Holmes & Anderson, 2017; Sornpaisarn et al., 2020) did not include Indonesia in their analyses. This is understandable because there is very limited data on alcohol to review; there is no public price or consumption data available, and most of the alcohol produced is unrecorded. Further, surveys on alcohol consumption conducted by the WHO and the Ministry of Health are infrequent. Additionally, the government agencies that regulate and control alcohol distribution are reluctant to provide complete data to researchers. The agencies' available historical data is limited and restricted due to confidentiality regulations. Nevertheless, research on how government policies affect alcohol consumption is essential when evaluating the past and preparing new policies. Therefore, this study attempts to add new knowledge to the subject by examining how policies may affect alcohol consumption in Indonesia. Moreover, this study also discusses how the policies may affect government revenue, specifically excise tax revenue.

This study is structured as follows. First, this introduction has presented an overview of alcohol in Indonesia. Next, the literature review contains empirical evidence that forms the groundwork of this research. The third section describes the data and methodology used for estimating the results. The fourth section discusses the outcomes, and finally, the conclusions and policy implications based on the previous sections are presented.

2. Literature review

As alcohol consumption causes both short-term and long-term negative consequences (Babor et al., 2010; Cnossen, 2005), governments have imposed policies for its control. Babor et al. (2010) considers all the policies that govern alcohol, health and social welfare as alcohol policies. The policies can be classified into two categories based on whether they provide funds or resources to specific groups (allocative) or direct control to individuals or organisations for particular outcomes (regulatory) (Longest, 2009). In this paper, the policies discussed are regulatory ones, including economic policies such as alcohol excise tax or price control and legal policies such as bans or sales control. In addition to the policies, the purchasing power of consumers may also affect the alcohol consumption level (Babor et al., 2010). Thus, regulatory policies and income tend to be the defining factors of alcohol consumption (Room et al., 2009).

The excise tax, which increases the price of alcohol, fulfils dual objectives: it discourages consumption and increases government revenue (Cnossen, 2005). Several previous studies have provided mixed results on the effect of tax policies on alcohol consumption. Numerous studies conducted in developed countries have found that increasing the excise tax reduces alcohol consumption (Byrnes et al., 2016; Cerdá et al., 2011; Doran et al., 2013; Gruenewald et al., 1993; Nelson & Mcnall, 2016; Neufeld et al., 2020; Paschall et al., 2009; Vandenberg et al., 2019; Wagenaar et al., 2009; Wette et al., 1993; Wicki et al., 2020). Vice versa, it was also found that decreasing the excise tax increases alcohol consumption (Andreasson et al., 2006). Another study found that the consumption patterns in low – and medium-income countries (LMIC) are similar (Sornpaisarn et al., 2013), but this study did not include Indonesia. Further, tax increases were also found to generate more government revenue (Vandenberg et al., 2019). Muller (2010) found that the opposite vectors of tax and consumption create a substitution effect, with the consumption trend moving from high-priced alcohol to low-priced goods.

In contrast, some studies found unique outcomes. Grittner et al. (2009) found that tax changes had no significant effect on alcohol consumption levels in Denmark. Additionally, Laksmana (2008) found that the increase of the excise tax in Indonesia caused higher production in a certain alcohol category,

that is, the B2 category, which has 15–20 per cent more alcohol by volume (abv); the increased tax had no significant effect on other categories. Despite the fact that the result is in contrast to other studies in various countries, it may be indicative of a unique alcohol consumption pattern in Indonesia, offering a stepping stone for further research with broader variables (alcohol consumption) and more recent data.

Another form of regulatory policies for alcohol (other than tax) involves controlling the physical availability of alcohol by restricting the time, place and density of outlets (Babor et al., 2010; Room et al., 2009). Previous studies in Russia (Kolosnitsyna et al., 2014; Neufeld et al., 2020), Switzerland (Wicki et al., 2020), the United States (Stout et al., 2000), and 26 other countries (Paschall et al., 2009) have found that these policies generally contribute to a decrease in the consumption level. However, certain situations, such as consumers' segmentation, can lead to an unchanged – or even higher – consumption, regardless of the policies (Kolosnitsyna et al., 2014; Stout et al., 2000). This is due to a substitution effect that is similar to the tax effect on alcohol consumption – the consumers simply go to areas with fewer control policies, causing the consumption level to remain stable (Williams et al., 2005).

An increase in people's incomes, which happens in many developed and middle-income countries, makes the alcohol tax and control policies less effective (Room et al., 2009) and creates easier opportunities to consume alcohol. A study by Cerdá et al. (2011) in the United States found that an increase in income level had a significant positive impact on alcohol consumption. However, a more recent study using global data by Holmes and Anderson (2017) found that, while the previous result was right at that time, the consumption pattern in high income countries fell after the average income achieved certain levels.

In conclusion, the excise tax, physical control and income levels are all related to the rate of alcohol consumption. Most existing studies found that consumption levels are negatively impacted by both taxation and control and positively impacted by income. Others found these factors to be insignificant or having the opposite effect on the consumption level. Based on a previous study by Laksmana (2008), the alcohol tax-consumption pattern in Indonesia may be unique with insignificant or positive effects. Accordingly, the effects of control and income on the consumption level may follow the general outcomes, with more control decreasing consumption and higher income increasing it.

3. Methods

3.1. Data and sources

Data for measuring the consumption level of alcoholic beverages and tax revenue was obtained from the Indonesian DGCE, Ministry of Finance. The data consists of national-level monthly imports and local production numbers from January 2010 to December 2019 for the consumption level in litres of alcoholic beverage products (litre of product). This data only accounts for the recorded product consumption in Indonesia, which is a small portion of the total consumption (WHO, 2011; 2018). However, it is the only available and reliable data for a proxy of the consumption level, based on the International Guide for Monitoring Alcohol Consumption and Related Harm, 'consumption = production + import – export' (WHO, 2000; p. 22). This approach assumes that the alcohol product is consumed in the same month as its import and production. The data consist of monthly excise revenue from import and local production in the same period as the consumption level (IDR per litre of alcohol) for the tax revenue.

Following this, the tax change analysis uses four Indonesian Ministry of Finance decrees about alcohol. These are excise tariff numbers 90/PMK.04/2006, 62/PMK.011/2010, 207/PMK.011/2013

and 158/PMK.010/2018. The tariffs vary between domestic production and imported alcohol, each of which consists of three categories based on abv: category A (< 5% abv), category B (5–20% abv), and category C (> 20% abv). Table 1 shows the change in excise tariff per litre of alcoholic beverages from 2010 to 2019 (in IDR). The lack of change in tariff during the research period requires implementing a differentiation strategy with a weighted average (Davis & Kilian, 2011).

Table 1: Excise tax tariffs per litre of product 2010–2019[a]

Start date	Domestic production			Import		
	Category A (< 5% abv)	Category B (5–20% abv)	Category C (> 20% abv)	Category A (< 5% abv)	Category B (5–20% abv)	Category C (> 20% abv)
January 2010	3,500	5,000[b] & 10,000	26,000	5,000	20,000[b] & 30,000	50,000
April 2010	11,000	30,000	75,000	11,000	40,000	130,000
January 2014	13,000	33,000	80,000	13,000	44,000	139,000
January 2019	15,000	33,000	80,000	15,000	44,000	139,000

[a] Data in IDR. [b] Before April 2010, there were two tariffs for category B products. The smaller tariffs are for 5−15% abv and the larger are for 15−20% abv.

Source: Ministry of Finance Decrees.

Despite the limitations discussed above, this study was able to generate sufficient statistics data as seen in the summary statistics of dependent and independent variables, displayed in Table 2. The statistic consists of three variables: product consumption, weighted-average excise tariff and excise revenue; each of these has four disaggregations for the analysis: total, category A, category B and category C. Each category has 120 months of observation from 2010 to 2019. All data in the categories were transformed into natural logarithms.

This research uses the income per capita data calculated by Statistics Indonesia (2022) to control the analysis from 2010 to 2019; this organisation uses the quarterly gross national product (GNP) data divided by the total population to determine the income per capita.

Last, data for the policy change analysis is from six major alcohol-imposed policies during the research period. The study uses two excise tariff change policies, 207/PMK.011/2013 and 158/PMK.010/2018, which the government imposed in January 2014 and January 2019, respectively. Second, it uses two Ministry of Trade decrees, 20/M-DAG/PER/4/2014 and 06/M-DAG/PER/1/2015, which were imposed in March 2014 and May 2015, respectively. The first policy is about control and supervision of the availability, distribution and sale of alcoholic drinks, while the second is a modified version of the previous policy that involves a partial ban on alcohol from minimarkets and small retail stores. Further, a change in the import duty tariff system in 132/PMK.010/2015 was applied in July 2015, and a ban on alcohol for the Papua province imposed by the governor's decree number 22/2016 was effective from April 2016. Therefore, there are six events of policy implementations with the potential to affect product consumption and government revenue.

Table 2: Summary statistics of alcoholic product consumption, weighted-average excise tariff and excise revenue

		Total	Category A (< 5% abv)	Category B (5-20% abv)	Category C (> 20% abv)
Product consumption (in thousands of litres)	**Mean**	54,527.65	33,878.76	18,274.14	2,374.74
	SD	49,700.48	37,655.95	22,222.34	3,295.49
	Max.	367,678.95	350,945.02	94,172.78	13,081.89
	Min.	2,836.74	2,397.02	86.18	8.39
Weighted-average excise tariff (in IDR)	**Mean**	20,201.77	12,200.62	32,966.15	80,977.73
	SD	6,454.92	1,944.25	4,218.00	11,139.25
	Max.	38,399.63	15,000.00	38,967.21	126,493.88
	Min.	3,517.23	3,000.00	7,500.00	26,000.00
Excise revenue (in billion IDR)	**Mean**	1,256.72	442.43	616.31	197.97
	SD	1,253.14	554.83	748.96	278.24
	Max.	5,919.67	5,264.17	3,236.66	1,256.19
	Min.	19,341.56	14.70	2.58	0.21

SD, standard deviation; Max., maximum; Min., minimum; abv: alcohol by volume.

Source: Data processed from Indonesian DGCE.

3.2. Model specification

Previous studies suggest that policies will, *ceteris paribus*, change the demand for alcohol. The excise tax leads to a change in alcohol price and makes it less affordable, and the control policy reduces the availability of alcohol in the market (Babor et al., 2010; Room et al., 2009). Thus, Indonesia's excise tax and control policies may affect product consumption and government revenue.

Two different analyses were performed in the present study to understand the effect of the alcohol policies: autoregressive integrated moving average (ARIMA) analysis for the various tax policies and an interrupted time series (ITS) analysis for treating the policy changes from 2010 to 2019.

First, the ARIMA model captures the effect of alcohol tax policies on product consumption and government revenue. The standard Box–Jenkins method was followed using existing data for the model. The method includes a three-step cycle comprising model specification, estimation, and diagnostic checking to find the best possible fit and most parsimonious model (Box et al., 2015). For determining the optimal lag lengths on the model, this research uses the study of Vanbenberg et al. (2019) to suggest that the tax change has an immediate effect on price and product consumption. Thus, another assumption that the excise taxes are fully passed through to price is necessary (Mäkelä & Österberg, 2009). Also, to control for the macroeconomic conditions, the analysis includes monthly income per capita from Statistics Indonesia (2022). The general ARIMA model for this analysis is as follows:

$$Yt = \beta_1 X_{1t} + \beta_2 X_{2t} + \emptyset_1 Y_{(t-1)} + \cdots + \emptyset_p Y_{(t-p)} - \theta_1 z_{(t-1)} - \ldots - \theta_q z_{(t-q)} + z_t \quad (1)$$

Where:

Y_t : Monthly product consumption or excise revenue

X_1 : Monthly weighted-average excise tax tariff for alcoholic beverage products

X_2 : Monthly national income per capita

β : Coefficient for autoregressive

$\emptyset$: Coefficient for moving average

p : The autoregressive parameter

q : The moving average parameter

z_t : White noise process.

Second, the ITS method was used for analysing the effect of policy changes on product consumption and government revenue. The ITS analysis is a quasi-experimental method that can find the effect of time-specific intervention on longitudinal data (Kontopantelis et al., 2015). Previous studies have used the ITS method to determine the effect of tax policy changes on consumption of alcohol (Nelson & Mcnall, 2016; Vandenberg et al., 2019). Thus, the ITS may be the most helpful method for this research, including the changes in tax and control policies. Furthermore, the ITS analysis can project the trends before, during and after the interventions (Kontopantelis et al., 2015). The period of observation is 120 months, with product consumption and government revenue – the total and the three categories – as primary variables. This research uses the six policy changes as interventions.

4. Results, analysis and discussion

4.1. Summary statistics

Table 2 shows an increasing trend for total product consumption, and that category A (< 5% abv) had the highest consumption level. The total consumption increased from a little more than 82 million litres in 2010 to 1.3 billion litres in 2019. The increase is consistent with WHO survey results, which found a per capita per year increase of recorded alcohol of 500 per cent from 0.06 litres in 2010 (WHO, 2011) to 0.3 litres in 2018 (WHO, 2018). The average monthly consumption in category A was 33 million litres (61% of total consumption), far higher than the average of categories B (5–20% abv) and C (> 20% abv), which were 18 and two million litres, respectively. Combined, the average total

consumption was 54 million litres each month. The lower price of alcohol in category A, which mostly consists of beer products –Indonesia has its famous local brands – caused by the lowest excise tax rate per litre, may be the reason for the high consumption level.

Further, despite having the lowest tariff (Table 1), product category A still generated excise revenues with a monthly average of IDR442 billion, or around 34 per cent of the average of the total revenue. The amount is less than the monthly average revenue from category B, IDR616 billion (47% of the average total revenue). The reason is that category B also has a high consumption level, even with a tariff of more than twice that of category A. In contrast, category C generated the lowest revenue with IDR197 billion (19% of the average total revenue). The low recorded consumption and high price due to excise tariffs may be the reason for the low revenue. Also, the import tax for category C is the highest at around 150 per cent, making the price almost three times the original. In total, alcoholic beverages generated an average monthly revenue of IDR1.3 trillion.

4.2. The effect of tariffs and income on alcohol product consumption

This study analyses the effects of the weighted-average excise tariff and income per capita on product consumption, in all categories. The results of the analysis answered the first research question about alcohol tax-consumption patterns in Indonesia. The analysis uses the ARIMA model, for which we need to perform correlogram (ac) and partial correlogram (pac) tests. The test results at the national level in Table 3 showed the expected effects on the tariff variable and the income variable, almost all of which are statistically significant at a 99.9 per cent level of confidence.

First, the tariff has significant positive effects on total consumption as well as consumption in category B and category C, but it has no significant effect on category A. The result shows that an increase in the total tariff by one per cent will increase total consumption by 0.35 per cent. For category B, a one per cent rise in the excise tariff increases consumption by 0.48 per cent. The category C shows a higher coefficient where an increase in tariff by one per cent in this category will increase consumption by 1.42 per cent. The results show that an increase in the excise tax, which increases the price of the goods, leads to increased alcoholic beverage consumption. Therefore, these results disagree with the law of demand, which states that consumption will be lower if the price is higher, and almost all previous studies in different countries found results consistent with this law (Ornstein, 1980; Vandenberg et al., 2019; Wette et al., 1993). Despite this, the unique results obtained here are close to a previous study by Laksmana (2008), which found that alcoholic beverage production in category B increased with an increase in the excise tariff.

Category A estimation has an unexpected negative sign, which follows the law of demand, but it does not have a significant effect on product consumption. This result contrasts with that of Room et al. (2009), which states that consumers will choose cheaper goods as substitutes whenever there are changes in the alcohol price.

Table 3: Estimated consumption and revenue effects after tax changes

Product consumption				Government revenue		
Total						
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Excise tariff: Total	0.354	0.102	0.001	1.312	0.088	0.000
Income per capita	0.923	0.065	0.000	0.949	0.058	0.000
ARIMA term	(1,0,3)			(3,0,1)		
Category A < 5% abv						
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Excise tariff: Category A	-0.036	0.315	0.907	0.963	0.312	0.002
Income per capita	1.145	0.191	0.000	1.145	0.190	0.000
ARIMA term	(3,0,3)			(3,0,3)		
Category B 5−20% abv						
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Excise tariff: Category B	0.480	0.048	0.006	1.208	0.317	0.000
Income per capita	0.726	0.035	0.000	0.905	0.925	0.000
ARIMA term	(2,0,2)			(3,0,3)		
Category C > 20% abv						
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Excise tariff: Category C	1.422	0.318	0.000	2.446	0.332	0.000
Income per capita	-0.166	0.240	0.487	-0.183	0.246	0.457
ARIMA term	(3,0,3)			(3,0,3)		

Coef., coefficient; S.E., standard error of the mean; ARIMA, autoregressive integrated moving average; abv, alcohol by volume. All variables are expressed as natural logarithms.

Source: The author

Alcoholic beverage consumption in Indonesia does not follow the consumption pattern of standard goods, so it is highly likely to fall under the category of 'Veblen goods' or luxury goods. Alcohol, according to Veblen (1899), is not a basic requirement of existence; intoxication and all other pathological manifestations of liquor reflect the status of those who can buy it. The Indonesian government was considering categorising alcohol as a luxury good until early 2010 (Ministry of Finance Decree 620/2004). Since then, the government has imposed higher excise taxes and import duties to keep the price high. The price may serve to render alcoholic beverages as exclusive as if they were luxury goods. This exclusivity of alcohol in Indonesia might create a segmentation of people who drink. In Indonesia, those who have high income and have no religious concerns are the main consumers of the recorded product.

Second, the income per capita has significant positive effects on product consumption in all categories, except category C. The results show that an increase in income by one per cent will increase the total consumption by 1.31 per cent. This is in line with the theory of Room et al. (2009) and the finding of Cerdá et al. (2011), both of which describe the positive effect of income on product consumption. Additionally, the increase in one per cent of income positively affects category A and B by 1.14 per cent and 0.72 per cent, respectively. Thus, a rise in income is strongly related to an increase in the recorded product consumption level and, possibly, a decrease in the unrecorded consumption of illegal product. Notably, an increase in income does not significantly change consumption of category C, which consists of very expensive alcohol groups, meaning that the rise in the per capita income is still minimal.

These results illustrates several issues associated with the excise tax on alcohol. First, the excise tax in Indonesia has no controlling effect on alcoholic beverage consumption. The tax increases consumption of the two high-alcohol content groups, category B and category C, and lowers consumption of category A, the low-alcohol content group. This situation is not ideal because the tax should reduce alcohol consumption, or at least reduce the consumption of high-alcohol drinks and shift it to those with low-alcohol content. It is common knowledge that high alcohol content is correlated with many harmful effects. Therefore, in addition to the tax not controlling the consumption of alcoholic beverages, it also plays a role in increasing the potential negative impacts due to alcohol consumption. Second, changes in excise rates are not able to counteract changes in income. The effect of income is greater and more significant than the effect of the tariff. As a fiscal control for consumption, the tariff should be adjusted to match changes in income. Therefore, the government needs to implement a more effective tariff system for alcoholic beverages in Indonesia.

4.3. The effect of excise tariff and income per capita on government revenue

Table 3 illustrates that both the tariff and income significantly affect government revenue from excise tax. The increase in excise tariff in all groups leads to higher revenue. The smallest positive effect was found in category A, in which a one per cent rise in the tax only increases the revenue by 0.98 per cent. In contrast, category C shows the highest positive effect with an increase of 2.58 per cent in revenue resulting from a one per cent increase in its tariff. The results agree with the study of Vandenberg (2019), which found that the tax has a significant positive effect on government revenue in Australia. Further, income also contributes to revenue through its support of recorded alcohol consumption, which generates tax. Similar to the excise tariff effect, category A has the smallest positive effect (3.3% increase) and category C the highest (5.8% increase) from a one per cent increase in income.

Table 4: Substitution effects of alcohol product categories

	Category A < 5% abv			Category B 5–20% abv			Category C > 20% abv		
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Category A ARIMA (3,0,3)	–	–	–	-0.146	0.049	0.003	0.053	0.042	0.208
Category B ARIMA (2,0,2)	-0.253	0.118	0.033	–	–	–	0.599	0.053	0.000
Category C ARIMA (3,0,3)	0.024	0.143	0.864	0.684	0.073	0.000	–	–	–

Coef., coefficient; S.E., standard error of the mean; ARIMA, autoregressive integrated moving average; abv, alcohol by volume. All variables are expressed as natural logarithms.

Source: The author

4.4. Substitution effect between each alcohol product categories

Table 4 shows the substitution effect in product consumption for categories A, B and C. First, only categories A and B involve a substitution effect. Using the ARIMA model, the results obtained are significant: an increase in category B by one per cent reduces category A consumption by 0.25 per cent. Vice versa, an increase of consumption in category A by one per cent reduces the consumption of category B by 0.14 per cent. The results indicate that people may substitute low alcohol-level products such as beer for medium-level alcohol products such as wine. In contrast, consumption of category C has positive effects on categories A and B, but this effect is statistically insignificant for category A. This means that whenever people consume high alcohol-level products such as spirits, they might also drink low and medium alcohol-level products . Thus, alcoholic beverage categories A and B are complementary to category C in terms of alcoholic beverage consumption.

4.5. The effect of alcohol policies on total alcohol product consumption

The present analysis studies the effects of various policies on monthly total product consumption. An ITS analysis using the Stata 'itsa' command and the policies as the interrupters, positioned at the exact months of their implementation, was performed to study the effects. The points of the interrupters are as follows:

- 2014m1 refers to Ministry of Finance Decree 207/2013 regarding the excise tariff for alcohol, effectively implemented in January 2014.
- 2014m4 refers to Ministry of Trade Decree 20/2014 regarding the control and supervision of the procurement, distribution and sale of alcoholic drinks, effectively implemented in April 2014.

- 2015m5 refers to Ministry of Trade Decree 6/2015 regarding the ban on alcohol in minimarkets, effectively implemented in May 2015.
- 2015m7 refers to Ministry of Finance Decree 132/2015 regarding the import tariff for alcohol, effectively implemented in July 2015.
- 2016m4 refers to the Papua Regional Regulation 22/2016 regarding the ban on alcohol in Papua Province, effectively implemented in April 2016.
- 2019m1 refers to Ministry of Finance Decree 158/2018 regarding the excise tariff for alcohol, effectively implemented in January 2019.

Table 5 shows that not every policy that tries to control product consumption has a significant and negative effect on consumption. Four of the six policies have significant effects on consumption, of which three are negative and one is positive.

Total consumption increased by 0.03 per cent each month before the first interrupter, 2014m1. From the beginning of 2010 to the end of 2013, Indonesia witnessed a growing trend in alcohol consumption, which was consistent with the prediction of Sornpaisarn et al. (2020).

The first and fourth interrupters, 2014m1 and 2015m7, respectively, negatively affected consumption only in the month of implementation. The new alcohol excise tax and import tariffs led to a drop in consumption by 0.37 per cent and 0.70 per cent, respectively. This means that the changes had short-term shock effects on consumption before the consumers adjusted to the new price. Despite the short-term influence, the results agree with previous findings that a tax increase reduces consumption (Byrnes et al., 2016; Cerdá et al., 2011; Doran et al., 2013; Gruenewald et al., 1993; Nelson & Mcnall, 2016; Neufeld et al., 2020; Paschall et al., 2009; Sornpaisarn et al., 2013; Vandenberg et al., 2019; Wagenaar et al., 2009; Wette et al., 1993; Wicki et al., 2020).

The fifth interrupter, 2016m4, was found to have a significant negative effect on the months during and after implementation, by 0.69 per cent and 0.21 per cent, respectively. The ban on alcohol in the Papua province effectively reduced the national product consumption level, at least for recorded product, and it was noticeable because the province has the highest level of consumption. Despite the ban in 2016, Basic Health Research (Rikesda) in 2018 showed that the province had the highest alcohol consumption at an average of 9.9 litres per month, which was higher than the national average of 5.4 litres (Ministry of Health, 2019).

Table 5: Estimated total consumption and revenue effects after the policy changes, January 2010–December 2019

	Total monthly product consumption			Total monthly government revenue		
	Coef.	**S.E.**	**p-value**	**Coef.**	**S.E.**	**p-value**
Before 2014m01	0.038	0.006	0.000	0.045	0.010	0.000
2014m1	-0.376	0.134	0.006	-0.464	0.205	0.026
After 2014m1	-0.039	0.029	0.191	-0.083	0.045	0.854
2014m4	-0.034	0.132	0.796	-0.117	0.132	0.374
After 2014m4	-0.028	0.036	0.435	-0.073	0.048	0.132
2015m5	-0.066	0.225	0.770	-0.073	0.198	0.771
After 2015m5	0.298	0.022	0.000	0.316	0.019	0.000
2015m7	-0.702	0.086	0.000	-0.813	0.092	0.000
After 2015m7	-0.037	0.021	0.085	-0.039	0.021	0.071
2016m4	-0.691	0.166	0.000	-0.617	0.191	0.002
After 2016m4	-0.211	0.023	0.000	-0.233	0.022	0.000
2019m1	-0.228	0.334	0.496	-0.572	0.288	0.050
After 2019m1	-0.037	0.038	0.342	-0.014	0.033	0.671

Coef., coefficient; S.E., standard error of the mean. All variables are expressed as natural logarithms.

Source: The author

Notably, 2015m5 revealed a unique result. The ban of alcoholic beverages in minimarkets had a significant positive effect after the implementation month. This result indicates that people consumed more product after the ban. The partial ban allowed other off-premise sellers, such as supermarkets and liquor stores, and on-premise places, such as restaurants and bars, to remain open. The remaining alcohol providers might have encouraged the consumers to buy or drink more product than they did prior to the implementation. William et al. (2005) attributes the high level of substitution activities to the policymakers' inability to handle other alcoholic sources.

Lastly, Table 5 shows that the implementation of 2014m4 and 2019m1 had no significant effect on consumption. 2014m1 is a control variable and supervision decree that regulated alcohol sales without altering the availability of alcohol in the market. 2019m1 was the last change in the excise tariff in the period of analysis. A difference was only seen for category A's tariff, going from IDR13,000 (USD0.91) to IDR15,000 (USD1.05). Thus, this minor change may not have been significant enough for consumers to change their consumption patterns (Grittner et al., 2009).

4.6. The effect of alcohol policies on total government revenue

To determine the effect of alcohol policies on revenue, the same method and interrupters were used. Almost identical results were obtained as those from the analysis of consumption. The consumption level is significantly correlated with government revenue from excise tax. The results showed that five of the six policies had a significant effect on revenue, and one policy positively impacted revenue. Excise revenue had an upward trend of 0.04 per cent each month before the first interrupter, 2014m1.

As can be seen in Table 5, all the tariff policies (2014m1, 2015m7, and 2019m1) had a significant negative effect on consumption during the first month of their implementation. Similar to the previous discussion, the 2014m1 and 2015m7 policies may have exerted a short-term shock on consumption, lowering the revenue by 0.46 per cent and 0.83 per cent, respectively. Further, 2019m1 also lowered revenue by 0.57 per cent, despite not having a significant impact on consumption.

The outcomes of the other policies were similar to that of the consumption analysis. The 2015m5 policy had a negative effect after the implementation month, and 2016m4 had a negative impact on the revenue during and after the implementation month. Following this, the other policies had no significant effect on revenue. In conclusion, when the policies affect consumption, government revenue is likely to be similarly affected.

Overall, the results of the ARIMA and ITS analysis can be explained by policy changes directed at recorded alcohol products. The ARIMA analysis showed that alcohol products in Indonesia fall into the category of luxury goods, where despite rising prices, consumption continues to climb. The ITS analysis showed that the most effective way to reduce alcohol consumption in Indonesia is via a total ban. However, these results apply to the recorded alcohol group alone, the consumption of which covers only 37.5 per cent of the total consumption (WHO, 2018). The results cannot explain whether the increase in consumption of the recorded alcohol group is associated with a decrease in consumption of the unrecorded group, or whether the two groups increase together. Further data and research are needed to elucidate this.

5. Conclusion and recommendation

5.1. Conclusion

This study investigated alcohol product consumption and government revenue from January 2010 to December 2019 using ARIMA and ITS analyses. The ARIMA analysis found significant effects of weighted-average excise tariff and income per capita on consumption and revenue. The result shows that both the tariff and income had positive effects on the dependent variables during the period under consideration. In contrast to past findings, this study's results indicate that alcoholic beverages in Indonesia may be Veblen (luxury) goods, which have increased consumption despite higher prices, resulting in a segmentation of consumers. Additionally, the ITS analysis showed that the implementation of alcohol policies had mixed results on consumption and revenue. The results

show that changes in the excise tax tariff and import duty had significant negative impacts only in the first month of implementation, indicating that a short-term shock occurred before consumers adjusted to the changes. Further, the partial ban of alcohol through 2015m5 had a positive effect after the implementation months, while the total ban through 2016m4 had an ongoing negative effect on both dependent variables, indicating that a substitution effect in alcohol consumption prevented any reduction in its consumption.

This study faced several limitations during the research period due to the following reasons. First, there is a lack of data available from government sources on alcoholic beverage consumption. The best data available was the excise data from the DGCE, which recorded alcohol production and import. Surveys were conducted by foreign agencies such as the WHO and RAND Corp. (for the Indonesia Family Life Survey [IFLS]) but with long gaps between them. Although the respondents to the surveys were the same before and after, many government policies occured during the gaps, thereby causing difficulties in their interpretation. In addition, surveys conducted by local agencies such as Statistics Indonesia and the Ministry of Health have inconsistencies in the questions involved, especially those regarding alcohol consumption. On the other hand, the probability of survey participants lying when answering surveys regarding alcohol consumption is high, due to it being perceived as sinful. Finally, although this study considers fiscal policies such as tax rates, excise rates rarely change, import duty rates cannot be connected to excise rates, and there is no data on the prices of alcoholic goods. The excise rate changed only three times between 2010 and 2019, causing slight variations in the tax. Additionally, the categorisation of alcoholic beverages between excise and customs is very different in Indonesia to other parts of the world. Alcoholic beverages are divided into three categories with regards to excise tax, but are divided into 33 categories under the 2017 Harmonised System classification for import-related taxes. In addition, the government does not have price data for alcoholic beverages. This data would be very useful for finding the degree of tax pass-through on the beverages, enriching the analysis of tax changes.

There are some insights to be gained for future research on Indonesia's alcohol consumption. The present study used 10 years of data and three major groups of alcohol based on the excise tax classification. Future research should be broader, over longer periods or with more specific data, such as pure alcohol levels. Using such data will give more conclusive results, which will be beneficial for more advanced studies on the harmful effects of alcohol. In addition, this study indicates uniquely the segmentation of alcohol consumers, which may explain why the increase in tariff elevates consumption. Research on this phenomenon of segmentation will improve knowledge on alcohol consumption in Indonesia. Lastly, further research is required on unrecorded alcohol consumption in Indonesia. Consumption in this category is soaring; therefore research on this category will be useful in explaining patterns and behaviours involved in national alcohol consumption.

5.2. Recommendation

This study determined how government policies affect alcohol product consumption and government revenue. Fiscal policy, in the form of excise taxes, has a positive effect on consumption and revenue. However, the implementation of other government policies has had mixed results. Limitations in the existing data limited this study. Despite this, the following are some policy implications that could be considered by the government when creating policies regarding alcoholic beverages.

The ARIMA analysis found that an increase in excise tax has a positive effect on alcohol consumption, which demonstrates flaws in the current Indonesian excise policy. In fact, an increase in tax increases government revenue, but eliminates the controlling effect of the tax. The government needs to revise alcohol policies so that they have more power in controlling consumption.

The Indonesian government must consider reform of the unrecorded alcohol market and alcohol tax. First, research on the correlation between the high price of recorded alcohol and the entry-exit process of unrecorded alcohol consumers is required. The consumption of unrecorded alcohol, either illicit or not, remains the highest among alcoholic beverages in Indonesia. With a better understanding of the market, the government can impose more effective control policies regarding unrecorded consumption. The government might also then include the traditional alcohol industry in the recorded alcohol group. It could start with providing smaller taxes or tax exemptions to the industry in exchange for recorded data. In this way, the government could increase the proportion of recorded alcohol. Lastly, the government could impose another policy reform of a single tax rate for pure alcohol. This method matches the tax to the harmful effect of the beverages, which is not the current situation. For example, the excise tax for products with 20 per cent abv is identical to products with 40 per cent abv, despite the latter being twice as harmful. The government could continue to differentiate the rates between locally produced and imported alcohol to protect local industry. These considerations may help in eliminating the flaws of the current excise policy.

