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The International Network of Customs Universities (INCU) is an association that provides the World Customs Organization (WCO) and other organisations with a single point of contact with universities and research institutes that are active in the f customs ield of customs research, education and training. The *World Customs Journal* provides a forum for customs professionals, academics, industry researchers, and research students to contribute items of interest and share research and experiences to enhance its readers' understanding of all aspects of the roles and responsibilities of Customs.

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EDITORIAL

The primary focus of this edition is the theory and practice of international trade facilitation, and I am pleased to have received some excellent contributions which serve to enhance the growing body of knowledge in this important area of study and research. These include articles by Andrew Grainger, who examines the topic from its basic concepts through to implementation; Carolin Eve Bolhöfer, who provides us with an informative examination of its impact on WTO law; and two insightful articles on issues and implications for Africa, by Edward Kafeero and Creck Buyonge & Irina Kireeva.

Other topics addressed by our academic contributors include Rob Preece's analysis of critical factors in the management of excise compliance, and some compelling valuation arguments by Santiago Ibáñez Marsilla. In addition, Michael Wolffgang and Talke Ovie complete their comprehensive coverage of emerging issues in European customs law.

Our practitioner contributions in this edition provide some excellent insights into the way in which the profession of Customs is seeking to address current and future challenges. Firstly, Yukiyasu Aoyama provides us with a critical evaluation of the complex mission of Customs and the increasing need for global cooperation among customs administrations. This is followed by a strategic commentary by Doug Tweddle on the way in which the AEO concept and data management can serve to enhance security, compliance and logistics management. Thirdly, Clay Kerswell provides a comprehensive overview of the reform process that is being progressed in the Middle East. This edition also includes a systematic examination by Carsten Weerth of the complexity of notes associated with HS 2007.

I would like to thank all our contributors for their valuable input, and invite contributions of an equally high standard for the next edition of the Journal, which will focus on the increasingly important issue of capacity building. That edition will also include a summary of outcomes from the WCO PICARD Conference which will be held in Shanghai, China from 14 to 16 May (see www.wcoomd.org/event.htm). For those of you who are attending, I look forward to seeing you there!

David Widdowson
Editor-in-Chief

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International Network of Customs Universities

WORLD CUSTOMS ORGANIZATION

Section 1

Academic Contributions

EMERGING ISSUES IN EUROPEAN CUSTOMS LAW

Hans-Michael Wolffgang and Talke Ovie

This is the third of a three-part article. Parts one and two were published in the 2007 issues of the *World Customs Journal*.

Abstract

In 1968 the Customs of the six founding Member States of the European Economic Union (EEC) had already been harmonised to such a degree that the customs payable by third countries could be established on the basis of a common customs tariff. Since it was no longer possible to levy customs duties on goods traded between Member States, there existed a customs tariff union between the founding Member States of the modern European Community long before the creation of the European internal market.

However, by itself the creation of a common customs tariff was not enough to realise a customs union as a fundamental characteristic of the European internal market. The EEC Treaty already required customs law to be harmonised in addition to tariffs. For many years rules governing customs law were scattered among a number of Regulations and sometimes differed. However, in 1994 the Community Customs Code (CC) and the Regulation laying down provisions for the implementation of the Community Customs Code created a uniform European Customs Law binding on all Member States. This has now provided a sound basis for achieving uniformity in customs matters of 27 countries.

B. The Customs Code (continued)

II. The structure of the Customs Code (continued)

9. Substantive customs law – the law on customs duties

Substantive customs law, the law on duties, is found in Titles II, VI and VII of the CC. The provisions govern the creation, collection, extinction, waiving and reimbursement of import and export duties in international trade including the provision of security. All provisions concentrate on the collection of customs duties which, according to Art. 4 no. 10 and 11 CC, are regarded as import or export duties. Their creation can be linked to both the entry of goods into economic circulation (import duty) and their leaving economic circulation (export duty). The obligation to pay such duties is referred to as **a customs debt on importation or a customs debt on exportation** (Art. 4 no. 9 CC).

a. Basis for collection

In order to determine the amount of a customs debt, different basic terms are required which form part of the basis of collection of any customs debt. The basic features are laid down in Title II CC: the customs tariff, origin and the customs value of the goods.