The ITS analysis adds to the knowledge on policymaking for future use. First, since the change in tax tariffs resulted in short-term reductions on alcohol product consumption, the government may perform more frequent tariff changes if the preferred outcome is to maintain consumption. The changes may keep consumption low and nullify the positive effect from the effects of the weighted-average tariff. However, the reduction in consumption will also reduce government revenue. Second, since a total ban negatively affects consumption (compared to a partial ban, which has a positive effect), the government could impose a total ban on alcohol if needed. The total ban in Papua province significantly reduced national alcohol consumption. However, the reduction only affects recorded alcohol, so the government must consider the unrecorded group before imposing a total ban.

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Sui generis of European Union customs law

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Abstract

Every year the interest of scientists from around the world in studying sui generis of EU customs law increases. The aim of this article is to initiate a scientific discussion on the development of an alternative approach to the understanding of EU customs law sui generis. It is suggested that one should not be limited by the characteristics of the provisions of the Common Customs Tariff and the EU Customs Code when justifying the uniqueness of EU customs law. The article considers the history of the EU customs law formation within four stages and demonstrates that modern EU customs law is formed by: EU founding agreements; acts adopted by EU institutions; agreements concluded both between EU member states and with third states; national customs law of EU member states; and practice of application of EU customs legislation, in particular, judicial practice. The paper identifies priority areas for the future development of EU customs law to include the single European customs agency formation and further approximation of customs laws of EU member states.

Keywords: customs legislation; customs union; EU Customs Code; Common Customs Tariff; international agreements

1. Introduction

Customs law is one of the fundamental branches of domestic law, which has always interested both theorists and practitioners. Its evolution is influenced by various factors, including the development of European integration, combating international terrorism and illegal migration, simplification and harmonisation of customs procedures, the spread of COVID-19 and more. For its part, European Union (EU) customs law has its own influence on the development of other branches of EU law, as well as on the development of various branches of domestic law of EU member states and third countries. In view of this, various aspects of EU customs law have repeatedly been the subject of research by scientists from around the world. For example, among the most popular of them are: the influence of international law on the EU customs law formation and their interaction (Lux, 2007; Rogmann, 2019; Ovádek & Willemyns, 2019); problematic aspects of the uniform application of EU customs law by its member states (Valantiejus & Katuoka, 2019; Shtal et al., 2018); the role of EU customs law in the europeanisation of national administrative law and the formation of EU administrative law (Limbach, 2015); and issues of interaction of EU customs law with the national customs law of its member states (Valantiejus, 2020).

For centuries, peoples and nations have tried as far as possible to prevent or minimise interference by other aspects of international law in their rule-making activities relating to customs matters. Only in exceptional circumstances, usually as a result of defeat in war, have they been forced to temporarily cede supremacy in these activities on the basis of treaty norms ofi international law. The latter, being imposed by force, were abolished as soon as possible, and control over rule-making in

the field of customs business was restored. In view of this, for a long time the customs law of various participants of international customs relations differed not only in content but also in structure. As a result, inconsistencies in customs law and different approaches to the practice of its implementation, stipulated by changes in the priorities of state customs policy, have repeatedly led to trade (tariff) wars and in some cases to armed conflicts (Johnston, 1894; Taylor, 1935; Kennan & Riezman, 1988).

Generally, scientists identify the features of EU customs law, as an integral part of the functioning customs union, by characterising the basic acts of EU customs legislation, namely the Common Customs Tariff and the Customs Code (Wolffgang, 2007; Wolffgang & Ovie, 2007; 2008; Weerth, 2008; Truel & Maganaris, 2015). This approach of EU customs law research can be explained by the fact that the Common Customs Tariff and uniform or harmonised customs legislation on the application of this tariff in the theory and practice of customs unions are recognised as one of the mandatory, primary and inherent features of customs unions (Borchard, 1931; World Customs Organization [WCO], 2018). Negotiations to establish such unions begin with customs legislation, and these issues play a crucial role in negotiations on the expansion of the EU (Lux, 2002).

At the same time, EU customs legislation is not limited to the Common Customs Tariff and EU Customs Code. In addition to the provisions of these legislative acts, its constituent parts also include the following: provisions supplementing or facilitating the implementation of EU Customs Code, adopted at the Union or national level; the legislation setting up a union system of reliefs from customs duty; and international agreements containing customs provisions, insofar as they are applicable in the Union (EU, 2013b). In addition, it is important to note that EU customs law is not limited to customs legislation as one of its forms, but also includes other social regulators, including moral norms, traditions, customs, and law enforcement practices and so on. Therefore, the identification of the peculiarities of EU customs law should be carried out systematically, taking into account both the above-mentioned components of EU customs legislation and other forms of its external existence.

The issue of conflicts of customs law in the various countries and their participation in trade wars remains relevant even at the beginning of the 21st century (Ossa, 2014; Karmakar & Jana, 2021). However, the development of trade globalisation and regional economic integration processes, national customs systems convergence and the international customs law formation (Bilozorov et al., 2019), as well as the need to unite efforts of representatives of the international community to counter threats to human civilisation, including international terrorism and the spread of COVID-19, during the second half of the 20th century and at the beginning of the 21st century significantly influenced the development of new approaches to understanding the role of customs authorities and the evolution of customs law as a social phenomenon. One of the manifestations of the latter was the emergence of another type – the customs law of customs unions along with domestic customs law and international customs law.

It is crucial to emphasize that in the legal doctrine, scientists from different regions of the world deal with the issue of customs unions, including the issue of a single customs law formation within the member states. At the same time, this applies to both scientists from states that are members of customs unions and scientists from third states. Thus, according to estimates by Ovádek and Willemyns (2019), there are currently 16 customs unions in the world, which include 118 countries. For their part, Gnutzmann and Gnutzmann-Mkrtchyan (2019) believe that only 81 countries are members of various customs unions. There are various directions of research in this area (Algazina, 2018; Rudahigwa & Tombola, 2021). The most relevant of these, despite more than 50 years of existence, are scientific papers on the uniqueness of the legal nature of the customs union of the EU member states and the customs law in force within its customs territory. At the same time, the diversity of manifestations of EU customs law *sui generis* attracts the attention of scientists from both EU member states and third states.

There are several explanations for this. First, a doctrinal discussion of the theoretical and applied aspects of EU customs law functioning within its customs territory is crucial for ensuring the effective functioning of the EU in general. Therefore, scientists from the EU Founding states (Lux, 2007; Rogmann, 2019; Wit, 2019) as well as the scientists from the states that later became the EU members (Valantiejus & Katuoka, 2019; Erkoreka, 2020; Valantiejus, 2020) dedicate scientific papers to this issue. Secondly, the scope of the legal impact of EU customs law is much larger than the scope of its functioning, limited by the EU customs territory. With this in mind, EU customs law is of interest to researchers both from states that share borders with the EU and from other states that interact with the EU in trade and other fields (Chen, 2016; Kril, 2020). Third, there are no analogues to EU customs law in any of the existing customs unions. Moreover, as a dynamic social and cultural phenomenon, EU customs law continues to evolve. It attracts the attention of theorists and practitioners from both member states of existing customs unions and from states that interact with each other within other forms of economic integration, or who plan to do so in future (Truel et al., 2015; Romanova, 2018).

The analysis of scientific publications devoted to the knowledge of various manifestations of EU customs law *sui generis* allow us to conclude that the doctrine of law lacks a systematic approach to study of this area of EU law. Researchers mostly focus on certain applied aspects of EU customs law and do not see the need to justify their own approach to its understanding. Frequently EU customs law is identified with customs legislation, and its content is disclosed with the help of the EU Customs Code fundamental provisions description, the Common Customs Tariff and directly related legislation. It is also common practice among scientists to describe only the current state of the basic acts of EU customs legislation or the latest changes made to them in their scientific papers. At the same time, the papers on the historical perspective of EU customs law formation and possible options for its further development are extremely rare in the scientific literature.

In view of the above, we can put forward the following provision, being the hypothesis of our study: in characterising EU customs law *sui generis*, researchers must pay attention to the history of its formation and discuss promising options for its possible development. An analysis of the long-standing practice of drafting EU customs legislation and the practice of its uniform application suggests that EU customs law will continue to develop. Therefore, the current state of EU customs law can be considered only as one of a number of stages of its long genesis. For its part, a carefully analysed history of EU customs law formation will attract the attention of researchers as long as the integration of international relations remain relevant.

Thus, the aim of our study is to initiate a scientific discussion on the development of an alternative approach to understanding EU customs law *sui generis*. It is suggested that one should not be limited by the characterstics of the Common Customs Tariff and the EU Customs Code provisions when justifying the uniqueness of EU customs law. Achieving this goal requires a review of the following priorities:

- to analyse the history of EU customs law formation
- to determine its current state
- to suggest likely options for further development of EU customs law for doctrinal discussion.

The goal set determines the methodology of this study. We first look at the legal basis for the establishment and history of EU customs law formation. Then, taking into account the results of the analysis of existing scientific literature methodological approaches to understanding EU customs law, we describe its current state. After that, we formulate assumptions about the possible future development of EU customs law.

Achieving the goal of the study necessitated the use of various methods of scientific knowledge to process scientific achievements on EU customs law, including: historical and law method; comparative method; system and structural method; hermeneutic method; method of analysis; synthesis method; and generalisation method. In particular, the historical and law method was used to characterise the process of emergence and formation of EU customs law. The use of the comparative method allowed us to compare the existing doctrinal approaches to the use of the categories 'customs law' and 'customs legislation' in scientific papers, as well as to conclude that it is inexpedient to identify them in this way when characterising EU customs law. The system and structural method was used in describing the content of EU customs law and the elucidation of the links between its structural elements. The EU's founding agreements, customs acts adopted by EU institutions, including court decisions, and international customs treaties to which the EU is a party have been studied using logical methods of analysis and synthesis and the hermeneutic method. The prediction method and the modelling method were used while making suggestions aimed at improving EU customs law and the practice of its application.

2. Formation of EU customs law

EU customs law is a 'living', dynamic, social and cultural phenomenon that continues to evolve. From the date of entry into force of the Treaty on establishing the European Economic Community (EEC) of 25 March 1957 to the present day, the history of its formation should be analysed in several stages. In the first stage, which lasted from 1 January 1958 to 1 July 1968, the EU Founding states began the process of standardising their customs legislation and adopted the first version of the Common Customs Tariff. Establishing a single system of exemptions from customs duties within the Community for the member states of the EEC on the basis of Council Regulation (EEC) 918/83 should be considered the result of the second stage, which lasted until 1983.

The most significant results of the third stage of the EU customs law formation were drafting the Common EEC Customs Code and the adoption of a new version of the EEC Common Customs Tariff on 1 January 1988. Since 1 January 1994 – the date of application in practice of the Community Customs Code provisions of 1992, the fourth stage of EU customs law formation began. During this phase, which continues to this day, the modernised Community Customs Code of 2008 was adopted and the current Customs Code of the Union entered into force on 1 May 2016. EU member states have made significant progress not only in the standardising national customs legislation, but also actively cooperating on standardising the application of EU customs legislation, as if by a single administration. In fact, by the end of 2021, a holistic system of sources of EU customs law had been formed by, for example, EU founding agreements; acts adopted by EU institutions; international agreements concluded both between EU member states and with third countries; national customs law of EU member states; and EU customs legislation application practice, in particular judicial practice.

Despite more than 60 years of formation, EU customs law continues to evolve. One of the highest priority areas of its further formation is the establishment of the single European Customs Agency. Its emergence will help to eliminate the ambiguous application of EU customs law by the customs authorities of EU member states and increase the effectiveness of customs policy within the customs territory of the EU both in the interests of its member states and the EU as a whole. Another promising area for improving EU customs law is the further convergence of customs laws of its member states (Sribnyak & Shatilo, 2020). With the emergence of a single customs administration for all EU member states, the necessity for the existence of the national customs laws of EU member states will disappear. For its part, this may significantly affect the content and the structure of existing sources of EU customs law in such areas as customs control over imports of goods, charging customs duties, establishing the origin of goods, applying a single risk assessment system, prosecuting customs offences, training of customs officers. In addition, a number of other areas of its modernisation remain

promising for the further development of EU customs law, including the introduction of Customs Information Technologies into the practice of customs administrations of EU member states, bringing EU customs law in line with customary and treaty rules of International Customs Law.

2.1. First stage of the formation of EU customs law

Another important component of the legal characteristics *sui generis* of EU customs law is the history of its development from its emergence to the present day. This issue remains one of the least studied in European legal doctrine. Scholars rarely mention the history of EU customs law (Lyons, 2018). For a number of them, it (the history) began in 1994, after the entry into force of the Community Customs Code (CCC) adopted in 1992 and the Regulation laying down provisions for the implementation of the Community Customs Code adopted in 1993 (Wolffgang, 2007; Anaboli, 2018). However, in our opinion, the history of the origin and formation of EU customs law should be considered from the date of entry into force of the Treaty establishing the EEC of 25 March 1957 (Treaty on the EEC or Treaty of Rome) the provisions of which required contracting parties to not only adopt a Common Customs Tariff for relations with third countries, but also to harmonise their customs legislation.

Indeed the formation of customs law was not part of the objectives of the EEC Treaty. However, a provision which made possible the existence and functioning of the Community, was fixed in part 1 of article. 9, namely: 'The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between member states of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries' (EEC, 1957). In view of the changes that have taken place in EU law since the entry into force of the Treaty of Rome, the above provisions are still valid today: 'The Union shall comprise a customs union…' (EU, 2012a). The immediate objectives of the EEC were to:

- create a common market for goods, labour, services and capital by abolishing customs duties and quantitative restrictions on the import and export of goods between member states, as well as all other equivalent measures
- establish a Common Customs Tariff and a common trade policy with regard to third countries
- establish a common policy in the field of agriculture, transport, energy
- standardise the laws of the member states to the extent necessary for the existence of the common market, etc.

On 2 August 1963, as part of activities aimed at harmonising the customs law of the EEC member states, the EEC Commission presented to the Council a Memorandum on an action program in the field of customs legislation, one of the main tasks of which was to establish and apply a single set of rules in the field of customs legislation within the association.

The development of the common market began with the formation of a customs union for industrial goods. Under the EEC Treaty France, Germany, Italy, Belgium, the Netherlands and Luxembourg planned to build a customs union gradually, over a twelve-year transition period divided into three four-year phases. How fruitful this process proved to be is shown by the fact that its completion took place on 1 July 1968 – 18 months earlier than planned. However, the text of the Treaty of Rome, and over time the Court of Justice practice clarifying its provisions, allowed member states to adopt emergency self-defence measures. In particular, states have most often imposed bans or restrictions on the import, export and transit of goods in accordance with the principles of public morality, public order and state security; protection of health and life of people, animals or plants; protection of national treasures of artistic, historical or archaeological value; and protection of industrial and commercial property. Such prohibitions or restrictions should not be used as a means of discrimination or a disguised restriction on trade between member states (Getman & Karasiuk, 2014). However, it

took more than 20 years to completely abolish all types of controls and formalities that remained at the borders between the member states of the customs union, as well as other barriers that hindered the final completion of the common market of goods, labour, services and capital.

Lyons (2018) notes in this regard that despite the fact that in 1968 a single customs tariff came into force, harmonised rules of origin and customs valuation, and the customs territory was defined, much remained to be done to accomplish the formation of the customs union. Thus, one of the first steps towards overcoming the existing obstacles was the further harmonisation of the customs laws of the EEC member states. From the very beginning until 1961, this process was based on the recommendations of the EEC Commission, which were addressed to the member states and related to the standardisation of legislative, regulatory and administrative provisions on customs matters (Articles 27 and 155 of the EEC Treaty). And after 1961 it was grounded on the basis of directives of the Council or the Commission developed in accordance with the provisions of Art. 100 of the EEC Treaty. However, this practice proved to be ineffective, so the Community gradually moved from the harmonisation of customs law on the basis of directives to its implementation on the basis of Regulations of the Council or the Commission, functioning directly in the territory of the member states of the customs union.

2.2. Second stage of the formation of EU customs law

In 1971, the EEC Commission adopted the Program for the Standardisation of Customs Law, which ultimately proclaimed the consolidation of customs law of the EEC member states. The tasks set by the Program, such as harmonisation of legal and administrative regulations on the transfer of goods for free circulation in terms of customs law, were planned to be completed by the end of 1975. However, these tasks were not completed on time. As a result, in the second half of the 1970s the EEC Commission, despite the results achieved[1], was forced to admit the unsatisfactory state of completion of the customs union (EEC, 1978).

This especially related to the results of the tasks provided for in another multi-year Customs Union Implementation Program, approved in 1979. The measures provided for in this Program were aimed at completing: the harmonisation of customs legislation and increasing its binding force; adopting a single customs code and GATT rules in the form of regulations on the valuation of goods for customs purposes; simplification of customs formalities; and related customs procedures. The following demands were separately emphasised, for example, further development of deeper cooperation between national customs administrations and the EEC Commission; strengthening the image of the Community within international meetings on customs matters; and enhancing Community participation in the activities of international organisations (EEC, 1979).

In general, the Commission was concerned that the Community was more often referred to as a tariff union rather than a customs union. In this regard 1980 was set as the deadline for the implementation of the most important measures aimed at transforming the tariff union into a true customs union. It should be noted that among the planned measures there were those that have not yet been completed, in particular, the development of a single list of offences in the customs sphere and a single system of sanctions for their commission (EEC, 1978).

In general, the EEC Commission proclaimed legal unity as a prerequisite for the functioning of the customs union and focused its efforts on the codification of customs law in the form of regulations. As the directives could not fully guarantee the unification of legislation and the necessary law and order, this approach, in the Commission's view, was preferred. By the end of 1981, the Council had adopted 21 proposals from the EEC Commission to that effect. However, in June 1981, the European Council expressed concern about the state of the Community's internal trade, and the EEC Commission had to reiterate the unsatisfactory results achieved since 1979. In early 1982, the EEC

Commission emphasised that: 'Twenty-four years after the creation of the European Community, it must be admitted that full customs union is still a long way off' (EEC, 1982). However, since 1983, the implementation of the goals set by the Program for the Implementation of the Customs Union in 1979 accelerated significantly. As early as March 28, 1983, Council Regulation (EEC) No. 918/83 was adopted, establishing a system of exemptions from customs duties in the Community (EEC, 1983).

2.3. Third stage of the formation of EU customs law

This process intensified especially after the signing of the Single European Act (SEA) by EEC member states on 17 February 1986, the provisions of which became the first serious revision of the EEC Treaty in the history of the Community. The SEA entered into force on 1 July 1987 and, among other tasks, clearly defined a three-stage program for the formation of a single internal market by 31 December 1992. In accordance with the provisions of Art. 13 of the SEA it was stated that the internal market should be understood to be an area without internal borders where the free movement of goods, persons, services and capital is ensured, on the basis of the provisions of the EEC Treaty (EEC, 1987c). Therefore, the existence of any customs formalities at the common borders of the EEC member states contradicted both the program of the customs union and the program of forming a single internal market. Since the abolition of customs duties at the borders between EU member states, the only obstacle to the movement of goods remained the need to complete customs documents. This process was facilitated on 1 January 1988, when the so-called Single Administrative Document was introduced, replacing 150 different national forms (EEC, 1987a).

On 1 January 1993, following the formal completion of the Single Internal Market Program on 31 December 1992, and the EU member states declaring the removal of all obstacles at the internal borders of the Customs Union, the customs procedures were abolished altogether. Thus, there were no obstacles left that required stops at the borders between EU member states during the transportation of goods. This made it possible to finally abolish internal customs borders throughout the EU. Also, on 1 January 1988, after the EEC acceded to the International Convention on the Harmonized Commodity Description and Coding System, a new version of the Common Customs Tariff of the EEC (EEC, 1987b) entered into force, replacing the Convention on Nomenclature Tariffs of 15 December 1950 (WCO, 1950) Common EEC Customs Tariff, which had been in force since 1968 (EEC, 1968).

On 28 February 1990, the EEC Commission submitted the Draft CCC for consideration, the development of which began in the early 1980s. Its adoption took place on 12 October 1992, in the form of a Regulation as in the case of the Common Customs Tariff (EEC, 1992).

2.4. Fourth stage of the formation of EU customs law

Full application of the CCC provisions began only on 1 January 1994, following the application of EU Commission Regulation No. 2454/93 of 2 July 2 1993, laying down provisions for the implementation of Council Regulation (European Communities [EC]) No. 2913/92 implementing the Community Customs Code of 12 October 1992 (EEC, 1993). Articles 161, 182 and 183 of the CCC were to apply from 1 January 1993. In essence, the application of the CCC was impossible in the absence of this Regulation. Wolffgang and Ovie (2008) believe that the emergence of customs law, which is mandatory for all EU member states, should be linked to the entry into force of the CCC in 1994 and the Regulation establishing the provisions on the implementation of the CCC. The authors emphasise that their emergence has formed a solid basis for achieving uniformity in the customs affairs of 27 countries.

Regulation (EEC) No. 2913/92 of 12 October 1992 (EEC, 1992) and Regulation (EEC) No. 2454/93 of 2 July 1993 (EEC, 1993) are also recognised as the primary basis of EU customs law by other scholars, in particular, by Erskine (2006) and Truel, Maganaris and Grigorescu (2015b). It should be noted that

the CCC of 12 October 1992, was developed by integrating customs procedures, which were applied separately in the respective member states during the 1980s. The Code repealed more than a hundred regulations and directives being in force in the field of customs regulation from 1968 to 1993, and aimed to achieve clarity and uniformity in the interpretation of the provisions of EU law on trade with third parties. To determine the cases and conditions under which the application of customs legislation may be simplified, as well as to consider other issues related to its application, the Customs Code Committee was established on the basis of CCC Art. 247–249 (EEC, 1992).

The adoption of the CCC was a significant achievement of the consolidation of EU customs law, which was initiated by the Program for the Standardisation of Customs Law in 1971. However, it should be noted that with its emergence the need for national customs laws of EU member states remained as the CCC enshrined only the basic foundations of customs relations legal regulation (Erskine, 2006). Thus, the national customs law of the EU member states remained the regulation of the organisation of national customs services, the legal regulation of relations of liability for violations of customs legislation and certain customs procedure rules. Some CCC articles even referred to the need to apply the provisions of the customs law of the EU member states (Articles 167, 217, 245, etc.) (EEC, 1992).

The provisions of the CCC of 12 October 1992, have long been used as the basic principles of customs regulation by EU member states. However, in order to further improve the EU's customs law and the customs services of its member states, the European Commission drafted a new Customs Code. From the very beginning of the draft work, it was decided that the modernisation of the current code should be carried out only through its complete revision and replacement with a new efficient document but not by revising of its individual provisions. As a result, the adoption of the updated modernised Community Customs Code took place on 23 April 2008, by Regulation (EC) No. 450/2008 of the European Parliament and of the Council, officially published on 4 June 2008 (EU, 2008a).

According to Art. 188 of the Modernised Customs Code (MCC), the entry into force of the provisions, enshrined in its articles, was planned in several stages, namely from: 24 June 2008; 24 June 2009; 1 January 2011; and 24 June 2013. It differed significantly from the 1992 CCC (EEC, 1992) both in structure and content. Thus, retaining nine sections in the structure of the MCC, the number of articles they contained was reduced from 253 to 188. In the content of the latter, considerable attention was paid to, for example, cooperation between customs administrations and authorised economic operators, submission of electronic customs declarations, and exchange of electronic data between customs administrations in compliance with the provisions on protection and confidentiality of personal data. Following the entry into force of Regulation (EC) No. 450/2008 of the European Parliament and of the Council, the EU Commission also approved amendments to the provisions on its implementation in the form of a Regulation of 17 November 2008 (EU, 2008b).

At the same time, as noted by Wolffgang and Harden (2016), the Modernised Customs Code (MCC) became obsolete long before it came into force. Therefore, on 20 February 2012, the EU Commission announced the start of work on the development of the third version of the Union Customs Code, which resulted in the adoption of Regulation No. 952/2013 of 9 October 2013, by the European Parliament and the Council establishing the European Union Customs Code (UCC) (EU, 2013b), which entered into force on 1 May 2016. During the same period, along with the improvement of the system of principles and norms of customs law, the EU paid considerable attention to measures aimed at ensuring the efficient and effective work of national customs administrations and their response to any requirements arising from changes in the customs environment as if it would be done by a single administration.

As Lyons (2017) points out, legislation alone is not enough to create a functioning customs union. Unified management is also needed. Although the Commission plays a key role in this, national customs authorities are also important and, therefore the Commission seeks closer cooperation between them. To achieve this objective, the European Parliament and the Council of the EU have adopted ongoing Action Programs in the form of decisions for customs within the Community.

3. Community Action Programs

In accordance with the Decision of the EEC Council No. 91/341/EEC of 20 June 1991, a Community Action Program on training customs officers was adopted (EEC, 1991). Pursuant to Decision No. 210/97/EC of 19 December 1996, a Program of Action for Community customs was approved (Customs 2000), the implementation of which was intended for the period from 1 January 1996 to 31 December 2002 (EC, 1997). Based on Decision No. 253/2003/EU of 11 February 2003, the Customs 2007 Program was approved for the period from 2003 to 2007 (EU, 2003). According to the Decision of the European Parliament and of the Council No. 624/2007/EU of 23 May 2007, a 'Program of Action for customs in the Community (Customs 2013)' was adopted (EU, 2008c).

It should be noted that in the content of the Program of Action for Customs in the Community (Customs 2013) issues associated with developing the practice of unified management in the customs sphere were given special attention. The implementation of the Customs 2013 Program was scheduled for the period from 1 January 2008 to 31 December 2013 and was coordinated and organised by the Commission and the member states within the framework of the common policy developed by the Customs Policy Group. All areas of improvement incustoms administrations envisaged by the 'Customs 2013' Program were divided into two objectives, general and special. Among the general objectives to be guaranteed by the 'Customs 2013' Program are, for example:

- ensuring the interaction and fulfilment of the obligations of the customs administrations of the member states as effectively as if they were a single administration, ensuring control with appropriate results anywhere in the customs territory of the Community and supporting the activities of legitimate economic operators
- preparation of candidate and potential candidate states for accession, including means of exchanging experience and knowledge with the customs administrations of these states.

Examples of specific objectives are:

- reducing administrative costs and losses associated with the services of economic operators by standardising and simplifying customs systems and control, and maintaining open and transparent cooperation with legal entities
- supporting development of a pan-European electronic customs environment through the development of operational communication systems of liason and the exchange of information related to the necessary legislative and administrative changes
- maintaining existing communication and information exchange systems and, where necessary, developing new ones; development and strengthening of general education (Limbach, 2015).

Goals of the 'Customs 2013' Program that were not achieved, together with new areas for improving the activities of customs administrations, were logically continued in the next EU Customs Action Program (Customs 2020). They were approved by Regulation No. 1294/2013 of 11 December 2013, and their implementation was planned for the period from 1 January 2014 to 31 December 2020 (EU, 2013a). The main goal of the 'Customs 2020' Program was to support the functioning and

modernisation of the Customs Union by deepening cooperation between EU member states, their customs authorities and their officials. However, not only EU member states could participate in the implementation of its provisions. Along with them, EU accession states, candidate states, potential candidates and European Neighbourhood Policy Partner Countries were also given this opportunity.

Achieving the main goal was planned by way of achieving specific objectives. The specific objectives are:

- to support customs authorities in protecting the financial and economic interests of the Union and of the member states, including the fight against fraud and the protection of intellectual property rights
- to increase safety and security, to protect citizens and the environment
- to improve the administrative capacity of the customs authorities
- to strengthen the competitiveness of European businesses.

Along with specific objectives, the 'Customs 2020' Program also identified the need to achieve a number of operational objectives, namely:

- to support the preparation, coherent application and effective implementation of Union law and policy in the field of customs
- to develop, improve, operate and support the European Information Systems for customs
- to identify, develop, share and apply best working practices and administrative procedures, in particular further to benchmarking activities
- to reinforce the skills and competences of customs officials
- to improve cooperation between customs authorities and international organisations, third countries, other governmental authorities, including Union and national market surveillance authorities, as well as economic operators and organisations representing economic operators.

It is important to emphasise that during the implementation of the 'Customs 2020' Program, the Commission once again called on EU member states to act as one in managing of the Customs Union to ensure that national administrations, businesses and the public obtain the maximum advantage. To assist EU member states in applying its customs legislation properly in future, the Commission has made it mandatory to monitor the implementation of the 'Customs 2020' Program to identify and correct any shortcomings and to develop a new action plan in this area (EU, 2016b). Taking into account the results of monitoring conducted on 11 March 2021, the Regulation of the European Parliament and of the Council No. 2021/444 approved the current Customs Program of Cooperation in the field of Customs. Its implementation is designed for the period from 1 January 2021 to 31 December 2027 (EU, 2021).

The preamble to the Customs Program generally praises the contribution of the 'Customs 2020' Program to the development of bilateral and multilateral customs cooperation, as well as to the protection of the financial interests of EU and its member states. In view of this, further financing of activities in the field of customs cooperation, in particular under the current Customs Program, is considered appropriate and relevant. In comparison with the 'Customs 2020' Program, the purpose of the current Customs Program deserves additional attention – it is designed to support the customs union and customs authorities working together and acting as one to protect the financial and economic interests of the Union and its member states, to ensure security and safety within the Union and to protect the Union from unfair and illegal trade, while facilitating legitimate business activity. As for its general objectives, these are to support:

- the preparation and uniform implementation of customs legislation and policy
- customs cooperation
- administrative and IT capacity building, including human competency and training, as well as the development and operation of European electronic systems
- innovation in the area of customs policy.

It should be noted that the Program pays considerable attention to the development and operation of European electronic systems required for the customs union and for the fulfilment of tasks by customs authorities, in particular the electronic systems referred to in Article 16(1) and Articles 278 and 280 of Regulation (EU) No. 952/2013, Article 8 of Regulation (EU) 2019/880 of the European Parliament and of the Council (EU, 2013b; EU, 2019), and in other provisions of Union law governing electronic systems for customs purposes, including international agreements, such as the Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) (EU, 2009a).

Among a number of other innovations in the current Customs Program, mention should also be made of the establishment of the Customs Program Committee to facilitate the Commission's activities, as well as the inclusion of other third country participants. However, their participation implies the need to conclude special international agreements with the Union, which regulate the participation of third countries in EU programs (EU, 2021). Thus, at the present stage of the EU's functioning, the formation of its customs law as the only agreed set of principles, norms and standards for all member states is being continued. In practice, EU customs law is given priority over the customs law of its member states, which gradually contributes to increasing the level of harmonisation and, in some cases, full unification of certain provisions of national legislation in the field of customs regulation.

4. Current state of EU customs law

It can be assumed that the subsequent development of the relevant processes may lead to the complete replacement of the customs law of the member states by a single EU customs law. At the same time, as of the end of 2021, EU customs law is a legal phenomenon *sui generis*, the material and procedural components of which are: EU founding agreements; acts adopted by EU institutions; international agreements concluded both between EU member states and with third countries; national customs law of EU member states; and practice of application of EU customs legislation, in particular judicial practice, etc. In this regard, we consider it unreasonable to use doctrinal approaches based on the division of EU legislation into primary EU law (treaties) or in secondary and tertiary EU legislation for the characterisation of EU customs law (Rogmann, 2019). Let us briefly describe the current state of EU customs law.

Among the EU founding agreements, the most important in this area are the Treaty on European Union (TEU) (EU, 2012b) and the Treaty on the Functioning of the European Union (TFEU) (EU, 2012a). Their articles enshrine numerous provisions important for the customs law of the Union. However, while TEU articles generally define the values and principles of the Union and do not directly mention the customs union and components of EU customs law, the TFEU text and its Protocols pay considerable attention to the regulation of customs relations. For example, according to Art. 3 TFEU, the Union has exclusive competence in relation to the customs union. For its part, in accordance with Art. 31 TFEU, Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Importantly for the legal regulation of customs relations both between EU member states and with third countries and territories, the rules of customs law are also enshrined in the following articles of the TFEU and its Protocols:

- Articles 28, 29 (Free movement of goods)
- Articles 30, 32 (The customs union)
- Art. 33 (Customs cooperation)
- Articles 34–37 (Prohibition of quantitative restrictions between member states)
- Art. 349 (General and final provisions)
- Protocol No. 7 'On the Privileges and Immunities of the European Union'
- Protocol No. 31 'Concerning Imports into the European Union of Petroleum Products Refined in the Netherlands Antilles'
- Protocol No. 34 'On special arrangements for Greenland' etc.

Among the acts adopted by EU institutions, the current EU Customs Code (UCC), approved by Regulation No. 952/2013 of the European Parliament and the Council of 9 October 2013, establishing the European Union Customs Code (EU, 2013b), plays the key role.

Wolfgang and Harden (2016) believe that among the factors influencing the development and adoption of the UCC, the most important are: changes in the economic environment; changes in the main sources of primary EU law; changing the role of customs; and the necessity to modernise customs law in order to achieve the objectives set out in the Modernised European Customs Code. The UCC consists of a preamble, 9 sections containing 288 articles, and one appendix – the Correlation Table. The following general rules and procedures applicable to goods imported into or exported from the customs territory of the EU have been enshrined in its content:

- general provisions
- factors on the basis of which import or export duty and other measures in respect of trade in goods are applied
- customs debt and guarantees
- goods brought into the customs territory of the Union
- general rules on customs status, placing goods under a customs procedure, verification, release and disposal of goods
- release for free circulation and relief from import duty
- special procedures
- goods taken out of the customs territory of the Union
- electronic systems, simplifications, delegation of power, committee procedure and final provisions.

The UCC is the fundamental but not the only piece of EU customs legislation. Therefore, other regulations adopted to promote compliance with the provisions of the UCC also play an important role in the effective legal regulation of customs relations in the EU:

- Delegated Regulation of the EU Commission No. 2015/2446 of 28 July 2015, (EU, 2015a)
- Implementing Regulation of the EU Commission No. 2015/2447 of 24 November 2015, (EU, 2015b)
- Delegated EU Commission Regulation No. 2016/341 of 17 December 2015 (EU, 2016a), etc.

An extremely important component of EU customs law is the Common Customs Tariff, which is applied in accordance with the Regulation of the EEC Council No. 2658/87 of 23 July 1987, on the Tariff and Statistical Nomenclature and the Common Customs Tariff (EEC, 1987b). The Common Customs Tariff is vital for the Community as an economic and customs union, as it forms the external line of defence of the common market. If member states applied different rates of import duty, goods could be imported from third countries through the territory of the member state with the lowest or zero duty rates and then apply the principle of free movement of goods within the common market (Lux, 2002). The Combined Nomenclature (CN) – a systematic list of descriptions of goods, compiled on the basis of the Harmonized System forms the basis of the Common Customs Tariff. In addition, CN is also used for community foreign trade statistics. The EU Commission draws up the EU's Integrated Tariff TARIC (from the French term 'Tarif intégré des Communautés européennes') on the basis of the CN. Legally, TARIC is not part of EU customs legislation. However, it is actively used by the Commission and the competent authorities of the member states in practice to implement the Union's measures in relation to imports, as well as to exports and trade between member states to the necessary extent.

The main purposes of using CN and TARIC are the following: collection of duties; designation of goods subject to excise duties; designation of goods subject to VAT at reduced rates; application of import and export non-tariff restrictions; and maintaining foreign trade statistics. TARIC is published annually in the Official Journal of the EU and is also available electronically. An important part of the customs law of the Union is formed by the rules establishing the system of exemptions from customs duties. Lux (2002) notes in this regard that the term 'duty relief' covers duty relief or reduction of the duty rate as stipulated in the customs tariff.

As in the case of the EU Common Customs Tariff, due to its size, the system of duty exemption in force in the Union is set out separately from the Customs Code, namely in Council Regulation (EU) No. 1186/2009 of 16 November 2009, establishing a Community system of exemptions. The structure of this Regulation consists of a preamble, four sections (I Scope and definitions; II Relief from import duty; III Relief from export duties; IV General and final provisions), containing 134 articles, and six annexes (EU, 2009b). An important place in the structure of EU customs law belongs to international agreements containing provisions in the field of customs law, to the extent that they are applied within the Union.

Depending on the subject composition, such agreements can be classified into the following types:

- agreements between EU member states (Convention on the Simplification of Formalities in Trade in Goods of 20 May 1987, Convention on a Common Transit Procedure of 20 May 1987, Convention on Mutual Assistance and Cooperation Between Customs Administrations of 18 December 1997)
- multilateral international agreements to which the EU and its member states are parties (International Convention on the Simplification and Harmonization of Customs Procedures of 18 May 1973, Customs Convention on the International Carriage of Goods under Cover of a TIR Carnet of 14 November 1975, International Convention on the Harmonized System of Description and Coding of Goods of 14 June 1983, the International Convention on Temporary Admission of 26 June 1990)

- agreements of the EU and its member states with third countries or international organisations of 27 June 2014 (Association Agreement between the European Union and its member states, of the one part, and Ukraine, of the other part) of June 27 2014 (Association Agreement).

Thus in the Association Agreement on the regulation of mutual relations in the field of customs regulation, attention is paid in the following articles:

1. art. 27 'Definition of customs duties'
2. art. 29 'Abolition of import duty'
3. art. 30 'Standstill'
4. art. 31 'Customs duties on exports'
5. art. 33 'Fees and other charges'
6. art. 49 'Lesser duty rule'
7. art. 50 'Application of measures and reviews'
8. art. 76 'Legislation and procedures'
9. art. 77 'Relations with the business community'
10. art. 78 'Fees and charges'
11. art. 79 'Customs valuation'
12. art. 80 'Customs cooperation'
13. art. 81 'Mutual administrative assistance in customs matters'
14. art. 82 'Technical assistance and capacity-building'
15. art. 83 'Customs Sub-Committee'
16. art. 84 'Approximation of customs legislation' (EU, 2014).

In areas not covered by the above-mentioned acts of EU customs legislation, or in which Union law provides for or permits the adoption of national laws, the law of the member state where the goods are placed under the customs procedure shall apply. This applies to various issues, in particular, the organisational structure of national customs administrations, the procedure for service in customs authorities, classification of customs offences, types and application of sanctions for customs offences, procedures for appealing against the actions of customs authorities and more. It should be borne in mind that the scope of national customs legislation is limited by state borders and does not extend to the entire customs territory of the EU. Therefore, given the number of EU member states, as well as the fact that national customs legislation plays only an additional role in the legal regulation of customs relations within the customs territory of the EU, we believe that providing a detailed description of the customs legislation of each EU member state is not appropriate in this paper.

In general, EU member states have made significant progress in applying EU customs legislation as if it were a single administration. However, they still have a long way to go in order to be fully coordinated in this area. In practice, there are constant cases of ambiguous interpretation and application of EU customs legislation by different law enforcement agencies of EU member states. Most often, such situations arise from the implementation of customs control over the import of goods, calculating the amount of customs duties, establishing the origin of goods, determining their classification in the combined nomenclature and the imposition of customs sanctions.

The formation, functioning and development of the Union's customs law is significantly influenced by the European Court of Justice (EJC) practice, which has largely specified the provisions of the founding treaties and obliged individual member states to repeal trade restrictions that contradict these rules. In this context, the most famous is the case of *Van Gend en Loos v. Nederlandse Adminastratie der Belastingen 1963*, a decision in which the principle of direct effect of the rules of the Treaty of Rome on the abolition of customs duties between member states was confirmed (Court of Justice of the European Economic Community [CJEEC], 1963). As a result of another case, *Commission v. Italy* in 1968, the EJC ruled that the concept of 'goods' was absent in the EU's founding treaties. According to the Court's decision on goods, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions (CJEEC, 1968).

Great importance is attached to the Court of Justice practice in the activities of national judicial authorities. Thus, at the request of the National Courts of the member states, the Court of Justice decides on the interpretation of the Common Customs Tariff, including the regulations adopted for its interpretation, which enables the courts to decide the cases before them. In addition, national courts assess the facts of the case on the basis of the interpretative criteria set out by the Court of Justice (CJEEC, 1979; 1985). Cases in the following areas of customs regulation are most often referred to the Court:

- Tariff Classification of Goods (Court of Justice of the European Union [CJEU], 2010; 2013; 2015)
- Customs Valuation of Goods (CJEU, 2017a)
- the Origin of the Goods for Customs purposes (CJEU, 2017b).

5. Conclusion

It can be argued that EU customs law has no analogues within any international association. It is a legal phenomenon *sui generis* both in content and form. Its legal effect extends not only to the EU, EU member states, natural and legal persons or any association of persons which, in accordance with EU or national law of its member states, is recognised as having the right to enforce legal acts, but also to third states, their individuals and legal entities.

The history of EU customs law formation, its correlation with international customs law and interaction with the national customs law of EU member states is so unique that when modelling the future EU customs law, scientists sometimes arrive at completely opposite conclusions. Thus, according to one version, the current state of EU customs law and trends in its further development may in the long run lead to the complete replacement of customs law of EU member states with a single EU customs law. According to another version, the development of EU customs law in the light of current evolutionary factors, including the intensification of trade globalisation and revolutionary factors, such as the terrorist attacks of 11 September 2001, and the gradual alignment of EU customs law with customary and treaty international customs law, may lead to a complete loss of autonomy in this area and the liquidation of customs authorities as a well-known state institution.

Thus, the opposite of doctrinal approaches to the perception of EU customs law as a social and cultural phenomenon *sui generis* necessitates further scientific research. Such research will be useful for the EU and its member states, as well as for EU accession countries, candidate countries, potential candidates, European Neighbourhood Policy partner countries and any third countries.

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Notes

1 For example, the final abolition of all duties between the member states of the EEC on 1 July 1977 and a more than 10-fold increase in trade.

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Putting More Union in European Customs

Tom Walsh

Abstract

The European Commission (2021) decided to call on external expertise to advance the debate on the future of the European Union (EU) Customs Union. To that end the Commission established a 'Wise Persons Group on challenges facing the Customs Union.' The Wise Persons Group (WPG) was an independent, high-level group comprised of people with experience in politics, law, industry, the public sector, international trade and academia. The WPG's primary goal was 'to reflect on the development of innovative ideas and concepts and deliver a report that contributes to a general inter-institutional debate on the future of the Customs Union.' The Group published its report and recommendations in March 2022 under the title *Putting more Union in the European Customs. Ten proposals to make the EU Customs Union fit for a Geopolitical Europe* (European Commission, 2022a).

Walsh has now joined the debate to demonstrate how necessary pragmatic compromises on the implementation of customs law have militated against the fundamental concept of the Customs Union since its inception and will continue to do so in the future unless there is the required political will to remedy the known fault lines.

Keywords: Customs Union review; WPG report; customs controls; combatting fraud; pre-clearance

1. Conflicting views on the status of European Union Customs Law

The European Union (EU) Commission sees itself as having a modernised legal framework of customs rules and procedures in place since 2016. For his part, Walsh has viewed the Customs Union legislation as the EU's Achilles heel from its inception, and it will continue to be so into the future unless the member states face up to their legal responsibilities and ensure that effective, proportionate and dissuasive measures are put in place to safeguard the EU against frauds and irregularities. In this article Walsh attempts to trace the development of EU customs law over the proceeding 50 or so years in the hope that his record of the milestones reached along the way may help chart a better way forward.

2. Defining and refining EU Customs Law (Walsh, 1986, pp. 340−344)

In 1968 the EU Customs Union abolished internal customs duties and charges having equivalent effect in trade between the member states and substituted a uniform system for taxing imports from outside the European Economic Community (now the EU). However, the establishment of the customs union involved not only the abolition of all customs duties in trade between the constituent member states and the introduction of a single customs tariff at the common border: a customs union with such limited objectives would not have been very stable. The necessary consequences of substituting

a single customs territory for the national territories − the basic feature of a customs union – were the elimination, at customs level, of any causes of unequal treatment or deflection of trade that could adversely affect economic operators in other member states.

Article 27 of the Treaty of Rome (EU, 1957) − the only Treaty provision providing for the approximation of national customs legislation – envisaged the member states taking the necessary steps 'to approximate their provisions laid down by law, regulation or administrative action in respect of customs matters' on the basis of recommendations from the Commission. In accordance with Article 189 of the Treaty, recommendations come last in the EU legislative hierarchy:

> In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety upon those to whom it is addressed.
>
> Recommendations and opinions shall have no binding force.

Since the recommendations were not binding on the recipient member states, they could look upon the recommendations addressed to them as a minimum which they were ready to accept, but beyond which they considered themselves free to do as they pleased. As a result, no real harmonisation of customs provisions was possible by that means. In effect the reliance on the efficacy of recommendations as instruments of change proved, in practice, to be little more than aspirational.

Given the profound and direct influence of customs legislation on the application of the customs tariff, it was deemed essential that the establishment of Community customs legislation should be brought about, as in the case of the common customs tariff (CCT), based on Community acts that were binding on the member states. After lengthy deliberations the member states were convinced of this necessity, and it was based on programs established by mutual agreement between the member states and the Commission (first in 1963, and later in 1971) that the preparation of genuine Community legislation was undertaken. The net result was the establishment of the CCT, common rules on origin and customs valuation – the duty elements in the taxation of goods. These core taxation measures were, in turn, supported by a framework of directives and regulations governing customs procedures, formalities, controls, debts and guarantees.

Over time it became increasingly evident that, when it came to uniformity of application throughout member states, directives fell far short of achieving the 'one state' norm for customs purposes. Commenting on the 'excessively lax nature of certain Community provisions' the Commission of the European Communities (1977, pp. 13−14) concluded that:

> A large number of Community customs provisions have been adopted by the Council in the form of directives. In those particular cases, there was, in practice, no alternative to the directive because of the pragmatic approach to the approximation of national customs laws. The Community rules, adopted as they were in the most urgent requirements, had to be able to dovetail without difficulty into the national customs legislation in force in each of the Member States. The directive, which is binding on the Member State to which it is addressed, with regard the result to be achieved, while leaving the national authorities responsible for the choice of form and means to be used, was the Community legal form most suited to the intended purpose.

> In the light of eight years' experience, however, there is a clear realisation of the difficulty of achieving via directives a really uniform application of Community rules throughout the Community, an objective that is essential however, to a genuine Customs Union. This difficulty is all the greater as the provisions in most of the directives are not sufficiently precise. As a result, the excessively loose drafting of certain directives has led to an approximation of the national customs provisions that is less thoroughgoing than might have been thought initially.
>
> The only way to ensure that customs legislation is uniform and reliable is to see that binding measures are enacted, which are obligatory and directly applicable with, and therefore offer legal guarantees for the individual [i.e. in binding regulation form].

3. Customs law

3.1. The Community Customs Code (Walsh, 2015, pp. 8−9)

The codification of the various pieces of customs legislation in a single, directly applicable Community Customs Code and accompanying Implementing Regulations was the most significant change in the *acquis communitaire* in the context of the establishment of the Single Market in 1993. The Community Customs Code (European Commission [EC], 1992) replaced 105 regulations, directives and amending provisions going back to 1968. The Commission began the consolidation process in the late 1970s, and it took years of painstaking work to produce the Community Customs Code in October 1992, and its Implementing Regulation in July 1993 (EC, 1993); both regulations came into operation on 1 January 1994. From an economic operator's standpoint, both the Code and its Implementing Regulation challenged legal comprehension. This was partly because they were published in the prescribed regulation format – without a table of contents and crossheadings. On the Commission's own admission, it was easy to get lost in the maze of unsignposted and seemingly unrelated provisions. Consequently, the Code lacked transparency, was not easily accessible and was extremely complex. Furthermore, the interpretative preambles in the original (replaced) directives and regulations were not carried forward into the consolidated Code – with the result that an immediate and invaluable source of interpretation and context was lost in the consolidation process.

For its part, the establishment of a single market underlined the critical importance of effective customs supervision at the common external border surrounding the EEC. Once non-Community or third country goods entered any of the Community member states, whether by fair or foul means, they were seen to be in free circulation and able to move and be traded freely throughout the single market area in the same way as goods grown or produced within the Community.

The aborted Modernised Customs Code came next in time.

3.2. The Modernised Customs Code (Walsh, 2015, pp. 10−11)

The Modernised Customs Code (EC, 2008) was promoted as the basis for providing for the simplification and modernisation of customs law in line with 21st century developments and demands. Its preamble set out its purpose as including, *inter alia,* the following objectives:

> (3) Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code was based upon integration of the customs procedures applied separately in the respective Member States during the 1980s. That Regulation has been repeatedly and substantially amended since its introduction, in order to address specific problems such as the protection of good faith or the taking into account of security requirements. Further legal amendments were required, inter alia, by the entry into force of the 2003 and 2005 Acts of Accession, as well as the Amendment to the International Convention on the simplification and harmonisation of customs

> procedures (hereinafter referred to as the Revised Kyoto Convention), the accession of the Community to which was approved by Council Decision 2003/231/EC). The time has now come to streamline customs procedures and to take into account the fact that electronic declarations and processing are the rule and paper-based declarations and processing the exception. For all of these reasons, further amendment of the present Code is not sufficient and a complete overhaul is necessary.
>
> (5) The facilitation of legitimate trade and the fight against fraud require simple, rapid and standard customs procedures and processes. It is therefore appropriate, in line with the Communication from the Commission on a simple and paperless environment for customs and trade, to simplify customs legislation, to allow the use of modern tools and technology and to promote further the uniform application of customs legislation and modernised approaches to customs control, thus helping to ensure the basis for efficient and simple clearance procedures. Customs procedures should be merged or aligned and the number of procedures reduced to those that are economically justified, with a view to increasing the competitiveness of business.
>
> (6) The completion of the internal (single) market, the reduction of barriers to international trade and investment and the reinforced need to ensure security and safety at the external borders of the Community have transformed the role of customs authorities giving them a leading role within the supply chain and, in their monitoring and management of international trade, making them a catalyst to the competitiveness of countries and companies. Customs legislation should therefore reflect the new economic reality and the new role and mission of customs authorities.

3.3. The Union Customs Code

For stated reasons, including the following, the Modernised Customs Code (MCC) never became operative (Walsh, 2015, p. 12):

> The implementation of a major part of the processes to be introduced depended on the definition and the development by the Commission, the national customs administrations and the economic operators of a wide range of electronic systems. This required a complex set up of actions between the Member States, the trade community and the Commission, notably important investments in new EU – wide IT systems and supporting activities as well as an unprecedented effort from the business community to operate according to new business models. It was then apparent that, at best, a very limited number of new customs IT systems would be introduced in June 2013 which was the latest legal date for the implementation of the MCC. A new task which intervened after the adoption of the Regulation (EC) No 450/2008, and was linked with the entry into force of the Lisbon Treaty, was the commitment made by the Commission to propose amendments to all basic acts in order to align them with the new provisions of the Lisbon Treaty concerning delegation of powers and the conferral of implementing powers before the end of the term of the Parliament. This has an impact on the foreseen implementing provisions of the MCC which now had to be 'split' between delegated acts and implementing acts in accordance with new empowerments in line with Articles 290 and 291 TFEU. Moreover, the 'Community' Customs Code (MCC) has now to be renamed into 'Union' Customs Code (UCC).

Consequently, Regulation (EU) 952/2013 (EC, 2013b) laying down the UCC was adopted and its provisions applied from 1 June 2016.

3.4. The critical importance of the role of national laws and procedures

While it is easy to look back in time and point to latent defects in, or omissions from, Customs Union legislation, the difficulties the Commission, in particular, faced on that front must be acknowledged. Indeed, many of those difficulties persist to this day. A document from the Commission explained the position (Commission of the European Communities, 1977, pp. 9−10; Walsh, 1986, p. 341):

> The introduction of Community customs legislation has not been completed. A number of Commission proposals are still under examination at Council level. Others are being prepared by the Commission departments.
>
> The drafting of those proposals is made difficult as a result of the close links between the Member States' customs law and other areas of national law (civil law, commercial law, maritime law, criminal law, [constitutional and international law] etc.) and as result of the historical circumstances under which the Member States' customs rules were evolved [some inheriting a residue of unconstitutional laws following from the adoption of new tripartite constitutions on independence.]

In recognition of the inherent difficulties involved, and in deference to the principle of *subsidiarity*, the EU essentially left the degree of customs controls to be applied by the member states to the discretion of individual member states. This arrangement is referred to as 'executive federalism'. The principle of executive federalism within the European Communities reflects the principle of subsidiarity, which is enshrined in Article 5 of the EC Treaty (EC, 2002):

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

To that end, Article 1 of the Community Customs Code (EC, 1992) provided that:

> Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them.

3.5. The legal lacuna surrounding customs controls

The extent to which the core processes of the Customs Union are applied uniformly across the EU has always been uneven. Walsh (2015, p. 28 and 2020, pp. 76−78) highlighted the position by reference to a study carried out by PwC in 2012/2013 to evaluate the state of the Customs Union. Not unexpectedly, the findings were a mixed bag. Some member states were found to be acting in a proportionate manner while others performed perfunctorily. The study summarised the position as follows (EC, 2013a):

> The broad conclusion of the study is that the level of uniformity in a majority of customs processes and procedures is not satisfactory. This includes certain processes based upon a common EU legal basis (e.g. valuation, classification).

The main findings on uniformity based on the analysis of the gathered data:

a. Conditions for simplified procedures, the interpretation of provisions on the taxable basis for import duty purposes (the customs value), and the classification of goods differ among Member States.

b. The role and level of documentary controls, physical controls, post-clearance controls or combinations thereof still depend to a great extent on national legislation, national policy and instructions within the control framework of specific Member States (within its risk management framework). Similarly, the European Court of Auditors also concluded that major differences in actual controls exist and that these controls were insufficient to secure the interests of the EU.

c. Specifically in relation to physical controls, differences arise depending on the control philosophy of Member States and differences in the scope of their controls.

d. Businesses repeatedly highlighted the impact of differing interpretations of EU legislation by customs officers and national authorities on the carrying out of documentary and physical controls. A further point made was that customs officers sometimes interpret and handle customs-related mistakes made by business differently.

In summary, Walsh (2015, p. 28) concluded that 'the administration of customs law throughout the EU is still very much a patchwork quilt – with each Member State viewing the law through its own prism.'

4. Customs practice

Based on these findings Walsh (2020, p. 83) went on to opine:

> *The Practice of 'Light-Touch' Regulation by Member States*
>
> On the other side of the coin, the greatest discretionary danger to the uniform application of customs controls and revenue protection arises from apparent light-touch regulatory policies adopted by some Member States when it comes to the application of proportionate customs supervision and controls. Even when viewed through their own lens, a UK Parliamentary Committee was forced to countenance the following serious adverse findings by the European Court of Auditors in relation to customs controls over sea imports:

Having listed the reported failures of Her Majesty's Revenue and Customs (HMRC) as set out in the European Court of Auditor's findings on customs practices in the United Kingdom (UK) (EC, 2017a), Walsh (2020, p. 84) concluded that:

> Looked at objectively, HMRC was deemed to be operating an open door for frauds and irregularities on the EU's traditional own resources. While the UK clearly benefits from increased commercial traffic through its ports, Member States and, *a fortiori*, the EU, lose out on revenue (own resources) which is rightly theirs.

5. Findings and recommendation of the Wise Persons Group in relation to extant customs law and practice

The WPG summarised their overriding findings as follows (EC, 2022a, pp. 3−4):

> Evidence gathered by the Wise Persons Group on Customs shows that dangerous, non-compliant products still enter the EU market every day and that we leave billions of Customs duties and taxes uncollected. The reality is also that European Customs do not yet currently function "as one". This leaves the Customs Union at the mercy of its weakest link. Incremental changes introduced over the years were necessary and our group notes the real and important efforts made in recent years to strengthen both the legal and technical framework for customs administration, which will make a difference to the strength of the Customs Union. Nonetheless, in a fast-changing world, these are insufficient to address the scale of the challenges faced by Customs. The Customs Union is not "fit for purpose".
>
> [T]he vast majority of – if not all – stakeholders interviewed for this report complain about a systematic absence of common implementation of customs measures, different control practices across border entry points, both within and across Member states, differences in control priorities, differences in investigative capacities (controlled deliveries, undercover activities), and differences in methods and sanctions for non-compliance. The same consignment of goods subject to antidumping measures or to prohibitions and restrictions may be checked or not depending on where it enters the EU. Some Customs authorities appear to apply more stringent controls than others do, and sanctions applied in case of irregularities.

With reference to the WPG weakest link analogy, Walsh (2015) wrote some six years earlier:

> At the end of the day a chain is as strong as its weakest link. As things currently stand the EU has to rely on individual Member States to carry out all the controls that they (Member States) deem necessary to ensure that customs legislation is correctly and consistently applied and for them to do so in accordance with the provisions in force i.e., Community or national provisions. While the pending Union Customs Code seeks to give the extant provisions more teeth, the protection of the EU, its citizens and its revenue still remains in the hands of individual Member States with varying levels of experience in administering a Common Customs Code.

Viewed in the foregoing cumulative light, it is not surprising that the WPG found the EU Customs Union was 'not fit for purpose.' This is a serious indictment of the cornerstone of the EU single market given the weight and width of the extensive knowledge and experiences of the WPG members.

6. Findings of the Wise Persons Group on data

To provide for the type of Customs Union the WPG believes the EU needs, they recommended an approach:

> [...] focussed on obtaining better quality data based on commercial sources, ensuring it is cross-validated along the chain, better shared among administrations, and better used for EU risk management,

rather than expecting customs:

> [...] to meet their challenges by simply applying the existing, now insufficient, techniques with more vigour.

In their analysis of data management by customs the WPG noted that customs data:

> [……] comes from operators (shippers/customs agents etc.) not familiar with the contents of consignments.

It would not be correct to suggest that customs rely on third party data relating to importations/exportations. Properly understood, customs data verifications are specifically designed to test the correctness of the cumulative dutiable elements involved in any particular importation, namely, tariff classification, valuation and origin. The same considerations apply, *mutatis mutandis*, to goods subject to prohibition and restriction.

For its part, customs tariff classification – the pivot consideration − is determined to the greatest degree possible by reference the objective physical characteristics of the goods at the time of importation/exportation – not by reference to the vagaries of the commercial description of the goods. Accordingly, the European Court of Justice (ECJ, 2006; 2007) ruled that:

> It is settled case law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be sought in their [the goods] objective characteristics and properties as defined in the wording of the relevant heading of the CN [combined nomenclature] and in the section or chapter notes.

This being the case, it is hardly surprising that pre-clearance physical examinations by customs have proved to be the most successful means of combating the misclassification of goods – whether done mistakenly or fraudulently. Conversely, if a declarant declares 'computers' as 'machinery' in their automated declaration, it will be accepted by the system and the goods cleared as such in the absence of physical examination by customs.

On origin, claims to preferential rates of duties must be supported by the legally prescribed form of certificates of origin set out in the particular trade agreement. Likewise, the agreement will have established the verification procedure to be adopted by the issuing authority in the claimed country of origin at the request of the customs authority in the country of importation. As a further safeguard, the agreement's rules will usually have an anti-avoidance measure built into them requiring (with certain well-defined exceptions) that the goods must be transported direct from the country of origin to the importing country, thus making the system of proofs and checks easier to administer. The 'direct transport' requirement may be verified by reference to transport documents such as bills of lading (maritime transport) and airway bills (air transport).

In the case of customs valuation, the constituent valuation criteria determine the nature and scale of the verifications required. The starting point is with the legal definition of customs value as set out in Article 70 UCC (EC, 2013b):

> 1. The primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union, adjusted, where necessary.

The adjustments are provided for in Articles 71 UCC (additions) and 72 UCC (exclusions). The key requirement for the transaction value method to apply is that there must be an arms-length legal sale involved. This being the case, in accordance with Article 145 UCC IA (EC, 2015a), 'the invoice which relates to the declared transaction value is required as a supporting document' to the declaration. While an invoice is not a contract as such – it is not signed by the buyer – it serves as a record or evidence of the transaction between the exporter and the importer.

7. Reconciliation of classification and valuation details between export and import declarations

Walsh (2015, p. 36) recommended that the EU should be looking to match, as far as possible, the details of the taxation elements declared on the customs export declaration with the corresponding details declared on the customs import declaration. Commenting on the twin taxation elements of classification and valuation, Walsh went on to opine that:

> [....]it would appear axiomatic that a "copy" of the export declaration filed with customs to export the goods to the EU should be produced in support of the import declaration into the EU, with particular reference to the declared export tariff code and value. While the export tariff code will not be based on the EU's CCT (Combined Nomenclature), the odds are that it will likewise be based on the Harmonised Commodity Description and Coding System (HS) and directly comparable – the HS system is used by more than 200 countries and economies as a basis for their Customs tariffs and covers more than 98 per cent of the merchandise in international trade.

Experience has shown that the exchange of export/import data can also reveal fraudulent export declarations, particularly concerning goods being deliberately overvalued on exportation. It is interesting that this data validating measure was raised some six years later at a meeting of the WPG in January 2022. The minutes of the meeting record (EC, 2022b, p. 2) that:

> The Group learned about approaches experienced by WCO members to improve the reliability of data. For instance, "your export becomes my import" aims at comparing export/import data to better identify fraud, while the collection of sale prices from online marketplaces aims at developing "web scraping" techniques.

In summary, there is a compelling case for being able to trace the transaction from womb to tomb to the greatest degree possible.

8. Customs declarations to be made by the importer/exporter

Walsh's recorded observations (2015, p. 110) on the merits of the importer, as opposed to the declarant, being obliged to make the legally binding customs declaration are set out hereunder:

> People coming from common-law jurisdictions experience difficulties with the concept of 'declarant'. They were used to the tried and tested concept of 'importer' – normally taken to be the beneficial owner of the goods but defined in more expansive ownership terms: 'importer' shall mean, include, and apply to any owner or other person for the time being possessed of or beneficially interested in goods at and from the time of importation thereof until the same are duly delivered out of the charge of the officers of customs. In Community law the concept of importer, based on property rights, was replaced by the concept of the person who has either control or possession of the goods and the covering documents. Accordingly, in Article 4(18) [of the EU Customs Code] 'Declarant' is defined as the person making the customs declaration in his own name, or the person in whose name the customs declaration is made. Article 64(1) [of the EU Customs Code] goes on explain:
>
> *Subject to Article 5 [of the EU Customs Code] a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent customs authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared.*

It is worth noting that some EU member states originally had difficulties with the concept of 'declarant.' Walsh (1986, p. 562) recorded these difficulties, noting that:

> The main plank of the release procedure [clearance of the goods by customs] is the declaration to customs, known as the entry, which is submitted on a special form. The 1979 Directive (EC, 1979) does not rule on every aspect of the entry – the important question of who [was] entitled to lodge an entry [was] left for later legislation. Article 2 of the Directive simply stated that:
>
> *The natural or legal person who makes the entry shall hereinafter be referred to as "the declarant".*

The opinion of the Economic and Social Committee at the time made it clear that the failure to define 'the conditions under which a person may be permitted to make a customs declaration was not an omission as such, but a clear case of the proposed definition having been 'blocked at Council' – the provision was based on Article 234 of the Treaty of Rome, which required a unanimous vote by the member states for adoption.

The definition of 'declarant' was made good by the Community Customs Code [CCC] Article 4: Definitions:

> [18] 'Declarant' means the person making the customs declaration in his own name or the person in whose name a customs declaration is made.

Article 64 of the CCC (EC, 1992) further provided that, in addition to making the requisite declaration, the declarant must be able to produce the goods and covering documentation to customs. In effect, the declarant no longer needs to be the owner of the goods or to have a proprietary interest in them, however, tenuous. Historically, importers had to make entry of their goods to customs – the same law applied to former English colonies. It would appear axiomatic that the importer, a party to the sales contract(s) and privy to all the operative terms and conditions involved, should have primary responsibility for declaring the goods to customs rather than a declarant/agent who is neither a party to the contract(s) involved, nor necessarily privy to its terms or conditions. He may not even know the nature of the goods involved.

9. Self-assessment of customs duty liability

Any serious revision of customs law and procedures should include the application of the principle of self-assessment to all customs declarations. This is currently restricted to AEOs[1] in defined areas of customs compliance. Walsh (1986, p. 318; 2015, pp.72−73) set out the rationale for this proposal as follows:

> **Shifting to substantial reliance on self-assessment by taxpayers, supported by movement from physical to post-release controls;**
>
> It is increasingly recognised that the key to effective tax administration is voluntary compliance by the taxpayer, and that the key to voluntary compliance is self-assessment: a system, that is, which relies on taxpayers to themselves declare and pay the tax due – but crucially, provides a system of ex post facto checks of those declarations, with penalties for misdeclaration. This is as true in the area of customs as it has proved, for instance, in relation to business and personal taxes. In the customs context, this means a de-emphasis on physical inspection at the point of entry, with importers (or their agents) themselves declaring the duties payable—but with effective control exercised after goods have been cleared for entry, involving post-release audit and other checks focused on addressing transactions where the risk of misdeclaration is greatest.