The common customs tariff. The customs tariff of the European Communities dictates whether a customs debt is owed, and if so, its amount (Art. 20 (1) CC). The introduction of a common customs tariff of the European Communities in relation to foreign countries had already been declared in Art. 3 (b) of the EC Treaty as forming the basis of the European customs union. For this reason, the first Community customs tariff was created on 1 July 1968 which nowadays forms part of European law on the basis of the Council Regulation (EEC) No. 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.[52]

Art. 20 (3) CC lists the components of the customs tariffs; they are the customs tariff scheme in the form of the Combined Nomenclature (Art. 20 (3) (a) CC), the different rates of duties and customs preferences and autonomous suspensive provisions, which can be used to reduce or cancel customs duties payable when certain goods are imported (Art. 20 (3) (c)–(g) CC). Provisions which specifically regulate the customs tariff are contained in various Regulations and other Community legislation.

The Combined Nomenclature. According to Art. 20 (3) (a) CC, the Combined Nomenclature (CN) represents the tariff scheme which is the basis for the common customs tariff. This nomenclature contains a systematic, hierarchical classification of goods, which are finely classified under different sub-groups at several levels, each of which each can be allocated a special code. Its structure follows the Harmonized System (HS), which, as a global comprehensive directory of goods, is based on the 'Harmonized System (HS) Commodity Description and Coding System', which entered into force on 1 January 1988 and is currently applied by 179 states. On the basis of this system, any product in the world can be given a six-figure code. The Combined Nomenclature continues this system at European level and its seventh and eighth digits also correspond to the tariff and statistical requirements of the EC. The applicable CN are published each year in the Official Journal of the EU.

The TARIC. Since the CN was not able to cover the entire customs tariff of the Community, the Community legislator created additional sub-divisions by adding a ninth and tenth digits to the number of goods. This amendment was incorporated into the integrated tariff of the Community (**Tarif Intègrè Communautaire (TARIC)**). The TARIC takes account of other European peculiarities such as anti-dumping measures, customs suspensions and/or customs quotas, and is administered as an informal databank in Brussels. The 10-digit number of the goods must be provided for each importation. In order to take account of national peculiarities such as the turnover tax on imports or excise tax, the Member States may adopt an eleventh digit in the TARIC as a means of further differentiation.

The electronic customs tariff. Nowadays, customs tariffs are mainly dealt with electronically. Information systems based on data processing technology are used which are updated daily by means of data transmission. In Germany, the electronic customs tariff **(Elektronische Zolltarif [EZT])** was introduced on 1 January 1999 in all systems as a sub-system of the ATLAS Total IT-Concept. The basis of this EZT is the TARIC2 databank of the Commission which is expanded by national sub-headings and measures, and contains all other information of the TARIC administered by the Commission, which is made available to the customs offices of Member States. The EZT does not have any legally binding effect for the traders. Only the relevant provisions have legally-binding effect.[53]

b. Classifying goods under the customs tariff

Before goods can be allocated their proper number they must be classified under the customs tariff (cf. Art. 20 (6) CC). This classification under a customs tariff largely depends on the material properties of the goods and the use or function of the goods. Different means have been provided in order to classify the goods uniformly. Apart from the comments on the sections and chapters, the heading and sub-headings, and the general provisions, classification rulings, judgments of the first instance of the European Court of Justice and the European Court of Justice as well as explanatory notes, all contribute to the uniform interpretation of the nomenclature. In the explanatory notes to the HS published by the WCO, detailed statements are made concerning, for example, the individual chapters and headings. As administrative

guidelines they have always served as an important aid when applying customs tariffs without binding courts and without the Member States creating their own rules of interpretation.[54]

c. Binding tariff information

In order that the trader may calculate a potential customs debt arising on importation more precisely, binding tariff information is available from the competent customs authority on the printed form in Annex 1b CCIP (Art. 12 (1) CC, Art. 6 (1) CCIP). If preferred, an application may be delivered to the customs authorities of the Member State in which the information is to be used or to the competent customs authorities in the Member State in which the applicant is established (Art. 6 (1) CCIP).[55] If the applicant has received information, the tariff information shall be binding on all EC customs offices for a period of six years from the date of issue unless it is withdrawn owing to inaccurate or incomplete information (Art. 12 (4) CC) or, subject to the requirements of Art. 12 (5) CC, invalidity intervenes early. If the legal background changes in the meantime, the binding tariff information no longer provides the traders with any protection.[56]

In order that the trader may calculate a potential customs debt arising on importation more precisely, binding tariff information is available from the competent customs authority (Art. 12 (1) CC). An application may be delivered to the customs authorities of the Member State in which the information is to be used or to the competent customs authorities in the Member State in which the applicant is established (Art. 6 (1) CCIP). If the applicant has received information, the tariff information shall be binding on all EC customs offices for a period of six years from the date of issue according to Art. 12 (4) CC unless, subject to the requirements of Art. 12 (5) CC, invalidity intervenes early. Since the binding tariff information is intended to provide a reliable basis of calculation with regard to import duties arising in future, a legal interest in the issue of binding tariff information is required. Should the legal background have changed whilst it was valid, the binding tariff information no longer provides the traders with any protection.

Recently, every trader has been able to obtain online information about binding (European) tariff information which has already been issued.[57] Isued information is transmitted to the Commission which then stores it on a central databank in order to make the information accessible to the public (Art. 8 (3) CCIP). Owing to the fact that a lot of information is sensitive, publication under Art. 6 (3) (k) CCIP requires the consent of the traders. Confidential information is not published.

d. Rates of duty

The amount of the customs debt can be accurately calculated on the basis of the rates of duty listed in the **common customs tariff**. Standard rates of duty are generally provided for all goods imported (Art. 20 (3) (c) CC), that is, contractual or autonomous rates of duty which are applied in relation to all foreign states. However, autonomous suspensive measures or relief (for example, customs suspensions, quotas or ceilings) and preferential tariff measures when levying the customs debt may have to be taken into account when collecting the customs debt (Art. 20 (3) (d)–(f) CC).

Right to preferential treatment. According to Art. 20 (3) (c)–(f) CC, preferential rates of duty may be applicable to imported goods. This right to preferential treatment applies to a large proportion of imported goods on the basis of the world trade order and can be applied so that there is a zero rate of duty. Taken at face value, customs treatment represents an infringement against the most favoured nation principle which applies in world trade according to Art. I GATT. However, this principle may be overridden by customs unions and free trade areas (Art. XXIV GATT). Therefore, this principle does not apply to the customs union of the European Communities with regard to the right to preferential treatment.

Regarding such customs preferences, Art. 20 (3) (d) and (e) CC distinguish between contractual (Art. 20 (3) (d) CC) and autonomous preferential measures (Art. 20 (3) (e) CC). Whereas **contractual customs preferences** result from international agreements between the EC and certain states (for example, central

and eastern European countries) or groups of states (for example, European Economic Area (EEA) and African, Caribbean and Pacific-Rim states), **autonomous customs preferences** are granted by the EC on the basis of fixed conditions in relation to the importation of goods from certain countries (mainly developing countries).

Preferential treatment may depend on the free movement or origin of the goods. Whether the goods are in free circulation in the integrated area only becomes important concerning the Agreement establishing an Association between the European Economic Community and Turkey.[58] All other autonomous or contractual preferential measures make the preferential treatment dependent on whether the goods originate in the preferential treatment zone or whether they have preferential parties. In addition, preferential treatment can only be granted if the goods have been properly released for free circulation (Art. 79 CC) and tariff quotas or tariff ceilings are not exceeded. Tariff quotas represent intended relief from duties owing to special legal provisions, which are granted within a certain period, at the end of which the standard rate re-applies. However, in the case of tariff ceilings, the real rate of duty will only re-apply on the basis of an EC ruling (Art. 20 (5) (b) CC).

Preferential origin of goods. The conditions under which goods may be granted preferential origin in a country are contained in Art. 27 CC as part of autonomous customs benefits either under Art. 66–123 CCIP or under the relevant preferential agreement provided that contractual customs benefits have been provided. For this reason, the general system of preferences has been created under Arts. 67–97 CCIP whilst the contractual preferential measures govern the origin of the goods in the relevant origin protocols.