An IMF Working Paper went further when noting in relation to the 'Computerisation of Customs Operations' involving import and export procedures (Walsh, 2020, p. 238):

> **Import and export procedures**
>
> The procedures to be introduced had to meet recognized criteria applied by modern customs administrations, consistent with the Revised Kyoto Convention: (i) self – assessment, which involves separating the roles between the trader and the customs officer (the importer/exporter assumes responsibility for spontaneously declaring and paying duty, and the customs officer checks these operations); (ii) a high level of compliance, meaning that all goods are recorded and assigned a customs status (regime); and (iii) simplicity and predictability, to reduce the costs for trade. Effective export procedures are particularly important to ensure proper administration of VAT refunds. Appreciable progress has been made in streamlining import and export procedures, a reform that was greatly facilitated by computerization. Self-assessment is now the standard in effect for both presentation of goods in customs (input of cargo manifest data into the system by the shipper or its representative), and assignment of the customs regime (input of declaration data by the customs broker acting for the importer/exporter).

At the end of the day, if it comes to the prosecution of a declarant/importer, the case will stand or fall on the declared amount of duties properly payable. As things stand in the EU, customs are responsible in law for calculating the proper amounts of duties payable. Consequently, an offender's first line of defence will be to claim that customs determined the amount properly payable, and that they duly discharged their obligation by paying the amount legally demanded of them by customs. This being the case, they can claim they had a 'legitimate expectation' that it was the correct amount payable. It is worth recording that EU customs law is notable for the fact that it positively provides for the EU-recognised general principle of legitimate expectation.

Walsh's views on self-assessment were referenced approvingly in a recent opinion of an Advocate General of the ECJ (2021):

> 79. More generally, self-assessment of the liabilities in relation to the goods covered by a declaration submitted to the customs authorities is generally considered to be one of the principles underpinning the EU legislation in this field. In this context, the role of the authorities is mostly confined to checking and verifying the declarations and, if necessary, rectifying them. The authorities cannot be expected to carry out time-consuming tasks in order to 'do the job' of the declarants and re-calculate their dues on the basis of information and data that is not readily available.

The principle of self-assessment was long recognised in common-law jurisdictions when considering, generally, the means of making customs declarations. For example, self-assessment is the essence of the widely used red/green channel systems at ports and airports.

10. Frauds – detection and prosecution

10.1. The cost of non-compliance occasioned by one member state

In a landmark case the EU Commission successfully sued the UK for its failure to exercise proper controls over imports (ECJ, 2019).

The losses of traditional own resources[2] to be made available to the Commission, less collection costs, amounted to:

- EUR496,025,324.30 in 2017 (until 11 October 2017)
- EUR646,809,443.80 in 2016
- EUR535,290,329.16 in 2015
- EUR480,098,912.45 in 2014
- EUR325,230,822.55 in 2013
- EUR173,404,943.81 in 2012
- EUR22,777,312.79 in 2011.

The ECJ (2019) described the fraud in the following terms:

> 226 This was a relatively unsophisticated fraud involving extremely low customs values being declared by 'phoenix' or 'shell' undertakings, namely undertakings with negligible resources formed for the sole purpose of carrying out the fraud, which would be wound up or would disappear as soon as the accuracy of the declared values was questioned by the customs authorities, making any post-clearance recovery of customs duties unlikely, if not practically impossible in the vast majority of cases.
>
> 227 The fraud was organised by criminal groups that operated through a network and used those undertakings to carry it out. The fraud was mobile and highly responsive in the sense that this illegal and clandestine trade was quickly diverted to another point of entry in the customs territory of the European Union as soon as customs controls were announced or signals to that effect were intercepted by those groups.

10.2. The control criteria required of the member states were a matter of EU record since 2005

The uncertainties surrounding the control defects which came to light in the UK fraud cases could possibly have been avoided if the measures set out in the preamble of the 'security amendment' to the CCC (EC, 2005) had been applied:

> (2) It is necessary to establish an equivalent level of protection in customs controls for goods brought into or out of the customs territory of the Community. In order to achieve this objective, it is necessary to establish an equivalent level of customs controls in the Community and to ensure a harmonised application of customs controls by the Member States, which have principal responsibility for applying these controls. Such controls should be based upon commonly agreed standards and risk criteria for the selection of goods and economic operators in order to minimise the risks to the Community and its citizens and to the Community's trading partners. Member

> States and the Commission should therefore introduce a Community-wide risk management framework to support a common approach so that priorities are set effectively and resources are allocated efficiently with the aim of maintaining a proper balance between customs controls and the facilitation of legitimate trade.

These measures should have been spelled out in clear and unequivocal terms in binding black letter law [Regulations], leaving the member states no room in which to manoeuvre, and thus creating the required degree of legal certainty for all concerned in these critical areas of law enforcement and revenue collection.

10.3. Fraudsters operate with total impunity

The EU Commission (European Anti-Fraud Office, OLAF), having first reportedly provided UK customs with a list of the parties involved and advised them to take the requisite criminal prosecutions, went on to direct them to secure the suspected duty underpayments by way of independent guarantees prior to the release of the goods. UK customs ignored both this advice and the standing provisions of EU law, which required that they should secure the potential duty liability in the circumstances of the particular cases – including cases where fraud was not suspected. Notwithstanding the importations were seen at the time as overt frauds, there appears to have been no requirement to obtain guarantees to cover potential penalties − the guarantees were to be in respect of suspected duty underpayments only. Mindful that the EU provisions in question were based on the 'parent' GATT Valuation Agreement, it is instructive to learn that the parent provisions in question allowed for the inclusion of penalties in a guarantee to allow the release of goods from customs control pending inquires as to the declared values of the goods for customs purposes. In considering the issue of guarantees in a dispute involving Colombia and Panama a World Trade Organization (WTO) Dispute Panel (WTO, 2018) agreed with Colombia:

> in that the fact that Article 13 of the Customs Valuation Agreement contemplates the use of guarantees expressly for the payment of customs duties does not mean that the use of guarantees to cover other taxes or penalties is prohibited under that article. (para. 7.636)

Article 7, sub-article 3 of the WTO Trade Facilitation Agreement (WTO, 2017) provides for the 'Separation of Release [of goods] from Final Determination of Customs Duties, Taxes, Fees and Charges':

> 3.4 In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.
>
> 3.6 Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.

In summary, it is clear that UK customs had the necessary authority, within the law, to demand security for the suspected underpayments of duty and potential penalties or fines. The Commission and EU law called for a duty guarantee only – which UK customs ignored: but the UK was not, *sensu stricto*, requested to obtain a guarantee to cover potential penalties.

10.4. Obligation of the member states to prosecute frauds

The ECJ/UK case left no doubt about the responsibilities of the member states for the prosecution of customs frauds, finding as follows (ECJ, 2019):

> 52 Accordingly, in order to ensure the protection of the financial interests of the Union, the Member States are obliged to adopt the measures necessary to guarantee the effective and comprehensive collection of customs duties, an obligation which dictates that customs inspections may be properly carried out.
>
> 53 It follows from the requirements of Article 325(1) TFEU that the Member States must, to that end, provide for the application of penalties that are effective and that act as a deterrent in cases of contravention of the EU customs legislation. Further, the obligation on the Member States to provide for penalties that are effective, proportionate and dissuasive in such cases was laid down in Article 21(1) of Regulation No 450/2008 and is now imposed in Article 42(1) of Regulation No 952/2013.
>
> 54 While the Member States have in that regard a freedom to choose the applicable penalties, which may take the form of administrative penalties, criminal penalties or a combination of the two, they must nonetheless ensure that cases of serious fraud or any other serious illegal activity affecting the financial interests of the Union in customs matters are punishable by criminal penalties that are effective and that act as a deterrent.

10.5. National measures open to UK Customs to deal with the offences

If UK customs were unwilling, or unable, to prosecute the perpetrators of the frauds, they had the independent option of either detaining or seizing the goods as being liable to forfeiture – a practice that dates to Roman times in England. Without going into too much detail, historically, UK customs law readily recognised that if the offenders were not arrested and the goods detained or seized, they were gone forever. Walsh (2015, p. 33) noted this historical position:

> In a wider context, however, customs general powers were designed to secure the smugglers, smuggled goods and their conveyances. Otherwise, the smugglers would flee the jurisdiction with their conveyances and goods and not be amenable to the law at all. Van Jaarsveld, *in The History of in rem forfeitures – A penal legacy of the past (2006), (12−2), Fundamina 137*, noted in this direction:
>
> *It is noteworthy that in rem civil forfeiture was used by the Admiralty Courts to punish foreign owners of pirate ships who escaped because they were outside their jurisdiction.*

Accordingly, as UK customs law provided for the detention and seizure of uncustomed goods, it was open to them to detain the goods in this case pending further enquiries, or to seize them outright as being liable to forfeiture. UK customs powers to that end could not have been clearer, having been exhaustively examined and ruled on in a domestic context by the UK Supreme Court in *R (On the application of Eastenders Cash and Carry plc and others) (Respondents) v The Commissioners for Her Majesty's Revenue and Customs (Appellant)* [2014] UKSC 34 (Walsh, 2015, p. 32).

In the case referred to in paragraph 10.1 above, the facts found by OLAF (EU, 2017) were as follows:

> […….] OLAF carried out an extensive analysis of all customs declarations presented in the UK for all imports of textiles and shoes from China between 2013 and 2016. For example, OLAF found women's trousers imported from China were declared at customs in the UK at an average price of EUR 0.91 per kg, although in the same period, the world market price for the raw material (cotton) alone was EUR 1.44 per kg and the average declared value in the whole of the EU for the same products was EUR 26.09 per kg. OLAF calculated a loss to the EU budget of almost EUR 1.987 billion in customs duties. The investigation also revealed substantial VAT evasion in connection with imports through the UK by abusing the suspension of the payment of VAT, the so-called customs procedure 42.

Based on the foregoing facts, and the phoenix-like characteristics of the importers involved, the seizure of the goods as being liable to forfeiture was clearly called for in the circumstances of the case. If the owners wished to reclaim the seized goods, they would have been obliged to lodge a valid notice of claim within a month from the date of the notice of seizure. In the absence of such a claim, ownership of the goods automatically vested in the State. In the case of a valid claim, UK Customs would have been obliged to initiate civil condemnation proceedings to confirm the forfeiture. Being civil *in rem* (against the thing) proceedings, UK Customs only needed to establish on the balance of probabilities evidential standard that the goods had been undervalued. They did not have to establish this fact beyond the higher reasonable doubt standard – the criminal standard. Further, they did not have to establish fraudulent intent. In the circumstances of the case, proving that the goods had been undervalued should not have presented a problem, more particularly when considered in the light of the ECJ (2019) finding that:

> 226 This was a relatively unsophisticated fraud involving extremely low customs values being declared by 'phoenix' or 'shell' undertakings, namely undertakings with negligible resources formed for the sole purpose of carrying out the fraud, which would be wound up, or would disappear, as soon as the accuracy of the declared values was questioned by the customs authorities, making any post – clearance recovery of customs duties unlikely, if not practically impossible in the vast majority of cases.

Further, even if the condemnation court perversely failed to find that the goods were lawfully seized as being liable to forfeiture, UK customs would have been protected from the tort of unlawful seizure or detention by the saving provisions of Section 144, Customs and Excise Management Act 1979 which indemnified them in the following circumstances:

> (1) Where, in any proceedings for the condemnation of any thing seized as liable to forfeiture under the Customs and Excise Acts, judgment is given for the claimant, the court may, if it sees fit, certify that there were reasonable grounds for the seizure.
>
> (2) Where any proceedings, whether civil or criminal, are brought against the Commissioners, a law officer of the Crown or any person authorised by or under the Customs and Excise Acts 1979 to seize or detain any thing liable to forfeiture under the Customs and Excise Acts on account of the seizure or detention of any thing, and judgment is given for the plaintiff or prosecutor, then if either – (a) a certificate relating to the seizure has been granted under subsection (1) above; or (b) the court is satisfied that there were reasonable grounds for seizing or detaining that thing under the Customs and Excise Acts, the plaintiff or prosecutor shall not be entitled to recover any damages or costs and the defendant shall not be liable to any punishment.

11 Penalties and sanctions for customs offences in the EU

11.1. Continuing failure by the EU to harmonise customs penalty provisions

The following facts best evidence the EU's seeming lack of commitment to a cogent Customs Union. The Commission of the European Economic Community (EC, 1963, pp. 22−27) highlighted the remedial action deemed necessary in 1963 to safeguard against the type of fraud that occurred in 2011 – nearly 50 years later (Walsh, 1986, p. 344):

> Although most customs law now falls within Community jurisdiction, infringements of the law continue to be dealt with according to the relevant provisions in force in each of the Member States. Such a situation is hardly compatible with the idea of the Customs Union. The infringements of Community customs law which are committed in one Member State have effects throughout the customs territory of the Community, and furthermore the wide range of sanctions resulting from a

> given infringement, depending on the state in which it is established and prosecuted, is such as to make for appreciable inequalities of treatment between Community nationals depending on which Member State they are based. At its utmost limit, this situation could even lead to the deflection of trade.

The problems identified in the Commission document to the Council in 1963 proved to be a blueprint of the above-reported UK customs case that resulted in the loss of 2.7 billion euro to the EU's revenue. Viewed against that stark background, it is hard to believe that more than 50 years later the harmonisation of the member states' customs penalties appears to be no nearer resolution. If anything, the strength of the proposed member states' obligations is being diluted from 'recommendations', which were abandoned as being useless a half a century ago, to 'guidelines' – the softest of soft non-binding law.

11.2. Having to rob Peter to pay Paul

The annual EU budget comprises of three main resources, namely, traditional own resources (largely customs duties); a statistical VAT-based contribution from each member state, and a residual own resource based on gross national income (GNI). GNI is considered as a balancing source of the EU budget as the amount to be contributed by each member state varies from year to year depending on the overall revenues needed to cover expenditures, after taking into account the amounts coming from customs duties, VAT-based contributions and miscellaneous sources such as fines imposed when businesses fail to comply with EU rules, taxes from EU staff salaries, bank interest, and contributions from third countries. Over the years the relative share of customs duties and VAT has significantly decreased. This has meant a corresponding increase in the GNI-based contributions to make up the required budget balance. The GNI contributions now account for over 70 per cent of the total own resources funding. Consequently, any decline (including losses caused by fraud) in the contribution of duties or the VAT-based share of own resources to the budget target must be compensated by higher national GNI based contributions. The net result is that member states must make additional compensatory contributions to the budget to make good any fraud-related losses arising. The reality is that EU frauds and irregularities come at a considerable cost to compliant member states, and ultimately to EU taxpayers – a fact that tends to be overlooked. This needs to be recognised in the EU collective fight against fraud.

11.3. Remaining unforeseen difficulties surrounding the EU's criminal law provisions

Regrettably, the EU Commission may well find that the full transposition of the provisions of the directive on the fight against fraud to the Union's financial interests (EC, 2017a) into the domestic laws of the member states will not necessarily sustain successful proceedings in the cases covered by the directive. Perverse as it may appear, the Commission will have to go a step further to ensure that the subsisting domestic laws and transposed EU provisions being relied on to sustain EU criminal prosecution are not at variance with the constitutional and binding international agreements provisions of the member states – not overlooking the supremacy of EU law. Walsh (2020, pp. 391–394) drew attention to these militating factors following studies on behalf of the EU Commission of accession member states in the 1990s. As a result, subsequent EU Customs Blueprints (EC, 2015b, p. 12, par. 1.1.) mandated that national customs procedures had to be based on a transparent, comprehensive and effective legislative framework and, at the same time, comply with national and international legal obligations and standards, namely,

- Legislative provisions are in line with national (constitutional) requirements.
- Legislative provisions ensure the application of relevant international conventions…

While the EU Customs Blueprints proved to be invaluable yardsticks for gauging best practice for the guidance of the accession member states and the wider world of customs, it is questionable if the then member states applied the same rigours to their own customs regimes. Had they done so, they may well have discovered a host of subsisting domestic laws and practices that needed to be reassessed in the light of higher laws such as the member states' constitutions, the European Convention on Human Rights and the entire corpus of binding EU law. For example, the EU Commission's report on the transposition of the Directive's provisions into member states' domestic law unwittingly points to a potentially unconstitutional provision that goes to the very heart of the rule of law and the essential element of any system of justice (EC, 2021):

> Conformity issues have been identified in a quarter of the Member States. On Article 7(1), the legislation of several Member States contains provisions that allow individuals to escape criminal liability or the imposition of sanctions if they report the crime or repay the damage caused to the Union's financial interests at various stages before or during criminal proceedings. Such provisions could make sanctions ineffective and not dissuasive.

A member state's retort would certainly refer the Commission to their own bible – the UCC:

> *Article 42*
>
> Application of penalties
>
> 1. Each Member State shall provide for penalties for failure to comply with the customs legislation. Such penalties shall be effective, proportionate and dissuasive.
>
> 2. Where administrative penalties are applied, they may take, *inter alia*, one or both of the following forms:
>
> (a) a pecuniary charge by the customs authorities, including, where appropriate, a settlement applied in place of and in lieu of a criminal penalty;
>
> b) the revocation, suspension or amendment of any authorisation held by the person concerned.

Walsh has long held the view that the imposition of these 'compromise' or 'compounded' penalties in relation to criminal offences amounts to the administration of justice in cases where a member state's constitution embraces the doctrine of the separation of powers. In such circumstances, the penalty determination is a matter for the member state's courts and not for a customs administrative body. Aside from the separation of powers doctrine prohibiting such practices, there is also the *nemo judex in causa sua* consideration ('nobody should be a judge in his own case').

Depending on the jurisdiction, compromise or compounded monetary settlements in lieu of criminal prosecutions are, in effect, a 'get out of jail' card for offenders. In legal terms the agreement can amount to a civil contract between the offender and the customs authority to pay the agreed penalty. The result is that the offender can avoid the statutory penalty and the risk of arrest and imprisonment. Further, should they fail to pay the agreed civil penalty, the customs authority − depending on the national legislative provisions in force – cannot reinstate the criminal prosecution. Instead, to recover the debt, they must sue the offender on the contractual settlement agreement in civil proceedings – a likely worthless pursuit. It is also a case in some jurisdictions that whereas the offender can resile from the agreement and have their day in court, this option is not open to the customs authorities. The overall gain to the offender – aside from the likely lower pecuniary penalty they will receive under the settlement arrangement – is that they avoid a criminal conviction, possible imprisonment and a criminal record. The downside for the rule of law is that the settlement system ousts the jurisdiction

of the courts in customs criminal offences and thus facilitates fraud. Other member states ultimately end up paying the cost of this. The member states' customs infringements and sanctions systems were considered by a Project Group established by the EU Commission in 2013. The following are the reported findings of the Project Group regarding settlements (EC, 2013a):

> Settlement refers to any procedure within the legal or administrative system of a Member State that allows the authorities to agree with an offender to settle the matter of a customs infringement as an alternative to initiating or completing customs sanction procedures. Fifteen out of twenty-four member states have this procedure for customs infringements.

12. Proposal to make the EU a bonded area

Having read the WPG's report the reader will, not unreasonably, ask what were the fundamental 'mischiefs' the group set out to address and where does the existing system fall down? The fundamentals of the existing system have been the same for hundreds of years and are well summarised by Crombie (1962, pp. 64−66):

> Within twenty-four hours of arrival at a port the Master or his authorised Deputy must make a full report of the ship [the ship's manifest] at the Customs House: to show, *[inter alia*], marks numbers and description of all her cargo and where it was loaded. His independent declaration of the goods to be unloaded provides an essential part of [Customs] control. It provides a general statement against which the detailed particulars declared by importers on their entries may be checked [by Customs], and against which goods actually landed may be written-off [accounted for].
>
> The importer's entry is essentially the self-assessment made by the importer or, commonly, by the forwarding agents who specialise in customs matters, and who, if only for geographical reasons, can more easily manage matters on the spot. The signatures of the agent must be binding upon the importer who authorises him to act on his behalf. The entry, the self-assessment of duty liability [by the importer] is made in the terms of the Customs and Excise Tariff, and is checked against it before being "passed" [document check]. And if the amount of duty payable is for any reason not known or in dispute a deposit [of duty] is taken to allow customs clearance [to] go forward as if the [full] duty had been paid. The entry completed and "passed", that is not merely received and accepted, and duty paid, the importer must now present it to the Officer in whose charge the goods are lying before they can obtain release of the goods. This is crucial to the Department's control, for the importer's self – assessment [entry declaration] has been checked by a scrutiny of the documents, when an under-declaration of duty may be discovered and sent back for correction of more than one kind; and now it is independently checked [by the Examining Officer] by comparison of the documents with the goods landed, when an under-payment may be discovered of a kind which would never come to light from a documentary check alone. Thus, the customs entry, when passed, is the authority to the Officer to release the goods which prove to be correctly declared, or if it contains fraudulent or incorrect declarations it is the basis on which any proceedings are ordered or fines imposed.

Notwithstanding computerisation and other technological advances, the foregoing checks, balances and legal considerations apply equally today. If anything, there are greater safeguards in place such as advance information about the arrival of means of transport (ships/aircraft/trucks) and cargoes; automated processing procedures; automated risk-based selection of goods for physical examination; x-ray scanning of goods and containers, and post – importation transaction checks and audits. For their part, the WPG seemingly want to go further and safeguard against potential duty losses. To that end they recommend (p. 32) that:

> Non-beneficiaries of the reformed AEO system would need some arrangement to ensure that they are trustworthy to trade with the EU market. As an exception to the AEOs, they would be able to trade with the EU by providing a bond in relation to the goods they move across EU borders. The bond would require to be guaranteed by an AEO and misdeclaration will be reported by controlling Member States' Customs authorities to the central body, which will make a charge against the bond. Such a charge would be considerably greater than the amount of the misdeclaration, to reflect the likelihood that the mis-declared item caught by a Customs control is in fact representative of a significantly larger number of consignments which were not checked, to ensure that there is a real disincentive to the traders being prepared to accept losses on a small number of mis-declared items, while taking the profit on a much larger number of items which were not sampled for checking. AEOs who consistently allowed fraudulent operators to avail of their bond guarantee services will be liable and will be removed from the Authorised list. In this way, commercial actors exporting to the EU would either be trusted directly or would be treated as trusted because they are "represented" by another AEO which vouches for them financially. This is particularly relevant for e-commerce platforms.

It is worth noting that a somewhat similarly conceived 'bonding' concept was proposed in England as far back as 1733 (Great Britain, 1843):

> The plan of the minister for the correction of these abuses [false declarations and undervaluations of imported goods] was to benefit the fair trader [Authorised Economic Operator or trusted trader in current parlance] by putting down his unprincipled competitors, and to improve the revenue without additional duties. Conceiving that the laws of the Customs were insufficient to prevent fraud, there being only one check – that at the time of importation – be proposed that tobacco should be subject to the laws of Excise as well as those of Customs and having first paid the Customs duties on importation ….be lodged in a warehouse appointed by the Commissioners of Excise [pending delivery for home consumption or re-exportation on payment of drawback]. (p. 102)

Setting aside the potential illegalities of the WPG 'bonding' proposal, it is not for customs to legislate for the unborn child. Furthermore, the overall scheme of customs law, which must be looked at as a whole, makes provision for the recovery of uncustomed goods and unpaid duties and the prosecution of offenders. I would respectfully argue the proposed 'bonding' arrangement would do nothing to remedy the flagrant failings of member states in relation to those matters. On the contrary, the proposal appears to be totally misconceived; it would be costly and cumbersome in terms of administration and compliance, and would achieve nothing in practice. It would represent a three-hundred-year step backwards in time. As a separate but related issue, it also must be borne in mind that the practice of allowing a 'trusted trader' to act as a guarantor for a 'non – trusted trader' proved to be a fertile source of fraud under the EU Single Market Excise Movement Control System. This type of fraud is well known and documented within the EU (Walsh, 2015, p. 44). Enforcement agencies involved in the prevention, detection and prosecution of criminal activities (including customs offences), *a fortiori,* international drug smuggling cartels, have long ago reached the inescapable conclusion that the most effective way of tackling offenders is to confiscate the proceeds of their crimes. The EU Commission summarised the measures adopted by Ireland and the United Kingdom to that end as follows (EC, 2019, pp. 6−7):

> Looking at *in rem* proceedings [...] applied in both Ireland and the United Kingdom common characteristics are evident:

- They target property believed to be the proceeds of crime rather than the person (who may not be investigated) [*in rem* proceedings against the property *per se* as opposed to *in personam* proceedings against the person involved – thereby avoiding "double jeopardy" (*non bis in idem)* i.e. being tried twice for the one offence];
- They apply civil procedural law rather than criminal procedural law. Regarding matters of evidence, they apply the civil law standard "on the balance of probabilities" (rather than the criminal standard "beyond reasonable doubt");
- They include important safeguards such as notice provisions, the opportunity for a respondent to contest the confiscation order by seeking to vary or annulling it, the opportunity for any persons claiming ownership to be heard, provision for legal aid, provision for compensation etc.;
- The statutory agency charged with the pursuit of the proceeds of crime (i.e. the Criminal Assets Bureau in Ireland) is multidisciplinary [it includes seconded customs staff] and is empowered to share confidential information.

These measures have proved to be highly successful and have survived sustained challenges to their legality in Ireland through the courts up to Supreme Court level, and beyond that to the European Court of Human Rights. The measures have been further validated by the number of countries that have introduced similar legislation since 1996. The EU Commission (2022c) also have the EU-wide position on asset recovery and confiscation under active review.

It is worth noting that customs interests and customs law were influential in the decision to set up the Criminal Assets Bureau (CAB) in Ireland in 1996 (Walsh, 2015, p. 31).

13. The elephants in the room

From a legal standpoint, the first thing that needs to be done is make the importer/exporter liable in law for the import/export declaration – they are a party to the sales contract(s) and privy to its terms and conditions. Further, the legal onus should be on them to self-assess their duty and other liabilities in accordance with all the provisions in force. Further, the detention and seizure of goods should take place where the circumstances call for such actions − subject to the overriding principle of proportionality. At the same time, all the member states' laws, regulations and procedures need to be examined to establish if they can successfully sustain legal proceedings. Further, the civil settlement of criminal offences involving commercial transactions should cease. Criminal prosecutions for such offences should become the norm and not the exceptions.

On trade facilitation, the only way to create a meaningful version of a seamless border is to make all goods eligible for clearance prior to importation – subject to risk analysis. By doing so, you automatically obviate the need for a temporary storage procedure for pre-cleared goods. As previously pointed out, the temporary storage facility was a legal fiction created in 1662 to facilitate the entry and clearance of import goods – to the exclusion of goods cleared by customs. Accordingly, if goods have been cleared prior to importation, there is no need for temporary storage, and every revenue reason why cleared goods should not be put into temporary storage as they may then be used as a vehicle to remove uncustomed goods. The incalculable savings to importers by obviating temporary storage in terms of time (days) and handling costs would greatly outweigh any revenue and safety and security risks involved. In fact, the risks involved are far greater for temporary storage goods (Walsh, 2021, pp. 19–20).

Finally, the WPG report has been a very valuable exercise and has provided a welcome platform for others to contribute to the debate.

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Notes

1 An Authorised Economic Operator (AEO) is a member of the international trading community that is deemed to represent a low customs risk and for whom greater levels of facilitation should be accorded

2 Traditional own resources (together with own resources based on value added tax and gross national income) constitute the revenue for EU budgets. Traditional own resources include mostly customs duties on goods imported into the EU as well as levies and anti-dumping duties. Member States are allowed to keep 25 per cent of customs duties collected for administration costs.

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Understanding the drivers of illicit alcohol: an analysis of selected country case studies

Daniel Witt and János Nagy

Abstract

In addition to depriving governments of revenue from legitimate economic actors, the illicit alcohol trade is a major threat to public health. The World Health Organization's (WHO) 2017 guidance on alcohol taxation has been influential in driving policies on this subject, particularly in developing countries. However, their analysis and limited academic literature do not fully account for the distinction between the licit and illicit markets, even though the illicit market leads to serious public health risks. Complementary to the WHO's concerns, this paper seeks to add an additional perspective by suggesting that high rates of tax cause diversion to the illicit market, and the analysis of that market should include the effects of taxation. Government policies on alcohol and taxation should therefore account for the illicit market and avoid diversion to it, to reduce harm to public health. The paper offers an analysis and recommendations for customs, tax, and public health officials to discourage the illicit market and avoid tax leakage, such as use of tax stamps, coordination with industry and more holistic enforcement measures. Several case studies, using data from an international consultancy that has researched the illicit market, illustrate the themes of the article. The authors call for additional research in the academic community to further define the causal relationship between tax, affordability, and the size of the illicit market and to tailor enforcement strategies that address specific aspects of the illicit market in particular countries. The serious health risks associated with illicit alcohol consumption make such research a necessary and complementary component of WHO efforts to advance public health.

Keywords: Alcohol taxation, customs, excise rates, illicit alcohol, illicit trade, smuggling, tax stamps

1. Introduction: context for the WHO guidance on alcohol taxation

As part of its growing emphasis on non-communicable diseases, the WHO's 2017 guidance on taxation and its *Resource tool on alcohol taxation and pricing policies* (WHO, 2017) have been influential in driving both academic literature on alcohol taxation and, to some degree, the taxation agenda, particularly in developing countries. For instance, one article in support of the policy (Chisholm et al., 2018) argues that higher taxes remain a 'best buy' for countries as a part of alcohol control strategies and represents a 'highly cost-effective use of resources'.

For the purposes of this paper, illicit alcohol is defined as any taxable alcoholic beverages on which the lawful duties and taxes due have not been paid (WHO uses the broader term of 'unrecorded' alcohol [WHO, 2017], which includes legal home brewing and community alcohol). Generally, illicit alcohol enters a market through 'diversion' from a lawful supply chain, produced outside the licensed regime,

is ‘under-invoiced’ or records understate the tax liability, ‘smuggled’ across a border, or acts as a ‘surrogate’ in which alcohol illegally made or made for a non-beverage purpose is packaged and sold as a beverage – sometimes illegally and dangerously packaged as a known alcohol brand.

However, the WHO analysis and a review of current events in terms of alcohol tax policy and administration does not adequately address the critical distinction between the licit and the illicit market nor elaborate directly on strategies for combating the illicit market, even though the illicit market leads to serious public health harms. While the WHO’s strategy (WHO, 2010) is specifically termed a ‘Global strategy to reduce the harmful use of alcohol’, many features of the legal market serve specifically to mitigate or prevent public health harms. Instead, WHO proposes that ‘An updated list of the most effective and complementary policy options recommends increasing excise taxes on alcoholic beverages as one of the most cost-effective interventions governments can use’ (WHO, 2017, p. v).

Complementary to the WHO’s concern for public health harms resulting from alcohol, this article considers several drivers of the illicit alcohol trade, a key concern of customs and fiscal officials worldwide, particularly in developing nations, as that trade causes both public health harms by its very nature and serious fiscal shortfalls that governments could use to improve public health. In the legal market, tax is often a large component of price, and tax increases are passed on to consumers. Since tax is not a variable for illicit suppliers, this paper suggests that high rates of tax divert trade to the illicit market, and in this sense the affordability concept is consistent with the WHO’s view that ‘The price of alcohol is the main factor influencing alcohol consumption and its related harms’ (WHO, 2017, p. 6).

While the WHO’s Resource tool (2017) cites several studies regarding price elasticity and consumption of alcohol, in the authors’ view it focuses too much on the link between tax elasticity and price elasticity and too little on the link between increases in the rate of taxation and shifts to the illicit market. Mixing price elasticity and tax elasticity runs the risk of presenting an incomplete picture of the market and missing the impact of the illicit market on public health harms. This could lead to overemphasising absolute levels of taxation in achieving public health goals.

The authors also agree that price is the main driver of the illicit alcohol market. But the analysis only begins, not ends, with taxation. Our position is that the absolute level of taxation (combined with consumers’ ability to pay tax) contributes significantly to the presence and extent of an illicit alcohol market when it makes the illicit market more affordable. This paper argues as well that sharp increases in tax as opposed to phased, multi-year tax increases can have a particularly strong impact on driving the illicit trade. Finally, the authors assert that an appropriate rate of excise tax should take into consideration average wages and/or purchasing power, the country’s overall fiscal position, and the rates of excise in neighbouring countries.

Still, some aspects of the WHO Resource tool (2017) point towards a more comprehensive understanding of the total market for alcohol. Cnossen’s insight (Cnossen, 2010), that externality correction is among the principal objectives of excise taxation, should be reflected in countries’ deliberations on how their taxation policies affect the illicit market. However, the authors disagree with the implied conclusion from that paper that (legal) alcoholic beverages have few substitutes. Case studies show that the presence of the illicit market – and the ease with which many consumers switch to it based on considerations of price − or, more recently, as will be illustrated below during pandemic-related prohibitions, illicit substitutes, are both easily available and often attractive to consumers despite the dangers. In other instances, consumers are not even aware that they have been offered illicit products, as they are often provided in the same packaging as licit products; the hospitality sector and markets can be misled as a result (Euromonitor International, 2018; Neufeld et al., 2019; Maroney, 2020). Any discussion of substitution must therefore include the illicit market to take full account of public health harms and fiscal loss to governments.