Complete manufacture. All preferential measures provide that the goods will originate from one of the preferential parties if they have been **completely manufactured** there, that is, have been naturalised (for example, Art. 68, 99 CCIP). Even if the preferential measures contain a causal listing of possible operations which lead to a complete manufacture of the goods, nowadays only a few goods are produced in a country owing to the fact that production is based on the division of labour. In most cases, primary materials from another country are used which have been acquired by the manufacturers. If this is the case, then the primary materials must be **sufficiently worked or processed** in order to obtain origin in a preferential zone.[59]

The conditions governing sufficient working or processing have been regulated differently over the course of time. Whereas older autonomous and contractual preferential measures presumed that a sufficient working or processing had been carried out if goods were to be classified under a different heading in the HS (that is, a change of heading had taken place), the modern reformed or recently concluded preferential measures were changed to so-called 'lists'. Accordingly, a finished product is only granted origin if the conditions contained in the list have been complied with. Besides a change of heading, the measures can also be criteria relating to the value or production. In particular, the explanatory notes (which are placed ahead of the lists (for example, Annex 14 CCIP)) must be observed when using lists.

Minimal treatment. The extent to which there has been an insufficient minimal treatment is also dealt with in all preferential measures (for example, Art. 70 CCIP). The origin of the power and fuel, plant and equipment, and machines and tools used to obtain such products are not taken into account when determining the origin of the products (for example, Art. 75 CCIP). In addition, according to the **territorial principle**, goods of origin which have been worked or processed outside the territory of the preferential party, as a rule also lose the right to preferential treatment (for example, Art. 77 CCIP). Once the goods have left the preference zone they are regarded as foreign products.

Cumulation. The modern division of labour also means that many preferential measures provide that production operations which have been carried out in one or more countries of a preference zone can be added or included (that is, cumulated) when origin is acquired.[60] A distinction is made between complete and limited cumulation, although the latter is, in turn, to be divided into bilateral and multilateral

cumulation. In particular, **multilateral cumulation** has become important. This allows production operations to be added which have taken place in a foreign country of the same preference zone (for example, ACT, OCTs). The Pan-European cumulation zone, in particular, (Bulgaria, the European Community, European Economic Area including Rumania) has created such an area of production based on the division of labour.

Evidence of preferential treatment. In order to grant the preferential rate of duty, the declarant must enclose the documents necessary to verify the right to preferential arrangements (Art. 218 (1) (c) CCIP). As a rule, this is a formal evidence of preferential treatment whose form depends on the preference zone in question. **Form A** is used for transporting goods as part of APS (Art. 80 (a) CCIP, Annex 17 CCIP), the **movement certificate A.TR.** is used in trade with Turkey according to Art. 5 Decision No. 1/2001 of the EC-Turkey Customs Cooperation Committee[61] and the **movement certificate EUR. 1** (Annex 21 CCIP) as part of other preferential measures (cf. Art. 16 (1) (a) Prot. no. 4 EEA Agreement). However, when trading with certain preferential parties, informal evidence of preferential treatment may be accepted. This usually refers to the declaration of origin on the invoice, which usually can be issued by any 'authorized exporter' as well as any other exporter within certain limits (cf. Art. 80 (b) CCIP). If the exporter has not manufactured the primary materials required for the production of the goods, then the exporter must obtain a supplier's declaration as to the origin of the goods in order to receive verifiable proof of preferential treatment (cf. Art. 27 No. 4 EEA Agreement in conjunction with Annexes V and VI).

Non-preferential origin of goods. Preferential origin is to be strictly distinguished from non-preferential origin, (Art. 22–26 CC and 35–65 CCIP). According to Art. 22 CC, this will only play a role if the determination of the origin of goods serves other commercial policy measures in international trade, that is, not the determination of a preferential rate of duty.

e. The customs value of goods

Before a customs tariff can be applied, the customs value of the goods must be determined. The calculation of the amount depends on the type of the customs duty. As a rule, there are ad valorem tariffs, mixed tariffs and specific tariffs. Modern customs tariffs, such as the common customs tariff, are usually ad valorem tariffs which means that the customs debt can be calculated according to a percentage of the goods' value.

The different types of calculation. Nowadays, the rules governing customs value are derived from the 'Agreement on Implementation of Art. VII GATT', the GATT Customs Valuation Code[62] which were incorporated in Art. 28–CC. Articles 29, 30 (1) and 31 (1) CC offer six methods of determining the customs value which must be used in the priority given. Only if it is not possible to use the first calculation method do the other methods apply (cf. Art. 30 (1) CC). This means that if it is not possible to calculate the customs value according to the transaction value (Art. 29 CC), the other calculation methods can be used. The methods apply in this order: the value of identical goods, the value of similar goods (Art. 30 (2) (a) CC), the deductive method (Art. 30 (2) (c) CC), the computed value of the goods (Art. 30 (2) (d) CC) and the estimation method (cf. Art. 31 CC), based on an estimation of the goods. The customs value declaration, which must be enclosed according to Art. 218 (1) (b) CCIP, is to be entered on the D.V. 1 form according to the specimen contained in Annex 28 CCIP.

The transaction valuation method. Art. 29 CC deals with the main case of all calculations of customs value. This presumes that the seller and the purchaser aim to conclude a transaction in the customs territory of the Community. Considering the different legal systems of the Contracting Parties of the GATT – Customs Valuation Code, the definition of a contract has to be interpreted broadly. Therefore, it is irrelevant whether the contract concluded is actually a contract of sale, a contract for services rendered (no. 651 BGB) or a contract for services (no. 631 BGB).

Therefore, the transaction value of the goods forms the core of the calculation method. This is the price agreed during the sale for export in the customs territory of the Community and has either been paid or is payable (Art. 29 (1) CC). If it is not possible to separate the tangible imported goods from the intangible components (for example, listening to music on a CD), which can only be used in tandem then, as a rule, the price for both components is the transaction value.[63] Depending on the contractual conditions, the transaction value of the goods must be adjusted to take account of additions **(**Art. 32) and deductions **(**Art. 33 CC).

Subject to Art. 29 (1) (a)–(d) CC, the transaction method cannot be used. This will be mainly the case if the seller and purchaser are connected (Art. 29 (1) (d)) and the connection has influenced the transaction value (Art. 29 (2) (a) CC). The question whether there is a connection between the seller and purchaser is dealt with in Art. 143 CCIP.

f. The customs debt

Chapter VII of the CC deals with the customs debt in detail. The incurrence, collection, extinction as well as the waiver and refund of the customs debt are dealt with in separate chapters. In addition, a security might also have to be provided.

The import and export customs debt. Articles 201–216 CC and 859 - 867a CCIP govern all aspects relating to how, when and for whom a customs debt might be incurred. Since goods in the customs territory can be imported and exported, a distinction is made between the import and export customs debt (Art. 4 No. 9 CC). The aspects of incurrence are structured uniformly so that para. (1) lays down the requirements for incurrence, para. (2) sets the time of incurrence and para. (3) deals with the identity of the customs debtor. All these criteria require that the goods to be charged customs duties are goods which are subject to import or export duties. This will always be the case if customs duties or agricultural duties are provided and non-tariff relief from duties does not apply to the case in question.[64]

The customs debt which is incurred creates a personal duty of the customs debtor to pay the debt. There are three groups of persons. As a rule, the person acting becomes the customs debtor. This can be the declarant (Art. 201 (3) CC, 209 (3) CC, 211 (3) CC, 216 (3) CC), the smuggler (Art. 202 (3) CC, 210 (3) CC), the person who removes the goods (Art. 203 (3) CC), the person responsible for non-fulfilment of the obligations (Art. 204 (3) CC) and the person who consumes or uses goods in the free zone (Art. 205 (3) CC). In addition, recourse can be had to the participants (Art. 202 (3) second indent CC), who were involved in the withdrawal (Art. 203 (3), second indent CC) or in the consumption or the use of the goods (Art. 205 (3), second indent CC), although they knew or could reasonably have known that they were acting illegally. Furthermore, persons can also be affected who have acquired or had the goods in their possession although they were aware of the facts or should reasonably have known of the facts (Art. 202 (3) CC). Therefore, in almost all cases there will be several possible customs debtors.