Indeed, the Resource tool notes that 'As alcohol taxation increases, the amount of unrecorded alcohol consumption tends to increase, thereby reducing the effectiveness of alcohol taxation and pricing strategies' (WHO, 2017, p. 18). Thus, when implementing strategies, governments should also consider policies that aim to reduce the unrecorded consumption of alcohol. This includes, in our view, not only greater enforcement of national laws but also changes to taxation policies that push consumers towards the illicit market.

Further, the authors agree that 'Unrecorded alcohol consumption has been shown to reduce the effectiveness of alcohol taxation and pricing strategies' (WHO, 2017, p. 17) and that increased enforcement is a necessary priority for many countries.

Notably, the *Resource tool* (WHO, 2017, p. 60) acknowledges that:

> High tax increases may provide financial incentives for under-invoicing, misdeclaration of the quantity or description of the product, smuggling, and illicit production, particularly when tax laws and enforcement are weak, penalties are small, and if the prosecution of smugglers takes time. Both tax revenues and consumption are impacted by the presence of an illicit market, and the impact is greater if this market is substantial.

But this raises serious questions about the cost-effectiveness of tax increases alone in combating harms from alcohol, as so many public health harms occur from the illicit market.

Similarly, the authors agree with the *Resource tool* on the important point that 'Tax administration should be effective and efficient' (WHO, 2017, p. xii). Effective tax administration requires a high level of compliance by taxpayers, whereas efficient tax administration requires low administrative costs in relation to revenue collected.

Effective and efficient tax administration requires technical capacity by the administrative agency and a well-designed tax system. A well-designed excise tax policy exhibits transparency and is easily defined; increased efficiency can be achieved by reducing administrative costs.

However, the authors add that beyond rate levels, tax *systems* should also be designed so as not to affect particular sectors of the market disproportionately, particularly for sectors that account for only a small part of the illicit market in any country. Technical capacity includes verification or compliance with health or other regulatory standards directly or indirectly. In practice, if the size of the illicit market is small or if the components of that illicit market are not properly understood, a mechanism such as tax stamps would not offer an appropriately targeted solution based on the specific problem.

Beyond the headlines, then, the *Resource tool* (WHO, 2017) offers much additional material for reflection. In short, the authors believe government policies on alcohol and taxation should account for the illicit market – and that this will save lives in countries around the world.

2. The impact of the illicit market

2.1. The global scope of the problem

Studies have attempted to estimate the scope of the global illicit alcohol market, notably Euromonitor International (2018). The broad conclusion is that the illicit alcohol market is quite large, though with variations in both size and scope (the composition of the market) among countries, and now accounts for a significant percentage of alcohol consumption worldwide. Euromonitor estimated that roughly one in four alcohol bottles is illicit, representing 25.8 per cent of all global consumption (Euromonitor International, 2018). The WHO expected 'unrecorded consumption' to rise to 27.7 per cent by 2025

(WHO, 2018, p. 58). In the 2018 Euromonitor study, spirits accounted for the bulk (81%) of the illicit market, due to generally higher prices for spirits (and thus higher profits from illicit sales), as well as opportunities for bottle refilling and counterfeit labelling, which are less profitable for other types of alcohol. Beer accounts for about 10 per cent of the illicit market.

There is also a link between what is often known as 'surrogate' alcohol, counterfeited alcohol and health risks from methanol poisoning. Manning and Kowalska (2021) have mapped poisoning directly attributed to illicit alcohol in several countries between 2015 and 2020 and identify over 750 reported deaths and over 4,300 reported hospitalisations in those countries. Some of this alcohol is denatured to make it unpalatable as a beverage; in some cases the denaturant itself is alcoholic, and both these products are entering markets packaged as beverages, including branded beverages, 'tax free', at considerable health risk (Organisation for Economic Co-operation and Development [OECD], 2016).

Additionally, the illicit alcohol market deprives governments of much-needed revenues, erodes the rule of law, and leads to severe public health consequences. Public policy, including an overly complex regulatory environment and weak or non-existent enforcement, can unintentionally stimulate the market, as can poorly monitored distribution channels (for instance, for illegal importation of ethanol).

Along with this comes enormous fiscal losses from tax evasion through illicit trade. The European Union (EU) reports a loss of EUR1.2 billion (USD1.328 billion) in total government revenues due to tax evasion associated with illicit trade in alcohol (European Union Intellectual Property Office [EUIPO], 2016), which is a staggering amount given that the percentage of illicit trade in the EU market is far lower than in emerging markets. In many countries, the illicit trader is not the 'moonshiner' of popular imagination but rather an organised criminal business evading the law, selling products that are clearly unsafe and unregulated and deliberately escaping revenue that is rightfully due to governments.

Nations impose taxes and fees on alcohol through a variety of policies, some more complex than others, to meet national objectives around consumption, revenue and other objectives such as promotion of the agriculture, tourism and hospitality industries. Generally, however, most countries impose excise taxes on volume, the quantity of alcohol in a particular product, or on price, which can affect leakage to other markets and therefore should be controlled. Differential tax regimes do exist − for instance, to support small producers and local products and to encourage consumption of beverages with lower alcohol content. Alcohol tax policy is also considered in terms of the size and pace of rate increases with 'sudden' large ad hoc rate increases seen as potentially a greater risk than those alcohol tax policies in which rate increases are applied in a consistent manner, such as tax rates linked to economic indicators such as the Consumer Price Index (CPI).[1]

Other factors also affect the illicit market, including the prevalence of traditional artisanal beverages not registered with tax authorities and which in some cases can be permitted in the same manner as 'home brew', the lower prices often available in the illicit market (particularly for products such as spirits with high alcohol content), and the ease of availability of often 'tax free' ethanol (potable or denatured) which is used for industrial purposes but which can readily be used as 'surrogate' alcohol or as counterfeit beverages.

2.2. The COVID-19 pandemic and the illicit alcohol market

In several countries, policies responding to the COVID-19 pandemic may have influenced (and in some cases inadvertently promoted) the illicit alcohol market. Restrictions on trading hours, the types of stores that could remain open as essential businesses, and in some cases outright prohibition or severe taxation of alcohol contributed to rises in the illicit market as purchasers sought alcohol by other means, frequently with tragic consequences.

In India, the National Capital Territory of Delhi imposed a 'special corona fee' of 70 per cent on alcohol sales during the pandemic (Times of India, 2020a). At that time, the state government was faced with a sharp rise in expenses relating to the coronavirus pandemic, when sales of all items fell during the lockdown. But singling out one industry for disproportionate treatment also carries serious risks. After an initial rise in sales due to pent-up demand, alcohol sales in the state saw a steep decline after the increase. Delhi consumers boosted their purchases of alcohol from neighbouring states where taxes were lower, and illicit liquor traffic increased in Delhi. This kind of sharp increase in tax and therefore price, for which both consumers and industry are unprepared, runs the risk of encouraging the illicit trade while discouraging legitimate purchases, with costs to both Delhi's fiscal position and public health. Delhi was both the first Indian state to impose a 'corona cess' (surcharge) and the first to remove it.

2.3. Taxation and the legal industry

In countries where production and consumption of alcohol beverages is legal, this industry operates in a highly regulated environment designed to ensure its safe production and safe consumption (for instance, manufacturing and selling licences must be obtained, and legal purchasing age laws exist for consumption). Industry also bears many of the costs of compliance with that regulation. This influences the total consumer price for alcoholic beverages. Appropriate and fair levels of taxation contribute to an effective regulatory scheme, keeping related administrative costs low, and fill state coffers for public health, education, and other necessary functions of government.

The legal industry has a right to insist that governments consider factors such as sustainability of the industry, equity and transparency in alcohol tax policy design. Alcohol tax increases should not be used to discriminate and should be applied with consistency and without surprise and should be set after understanding the impact upon the market. Supporting alcohol tax policy, particularly any significant tax rate increases, should be an investment in increasing law enforcement capacities to mitigate a certain portion of revenue loss. One major objective of alcohol tax policy and enforcement is to reduce the price differentials between legal and illicit products and thereby lessen the incentives for criminals to engage in illicit alcohol production and trafficking, with its tragic consequences.

As noted above, attempts to estimate the global illicit market are inexact because of a lack of reliable information. For this paper, data from Euromonitor International – a market research consultancy that has specialised in estimates of illicit trade in various goods in 45 countries around the world – are useful in providing both research into the several categories that comprise illicit alcohol trade (e.g., adulterated product, counterfeit, tax leakage, unregulated artisanal) and strong estimates of fiscal loss, thus encouraging policymakers to act on recommendations to reduce the illicit market.

A series of case studies below examines the possible link between high levels of tax (or actual prohibition) and incidence of illicit trade, which leads so often to public health harms.

3. Country case studies: illicit alcohol penetration and responses

3.1. Dominican Republic

The Dominican Republic (DR) suffers the highest prevalence of the illicit market in Latin America (Euromonitor International, 2020; International Alliance for Responsible Drinking [IARD], 2018). One in three bottles is in some way part of the illicit market (Mejia, 2021) which is destabilising for the legitimate market. The DR is a developing nation with a tax system that includes an ad valorem (10%) tax based on the retail consumer price combined with an alcohol by volume (ABV) content-based 'impuesto selectivo al consumo' ('selective consumption' tax or 'excise type' tax) at USD12 per litre of absolute alcohol.

Further, the DR imposed a very high increase in rates in a short period of time. A tax reform in 2013 increased the ad valorem tax rate by 33 per cent from 2012 − a 'tax shock' that had and continues to potentially contribute to the current high levels of illicit market shares of spirits and beer. The authors argue that a better policy approach would have been for the Dominican Government to communicate proposed excise tax hikes in advance and transparently, to assist the legal market in adjusting to a gradual rise and help ensure that products remain affordable to reduce the risk of diversion to the illicit market.

In 2016, the total illicit alcohol market was 141,052 HL LAE (hectolitres of pure alcohol), the majority of which was illicit spirits (Euromonitor International, 2017). In that year, this was approximately 30.8 per cent of the total alcohol market, among the highest in Latin America (with a regional average that year of 20.2 per cent). This illicit market had a value of USD548 million and represented a fiscal loss to the government of USD262 million (Euromonitor 2020; IARD, 2018).

Alcohol taxation, and excise taxes more generally, are important to the revenue of the Dominican Government, both through excise and ad valorem taxes, not least from the tourism industry. Government revenues (Dominican Today, 2020), fell 14.3 per cent in the first half of 2020. Given the importance of liquor duty to the government, anything that harms excise revenue – notably, the illicit alcohol trade – reduces monies available for education, public health, and other essential government functions.

Sadly, reports of deaths, often around major holidays, from consuming illicit, often adulterated, liquor are common. Curfews and other COVID-19 restrictions on the hospitality sector may have inadvertently contributed to this problem in 2020−2021. There were at least 166 deaths in the first half of 2021, in addition to more than 330 in 2020 (Witt, 2021a). Excessive levels of tax encourages illicit production and black markets, with tragic consequences. As former Dominican Minister of Health Rafael Sánchez Cárdenas has said, 'Clerén [illicit alcohol] has a [death] rate much, much higher than Covid-19 – 63.2% at one point during the pandemic' (Witt, 2021a).

The Dominican Government has started on a path to counter the illicit market. It has empowered a multisectoral committee to combat illicit trade, and its Decree 275-21 seeks better control of importation and commercial use of products used to make alcoholic beverages, to reduce the risk of diversion to the illicit market. But much more remains to be done. In particular, the government is strengthening controls on the distribution chain, charting the path from production to consumption, and undertaking a strategic consumer education campaign warning of the dangers of illicit consumption. Overall, the DR example suggests it is possible that high rates of tax do not deter consumption; in fact, they push people towards the more dangerous illicit market, increasing public health harms. However, the government demonstrated its willingness to fight illicit alcohol by signing Decree 55-21, which established an enforcement agency to fight illicit trade of regulated products. This Decree represented the culmination of years of discussions on the lack of a concerted effort to fight illicit trade.

While the Dominican Customs and Tax Collection Agency began working together in 2016 on efforts to stop the illicit trade and have had some impact, much work remains. Imports of contraband, both raw ethanol and finished products, contribute significantly to the trade, including counterfeit products. Somewhat unusually, Euromonitor found that prices between the licit and illicit markets did not vary at that time – leading to a situation in which there was fiscal loss but no corresponding economic benefit for consumers (and significant risk from contraband products) and reaffirming the urgent need for a broad consumer education campaign on the dangers of the illicit market. Limited or weak customs and licensing enforcement as well as the potential for high profit helps drive this trade. A combination of tax reform and enhanced enforcement, including stronger criminal penalties, is needed to address illicit trade systemically.

3.2. Case study: Colombia

Colombia is another example of a country in which social acceptance of consumption of illicit alcohol (Euromonitor 2020; IARD 2018) has led to a thriving illicit market, despite the health risks to consumers. Sharp price differentials between the licit and illicit market drive this social acceptance and consumption.

Approximately 22.8 per cent of the total market is illicit, with a value of USD1.504 billion and constituting 366,361 million HL LAE, for a USD678 million fiscal loss. From 2017 to 2019, the consumption of illicit alcohol rose approximately 2.9 per cent in volume LAE (Euromonitor International 2020). This was driven primarily by an increase in retail prices, causing an increase in fiscal loss of 4.8 per cent between 2017−2019. During the COVID-19 restrictions in 2020, the share of the illicit market temporarily rose to near 40 per cent, supported by the growth of marketing illicit products through social media and other digital channels (Transnational Alliance to Combat Illicit Trade [TRACIT], 2021).

The nature of the illicit market varies widely among countries, based on many factors including geography (the ease of smuggling), levels of tax and other enforcement, importation of ethanol, and the size of largely unregulated artisanal markets. In Colombia, the largest share (53 per cent) is adulterated alcohol, nearly 28 per cent is contraband (much arriving via Venezuela and the Caribbean), nearly 10 per cent is alcohol not intended for human consumption, 5.4 per cent is artisanal production, and 4.1 per cent simply evades production taxes (Euromonitor International, 2020). Each causes fiscal loss assuming that consumption would otherwise take place in the legal market; nearly two-thirds of the illicit market is made up of alcohol that risks direct public health harms from consumption (more if one includes potentially risky artisanal products).

According to Euromonitor's surveys, price is a key driver of the illicit market, in both directions. The devaluation of the Colombian peso played a role in controlling contraband. Overall, consumption of illicit alcohol rose 27 per cent from 2011−2019, though there was a drop between 2014 and 2015 from 371,527 to 347,501 HL LAE. The value of the total illicit market rose 44 per cent in that period, leading to a 45 per cent increase in fiscal loss. Euromonitor estimated the total price gap at about 9.9 per cent in 2019, though the price gap for the contraband sector was approximately 24.4 per cent. As in many countries, spirits (particularly whiskey, in Colombia's case) had the highest price gap, and beer the lowest. Beer accounts for only 1 per cent of the illicit market (3,217.5 HL LAE), with USD2.7 million fiscal loss.

At the other end of the scale, adulterated alcohol accounts for 53 per cent of volume in the illicit market and 65.6 per cent of fiscal loss. Much of this results from importation of potable ethanol; 73.6 per cent of ethanol used for adulteration is imported legally into Colombia.

Tax remained relatively stable in the 2017−2019 period, at USD18.2−18.5 per LAE during 2019. As prices for alcohol fell in 2014−2015, including the price gap between licit and illicit product, so did consumption in the illicit market (Euromonitor International, 2020).

Tax evasion, in particular by declaring less alcohol content in their products than actually exists, rose 41 per cent from 2011−2019, with an 11.5 per cent rise in 2017−2019 alone. This caused USD32 million of fiscal loss.

In Colombia's work against the illicit market, beer, although it represents only 7.9 per cent of the legal market, has been a success story: illicit beer consumption fell 52 per cent between 2011 and 2019 because of significant diminution of the contraband market – which represented 78.2 per cent of the illicit beer market in 2014 but only 37.2 per cent in 2019, for a total reduction of nearly 50 per cent.

Another key policy is to promote denaturation of potable ethanol to reduce the risk of diversion to illicit alcohol consumption and thus reduce public health harms. Reforms to the 'Ley de Licores' (liquor law) to further restrict the use of ethanol in illicit activities, particularly adulteration, would assist in combating the illicit market. Because imports of denatured ethanol were 2.0 per cent larger in 2019 than in 2017, there was no migration from denatured ethanol to drinkable ethanol (Euromonitor International, 2020).

Another powerful solution to help reduce the illicit market is electronic invoicing, a model pioneered in major Latin American markets such as Chile, Brazil, and Mexico, starting in 2003 (Barreix et al., 2018). For such a system to work well, it must both permit sufficient control by the tax authorities and also provide benefits to taxpaying corporations to encourage adoption.

Colombia took first steps in this direction through Article 37 of Law 223 of 1995, granting authority to the national government to regulate electronic invoicing, followed by Regulatory Decree No. 1094 of 1996, Law 527 of 1999 (concerning electronic certifications and e-signature), Law 962 of 2005 (extending the scope of electronic invoicing), and Regulatory Decree No. 1929 of May 2007. But the system would work better if DIAN (the Colombian revenue authority) adopted a new model, including standard forms for invoicing, validating authenticity (including use of QR codes), and acknowledgment of receipt.

3.3. Case study: South Africa

South Africa is another example of a jurisdiction that imposed severe restrictions on alcohol sales as a measure designed to address the COVID-19 pandemic. As Euromonitor (Euromonitor Consulting, 2021) reports,

> The dry sales ban resulted in an increase in the demand for illicit alcohol, further incentivizing syndicates to take advantage of the depressed legal market for profit making. Indirect consequences saw a rise in homebrew consumption-related deaths as well as an increase in criminal activities. Lack of punitive measures and enforcement further encouraged illicit activity.

Further, the ban pushed consumers into the 'home brew' market, with supermarkets reporting a 900 per cent increase in pineapple sales; indeed supermarkets began selling pineapples packaged with yeast for the home brew of traditional 'pineapple beer' (TRACIT, 2021).

Even before the ban, the illicit alcohol trade in South Africa was near global standards, at 665,431 HL LAE or 22 per cent of the total market in 2020, having grown by a 10 per cent compound annual growth rate between 2017 and 2020 (Euromonitor Consulting, 2021), with a value of R20.5 billion (USD1.252 billion) and an estimated fiscal loss of R11.3 billion (USD690.4 million). However, this is considerably lower than the 40 per cent average for African countries (Euromonitor International, 2018; IARD, 2018). The illicit market in South Africa is characterised by high rates of smuggling and under-declarations of imports. Counterfeiting (23%) and illicit homebrew (24%) also play significant roles.

The ban raised prices for alcohol, as there was no way to purchase alcohol legally during that time, and also encouraged the growth of the illicit market given the expectation of strong profits, as illicit traders could control both the supply and the price. Once the ban was lifted, illicit traders resorted to undercutting licit market prices outside of the legal sales ban by 43 per cent to retain demand and beat competition (Euromonitor Consulting, 2021). Such actions reinforce the fiscal loss already experienced because of the ban – revenues that could have been used to fight the pandemic. Increased homebrewing (as well as counterfeit or adulterated alcohol) also raised the potential for serious health harms.

Notably, the ban also changed the direction of South Africa's fiscal policies related to alcohol. The South African Treasury had previously determined to limit the rise in alcohol excise tax to the rate of inflation. Following increases in excise duty in 2019 (SA News, 2019) and of between 4.4 per cent and 7.5 per cent again in 2020, the Treasury noted (SA News, 2020) that 'The excise burdens for most types of alcoholic beverages... currently exceed the targeted level as a result of above-inflation increases and price fluctuations.' Because inflation is now lower as the economy has slowed, increases in excise duty led to increases effectively above the rate of inflation and thus above the policy target. The policy of limiting excise tax rises to the inflation rate helps avoid diversions to the illicit market, which grew during the pandemic-related prohibition.

As the South African Revenue Service (2021) notes:

> The primary function [of excise duties] is to ensure a constant stream of revenue for the State, with a secondary function of discouraging consumption of certain harmful products; i.e. harmful to human health or to the environment.

From this perspective, it is clear that only lower rates of tax meet the goal of providing "a constant stream of revenue for the State" by discouraging consumption of harmful illicit (and thus untaxed) alcohol.

More broadly, South Africa's efforts to combat illicit trade in alcohol have been hampered by a lack of enforcement of current regulations and relatively light penalties (Euromonitor Consulting, 2021). Pandemic-related prohibition has only made the problem worse. It will require redoubled efforts for the government to seize the initiative and deter migration to the illicit market.

3.4. Malaysia

Malaysia has the second highest beer excise duty rate globally behind Norway (Confederation of Malaysian Brewers Berhad [CMBB], 2022), which makes contraband attractive, with estimated illicit sales of beer between 70 per cent and 80 per cent of the market in the Malaysian states of Sabah and Sarawak and up to 14 per cent of beer sales in Peninsular Malaysia (Wong, 2020). The CMBB also indicates that the main concern is diversion of product which is tax suspended as either exports or sale to the duty-free island of Labuan, as well as some smuggling from Indonesia, Thailand and the Philippines.

There is less known as to the extent of the illicit spirits market, but it is not at the size of beer, and this paper notes that 'compound hard liquor', the leading spirits category, is taxed at just over one-third the rate of beer, which may be a factor (CMBB, 2022). Illicit spirit does exist, however, with the Malaysian Ministry of Health identifying some 33 deaths from methanol poisoning in one period in September 2021, most attributed to migrant worker camps and the consumption of counterfeit liquor (New Straits Times, 2021).

Malaysia has seemingly turned to retailers, wholesalers and the public to assist with the response to the illicit alcohol market by offering a mobile phone app in support of its digital tax stamp system. All imported beer, and all locally produced wines and spirits, require tax stamps to be applied to the product that contain both a unique serial number and several encrypted data fields, which are registered and stored in a centralised system. For locally manufactured beer, a secure ink spray is used instead of the digital tax stamp.[2]

The system supplier to the Royal Malaysian Customs Department not only provided officers with handheld scanning devices[3] to conduct 'real time' verification of products in the supply chain but also allowed for the technology to be downloaded as an app known as '*JKDM2u'* for use by private citizens and liquor businesses also to confirm the tax status and authenticity of alcoholic beverages (with a supporting 'hot line').[4] The Director-General of Royal Malaysian Customs made a statement that he expected the app, released in late 2018, to improve revenue collections by USD72 million in its first year of use.[5]

3.5. United Kingdom

A close examination of policies in the United Kingdom (UK) shows that coordinated strategies to reduce the illicit market can have significant impact.

A three-stage strategy (2005, 2010, and 2016) has increased the revenue protected from fiscal loss to over GBP1 billion a year, on relatively moderate investments including GBP17.6 million (USD27.206 million) for increasing the capability to investigate fraudulent businesses in 2010 and GBP47 million (USD72.652 million) in additional resources to introduce an alcohol control room and taskforce to strengthen the ability to intercept illicit alcohol (Her Majesty's Revenue and Customs [HMRC], 2016).

HMRC established a Joint Alcohol Anti-Fraud Taskforce (JAAT) to increase collaboration with industry as well as with other UK and international enforcement agencies (JAAT, 2015). In 2014, the UK Government introduced new due diligence requirements for businesses to take reasonable steps to avoid fraud and secure wholesale and retail supply chains. Tightening terms for excise duty repayments also helped reduce fraud, cutting claims by over GBP40 million (USD65.896 million) per year.

Principal lessons from the UK experience include benefiting from a relatively small taxpayer base of producers, warehouses, and importers; tax stamps on spirits; partnership with business, including memorandums of understanding on supply chain controls; effective monitoring of licensure; adoption of electronic tax payments; higher penalties to reinforce the significance of the offence; and, not least, political will across the public sector and a public awareness campaign. One initiative worthy of note was the introduction of the Alcohol Wholesale Registration Scheme (AWRS) in 2016, which effectively set up a 'due diligence' process for alcohol retailers requiring them to confirm AWRS registration of their suppliers and penalises those retailers who acquire from non-AWRS registered suppliers. Through these efforts, the UK was able to reduce the size of the illicit alcohol market overall (including beer, wine, cider, intermediate products, and spirits) from 12.1 per cent in 2014/15 to 9 per cent in 2019/20, including illicit beer sales, which were estimated at the 'upper end', near 25 per cent of the market, and spirits, which in combination with the tax stamps in 2006 has seen a fall from an upper end estimate of nearly 20 per cent (HMRC, 2021).

6. Analysis of the case studies and further research required

This paper suggests that significant increases in the level of taxation of excisable and highly taxed goods for which there are large differences in taxation among neighbouring countries (and nearby countries, for instance through maritime smuggling) increases the risk of fraud and smuggling. After reviewing several countries, there appears to be justification to further research a link between alcohol tax rates and the extent of the illicit alcohol market, even though other indicators also appear to be present, in particular the regulation of sales and the capability of both enforcement measures and of the customs and tax administration officials who enforce the relevant laws.

WHO estimates that approximately 25 per cent of all alcohol consumed as a beverage globally in 2016 (by consumers over 15 years of age) was 'unrecorded' (WHO, 2018). This has been used as a 'threshold' in analysing the case study countries, with the DR and Malaysia (beer) above this threshold,

South Africa and Colombia just below, and the UK down from near 25 per cent illicit markets for beer and 20 per cent for spirits (using HMRC's 'upper band' figures). It should also be noted that Colombia and the DR are well above the regional average unrecorded levels, which are 14 per cent of the alcohol market (WHO, 2018).

6.1. Levels of tax and fiscal strategies

The main point of this paper is to encourage further consideration of the impact of and on the illicit alcohol market in determining appropriate rates of tax. The example of Malaysia with its second highest level of beer excise taxation globally and the extent of the illicit beer market clearly suggests the strong possibility of a link between high rates of tax and illicit activity. However, what is required is a definition of 'high levels of tax' given that a range of economic factors such as 'income levels', product pricing, and 'affordability' could come into play. In short, consumers in some economies may be able to afford the tax component of the product more than others. Equally, what capability is there for the supply chain to 'absorb' tax or tax increases so that there is minimal impact on final pricing to the consumer?

The authors believe there should be research conducted into the extent of taxation in relation to product pricing in the context of the economic conditions of the country being studied. A USD10 per litre of alcohol tax rate may have little impact in a developed economy, but USD10 per litre could be a significant driver of illicit alcohol in a developing economy as consumers struggle to afford an alcoholic beverage.

Similarly, there may be value in studying the deployment of various alcohol tax policy strategies, particularly those which include the 'tax shock' or rapid tax increase in response to a consumption issue or a budget increase measure, looking at policy implementation in the context of the economic conditions of the country concerned and further comparing such policies with alternate approaches such as smaller tax rate rises or regular tax rises such as those linked to an economic factor such as the CPI.

The alcohol tax rates of excise in neighbouring countries, and countries' overall fiscal position can also be part of these considerations.

6.2. Reducing tax leakage

Tax leakage remains a problem in many countries. Steps such as electronic invoicing systems that link producers with customs and revenue authorities directly and securely, higher penalties for tax evasion, and greater fiscal controls in supply chains help solve the problem. Modern revenue controls with remote access to all production and bottling data, as well as audits complemented by unannounced physical checks address revenue leakage from unrecorded products of licensed producers. Partnership with industry can also help: legitimate businesses that pay all excise and product taxes are eager to find cost-effective ways of collecting this revenue – and to ensure that their competitors do not benefit from tax leakage.

6.3. Tax stamps

On traditional paper-based tax stamps, caution is recommended despite advances in areas such as enhanced security features. Digital tax stamp alternatives (smart stamps) may work better and help avoid risks of counterfeiting and price increases unjustified by increased revenue collection (Godden & Allen, 2017).

Tax stamps have both benefits and costs. They can, in some circumstances of high illicit trade, help identify contraband, particularly if producers and importers can source and adhere the stamps directly into their labelling, protecting government revenue, public health through deterring the illicit market, and brand identity for producers. To achieve these objectives, stamps should be provided at low cost rather than as a revenue stream in themselves. Otherwise, stamps impose an administrative burden on legitimate businesses beyond the existing need to pay value-added tax (VAT) and other taxes and can sometimes be copied, providing a false sense of both authenticity and the security and safety of the product. Of themselves, tax stamps do not benefit public health (other than by identifying some contraband).

It is important in this regard to remember the purpose of tax stamps is to reduce tax evasion and increase revenue by providing a physical confirmation of tax paid. However, tax stamps in a compliant sector do not increase revenues but make legal products more expensive. This is a counterproductive result, as the effectiveness of stamps depends on their ability to close the revenue gap between the licit and illicit markets – yet increasing the price of legal products widens the price gap and risks increasing diversion to the illicit market, exacerbating the problem tax stamps are intended to solve. This effect, the counterfeiting of stamps, and the failure of sustained revenue increases have been observed in markets as divergent as Turkey, Denmark (where the government abolished stamps in 2015), Colombia, and Morocco (Godden & Allen, 2017; Hatim, 2020; Euromonitor International, 2015).

Kenya's experience shows challenges with reliance on tax stamps. The Kenyan Revenue Authority (KRA) has adopted excise tax stamps (since 2013 the Excisable Goods Management System) in both digital and paper formats (Godden & Allen, 2017). The system was designed to ensure traceability of excisable products while increasing public revenue and reducing tax evasion.

The first goal, traceability, is achieved when production lines accurately transfer production data to KRA's servers – but that does not happen in real time, leading to inefficiencies in data processing. Further, in January 2019, authorities found counterfeit stamps on USD12 million of alcohol products (SafeProof, 2019). The presence of counterfeit stamps renders traceability impossible, even if manufacturers are successful in detecting counterfeit stamps. Because importers of excisable goods are registered and licensed with KRA, stringent customs border controls would be a more effective control of contraband products than excise stamps, which are in any case applied only once goods have entered Kenya.

Significant differences in excise taxes among countries in the East African Community cause price differentials that drive a market for contraband, again reinforcing the importance of customs enforcement over tax stamps. Further, because beer is not widely counterfeited in Kenya, the digital stamp added costs with little corresponding revenue effect or reduction in the illicit market for that product. A similar effect was observed in Morocco after 2012 when a tax stamp system increased the costs of production by 6−12 per cent, resulting in a 12−25 per cent increase in the price of legal beer. Sales fell about 9 per cent following the price increase, but smuggling of illicit beer did not fall (Godden & Allen 2017).

While digital stamps represent an attempt to use modern technology in goods tracking, the system is ineffective without strong customs enforcement, including surveillance of the supply chain and marketplace with tax stamp verification by officials. Further analysis is warranted as to the revenue gains from tax stamps or fiscal marking schemes versus the costs of running the programs, including the use of surveillance of the supply chain and marketplace with tax stamp verification in compliance programs.

6.4. Customs and other enforcement measures

As the above analysis shows, enforcement efforts by customs and other authorities are essential to combat the illicit market. Given the fiscal loss and costs to human health resulting from the illicit alcohol market, customs officials should pay closer attention to production and smuggling of illicit alcohol, to promote both higher revenues and positive public health outcomes. Governments facing large illicit alcohol markets may wish to increase penalties for crimes in this area, to address the risk/reward calculations of participating in the illicit market.

More basically, governments should also increase enforcement of existing national laws, including giving authorities sufficient powers (search, seizure, destruction) and penalties, including prison time for offenders, following the example of illegal drugs and narcotics, given the risks to human health. Cross-border cooperation will be necessary for markets where borders are porous, coastlines offer opportunities for smuggling, or excise tax rates differ sharply.

Of course, to do so, customs authorities need budgets and resources sufficient to the task, as well as enhanced training and use of intelligence tools and risk analysis. It is essential to understand the nature and extent of the illicit trade and then match remedies to the nature of the problem through a coordinated national enforcement strategy to target the methods, routes, and actors involved.

To address the informal and unregulated artisanal market, tax authorities may wish to consider awareness campaigns to address the health risks and encourage migration towards formalisation in the sector (beginning with amnesty and registration), offering incentives to unlicensed small-scale producers to register for consumer protection quality controls, including safety inspection.

Ethanol regulation and control, including making ethanol undrinkable through denaturing, is an effective way to address counterfeiting of spirits and adulteration. Customs officials will play a vital role in enforcing these regulations at the border.

Finally, the authors believe the World Customs Organization (WCO) should highlight the importance of the illicit alcohol market not only for state revenues but for public health. While national governments must take the lead in addressing the illicit market in their own countries, increased cross-border cooperation in areas of high smuggling or other diversion are appropriate.

More broadly, we call for further research in the academic community to illuminate the illicit market and further define the causal relationship between tax, affordability, and the size of the illicit market, as well as the relationships between various parts of the illicit market in particular countries. The numerous tragedies associated with illicit alcohol consumption in countries around the world show that such research, far from undermining the WHO's goals in reducing harms from alcohol consumption, is both a complementary and necessary component in achieving our common goal of advancing public health.

No country has yet succeeded in eliminating illicit trade in alcohol, though some have come close: the US has reduced illicit trade to around 2 per cent, while Panama stands at 2.2 per cent and Chile at 1.5 per cent of total consumption (Euromonitor International 2020). These successes are achieved through multi-pronged, multi-stakeholder efforts.

Proven steps exist that many countries have taken to combat the illicit alcohol trade. However, they require political will, and perhaps the best way to achieve that is for public health authorities and customs officials to work together rather than in separate spheres. Public education on the risk of consuming illicit alcohol is a necessary task and a good place to begin this cooperation where it does not yet exist.

Excessive alcohol taxation fuels crime and death and harms domestic industries whose taxes contribute to essential government services. Better, more calibrated policies on alcohol taxation that understand and target the illicit market reduce fiscal loss and, more importantly, avoid needless and preventable death and injury.

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Notes

1 See, for example, Australia, New Zealand or the United Kingdom.

2 See Royal Malaysia Customs Department Legislation & Guide (customs.gov.my).

3 SICPA Mobile 45.

4 See JKDM2u – Download (apps112.com) for details of the app and download options.

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Strengthening customs control and trade facilitation: a case study of Sihanoukville International Port, Cambodia

Angkearsoben Tan

Abstract

The constant and significant growth in containerised cargo has put tremendous pressure on many customs administrations around the world. Cambodia is no exception, and Sihanoukville International Port (SIP) Customs faces increasing challenges in achieving its objective of ensuring effective customs control while promoting trade facilitation. This paper examines the IT system, risk management system, and relevant legislation to identify the main barriers preventing Customs from achieving this objective. It concludes that while significant efforts have been made by the General Department of Customs and Excise of Cambodia (GDCE) to address generic challenges, several more specific and practical solutions are required to effectively manage the particular issues being faced at SIP. The paper concludes by providing practical recommendations to deal with the identified challenges in accordance with international standards and best practices.

Keywords: Containerised cargo, Cambodia, customs control, trade facilitation, Sihanoukville International Port

1. Introduction

In a globalised world, the volume of international trade is increasing exponentially, and containerised transport through seaports has become an increasingly popular mode of transportation for global trade. Data from the United Nations Conference on Trade and Development (UNCTAD, 2020) indicates that despite the pandemic, the volume of containers moving through ports globally was around 815.6 million TEUs[1], which was only 1.2 per cent lower than the pre-pandemic levels of 2019.

Cambodia, like most countries, is experiencing an increase in trade volume and containerised cargo traffic, with a moderate reduction due to the pandemic. According to UNCTAD (2021), the container throughput in Cambodia was 763,621 TEUs in 2020, which fell slightly from 779,205 TEUs in 2019, indicating that the pandemic does not seem to have disrupted the container traffic in Cambodia. Indeed, the volume of containers, which are mainly shipped via Sihanoukville International Port (SIP),[2] almost

doubled from 391,819 TEUs in 2015 to approximately 732,387 TEUs in 2021, as shown in Table 1, illustrating the steady increase in SIP throughput volume from 2015 to 2021 (SIP, 2022).

Table 1: Sihanoukville International Port throughput volume 2015−2021

Year	Containers	TEUs
2015	244,333	391,819
2016	248,282	400,187
2017	279,611	459,839
2018	323,443	541,228
2019	382,872	639,211
2020	383,392	641,842
2021	434,331	732,387

Source: SIP, 2022

The General Department of Customs and Excise of Cambodia (GDCE) plays a pivotal role at the border in controlling the importation, exportation, and transit of goods by collecting revenue, protecting border security, and facilitating legitimate trade. As the Royal Government of Cambodia (RGC) still relies heavily on revenue collected by Customs, revenue collection sits high on the GDCE agenda (GDCE, 2019a). In addition, while trade flows have increased significantly, the GDCE also needs to respond to business operators' increasing demand for trade facilitation.

In early 2019, as a trade facilitation measure, the RGC (2019) decided to remove several agencies from the border, leaving the GDCE as the only agency at the border to exercise control over the importation, exportation, and transit of goods. This change has required the GDCE to strengthen the capability of customs checkpoints at the border, especially SIP, to meet its increased regulatory responsibilities. As a result, the GDCE has been working extensively to manage the continuous increase in international containerised trade into Cambodia and to ensure that its policies and practices meet international standards (GDCE, 2019b).

However, SIP Customs and Excise Branch still faces pertinent challenges to exercise customs control over containers efficiently and effectively. Even though the GDCE Strategy for Reform and Modernization (GDCE, 2019b) consists of policies and strategic plans to develop additional IT and automated systems, enhance the risk management system, and review the existing laws and regulations, those policies do not address several specific issues faced by the SIP Customs and Excise Branch. In this context, this paper explores practical operational options that support the high-level policies developed by the GDCE to address the fundamental issues facing Customs at the international seaport checkpoints, particularly SIP.

The paper specifically examines the importation of containerised sea cargo, with a focus on three key areas of regulatory control: legislative base, application of IT, and risk management. It first discusses relevant provisions of international agreements, standards, and recommendations. Then, it assesses

the current domestic law, policies and practices to identify specific challenges facing SIP. The paper concludes by providing practical recommendations for the GDCE to address existing challenges and thereby enhance customs control and trade facilitation at SIP.

2. International agreements, standards, and best practices

This section discusses relevant international legal instruments, recommendations, and practices related to the three key areas, which have been identified as the main focus of this paper. The relevant international legal frameworks are the World Customs Organization (WCO) International Convention on the Simplification and Harmonization of Customs Procedures (WCO, 1999), also known as the Revised Kyoto Convention (RKC), and the World Trade Organization (WTO) Trade Facilitation Agreement (TFA) (WTO, 2014).

Cambodia became a member of the WCO in 2001 and became a contracting party to the RKC in 2014. Therefore, Cambodia is required to comply with the provisions of the RKC and is expected to apply other recommendations and standards of the WCO, including the SAFE Framework of Standards to Secure and Facilitate Global Trade (SAFE FoS) (WCO, 2018). Also, Cambodia became a WTO member in 2004, and as a member, Cambodia is obliged to implement the TFA articles.

The recommendations and practices discussed in this section are drawn from the initiatives of the WCO and other international organisations, those of other customs administrations, and academic literature.

Legislative base

Appropriate legislation is an essential building block for implementing the processes and procedures necessary to enhance customs control and trade facilitation (Widdowson, 2020). The key chapters of the General Annex to the RKC (WCO, 1999) that are relevant to the paper are Chapter 3 on Clearance and other Formalities, Chapter 6 on Customs Control, and Chapter 7 on Application of Technology of the General Annex to the RKC. The key provisions of the TFA (WTO, 2014) are the provisions in Article 7 on Release and Clearance of Goods and Article 10 on Formalities Connected with Importation, Exportation, and Transit. Therefore, the domestic legislation of Cambodia should reflect the above-mentioned provisions of the RKC and TFA, to enable the GDCE to develop and implement procedures and processes that are based on these international standards as required by national legislation.

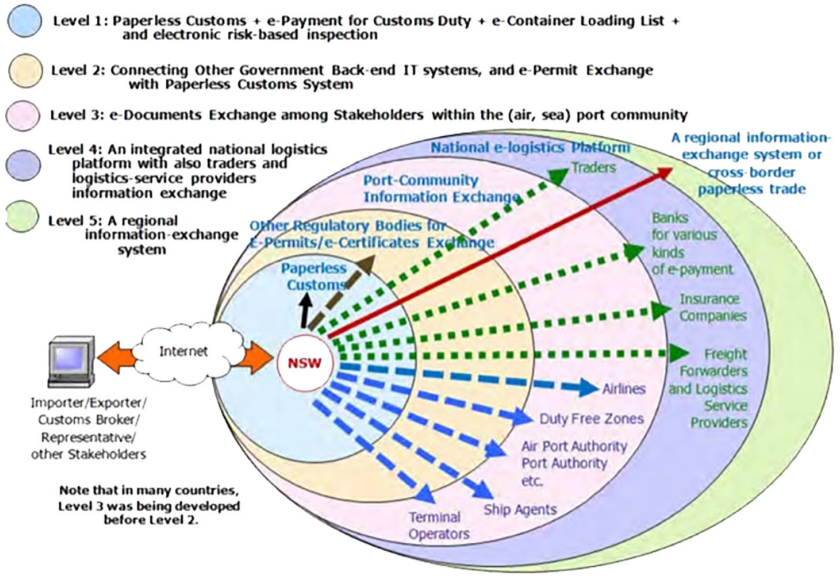
Some specific key standards of the General Annex to the RKC (WCO, 1999) and provisions of TFA (WTO, 2014) are relevant to the paper. Firstly, the legislative base for pre-arrival processing is an important factor for trade facilitation and customs control as required by Standard 3.25 of the General Annex to the RKC and Article 7.1 of the TFA. Secondly, Standard 7.4 of the General Annex to the RKC and Article 10.2 of the TFA suggest a movement to a paperless environment that allows the electronic submission of customs declarations and relevant documents for cross-border trade formalities. For example, several legislative requirements have been developed to support the TradeNet[3] implementation in Singapore, such as the Electronic Transactions Act, Customs Act, and Goods and Service Tax Act (United Nations Network of Experts for Paperless Trade in Asia Pacific [UNNExT], 2010). Thirdly, a guideline to Standard 3.36 of the General Annex to the RKC indicates that the decision regarding the presence of a declarant at the examination of goods is ultimately at the discretion of customs administrations (WCO, 2010b).

Application of IT

The application of IT is one of the crucial areas in Customs as information management systems, automation, and electronic submission of documents are important elements in the effective management of trade information and trade facilitation. Key provisions of the RKC (WCO, 1999) and TFA (WTO, 2014), and recommendations of SAFE FoS (WCO, 2018) require and encourage customs administrations to apply IT. Standards 7.1, 7.2, and 9.3 and Transitional standards 3.21 and 6.9 of the RKC and Standard 2.4 in Pillar 2 of SAFE FoS emphasise that a customs administration shall make the best use of IT for a declaration to be lodged electronically to maximise the effectiveness of customs control and speed up customs operations. In addition, Transitional Standard 9.3 of the RKC suggests customs administrations should employ IT to improve the effectiveness of information sharing. In the 21st century, customs administrations are necessarily required to take full advantage of technological advancements to enhance customs operations (WCO, 2008).

The general trend to advance the IT systems in customs administrations is towards developing and implementing an electronic single window. Paragraph 4 of Article 10 of TFA notes that all members need to develop a single window for traders to submit electronic supporting documents through a single entry to all relevant agencies and employ information technology to support the single window (WTO, 2014). As a result, the WCO published the 'Single Window Compendium' in 2011 and updated it in its 'Compendium on Building a Single Window Environment' in 2017 (WCO, 2017). Volume 1, part I of that publication recommends the implementation of a single window to provide better services for international trade. Volume 2, part VI of the WCO (2017) identifies that the main service in developing a single window is the electronic submission of supporting documents in a single entry for trade. Figure 1 shows five levels of evolution of a single window.

Figure 1: Five-stage evolutional roadmap of single window implementation



Source: United Nations Economic and Social Commission for Asia and the Pacific [UNESCAP] and United Nations Economic Commission for Europe [UNECE], (2012)

The evolutionary model of the single window in the figure above was developed as a roadmap to assist each country in planning their National Single Window (NSW) implementation and to assess and examine the current situation in their countries, from level 1 to level 5 (UNESCAP and UNECE, 2012). The model can guide countries to explore the next steps they aim to reach. For instance, after assessing and identifying that a country does not have paperless processing, level 1 on paperless customs for electronic submission should be the first main development priority (UNESCAP and UNECE, 2012). If paperless customs is already developed, the next step would be level 2, which integrates the system with other government agencies or level 3, integration with the port authorities for a country with major seaports.

Customs automation starts when customs administrations decide to upgrade customs procedures and technology, moving towards a paperless process without requiring traders to submit paper-based documentation (WCO, 2017). Paperless processing also requires cooperation and collaboration with stakeholders, including other government agencies, to enable electronic supporting documents issued by the respective government agencies (WCO, 2017). UNESCAP and UNECE (2012) highlight that the transformation of paper to electronic processing can save billions of dollars in global trade; however, such a system cannot happen overnight and takes years of continuous development and improvement. For example, Thai Customs has launched e-Customs, including e-import, e-export, e-manifest, e-warehouse, and e-payment, which provides business operators with a paperless customs system (Thai Customs, 2019). The paperless customs system allows the submission of electronic declarations and supporting documents without requiring traders to submit paper documents and visit customs offices, which reduces processing time and cost (UNESCAP and UNECE, 2012).

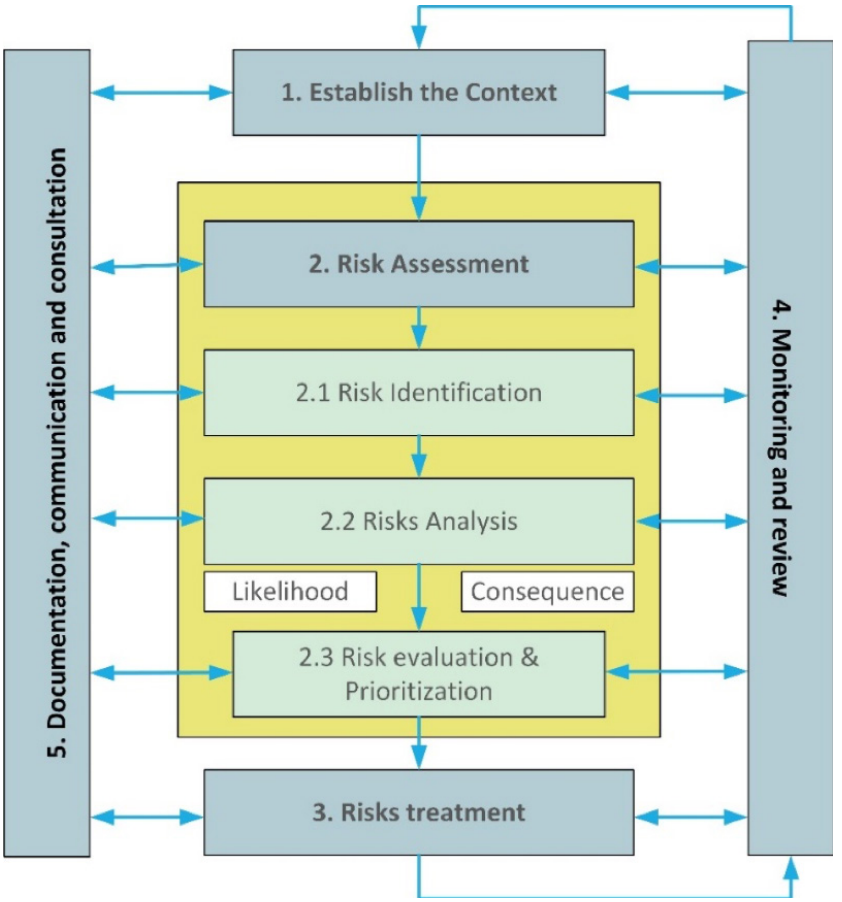
Some customs administrations at the seaport have implemented an automated gate control system at the border to manage the shipments entering and leaving the ports through all gates 24/7. For example, Indonesia Customs implemented the Auto Gate system as an accelerator and manager of the goods flow at the container terminal (Pramesti et al., 2020). The system is a container control process that automatically checks and verifies the documents without requiring officers to monitor them at the gate. Its implementation has significantly increased the effectiveness and efficiency of the customs service to control the flow of cargo and increase the speed of container traffic at the gate (Pramesti et al., 2020).

Risk management

Risk management (RM) is a key element of customs administration that serves to achieve both customs control and trade facilitation (Widdowson, 2005). Standards 6.3 and 6.4 of the General Annex of the RKC (WCO, 1999) and Article 7.4 of the TFA (WTO, 2014) require members to employ a RM system with appropriate risk selectivity criteria to enable Customs to direct resources to high-risk shipments and facilitate low-risk ones. SAFE FoS also recommends that customs administrations adopt RM to effectively profile and target high-risk goods (WCO, 2018), and the WCO (WCO, 2008) identifies RM as the most crucial tool for the future direction of Customs in the 21st century.

As RM is globally recognised as an essential policy, the WCO developed a RM compendium (WCO, 2010a) to assist members with the development and implementation of a RM system and framework in their administrations. The RM process is shown in Figure 2. The RM compendium has two volumes: Volume 1 focuses on developing an organisational framework to manage risks, and Volume 2 focuses on operational work for customs at the frontline to conduct profiling and targeting (WCO, 2010a).

Figure 2: Risk management − principles and guidelines



Source: WCO, 2010a

Risk profiling and targeting are necessary for managing risks at the border (WCO, 2010a). Customs administrations are encouraged to develop risk profiles that are detailed and relevant to each customs checkpoint, and the profiles should contain the risk areas, assessment of those risks, measures to be taken, specified active dates, and the evaluation and results (WCO, 2010a). Therefore, customs administrations should work closely with their frontline officers to identify the relevant risks and indicators at their checkpoints. The WCO developed the 'Maritime Risk Indicators' in volume 2 of the RM compendium (WCO, 2010a) as guidance in establishing risk profiles and indicators for the pre-arrival, arrival and post-arrival phase of cargo at seaports. Importantly, the profiling and targeting process should not be static but constantly changing and evolving. The procedure for developing a risk profile should follow a standardised method to ensure fair and objective decisions, and there should not be any opportunities for traders to manipulate the rules (Grigoriou, 2019). Meanwhile, Komarov (2016) recommends a combination of automated and manual targeting as a preference for customs control based on RM.

The RM compendium emphasises the importance of feedback from both the risk selection and inputs from the frontline to review and adjust future risk indicators and predict new trends (WCO, 2010a). In other words, customs checkpoints, including seaports, should report both positive and negative findings from examining high-risk shipments, which have been identified by the established risk indicators, and any kind of information that could present a risk in their area. Therefore, customs administrations shall develop a user-friendly system to allow frontline officers to report any risk indicators or information necessary to develop or adjust risks (WCO, 2010a).

Lastly, the RM compendium highlights seizure analysis as a crucial instrument for both risk management policy and frontline operations. It provides lessons learned for Customs to recognise the current weaknesses in their control system, the methods of smuggling, and predict future smuggling trends (WCO, 2010a). This means the information from seizures should be effectively used for future profiling and targeting. However, seizure analysis can only demonstrate what Customs has done successfully to detect illicit goods, and it cannot illustrate the things customs administrations fail to do to intercept illicit smuggling (WCO, 2010a). In this context, seizure information from other national and international law enforcement agencies and seizure reports shared in the Customs Enforcement Network Communication Platform (CENcomm) is of particular use for seizure analysis (WCO, 2010a).

3. Current situation in Cambodia and challenges

This section assesses the current legal framework, IT systems, and RM at the SIP Customs and Excise Branch of the GDCE against international standards.

3.1. Legal framework

The main legal framework for customs operations in Cambodia is the Law on Customs (LoC). The LoC was adopted and ratified in 2007, and it contains 80 articles covering rights, responsibilities and policies of the GDCE as the sole leading agency at the border enforcing control over exportation, importation and transit (RGC, 2007). It is the legal basis on which regulations and decisions of the GDCE are made to ensure it meets emerging trends and development in the trading environment (Nagy et al., 2020). After 14 years, the law seems to be outdated and unable to keep pace with current and future trends. The Secretariat for the Amendment of the LoC was established in February 2021 to support the Department of Legal and Public Affairs of the GDCE to review and revise the law to meet international standards (GDCE, 2021b).

The provisions and procedures for customs declarations are set out in Sub Decree No.1447MEF on Provision and Procedures of Customs Declaration, issued by the Ministry of Economy and Finance (MEF, 2007). The detailed functions and requirements for customs declarations, known as Single Administrative Documents (SADs), are outlined in Letter No. 1308 by the GDCE (GDCE, 2009).

Paper-based customs declarations and supporting documents are still required by the RGC (2007). Article 51 of LoC (RGC, 2007) requires all stakeholders involved in import or export transactions to keep hard copies of all relevant documents, records, and trading information, as well as information recorded in the electronic system, for 10 years, at their premises in Cambodia. Stakeholders covered by Article 51 include importers, exporters, customs brokers, port operators, customs bonded warehouse operators, logistics operators, and other relevant parties (RGC, 2007). Here it is important to note that paper-based documents can be costly and easily manipulated for forgery, especially in situations where several parties are involved (Cesario, 2021).

Under the provisions of Article 54 of the RGC (2007) and Sub Decree No.109MEF.PRK on Management of Unclaimed Goods (MEF, 2008), customs officers cannot inspect any goods without owners or their authorised representatives being present. If an inspection is needed and the owner is not present, Customs shall request court approval and a representative from the court to attend the inspection when the goods become unclaimed after 135 days. This is not consistent with RKC General Annex guidelines on Standard 3.36 which allows customs to decide whether traders should or should not be present based on the circumstances (WCO, 2010b), and as noted by the WCO, in some high-risk situations, it is more practical for customs officers to conduct an inspection without the traders or their representatives being present (WCO, 2010b). It is complicated and time-consuming for the GDCE to wait until the goods become unclaimed after 135 days to request approval and presence from the court simply to open high-risk containers, and such a situation may also provide a loophole and opportunities for illegal activities, such as Rip-On/Rip-Off[4].

During the diagnostic mission as part of the WCO Mercator Programme, Fellows, Nojima and Dorji (2018) identified that there is no legal framework to enable pre-arrival processing, and in accordance with Regulation No. 1308, traders cannot lodge information and documents prior to the arrival of goods even though Sub Decree No.1447MEF (MEF, 2007) covers some functions for pre-arrival processing. The current practice is not consistent with TFA Article 7.1 (WTO, 2014) and RKC Standard 3.25 (WCO, 1999) as there is no regulation or provision for pre-arrival customs clearance in Cambodia. However, according to a report of the Department of Legal Affairs and Public Relation (DLAPR), the GDCE proposes to add new provisions to support pre-arrival processing in the draft revised law (DLAPR, 2021).

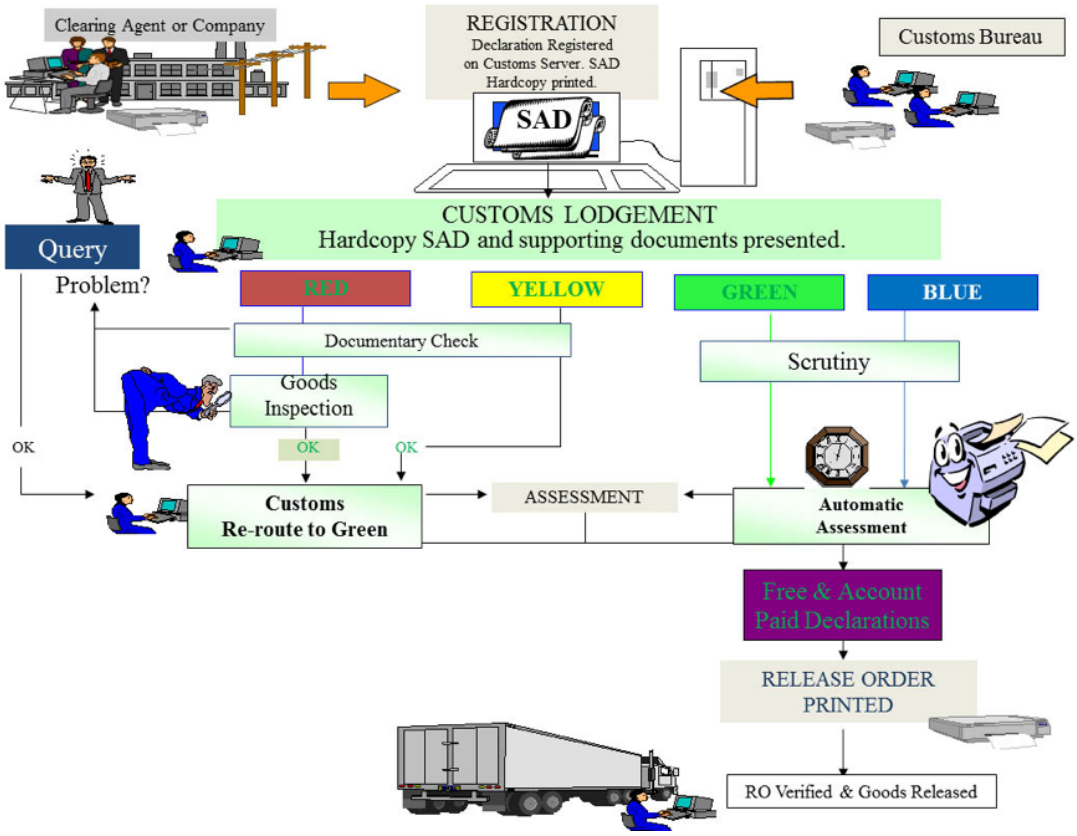
3.2. IT systems

The GDCE uses ASYCUDA World for the customs clearance process in Cambodia (GDCE, 2019b). ASYCUDA World was launched in Cambodia in 2006 and is currently installed at all customs branches and offices to accommodate all international trade (GDCE, 2018). SIP Customs and Excise Branch uses ASYCUDA World (GDCE, 2018), Manifest Database System (SIP Customs and Excise Branch, 2021), and E-Customs (GDCE, 2019b) for customs control and operations.

Before a vessel arrives, shipping agents must notify and submit all relevant documents, including, for example, the cargo manifest, bills of lading and crew list, to customs officers in charge of the Ship Formality Section, Manifest Section, and Container Control Unit (CCU) (GDCE, 2015). Since the Manifest Database System is not linked to ASYCUDA World, customs officers at the Manifest Section enter all key information into the Manifest Database System after receiving hard-copy bills of lading for recording and writing off when traders come to clear their goods (SIP Customs and Excise Branch, 2021).

For the customs declaration process, traders are required to submit customs declarations known as SADs via the ASYCUDA World system and submit hard-copy declarations to customs officers for verification and processing (GDCE, 2015). ASYCUDA World covers the procedures from submitting declarations to issuing cargo release notes, as shown in Figure 3 (GDCE, 2021a). However, the challenge is that supporting documents are unable to be submitted via ASYCUDA World and can only be submitted in the form of hard copies (GDCE, 2015). Note, however, that the GDCE is in the process of implementing the NSW, which will allow traders to electronically submit supporting documents, including manifest data, licences and other relevant documents (GDCE, 2020a).

Figure 3: Flowchart of SADs Process via ASYCUDA World in Cambodia



Source: GDCE (2021a)

The GDCE has made significant progress in employing IT in most customs areas, but more effort is needed to enable customs clearance procedures to be streamlined. For example, traders may submit trading information into ASYCUDA World while customs officers at the Manifest Section enter the same information into the Manifest System. This duplication causes a cumbersome burden for both customs officers and traders. In addition, stand-alone systems make it difficult for SIP Customs and Excise Branch to manage the information effectively since the systems are not integrated. This challenge should be addressed once the NSW is fully implemented, at which time an electronic manifest may be submitted to Customs, and traders will be able to submit other necessary supporting documents via the electronic single window linked to ASYCUDA World.

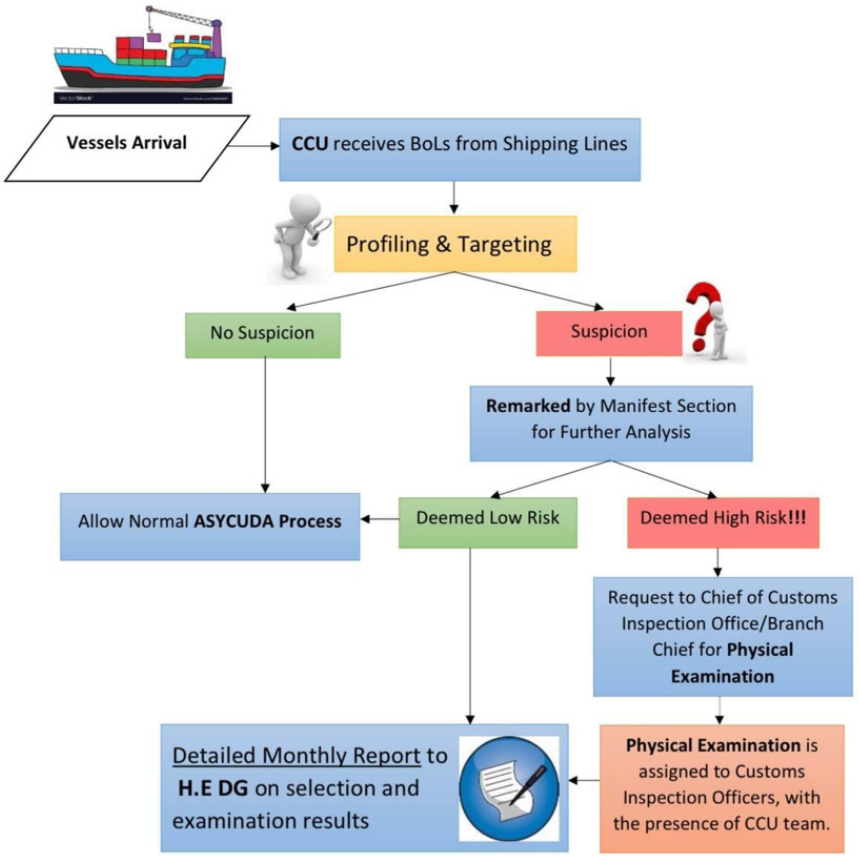
3.3. Risk management

Customs RM has been implemented in Cambodia since 2006 (RGC, 2006). Article 15 (RGC, 2006) requires that the inspection of goods at the border must be undertaken using risk-based procedures. The Risk Management Office (RMO) was subsequently established in 2007 (Hong, 2020), and currently falls under the Department of Customs Audit (MEF, 2018). The RM system was recently migrated into ASYCUDA World through the support of ASEAN Regional Integration Support from the EU (ARISE) Plus Cambodia[5] (GDCE, 2022).

The CCU, a specific team at SIP that is responsible for profiling and targeting high-risk consignments (GDCE, 2019a) was created under the framework of the UNODC-WCO Container Control Programme in 2017 (GDCE, 2019a). With support from UNODC and WCO, customs officers working in the CCU are trained by international experts on profiling and targeting techniques (GDCE, 2019a).

According to the GDCE (2019a), when CCU officers find sufficient risk indicators in the bills of lading, they can request the Chief of the Customs Control Unit to flag the shipment for further analysis and conduct a physical examination if needed, as illustrated in Figure 4.

Figure 4: Process flow of Container Control Unit to target high-risk consignments for examination



Source: GDCE, 2019a

Although Cambodia has made good progress in following international agreements and standards by establishing the RMO and implementing RM policy, the RM system of the GDCE is not yet highly effective in identifying high-risk containers (Hong, 2020). Firstly, the level of physical examination required is undeniably high, while the outcome from the intervention is relatively low (Fellows, Nojima, & Dorji, 2018). This means that frontline customs officers cannot rely solely on the systems to identify high-risk containers, as unnecessary intervention can lead to redundant delays and costs to legitimate trade. In this regard, the CCU seems to operate separately from the RMO when in fact, the RMO and CCU should work closely when developing risk profiles and indicators for SIP. In addition, the feedback mechanism is limited, as is the level of cooperation between the RMO and SIP

checkpoint. In addition, customs officers at SIP must fill out both paper-based (GDCE, 2020b) and electronic inspection results for SADs in the RED Channel[6] (GDCE, 2022). This procedure can be resource-intensive and ineffective as the awareness and understanding of frontline officers regarding customs RM seems to be limited.

4. Recommendations

After examining the current situation and challenges at SIP, and exploring international agreements, recommendations and best practices, it is recommended that the GDCE consider the following proposals to enhance customs control and trade facilitation at SIP:

- the development of a digital gate control system to exercise control over all shipments entering and leaving the port 24/7 and to reduce congestion at the gates
- the implementation of an electronic manifest to effectively control manifest data, speed up the clearance process, support pre-arrival processing, and enable automated profiling and targeting
- the integration or linking all available IT systems of SIP Customs and Excise Branch
- the examination of possibilities for Customs to link with the port authority, as part of the NSW, and to share necessary information
- the enhancement of cooperation between RMO and SIP Customs and Excise Branch to share results and risk information
- an increase in the awareness and understanding of frontline officers regarding RM
- the development of risk profiles and indicators specifically for SIP Customs and Excise Branch, with the cooperation of the CCU team
- the examination of/updating of risk profiles and indicators regularly to keep up with emerging trends.

To support the implementation of the above recommendations, the GDCE should consider proposing an amendment to the LoC to address the following:

- allowing the acceptance of electronic customs declarations and supporting documents without the requirement for paper-based documents (Standard 7.4 of the General Annex to the RKC and Article 10.2 of the TFA)
- inserting a new provision to support pre-arrival processing (Standard 3.25 of the General Annex to the RKC and Article 7.1 of the TFA)
- providing the GDCE with appropriate legislative powers to enable inspection of high-risk consignments with or without the presence of the traders or their representatives (Standard 3.36 of the General Annex to the RKC).

5. Conclusion

The emergence of globalisation has placed pressure on customs administrations around the world, particularly in developing countries. The GDCE is no exception, and it faces many other challenges due to the increasing volume of international trade, especially sea cargo. General policies and strategies that apply to all customs checkpoints are not always sufficiently effective to respond to the particular issues that are being experienced at SIP Customs and Excise Branch.

This paper studies the specific issues at SIP, explores international agreements, recommendations and best practices, assesses the current situation in Cambodia, and develops concrete recommendations to address the identified challenges. The paper identifies three major aspects that need to be improved, which are: an outdated legal base, limited IT capabilities, and an ineffective RM system. These aspects play important roles in both trade facilitation and customs control, as highlighted by the international agreements and recommendations discussed.

To achieve more effective and efficient customs operations at SIP, the GDCE should examine the identified issues and review the recommendations that are designed to address the challenges. As a result, it will be possible to maximise the effectiveness of customs control and trade facilitation in a way which complies with international agreements, recommendations, and best practices.

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Notes

1 Twenty-foot Equivalent Unit (TEU)

2 SIP is the only deep seaport accommodating large container vessels entering or leaving Cambodia (GDCE, 2019c)

3 TradeNet is the National Single Window system implemented in Singapore for customs declarations and trade documentation (Singapore Customs, 2022).

4 Rip-On/Rip-Off is a method to manipulate legitimate containerised cargo by concealing and smuggling illicit goods at any stage of the process without the shipper and the consignee being aware (United Nations Office on Drugs and Crime [UNODC], 2022).

5 ARISE Plus Cambodia is a project sponsored by the European Union to assist Cambodia in building trade-related capacity (ARISE Plus Cambodia, 2020).

6 RED Channel in ASYCUDA World refers to the lane for the shipments that are deemed high risk and require examination (GDCE, 2022).

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Formation and development of international customs law: periodisation issues

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Abstract

This article considers and analyses the history of the origin and evolution of international customs law from ancient times up to the present and offers a perspective on its periodisation. The article covers the evolution of norms of international customs law from the norms of international courtesy, norms of international traditions, separate articles of bilateral peace and union international treaties, trade treatises and the first special agreements on customs tariffs before their fixation in the texts of multilateral international customs conventions, as well as the acts of international organisations. It analyses the contribution to the formation of a system of universal international customs law by the League of Nations, the World Customs Organization, the United Nations and other international organisations.

Keywords: international customs law; international customs relations; international conferences; international conventions; international organizations

1. Introduction

Establishing the time of origin of international law and periodisation of its history are among the most complex problems of the science of international law. Scientists specialising in this topic almost unanimously conclude that despite the duration of research and the considerable number of published works, solutions have not been arrived at. For example, Butkevych (2009) states the following: 'Historians of law speak more about the chronology of adopting legal acts and transmit their content than about the evolution of international legal categories, principles, norms or institutions, and theorists of law point to the definition of law, its sources, principles and norms, specific spatial and time framework of their application, rather than the genesis and historical development of these norms and institutions' (Butkevych, 2009, p. 136).

Emphasising the necessity to study international law history, Lukashuk (1997, p. 40) wrote the following: 'None of the phenomena can be considered outside of its own history. Attempts to ignore the peculiarities of history were unsuccessful in learning the phenomenon. Studying the past is necessary to understand the nature of international law, identify its capabilities, enhance its effectiveness and clarify its prospects'.

In our opinion, such a statement can also be applied to international customs law, but the history of its origin and development, one of the integral components of international law history, has not yet attracted due attention of scientists. In scientific and educational publications, researchers mention only specific historical events, facts and sources, or discuss the prospects or consequences of applying international legal acts to customs matters at national or international levels, without giving particular importance to the genesis of international customs law.

Therefore, in view of the lack of comprehensive research of international customs law history, it can be argued that the defined problem is relevant and deserves exploration.

Generalising the viewpoints of researchers regarding the origin of international customs law, we identify two emerging approaches to the problem. The first of these is based on the writings of scientists who have recognised the emergence of international customs law in the system of international public law but have not specified the time and place of its origin. At the same time, the dynamic development of international customs law is most often associated with the establishment of the World Customs Organization (WCO) and its predecessor, the Customs Cooperation Council (CCC), and their activities in the second half of the 20th century. As for the second approach, its representatives, while exploring some aspects of the legal nature of international customs law, fail to mention its origin and formation.

An article, published at the beginning of 1991, entitled 'The evolution of international legal regulation of international customs relations' (Mytsyk, 1991), is an exception. Its content is based on a set of factors relating to the formation of a new branch of international law – international customs law. The author of the article analysed the historical stages and current trends of its formation and provided a general description of the contractual and institutional forms of the international legal regulation of international customs relations used by states during the 20th century.

An attempt to consider the history of emerging and developing international customs law was made by the Russian researcher Buvaeva in the textbook *International Customs Law* (Buvaeva, 2013). However, the chapter of the textbook devoted to this issue is focused on exploring the concepts, forms and stages of formation and development of international customs cooperation, mentioning the history of international customs law only indirectly, in the context of its connection with the history of such cooperation. In addition, the main stages of formation and development of international customs cooperation (Buvaeva, 2013, pp. 56–67) were described without proper reference to previously published theses (Perepolkin, 2007), having been further developed in a separate monographic study (Perepolkin, 2008).

Therefore, significant results in studying international customs law history have not been achieved by representatives of international law science to date. This includes such fundamental issues as establishing the spatial and time boundaries of the origin of international customs law and its periodisation. As to the difficulty of correctly answering such a question, the well-known Soviet historian-encyclopedist Zhukov (1980) stated the following: 'Absolutely accurate dating of major historical processes and phenomena is virtually impossible, and any periodization is approximate and relative'.

2. An epoch of local international customs law

A modern understanding of international customs law as an integral system of legal norms was preceded by a long practice of local regulation of international customs relations based on customary and treaty norms of law. While some such norms were relevant in the past, they have lost relevance in today's world. The norms that have stood the test of time now occupy an important place in the system of modern international customs law and have been adapted to reflect best practice in regulating cooperation on customs issues.

In considering historical prerequisites for developing international customs law in the context of international law it is worth beginning from the time that bilateral international customs relations were developed, that is immediately upon states' awareness of the importance of these relations for satisfying individual (national) and common (international) interests. This is evidenced by the readiness of states to comply with legally binding rules of conduct, established by regulatory acts.

Consequently, from the time of creating international customs relations between states, there was also a necessity to directly influence such relations through international legal norms. Due to various factors, the content and orientation of these norms, the method of creation, the scope and the number of participants, have been continually changing. However, the main purpose of the international legal norms, namely the regulation of international customs relations, have remained unchanged.

Scientists take a different approach to establishing the time and place of origin of international customs relations. For example, Mytsyk associated their appearance with the development of international customs cooperation in the early 20th century due to the necessity to resolve the issues of simplification and standardisation of customs formalities in the field of international trade (Mytsyk, 1991). Although not indicating precisely when international customs relations became the subject of international law regulation, Yershov stated the following: 'Having created as a system of relations on regulating trade and exchange processes (initially – between a limited circle of the nearest neighbours), customs relations gradually became a form of interaction between border territories on foreign trade issues' (Yershov, 2000). At the same time, despite differences in establishing the time of origin of international customs relations, researchers almost unanimously associate the appearance of such relations with the development of foreign trade and its regulation by states. In comparison, some propose that the periodisation of the development of customs relations parallels the main stages of state system development (Mazur, 2004).

The inability to obtain an accurate historical picture of the regulation of international customs relations is possibly because not all sources have survived to this day, and possibly because there is little evidence of relevant practice at all. Consequently, we propose to focus on well-known facts about the evolution of international customs law based on the norms of international courtesy – a combination of bilateral customary and treaty norms – to the system of rules of conduct within the framework of modern international law.

Adhering to the most popular view in international law science on the creation of international customs relations, we can assume that the first examples of such regulation existed in the states of the ancient world as early as the third millennium BC in the context of foreign trade between ancient Egypt and the Phoenician cities and inhabitants of the lands of the Red Sea basin; at the turn of the third–second millennium BC in ancient Assyria where a duty was levied to the benefit of Ashur state on trade with its colonies in Asia Minor; or in Babylon, which united the entire valley of Mesopotamia in the beginning of the second millennium BC and became, for almost two thousand years, an important economic and cultural centre of the ancient world (Markov, 1987).

The interest of the states to maintain lively trade relations facilitated the development of diplomatic contacts between them and with that the creation of the first examples of exemption (granting immunity) from paying duties for state representatives engaged in official relations. Thus, the ambassadorial law of India in the mid-first millennium BC reserved for ambassadors the opportunity to bring with them money, travel goods, commodities of their country, which were not subject to duties (Baskin, 1990).

The practice of regulating customs relations in foreign trade based on peace and union treaties became widespread in both ancient Greece and in remote Hellenic colonies (Havrylenko, 2006). For example, in the text of the trade agreement, which supplemented the union treaty between Macedonia and Chalcis, dated from the fourth century BC, the right of exportation and importation was provided to both states without paying duties, except for specifically identified scarce goods such as spruce wood and resin (Levin, 1962).

A long-standing practice in international relations has been the possibility of using customs privileges to obtain a right to free trade. As a significant privilege in international relations, free trade treatment was granted only to a particular category of foreigners based on a special honorary act (proxeny) that belonged to public resolutions (decrees).

In various countries the nature of proxeny differed. Referring to the work of Monso 'Les proxenies grecques' in 1886, Nikitina (1978) pointed out that proxeny 'was a religious institute in large religious centers, trade – in the cities of trade, political and diplomatic – in the great powers, playing a prominent political role' (p. 98). For example, in Delphi numerous proxenic acts were adopted to ensure the reception of ambassadors sent by the Delphi Sanctuary to announce times of celebration in various ancient cities and to facilitate religious relations (Nikitina, 1978).

The use of proxeny changed in the ancient world and surrounding territories, especially during the dominance of the Roman Empire, and innovations appeared in the legal regulation of international customs relations. In particular, the number of international treaties concluded by Rome was reduced, with a focus on treaties with more powerful states – the Parthian Kingdom, the Khan Empire in China, the Kushan state and the allied states, having managed to maintain independence in the customs and tax sphere, for example, as the Bosporan Kingdom.

Considering the international status of Roman society, intrastate norms of law replaced the international legal norms in regulating customs relations between the nations controlled by the Roman Empire. A tendency towards legal regulation of international customs relations remained until the division of the Empire into western and eastern and after the fall of the western Roman Empire gradually began to lose its domination.

In this regard, the period of renewal of the positioning of international customs relations in international law occurred for several centuries. Consequently, at the beginning of the Middle Ages legal regulation of international customs relations remained relatively unchanged, as the norms developed by the ancient states continued to have effect. However, during that period, the number of both intrastate legislative acts and international treaties increased significantly, in the content of which, along with regulating trade relations, attention was also devoted to customs issues (Havrylenko, Novikova & Syroid, 2016). However, this did not contribute to improving legal regulation of foreign trade relations, promoting trade or eliminating customs barriers, since the main factors that influenced its emergence were the lack of strong centralised power in the newly formed monarchies and a high level of feudal disunity.

In some official intrastate legislative acts of general character of Medieval Europe in the ninth – tenth centuries can be found the first mentions of normative regulation of the uneasy customs relations between representatives of local authorities and merchants from Slavic lands. Here we are talking about the previously mentioned 'Didenhofen capitulary' of Charlemagne of 805, 'Rafelstetten Customs Statute' of 903–906 (Inquisitio de theloneis Raffelstettensis (903−906), 1890) of Louis IV and other acts, having survived to this day.

Some researchers consider medieval capitularies and statutes to be the first blueprints of interstate customs treaties (Kolesnykov, Morozov, Vynohradov, et al., 2006), contributing to the provisions of Kyiv Rus (Filatov, 2013), and in the case of the Rafelstetten Customs Statute – the recognition of the status of a treaty (Polonska-Vasylenko, 1995), one of the oldest international trade treaties of Kyiv Rus and a source of international customs law (Chornyi, 2000). However, we find such views debatable because the characteristics of many international treaties of that time were not peculiar in their content or implementation. For example, during the development of the Rafelstetten Customs Statute no new rules were created, its drafters relied on customs orders that existed during the reigns of King Louis German (840–876) and Charlemagne (876–880) within a clearly defined territory – Eastern Bavaria − and was published in accordance with the decree of the East Frankish King Louis IV Child (899–911) (Nazarenko, 2001).

As a source of legal regulation of international relations, international treaties were indeed widely recognised, particularly in the epoch of medieval feudal Europe. That was directly reflected both in the significant increase in their number and in the appearance of new types of such treaties. At the same time,

along with the established practice of resolving customs issues in foreign trade relations based on peace treaties, the first examples of independent trade treatises emerged, regulating customs relations in the content of, for example, river navigation agreements.

An important role in developing legal regulation of international customs relations based on contractual international legal norms also related to armed conflicts. It especially concerned those that arose on the basis of long customs conflicts, such as the Byzantine-Iranian wars of the end of the sixth – beginning of the seventh centuries, the Bulgarian-Byzantine wars of the end of the ninth – beginning of the tenth centuries, and possibly the Rus-Byzantine wars of the tenth century (Kolesnykov, Morozov, Vynohradov, et al., 2006), which ended with the signing of peace treaties. The most famous peace treaties of that time, the content of which paid much attention to resolving customs issues, certainly included treaties between Kyiv Rus and Byzantium in 911 and 944 (in certain sources – 907 and 941).

In general, the growth of international trade significantly influenced both the development of customs policy and customs affairs at the national level; and the evolution of international customs law norms, in particular, contributed to the further development of institution of international treaties that regulated of international customs relations. The gradual establishment in the system of international trade relations of the equality of parties and the interest of states to achieve stable development, contributed to the final normative fixing in the content of trade and political treaties of the concept of most favoured treatment. This concept formed the basis for contracting parties to provide customs benefits to foreign traders, that should not be greater than the duty paid by their own subjects or by other foreigners who were subject to such least duty charge.

However, the positions of scientists regarding the establishment of the time of inclusion in international treaties of the above concept diff. For example, the French scientists Karro and Zhiuiar, referring to the Treaty of Peace and Trade between the Venetian Republic and Tunisia signed on 5 October 1231 claimed that its use was known in the thirteenth century (Karro & Zhiuiar, 2001). Another position on the emergence of the concept of most favoured treatment in international treaties was expressed by Soviet lawyers who were specialists on international law. Thus, Levin (1962) noted that the concept of most favoured treatment began to be included in trade agreements from the fifteenth century, and Lisovskii (1979) pointed to its presence in the content of trade agreements of France with Turkey in 1535, the Netherlands with Spain in 1609, England with Sweden in 1661, England with Turkey in 1675 and Holland with Turkey in1680, namely in the treaties of the sixteenth–eighteenth centuries.

It was in the seventeenth century that the European states, in the interests of developing international trade, in the context of the continuing struggle for the recognition of the universal principle of the high seas and the proclamation of freedom of navigation on rivers, made resort to the regulation in trade treaties of both national border customs duties and internal customs duties of individual provinces and cities. For example, the Anglo-French Treaty 'On Security and Freedom of Trade' of 1606 provided for mutual notification of customs tariffs and a certain restriction on internal customs duties (Levin, 1962, p. 45).

However, the states' use of international trade treaties to resolve problems by applying domestic customs duties was short-lived. That was facilitated by changes in domestic customs policy aimed at forming centralised customs systems within unified national customs borders. For example, in France internal customs duties on goods were abolished in 1662, and steps towards creating a single customs border, without its extension to provinces within its own customs jurisdiction – Alsace-Lorraine – began to take effect in 1664 (Morozov, 2011, p. 46).

It should be noted that by the end of the seventeenth century the practice of regulating international customs relations based on trade treaties had become widely recognised by states. In international relations there was a definitive separation of commercial articles of political treaties into independent

trade treatises (Talalayev, 1980), there was a distinction between treatises (treaties) and conventions, having been: a) short (for example, from the second century); b) minor; and c) additional (to a treatise already concluded) (Aleksandrenko, 1906).

Both the content and the structure of international agreements have since been updated. As early as the eighteenth century the Ukrainian researcher of customs history Morozov pointed to the trade treaty as an interstate political and economic agreement, necessarily including a section on regulating customs tariff procedures. In the second half of the nineteenth century if that treaty did not include such tariff application, the name 'Trade treaty' would even be rejected. Gradually new variants of such treaties appeared: conventional treaties or tariff treaties (Morozov, 2011, pp.141−142).

The appearance of special international agreements on customs tariffs did not immediately change the attitude of states to trade treatises and treaties on peace, as the main sources of legal regulation of international customs relations. As a rule, during the eighteenth and nineteenth centuries, these types of international agreements continued to be used to harmonise customs duty rates for specific types of goods and to set out: lists of goods exempted from customs duties on importation into the customs territory of a contracting state, types of goods that came under restrictions or were prohibited for importation, conditions for waiving customs duties and fees in the context of implementing coastal law by coastal states, conditions for applying national regimes, granting the principle of the most favoured treatment, and anti-smuggling provisions, etc.

Among the most famous international agreements of the eighteenth century with content devoted to the above-mentioned issues are the treatise of 1740 between Turkey and France (the last one of which retained the title of capitulation); the treatise of 1742 between France and Denmark; the treaty of 1766 on friendship, trade and navigation between England and Russian Empire; the treaty of 1776 on union and trade between the United States of America and France and others. For example, the conditions of equality with other nations in paying customs duties were defined in article 11 of the Peace Treaty of Kuchuk-Kainarji of 1774 and article 6 of the Ainalikavak Convention of 1779 (Aleksandrenko, 1906, pp. 58, 72), devoted to 'interpretation' of the main points of the Treaty of Kuchuk-Kainarji.

It is important to note that orientation of states to customs unification changed significantly during the nineteenth century through a stable system of relations of international customs cooperation and their legal regulation. Along with the continuous improvement of the structure and content of international customs agreements and the conclusion of the first multilateral international customs conventions, the number of convocations and the legal impact of the results of activities of international conferences increased, and the first international organisations operating on a permanent basis appeared.

It is also worth noting that the policy of the states in asserting their own customs interests for domination in foreign trade and development of their own industry, through a continuing increase in customs tariff rates and the introduction of new types of non-tariff restrictions, was mostly apparent at the end of the nineteenth century. During the period from 1891 to 1896 customs wars continued in Europe between Spain and France, Spain and Germany, France and Switzerland, Italy and France, and Germany and the Russian Empire. The example of the USA–Spain trade disputes over the Cuban market in 1898 also showed how a customs conflict could turn into a military conflict between two countries (Kolesnykov, Morozov, Vynohradov, et al., 2006, pp. 338, 341).

Even the first common international customs organisation – the International Union for the Publication of Customs Tariffs − was unable to prevent the intensifying international relations on customs regulation and numerous emerging numerous customs wars between states on different continents. In accordance with the provisions of the International Convention for the Establishment of the International Union for the Publication of Customs Tariffs of 5 July 1890 the organisation was established and started its activity on 1 April 1891 as an information and technical organisation that classified, published and distributed materials on the customs tariffs and customs legislation

of different countries of the world. Similar activities took place at the regional level as well. Thus, according to the results of the First International Conference of the American States, which took place in 1889–1890 in Washington (USA), it was decided to establish the International Union of American Republics and to create a permanent Commercial Bureau for collecting, systematising and publishing materials and legislation of the member states on trade and customs activities, etc. Its formation became a logical consequence of multiyear efforts of states to reach mutual understanding on customs tariff regulation of foreign trade, confirm their readiness to develop international customs cooperation on a multilateral basis, contribute to the further development of legal regulation forms of international customs relations and summarise the set of significant changes that the scope of international customs law underwent during the nineteenth century (Perepolkin, 2015, p. 48).

Among the broad spectrum of innovations, the most significant have been:

- the first multilateral international customs convention was concluded on 5 July 1890 (Convention Concerning the Formation of an International Union for the Publication of Customs Tariffs (Brussels, 5 July 1890))
- new types of subjects of international customs law – customs unions and international organisations appeared
- international treatises completely abolished certain types of customs duties (for example, *droit de pavillon* – a duty on the flag).

New areas of international customs cooperation were also developed such as information sharing, combating customs offences (in particular smuggling and forging of customs documentation), and developing rules of origin. Also, with the commencement of industrial exhibitions, provisions for duty-free importation of samples and models of products were introduced, subject to obligatory exportation within a year. The return export was ensured by paying a customs duty in security, which was then returned to the owner (Morozov, 2011, p. 143).

In the second half of the 20th century those areas of international customs cooperation received their final doctrinal consolidation in the system of international customs law in the form of independent institutions, namely: customs tariff and non-tariff regulation of trade, combatting offences against customs law, rules of origin and temporary importation (exportation) accordingly.

3. Epoch of universal international customs law

The creation of the International Union for the Publication of Customs Tariffs significantly influenced the progressive development of international customs law. In particular, its foundation initiated international cooperation of states at the institutional level, that is, within the framework of international organisations. This also saw a transition from a local international customs law to the formation of universal international customs law.

However, the turbulent events of the late nineteenth – early 21st centuries, in particular related to the beginning of the First World War and its course, did not contribute to active development of relations of international customs cooperation, and with them the further development of international customs law. Therefore, it was only following the war that states reverted to joint activities towards the universalisation of norms of international customs law. They sought to reach agreement on many pressing issues in customs regulation, including minimising foreign trade prohibitions and restrictions, enhancing the ability to combat smuggling, simplifying customs and other border formalities, etc., during multilateral international conferences convened under the aegis of the League of Nations. However, states generally failed to achieve their goal of convening such conferences.

When the states finally succeeded to reach general agreement, implementation of the planned measures was further hindered by the unilateral actions of individual states or the absence of the general consent of member states to sign the final act of an international conference, or an elaborated draft of an international convention. For example, at the Customs conference opened in Beijing in August 1925, subject to the abolition of all domestic customs duties by China, it was generally agreed to recognise China's customs autonomy from 1 January 1929. However, the conference was unable to implement the autonomy because it failed to decide on the immediate introduction of a surcharge to the existing low customs tariff (Voitinskii, Galperin, Guber, et al., 1956, p. 399).

Examples of ineffective activities of international conferences in the first third of the twentieth century can also be found in works of other authors, in particular, Lisovskii. For example, to overcome the negative effects of the world economic crisis of 1929–1933, by concluding a customs truce the United States of America initiated an international economic conference between the member states of the League of Nations in May – June 1933. However, after signing the minutes of the final meeting of the conference with the representatives of 30 other countries, including the Soviet Union, England, France, Germany and Italy, in July of that year they refused to implement the proposed measures (Lisovskii, 1984, pp. 21–22). Further, none of the states signed the draft of a proposed nomenclature of the customs tariff developed in 1924, which contained about 200 items of goods (Lisovskii, 1979, p. 33). That is why among the many international conferences held under the auspices of the League of Nations, the Geneva customs conference of 1923 deserves special attention.

The main achievement of the first conference is considered to be the signing of the International Convention on Simplification of Customs Formalities by 36 member states on 3 November 1923. The Convention entered into force on 27 November 1924 and consisted of a preamble, 30 articles of the main text and a minute recognised as its integral part. Both the Convention and its Customs Law, the International Convention on Simplification of Customs Formalities of 1923, with the participation of most European Union member states, remained in force at the beginning of the third millennium: '… it was not affected by concluding the Treaty on founding the European Union (Article 307 of the Treaty establishing the European Union)' (Lux, 2002).

The results of some of the international conferences of the League of Nations have been used by states to coordinate their actions to reduce customs tariff and non-tariff trade barriers to the maximum at the regional level. In this regard, in Oslo on 22 December 1930 Denmark, Norway, Sweden, the Netherlands, Belgium and Luxembourg signed the Convention on economic convergence with the main provisions borrowed from the draft of the economic conference of the League of Nations of 1930 by 'the Oslo Group' countries (Grabar, Durdenevskii, Kozhevnikov, et al., 1947).

The contribution of the League of Nations to developing international customs law also includes replenishing its source base by several examples of international judicial practice on customs regulation. That became possible owing to the activity within its structure of the Permanent Court of International Justice, which in one of its conclusions summarised and identified the features of a customs union, namely: the uniformity of customs laws and tariffs; the unity of customs borders and customs territory regarding third countries; the exemption from import and export customs duties on exchanging goods between partner states; the distribution of customs duties levied due to the established quota.

Another conclusion of 5 September 1931, relating to the obligations of Austria[1], prohibited a union with Germany even if it took the form of an economic union. Intervention by the League of Nations in relations between Austria and Germany led to the provisions of the draft signed between them on 14 March 1931 about the 'likeness of customs and political and trade conditions', in other words, the project of a true customs union, under which countries kept their customs services, but had to unify tariffs and customs legislation and remove all obstacles at common borders (Duroselle, 1999).

After the formal liquidation of the League of Nations, the development of international customs law towards its universalisation continued on a multilateral basis, taking into account the provisions of the General Agreement on Tariffs and Trade (hereinafter referred to as the GATT) of 30 October 1947 and a number of international customs conventions and legal acts, prepared by the Customs Cooperation Council (later known as the WCO), the United Nations Economic Commission for Europe, and subsequently the World Trade Organization (WTO).

The GATT, as the French researchers of international economic law Carro and Jujar rightly stated, 'is a true code of applying customs duties' (Karro & Zhiuiar, 2001).

Many of its prescriptions, which significantly influenced the progressive development of international customs law and its codification during the second half of the 20th century, continued to be relevant at the beginning of the third millennium.

On the one hand, it became possible (due to the statutory consolidation in the GATT articles, such as *lex generalis*, in other words, the 'common law') to introduce several new fundamental, guiding ideas and time-tested rules of conduct, having been pursued by states entirely at the bilateral level over a long period of development of the legal regulation of international customs relations. For example, in relation to methods of protecting national markets, there only the imposition of tariffs was legalised, with all non-tariff trade barriers, including all quantitative restrictions, being prohibited. Moreover, the ultimate goal of the GATT was to strive for the complete elimination of customs duties, by gradually reducing them. Along with the states there was recognised a right to participate in international customs (trade) relations by both customs unions and other 'separate autonomous customs territories'. Based on these provisions, Hong Kong, Macao, the separate customs territories of Taiwan, Penghu, Kinmen and Maizu (Chinese Taipei), as well as the European Union, are now recognised as equal participants in foreign trade relations. In addition, the following were defined: the principle of transit freedom; the need to completely abolish all customs formalities of a protectionist nature; conditions for levying anti-dumping and countervailing customs duties; and for imported goods, uniform requirements were established for applying rules of origin and valuation methods for customs purposes.

On the other hand, maintaining the relevance of the GATT provisions and significantly expanding the scope of material relations being discussed at the periodic meetings of its contracting parties were considerably helped by the process of gradual institutionalisation of this agreement to the level of an international organisation possessing international personality. The GATT–1947 transformed from a series of periodic negotiations (see, in particular, Articles 25 and 28 bis) to the GATT−1994, being a permanent centre for trade negotiations and an organiser of global rounds of international trade negotiations (Karro & Zhiuiar, 2001). With its transformation, the GATT–1994 became the main source of influence for today's WTO, the implementation of certain provisions of this agreement being made possible in cooperation with other international intergovernmental organisations.

In the field of customs activity, such international organisations are, first of all, the International Union for the Publication of Customs Tariffs and established in 1950 under the name of the 'Customs Cooperation Council' (now known as the WCO). It is now the WCO that jointly administers and implements the provisions of the Agreement on applying Article 7 of the GATT (the Customs Valuation Code) and the Agreement on rules of origin signed as a result of the negotiations of the Uruguay Round on 15 April 1994. As a result, the WCO institutional structure has the following two joint bodies: the Technical Committee on Customs Valuation and the Technical Committee on Rules of Origin.

It should be noted that having started its activity in only 17 European states, the Customs Cooperation Council quickly became the world centre for systematising and improving norms of international customs law. Already in 1984, considering the necessity for more detailed information on the needs

of all member states and their broad geographical representation, the organisation decided to adopt a regional representation system. In this regard, basing on a range of factors, such as a working language, geographical proximity, and the existing regional structures of other international organisations, six working regions were established within the Customs Cooperation Council, namely: East and South Africa; West and Central Africa; North Africa, Mideast; Far East, South and Southeast Asia, Australia and the Pacific Islands; North, South, Central America and the Caribbean; and Europe. Subsequently, in 1994 the universal international legal status of the Customs Cooperation Council was recognised by all its member states by introducing a second informal name, 'the World Customs Organization'.

Currently, there are 183 WCO member states, including Hong Kong, Macao and the European Union. The WCO prepares drafts of codification acts and amendments to existing international conventions, and develops numerous recommendations, declarations and resolutions on various issues of customs regulation. Well-known examples of such acts are the International Convention on the Simplification and Harmonization of Customs Procedures of 18 May 1973, the International Convention on the Harmonized Commodity Description and Coding System of 14 June 1983, the International Convention on Temporary Importation of 26 June 1990, the Arusha Declaration of Professional Ethics of 7 July 1993 (revised in June 2003), the Resolution on the Framework of Standards to Secure and Facilitate Global Trade of 23 June 2005 and many others.

The WCO's successful rulemaking activity on international legal regulation of international customs relations depends to a large extent on activities of other international organisations in this field and maintaining ongoing cooperation with them. The main organisations are the WTO and the United Nations, represented by one of the oldest known authorities – the Economic Commission for Europe. At sessions of its special authority, –the Working Group on Customs Matters relating to Transport (hereinafter – WP.30), operating in Geneva as a subsidiary authority of the UN Economic and Social Council, recommendations and resolutions were developed on customs facilitation and standardisation of documents used in international trade, as adopted by the WCO in its work on codification and progressive development of international customs law. In addition, WP.30 has made a significant contribution to developing international customs law through adopting several international conventions, for example, the Customs Convention on Containers of 2 December 1972; the Customs Convention on International Transportation of Goods Using TIR Carnet of 14 November 1975; the International Convention on the Harmonization of Frontier Control of Goods of 21 October 1982; the Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes of 9 February 2006; and others (Perepolkin, 2015, p. 31).

Resuming the history of the origin of international customs law, it is also important to note that multilateral international cooperation within the framework of the GATT/WTO, the WCO, the UN and other international organisations, contributed not only to forming a universal international customs law, but also to its progressive development at a regional level. The most prominent example is the emergence of the European customs law or the EU customs law, impacting also customs affairs of third countries.

4. Conclusion

The history of international customs law has not emerged as a subject of comprehensive scientific research in either the Ukraine or elsewhere. Its further scientific discussion is useful both for describing the history of development of domestic customs law and for an in-depth study of the history of international law.

Regarding the periodisation of the history of international customs law, it is proposed to divide it into two global epochs: the epoch of local international customs law and the epoch of universal international customs law. Each of these epochs has its own periods.

4.1. Epoch of local international customs law

4.1.1. Prehistory of international customs law (from ancient times to 1648).

The modern understanding of international customs law as a coherent system of legal norms was preceded by a long practice of local regulation of international customs relations based on a distinct set of customary and contractual norms of law. The rules of conduct were mainly bilateral and concerned the granting of customs privileges in foreign trade and the recognition of certain categories of honorary foreigners for the purpose of customs privileges and immunities.

4.1.2. From the Peace of Westphalia of 1648 to the foundation in 1891 of the first international customs organisation – the International Union for the Publication of Customs Tariffs.

Following the Peace Congress of Westphalia, the scope of norms of international customs law gradually underwent significant changes, in particular in relation to:

- the expanded scope of customs tariff and non-tariff regulation of foreign trade
- cooperation on combating customs offences, introduction of definitions of rules of origin and temporary import (export)
- the evolution of norms of international customs law from bilateral norms of international courtesy, international traditions, separate articles of bilateral peace and union international agreements, trade treatises and special agreements on customs tariffs to the signing on 5 July 1890 of the first multilateral international customs convention – the International Convention on creating the International Union for the Publication of Customs Tariffs
- inclusion of customs regulation issues on the agenda of international conferences
- the emergence of new kinds of participants in international customs relations – customs unions and international organisations, etc.

Creation of the International Union for the Publication of Customs Tariffs which started its activity on 1 April 1891, became a natural consequence of the centuries-old efforts of states to reach mutual understanding on customs tariff regulation of foreign trade. This was testimony to their willingness to develop international customs cooperation on a multilateral basis and promote the necessary preconditions for further progressive development and codification of norms of international customs law.

4.2. Epoch of universal international customs law.

4.2.1. Institutionalisation of forms of legal regulation of international customs relations and the formation of the principles of universal international customs law (since 1891 to the formal elimination of the League of Nations in 1946).

The starting point for changing international customs law from the regulation of local international customs relations to the development of norms of a universal nature, can be considered to be the establishment of the International Union for the Publication of Customs Tariffs. The purpose of its establishment was to translate and publish customs tariffs of different states of the globe, as well as legislative or administrative resolutions, and amendments. The reason for its development was the constant aggravation of international customs relations between countries from different continents, having caused customs wars from time to time.

In laying the groundwork of universal international customs law, multilateral international conferences became of great importance and were systematically convened under the aegis of the League of Nations. The agenda of such international conferences generally included issues of legal regulation of most relevance to international customs relations, in particular, minimising prohibitions and restrictions in foreign trade, strengthening combating smuggling, simplifying customs and other formalities at the borders, etc.

4.2.2. Establishment of universal international customs law, its codification and progressive development (since 1947 until now).

After World War II the establishment of a universal international customs law was completed, based on the provisions of the GATT of 30 October 1947 and several international conventions and international legal acts in the field of customs, prepared by the WCO, the UN Economic Commission for Europe, and subsequently the WTO and other international organisations.

During the second half of the twentieth – beginning of the twenty-first centuries the relevant principles, norms and standards were recognised not only by most states of the world, but also by many interstate integration unions, and were further developed in numerous international legal acts.

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Notes

1 Stemming from the provisions of the Treaty of Saint-Germain of 10 September 1919 and the Geneva Protocol of 4 October 1922.

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INTERNATIONAL NETWORK OF CUSTOMS UNIVERSITIES

WORLD CUSTOMS ORGANIZATION

Section 2

Practitioner Contributions

Development of the system of customs experts – the example of China Customs

Tong Hua

Abstract

In recent years, the ever-evolving internal and external environment has made the development and professional construction of human resources (HR) crucial to the realisation of Customs' overall strategic goals. In this context, a customs expert system, is a policy arrangement that has received extensive attention from the members of the World Customs Organization (WCO). Here, the paper systematically reviews the contributions of the WCO and the best practices of its members in customs HR professional development. The paper analyses in detail the three reasons for the introduction of the customs expert system by China Customs and explain its content. The paper also emphasises the management model including methods to identify experts, their tenure and their regular assessment. After analysing the achievements of and problems faced by China Customs regarding the existing expert system, the author proposes the following five suggestions for the future development of the expert system: first, to expand the classification of customs experts; second, to learn from other countries' customs expert systems through extensive international customs cooperation events; third, to conduct in-depth studies of the system's connection between professional and technical civil servants and customs experts; fourth, to improve the relevant institutional arrangements for 'expert-type leaders', and further clarify the setting of expert levels; and lastly, to actively explore the utilisation of expert teams.

Keywords: People development, customs professionalism; expert system; career development; China Customs

1. Literature review

1.1. Achievements of the World Customs Organization (WCO) in the professional development of customs human resources

To meet the growing demand for professional training of customs officers, the WCO has established three major assessment dimensions in the field of HR training and management: knowledge, skills, and attitude. It has also created the Partnership in Customs Academic Research and Development (PICARD)-centric standards for customs HR professional management and development. The different training standards for strategic and operational levels have greatly promoted the scientificity of each member's training systems for customs officers (WCO, 2019a). Through ongoing cooperation with the International Network of Customs Universities (INCU), the WCO has been able to further promote the PICARD standards in the customs academic community and has obtained support in

the content argumentation and regular revision of the standard (WCO, 2019a). In addition, the WCO has comprehensively addressed the theoretical models and best practices from members for the professional development of customs human resources in the 'WCO Framework of Principles and Practices on Customs Professionalism' (FPPCP), and highlighted the important role of the dual career paths available to customs officers in the process of human resource management and development (HRMD) (WCO, 2016, p. 130).

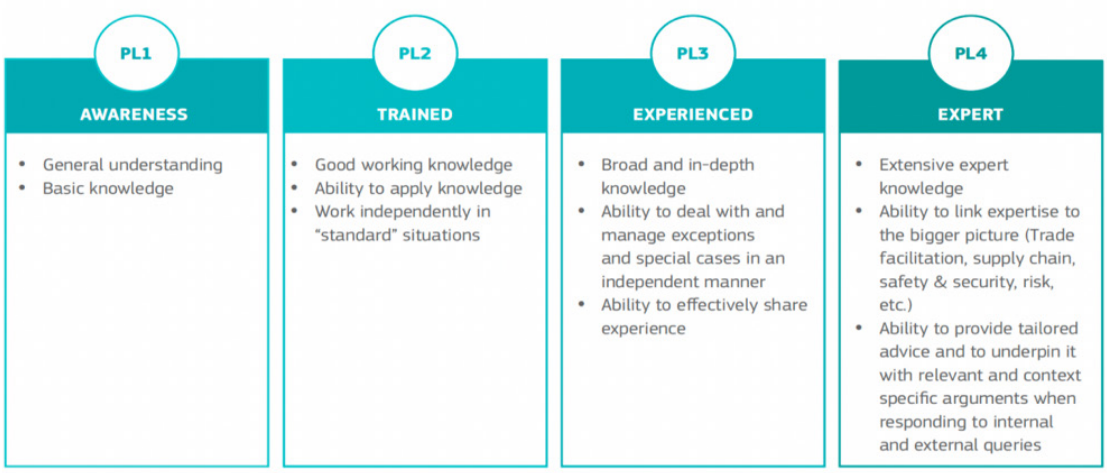
The WCO has elaborated in detail how to implement the three dimensions (knowledge, skills, and attitude) step by step, and how to conduct regular assessments in its 'Guide to Implementing Competency-based Human Resources Management in a customs administration environment', to provide guidance for members to cultivate competent customs officers from a practical level (WCO, 2019b). In addition to providing relevant guidance in response to the demand of members, the WCO itself conducts professional assessment and accreditation for customs officers from each member administration in a variety of fields (such as time-release study, free zone, cross-border e-commerce and HRMD) on a global scale. The qualified officers are recognised as WCO ACE (Accredited Customs Experts) and customs modernisation advisers, providing international intellectual support for the modernisation and reform for members (WCO, 2018).

1.2. Best practices of the WCO members in HR professional development

The competency-based human resources management framework has been widely implemented among the WCO members. The customs authorities from the European Union, New Zealand, Korea, and Thailand have had fruitful outcomes in the exploration of customs expert systems. The EU Customs regards competency-based human resource management as an important way to promote customs modernisation. The EU Customs provides a dual career path (general management track and expert track) for its customs officers and stipulates four types of competencies (management competencies, operational competencies, professional competencies and customs core values). Four levels of proficiency are also proposed (Figure 1): Awareness, Trained, Experienced and Expert. By adopting this dual career path, EU Customs provides its officers with the opportunity to become experts or senior executives by drawing on the WCO competency-based human resource management (HRM) framework and realises the comprehensive development of customs' human resources (European Commission, 2019).

The New Zealand Customs Service also fully embodies the idea of a dual career path in the 'Customs Rank Career Pathway' planned for its officers. After being promoted to senior customs officers, the employees have an option to become 'supervising customs officers' or customs technical specialists. Both professional paths have great career development potential (New Zealand Customs Service, 2019). The Korea Customs Service adopts a career path model based on the principle of rotation that categorises experts and requires a three-year rotation period to familiarise the experts with all major tasks in different departments before entering the customs specialist streams (WCO, 2016, p. 134). Thai Customs also has experts in, for example, Rules of Origin, Classification, Valuation, Legal affairs, Human Resources Management and Human Resources Development, ranking slightly higher than section director in the administrative level (Thai Customs Academy, 2017).

Figure 1: Four levels of proficiency of EU customs officers



Source: European Commission (2019, p. 9).

1.3. The experience gained by China Customs in professional development of human resources

China Customs, as one of the ministerial-level government departments, implements a three-layer vertical management system (General Administration of China Customs, Customs Districts and Customs Houses). China Customs has carried out various reforms of, and investigations into, the professional development of human resources in recent years, with relevant research performed by customs officers and scholars. At the initial stage of implementation of the customs expert system, some proposed that the rank promotion system for customs officers needed to further increase the level of non-leadership positions in grassroots units, and introduce a broader competition mechanism (She, 2013); others took the current situation of human resource career management in different customs districts as examples, and concluded that customs should further establish the 'people-centric' way of human resources management, and improve the job classification management system to achieve the professional development of the team (Deng, 2011). After comprehensive implementation of the customs expert system, some discovered that optimising the customs expert system needs to follow the four basic principles of overall planning, separation of political affairs, flexible job adjustment and appropriate proportions (Cai, 2020). In addition, it is also believed that countermeasures to solve the bottleneck of human resources professional development of customs mainly include: relying on technological means to reduce the work pressure, strengthening the positive incentive measures for customs personnel and improving the level of personnel training (Han, 2019).

2. Basic information about the China Customs civil servant (personnel) system

2.1. Management bodies of customs HRM at all levels

China Customs has adopted the three-layer vertical management system described above in its institutional design. The management bodies of customs personnel (except for the department leaders) also follow this vertical management system.

2.1.1. Upper level: Department of Personnel and Education, General Administration of China Customs (GACC)

The Department of Personnel and Education of the GACC is responsible for the HRM institutional design, management of customs ranks, remunerations and benefits, and training of personnel across all customs agencies. It also guides the development of customs talent teams, affiliated customs college and other training institutions.

2.1.2. Middle level: Personnel & Education Division, customs districts

The Personnel & Education Division of the customs district is responsible for implementing the resolutions and decisions made by the GACC on personnel management, formulating plans for the management of customs personnel and implementing the management system for the customs rank system.

2.1.3. Grassroots level: Personnel Section, customs houses

The Personnel Section of the customs house is responsible for implementing all laws and regulations regarding personnel management, such as carrying out publicity and education on anti-corruption; undertaking talent development, personnel management and retired personnel management and undertaking the daily management of contract staff and labour dispatch personnel of the customs house.

2.2. Positions and administrative ranks of customs civil servants

The China Customs HRM system of positions and ranks fully implements the 'Regulations on Parallel Positions and Ranks of Civil Servants' issued by the General Office of the Central Committee of the Communist Party of China. The regulation clearly points out that the rank of civil servant is a promotion channel parallel to leadership positions. It reflects the political quality, professional ability and seniority contribution, which is an important basis for determining remuneration and other benefits. The (administration) ranks do not have leadership responsibilities. Civil servants who hold leadership positions perform their leadership duties, and civil servants who do not hold those positions perform their duties and accept leadership and command according to their affiliation.

2.3. Ranking of civil servants

The rankings of China Customs officers are set up according to three categories: comprehensive management, administrative law enforcement, and professional and technical (customs) civil servants (Table 1).

Table 1: Three categories of China Customs officers and related rankings

Category	Comprehensive management	Corresponding former non-leadership positions	Administrative law enforcement	Professional and technical
Rank	Counsel First-class	Counsel (Director-general level)	-	Commissioner General First-class
	Counsel Second-class	Deputy Counsel (Deputy Director-general level)	Supervisor	Commissioner General Second-class
	Consultant First-class	-	Senior director First-class	Senior manager First-class
	Consultant Second-class	Consultant (Director level)	Senior director Second-class	Senior manager Second-class
	Consultant Third-class	-	Senior director Third-class	Senior manager Third-class
	Consultant Fourth-class	Deputy Consultant (Deputy Director level)	Senior director Fourth-class	Senior manager Fourth-class
	Principal Staff First-class	-	Director First-class	Manager First-class
	Principal Staff Second-class	Principal Staff (Section chief)	Director Second-class	Manager Second-class
	Principal Staff Third-class	-	Director Third-class	Manager Third-class
	Principal Staff Fourth-class	Deputy Principal Staff (Deputy Section chief)	Director Fourth-class	Manager Fourth-class
	Staff First-class	Staff	Administrative law enforcer First-class	Professional technician
	Staff Second-class	Clerk	Administrative law enforcer Second-class	-

Source: Relevant regulations on Chinese civil servants

3. Reasons for the establishment of the China Customs expert system

3.1. Changes in the customs environment have spawned the demand for professional development of human resources in China Customs

Since the start of the 21st century, with the continuous development of information technology and the exponential growth of trade volume, customs officers must be able to adapt to the rapidly changing trade environment, master more professional business knowledge and skills and complete the various tasks of their positions. In addition, the functions of customs are also constantly expanding and changing, from focusing on trade facilitation to pursuing a balance between trade facilitation and security. In this context, with the increasing systematisation of professional knowledge in the various fields of customs, it is difficult for customs officers to become 'generalists' who have a comprehensive knowledge of all the various business areas. From the perspective of human resource managers, the cost of training such 'generalists' is also not very economical. Therefore, China Customs adopted the expert system as an important measure to solve this problem.

3.2. The preferential policies for the promotion of customs rank have been adjusted, and there are restrictions on the promotion of grassroots customs officers

In 2019, the GACC formulated the 'Implementation Plan for the Classification Management of Customs Civil Servants and the Parallel System of Positions and Ranks'. The implementation plan set a proportional limit on the number of ranks and positions, which made the previous 'promotion when the time comes' a thing of the past. The previous preferential policy stipulated that someone could be promoted to the rank of deputy principal after four working years and could be promoted to the rank of principal after seven. This adjustment of policies had lowered the promotion 'ceiling' of grassroots customs officers; for example, one customs district has implemented a classification scheme for customs civil servants, paralleling their positions and ranks under the guidance of the GACC. It requires an unlimited number of positions below the rank of first-class principal in the area of comprehensive management, and that the number of positions from first to fourth class sponsors must not exceed 60 percent of the total number of administrative law enforcement positions, of which the number of first- and second-class directors shall not exceed 50 percent of the total number of directors. According to the previous non-leadership promotion system for grassroots customs officers, a newly recruited customs officer who had worked for four years and who was qualified could be promoted to the rank of deputy principal, and then be promoted again after three years to become a principal staff. However, the current existing promotion channels cannot meet the demands for all officers.

3.3. The existing customs leadership positions are approaching saturation and there is an urgent need to expand personnel promotion channels

In March 2018, the 'Plan for Deepening the Reform of Party and State Institutions' decided to assign the management responsibilities and the teams of entry-exit inspection and quarantine to China Customs. Therefore, the number of personnel was further expanded. According to data released by the WCO in 2021, there were more than 70,000 customs officers in China Customs, and more than 100,000 people working in customs overall. The number of customs leadership positions has not increased proportionally following the reform. The existing customs leadership positions have become increasingly saturated and career development of grassroots customs officers is relatively limited. The customs expert system should work to improve the current situation.

4. China Customs Expert System

4.1. Definition of China Customs Expert System

'Customs experts' refers to professionals who have technical expertise in a certain field of customs. Their main responsibilities include participation in regulation and policy design, regional economic development planning, customs-related research, evaluation of difficult and complex issues, and providing viewpoints for decision-making and various technique training.

4.2. Development of China Customs Expert System

4.2.1. Initial establishment

In October 2011, the GACC proposed to 'concentrate resources that can be mobilised to the maximum extent to establish a customs expert system as soon as possible. In May 2012, the GACC issued the 'Guiding Opinions on Establishing the Customs Expert System (for Trial Implementation)', which clarified the five aspects of the Customs Expert System's guiding ideology, objectives, main contents, incentives and guarantees, and implementation. According to this document, China Customs focussed on tariffs, statistics and technology as pilot areas. They then formulated the 'Detailed Operational Rules for the Comprehensive Evaluation of Customs Expert Appointment (for Trial Implementation)' and the 'Administrative Measures for the Written Examination of Customs Expert Appointment (for Trial Implementation)', taking personal qualifications, meritorious awards, theoretical research results, and work performance as the four bases for expert evaluation, and conducting written tests and interviews in related professional areas. Once launched, the system and selection method have received continuous attention and positive response from Customs across the country.

4.2.2. Pilot expansion

In 2013, the GACC issued the 'Administrative Measures for the Use of Customs Experts (for Trial Implementation)', which further clarified the relevant requirements on expert professional (knowledge & skills) development, assessment, dynamic adjustment, incentives and guarantees. In 2014, in addition to the original three areas (tariffs, statistics and technology), the customs expert system was extended to four more areas: laws and regulations, bonded issues, post-clearance audit and finance.

4.2.3. Future trends

As of 2020, more than 400 customs experts were accredited by China Customs. To further strengthen the development of high-quality professional customs personnel, the Department of Personnel and Education has issued relevant plans to improve the customs expert system, in which the expert classification is further optimised to four levels: chief, first-class, second-class and third-class. The expert team will cover civil servants and public institution personnel in Customs and the customs expert system will be deployed in 15 fields, including risk management, comprehensive customs business, health and quarantine, flora and fauna quarantine, food safety, foreign affairs and technology etc.

4.3. Overall structure of the China Customs Expert System

There are four levels of customs experts, namely chief, first-class, second-class and third-class experts. Among them, the Talent Work Leading Group of the Party Committee of the GACC is responsible for the selection of chief and first-level experts. The office of this leading group has been set up in the Department of Personnel and Education. Meanwhile, the GACC has set up working groups in various professional fields that are responsible for formulating the selection, accreditation, training

and assessment systems for experts in that field of interest. The working groups are also responsible for the selection of second-level experts in this field and third-level experts from the headquarter of China Customs, and perform selection, training and assessment for all four levels of customs experts. Each customs district is responsible for formulating the system for the selection, management and assessment of customs experts of its own unit. Each is also responsible for the selection, training, management and assessment of the third-level experts of its own unit.

4.4. Management of the China Customs Expert System

4.4.1. Accreditation of customs experts

The method for accreditation of customs experts contains two separate parts: a comprehensive evaluation and a written examination. The comprehensive evaluation includes evaluation of customs business ability and a professional defence, both of which are assessed using a quantitative scoring method based on a percentage system. Generally, second-class and above experts are selected by comprehensive evaluation or other methods, and third-class experts are selected by written examination. The evaluation of customs business ability mainly concerns the personal qualifications of the participants, meritorious service and awards, theoretical research achievements, work performance and recommendations from their departments. Applicants for the second-class and above expert qualifications should complete the form 'Customs Expert Business Capability Evaluation Items and Standards', following which the materials are reviewed by the personnel department and the relevant customs business department. Then, the customs expert working group designates a third party to verify the scores and provide a grading to get a clear opinion on whether to agree with the shortlisted professional defence. The customs expert working group oversees the professional defence at all levels. The applicant must participate in the interview and prepare for the Q & A session. The working group gives grades according to the performance and calculates a professional defence score. The results of the final comprehensive review are based on both the evaluation of customs competency and the interview score. The evaluation of third-class experts is directly determined by the score on the written examination. The content of the professional written examination is uniformly stipulated by the relevant customs business departments of the GACC, organised by the Department of Personnel and Education, and adopts a closed-book mode.

4.4.2. Tenure and promotion of customs experts

The tenure of a customs expert (at all four levels) is generally four years. After the term expires, they can apply for re-accreditation, and they must be re-accredited in accordance with the prescribed conditions and procedures. Experts at the upper levels are generally generated from experts at the lower levels, and only after serving two consecutive terms at the same level can they be accredited as experts at the higher level. Experts who have outstanding performance in major tasks during their tenure can be recommended by the leading department or unit in the professional field and can be promoted to the next level as determined by the corresponding expert working group.

4.4.3. Assessment of customs experts

The assessment of customs experts involves a combination of special assessment, mid-term assessment and tenure assessment. The special assessment mainly assesses the role of experts in their tasks related to a professional field; the mid-term assessment mainly focuses on the performance of customs experts in the current year, which is carried out in combination with the annual assessment; the tenure assessment mainly assesses the performance of experts' duties during their whole tenure, which is generally conducted once every four years.

Specifically, the assessment of customs experts is generally carried out according to the following procedures:

1. Self-evaluation: The expert writes a report on their performance during their tenure, fills out the 'Customs Expert Assessment Registration Form, and submits related debriefing materials that support their report.
2. Professional evaluation: The working group assesses and reviews the expert's performance report and other supporting materials.
3. Institutional evaluation: To determine whether the assessed experts are 'excellent', 'competent' or 'not competent'. The evaluation of the chief experts differs from the other three levels, and is based on their level of innovation and contribution to China Customs. The proportion of 'excellent' first-class experts in the assessment cannot exceed 35 percent of the total number of first-class experts in the professional field, the proportion of 'excellent' second-class experts in the assessment cannot exceed 30 percent of the total number of second-class experts in the professional field, and the proportion of 'excellent' third-class experts in the assessment cannot exceed 25 percent of the total number of third-class experts in the unit.

5. Achievements of and problems with the China Customs Expert System

5.1. Achievements of the China Customs Expert System

Through continuous exploration and innovation of the expert system, China Customs has trained more than 400 experts at all levels. This has played a positive role in promoting customs professionalism. Experts in relevant fields have played an important role in diagnosing customs clearance problems, formulating regulatory policies and participating in international negotiations. They have actively disseminated professional knowledge and skills in their respective customs positions, cultivated more knowledge-based customs officers and formed a good atmosphere of professional competency development. Regarding human resources development, the system has actively contributed to the improvement of customs professional team building.

5.1.1. Providing intellectual support for high-level decision-making

Compared with regular, non-expert customs officers, customs experts at all levels have a deeper understanding of relevant business processes and are better able to find problems and possible solutions under complex conditions. When making decisions, customs experts can provide professional advice to customs executives based on their rich experience, reducing resistance to policy implementation. Multiple experts can be united to form professional working groups that can provide scientific advice, through joint analysis and assessment of problems.

5.1.2. Promoting the construction of customs high-end think tanks

Customs experts at all levels have an in-depth understanding of current key issues and future development trends. Therefore, a team of experts is very important for building high-end think tanks for Customs. At present, customs experts can disseminate first-hand customs reform information in the Shanghai Customs College (a WCO Regional Training Centre) and other institutions through, for example, joining high-level research projects and invited lectures; they can provide in-depth explanations of the best practice of China Customs for domestic and foreign trainees, and they can cooperate with relevant scholars to perform research on, for example, customs reform and development.

5.1.3. Stimulating the sustainability of customs teamwork

The customs expert system encourages customs personnel to conduct in-depth research in their respective areas of expertise, improving the professional and technical expertise of customs officers, guiding them to re-evaluate their career paths, and apply the professional knowledge and skills they have acquired in their daily work. Customs experts can guide the younger officers in the team with their experience and knowledge, which may create a sustainable mechanism for professional personnel training.

5.2. Existing problems with the China Customs Expert System

5.2.1. The growing number of 'expert-type' leaders may reduce policy incentives

The customs expert system, on the one hand, is deployed mainly to improve the professional level of personnel; on the other hand, it also provides a new career development path for customs officers in related positions. At present, a considerable number of customs officials are in leadership positions as well as being experts in a certain business field. Such 'expert-type leaders' account for a significant proportion of the current total number of experts. Experts in leadership positions contribute to professional management activities within Customs and promote scientific policy formulation. However, it is more difficult for young customs officers to obtain one of the limited positions of customs experts, which may hinder the sustainable cultivation of customs experts and the motivation of personnel.

5.2.2. The need to strengthen teamwork between experts in different fields remains

At present, the reform of China Customs is faced with complex problems in multiple fields, which often involves synergistic analysis from multiple perspectives. At present, many customs experts master relevant professional knowledge mainly in one particular field, and are often unable to consider all the aspects involved in complex issues. There is a lack of practice for experts to collaborate. Therefore, the formation of multiple expert teams should be a priority for reform of the pilot customs expert system in the future.

5.2.3. The distinction between customs experts and scientific research civil servants remains to be clarified

The expert system is an internal institutional arrangement of China Customs. At present, the relevant state departments have made innovative supplements to the civil service system and have proposed to establish a category of 'scientific research' civil servants. This has raised the following questions: what is the specific connection or difference between customs experts and scientific research civil servants, and can these two achieve mutual recognition? These issues need to be discussed and resolved as a matter of priority.

5.2.4. Research on customs expert systems from other WCO members needs to be strengthened

The development of the customs expert system has achieved considerable results. Faced with the continuous challenges of the professional management of human resources, however, China Customs still needs to further improve ideas of institutional design and specific standards of the expert system with reference to practices from other customs authorities.

6. Suggestions on further development of the China Customs Expert System

6.1. Further expansion of the customs expert classification

Based on the existing system of chief, first-, second-, and third-class experts, appropriate consideration may be given to further expanding the classification of experts in the future. With communication and negotiation with relevant departments, China Customs may consider adding experts at the international level (such as WTO Accredited and WCO Accredited Experts), to achieve in-depth integration with relevant international institutional arrangements. This would provide more working conditions for customs experts to help achieve the various development goals of Customs.

6.2. Draw on the experience of customs expert systems from other WCO members through international events

In future, China Customs may consider sending more personnel to participate in related WCO regional human resource management seminars and other activities. When customs experts from China perform WCO missions or other tasks, they could hold talks with the relevant representatives of Customs and obtain first-hand information on different customs expert systems. Following analysis and comparison of the relevant arrangements and best practices, the results can be used to support higher-level decision-making.

6.3. Perform in-depth research of the institutional connection between professional and technical civil servants and customs experts

The current pilot situation of professional and technical civil servants in the field of customs tariff management has highlighted the need to thoroughly review relevant experience and identified problems, to organise human resources experts to conduct in-depth research and discussions, and to communicate with other relevant departments. This would enable the exploration and early establishment of a set of job rotation principles or a connection mechanism between the professional and technical civil servant system and the customs expert system. Policymakers need to make breakthroughs on key issues such as change in rank and qualification periods.

6.4. Improve relevant institutional arrangements for ‘expert-type leaders’

The relevant customs departments need to investigate and analyse the accreditation, assessment, tenure and other issues related to ‘expert-type leaders’ to issue correspondingly detailed regulations in the future. Possible solutions may include increasing the proportion of young customs officers in the process of expert accreditation in the future and developing expert training plans for young officers.

6.5. Explore the working model of expert teams to achieve a synergistic effect

China Customs could consider establishing a research team composed of multiple customs experts from different areas to jointly analyse and solve complex problems. It is also feasible to establish pools of experts and encourage experts to further expand their fields of expertise.

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Developments at the World Customs Organization Technical Committee on Customs Valuation 2021–2022 regarding royalties

Leonardo Macedo

Abstract

The World Customs Organization (WCO) Technical Committee on Customs Valuation (TCCV) has the responsibility to examine specific cases arising from problems when applying the World Trade Organization (WTO) Customs Valuation Agreement (CVA). During the 50th, 51st, 52nd and 53rd TCCV sessions, three cases reached consensus and were published as instruments: Advisory Opinions 4.18, 4.19 and 24.1. All three address difficulties WTO members face when dealing with royalties as compulsory adjustments. Compulsory services adjustments are probably the most relevant example of the complexity of the WTO CVA.

Keywords: customs valuation, royalties, World Trade Organization, tariffs, international trade

1. Introduction

The World Customs Organization's (WCO) Technical Committee on Customs Valuation (TCCV) has the responsibility to examine specific cases arising from problems encountered by members when applying the World Trade Organization (WTO) Customs Valuation Agreement (CVA). The intention is that the TCCV prepares instruments to achieve uniformity in the interpretation and application of the CVA at the technical level. Once a specific case reaches consensus, instruments, such as Advisory Opinions, Commentaries, Explanatory Notes, Case Studies or Studies, are issued.

For a TCCV instrument to be made publicly available, it must be reported to the WCO Council and the WTO Committee on Customs Valuation (CCV). The reporting procedure is not fixed but depends only on the schedule of meetings for each of the international organisations in Brussels and Geneva. Once an instrument fulfils the reports in both organisations, it is then published in the Customs Valuation Compendium that is available for sale or subscription through the WCO.

During the 50th, 51st, 52nd and 53rd TCCV sessions, three cases reached consensus and were published as instruments: Advisory Opinions 4.18, 4.19 and 24.1. These three TCCV instruments were reported and approved at the WCO Council in June 2022. This article briefly describes each of these instruments as an update on the latest customs valuation developments.

2. WCO TCCV customs valuation instruments, 2021−2022

Before briefly commenting on the new instruments, it is crucial to mention that all three address difficulties WTO members face when dealing with royalties as compulsory adjustments. WCO TCCV Advisory Opinions 4.18, 4.19 and 24.1 (WCO, 2022) address royalties according to WTO CVA Article 8.1(c) as follows 'royalties and licence fees related to the goods being valued…' (WTO, 1999).

WTO CVA Article 8.1(c) reveals great complexity as it demands the control of intangibles and services. Royalties present many different situations, as can be seen from the approved instruments.

2.1. Advisory Opinion 4.18 − Royalties and licence fees under Article 8.1(c) of the Agreement (Royalty − Income tax) (adopted at the 52nd Session of the TCCV)

Advisory Opinion 4.18 addresses a case of royalties from a licence agreement between an importer and exporter. In brief, the importer agrees to pay a five percent rate for royalties from the imported patented goods. The royalties are calculated based on the sales of the patented goods in the market of the country of importation. The importer also agrees to pay the 'non-resident income tax' on the exporter's behalf when transferring the royalties abroad. In summary, the importer agrees to pay the royalties to the exporter plus the 'non-resident income tax' to the tax authorities on behalf of the exporter. On these terms the patent owner receives a five per cent net royalty payment for the licence.

As for the tax authority's legislation, the 'non-resident income tax' requires the royalties to be added to the taxable basis. The formula is thus:

net royalty/(1 − income tax rate %) x income tax rate %

The consequence when applying the formula is that the amount based on the effective rate is higher than when considering the applied rate.

The issue brought before the TCCV was whether the total amount of 'non-resident income tax' forms part of the customs value for the imported goods under Article 8.1(c).

The TCCV concluded that the total amount of 'non-resident income tax' forms part of the licensor's gross royalty income, considered an indirect payment and should thus be added to the price actually paid or payable per Article 8.1(c) of the WTO CVA.

2.2. Advisory Opinion 4.19 – Royalties and licence fees under Article 8.1(c) of the Agreement (adopted at the 53rd Session of the TCCV)

Advisory Opinion 4.19 addresses a case of royalties and licence fees connected to the importation of a soft drink concentrate. The imported concentrate is diluted in water, packed and sold in the domestic market for consumers. The importer agreed to pay a 15 per cent rate for royalties based on the drink sale price. The case stated that all conditions of Article 8.1(c) of the WTO CVA were met.

The first issue before the TCCV was whether the royalties were related to the imported goods. The second issue was calculating the royalties to be added to the price paid or payable for the imported soft drink concentrate.

The TCCV concluded that the total royalty payment amount is a condition of sale. A primary consideration was that there was no patented process to dilute the concentrate nor any other reason for the royalty payment, except for the importation of the concentrate. As such, it should be added as a whole amount to the price actually paid or payable. The TCCV based its conclusion on Advisory Opinions 4.4 and 4.6.

2.3. Advisory Opinion 24.1 − Valuation treatment of imported goods bearing the buyer's own trademark (adopted at the 52nd Session of the TCCV)

Advisory Opinion 24.1 discussed a case where the imported goods bear the buyer's trademark. There were no royalties or licence fees to be paid, and the TCCV referred to different prices for the imported goods when bearing or not bearing the trademark.

The TCCV concluded that the difference in price between goods bearing or not bearing the trademark was no reason to reject the transaction value method. Article 1 should be applied, and there was no base for Article 8.1(c) adjustments.

Conclusion

The fact that all three new WCO TCCV instruments deal with royalties is no surprise. The entire topic of compulsory services adjustments is probably the most relevant example of the complexity of the WTO CVA. Services are difficult to identify in an international trade transaction and are also challenging to calculate in relation to the goods being valued.

The payments for such services are usually separated from the invoice. Customs authorities must have the capacity to cross-check the information from different government agencies, including central banks and intellectual property agencies, to find out whether companies with imported goods pay royalties or licence fees. Once these companies are identified, it is necessary to conduct audits on a case-by-case basis to check whether the royalties are related to the imported goods. The process is highly time-consuming and requires a team of trained professionals.

A relevant point when discussing royalties as compulsory adjustments is the need for objective and quantifiable data. Among other things, a clear understanding of how the royalties are calculated is necessary. If that is not possible, the WTO CVA requires tax and customs authorities to use other customs valuation methods.

Finally, a question to reflect on is whether the royalty information available on transfer pricing studies and databases might one day be used as a starting point for the compulsory adjustments.

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Section 3

Reference Material

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