Where there are several customs debtors they are jointly and separably liable (Art. 213 CC). Consequently, the customs authorities may demand that each debtor pay the whole debt or only part of the debt, and all debtors remain under the obligation to pay until the whole customs debt has been discharged. The customs office must make a proper choice as to whether (discretion to issue an order) and to what amount (discretion to select) it can proceed against one or more customs debtors. As a rule, proceedings should be initiated against the customs debtor who is closest to the customs debt. This is usually determined according to the order of their listing in the CC.

Liability for the debts of a third party is regulated in the CC as part of the provision of security. This makes provision for the guarantor. According to Art. 195 CC, the guarantor must contractually agree to provide the amount to be secured when the customs debt becomes due. Therefore, the guarantor is also jointly and severally liable without personally becoming a customs debtor.

g. The incurrence of a customs debt on importation

The incurrence of a customs debt on importation according to Art. 201 CC. Art. 201 (1) CC lays down the conditions under which a customs debt on importation may arise. This is usually the case if goods subject to a customs debt on importation are released either for free circulation (Art. 201 (1) (a) CC) or placed under the temporary importation procedure with partial relief from import duties (Art. 201 (1) (b) CC), in order to then freely circulate on the market in the customs territory of the European Communities (cf. Art. Art. 79 sub-para. 2 CC). Although the ECJ has held that the customs debt only arises upon release, its amount is established at the time of acceptance of the customs declaration (Art. 201 (2) ZK).

The incurrence of a customs debt on importation according to Art. 202 CC. In addition, a customs debt on importation may arise according to Art. 202 (1) CC if the goods have been introduced into the customs territory of the Community unlawfully, that is, have been smuggled in. With reference to Art. 38 to 41 CC, the term 'introduction' is limited to immediate border entry and covers the entire period until presentation. This particularly refers to the smuggling of imports by bringing the goods into the country by means of unauthorised routes, concealment and silence in relation to certain goods during presentation and the use of 'declaration free exportation' (Art. 230–234 CCIP). Only recently, the ECJ decided that the presentation of goods applied to all goods brought into the customs territory of the Community even those hidden or concealed by means of special arrangements. According to Art. 40 CC, the obligation to present goods under Art. 38 CC applies to drivers and co-drivers of a lorry who have brought the goods into the Community customs territory even if the goods were hidden or concealed in the vehicle without their knowledge.[65] The person who has brought the goods into the Community customs territory without having presented them, is regarded as the debtor pursuant to Art. 202 (3) first indent CC.

The incurrence of a customs debt on importation according to Art. 203 CC. According to Art. 203 (1) CC, import duties are also incurred if goods subject to import duties are removed from customs supervision. Art. 203 (1) CC does not define the term 'removal'. According to the ECJ, 'removal' refers to any act or omission which leads to the competent customs office being prevented even if only temporarily from accessing goods which are subject to customs supervision and carrying out the examinations provided for in Art. 37 (1) CC. It is not necessary that the trader intend to remove the goods from customs supervision.[66] Since this provision has priority over Art. 204 CC any failures according to Art. 203 (1) CC cannot be remedied by means of the 'unless' clause in Art. 204 sub-para. 2 CC according to Art. 859 CCIP. However, the customs debtor can be granted relief according to Art. 212a CC. Typical examples of removal from customs supervisions include the removal of seals and the unloading of goods from an unauthorised place during the transit procedure,[67] or the removal of goods which were selected at the business premises of the declarant,[68] or the removal of goods from the customs warehouse and their re-exportation without the required formalities having been observed, insofar as the customs authorities were not able to ensure the customs supervision of these goods.[69]

The incurrence of a customs debt on importation according to Art. 204 CC. Art. 204 (1) CC also regulates the incurrence of a customs debt on importation in the case of failures, which do not constitute a removal according to Art. 203 (1) CC. In accordance with Art. 204 (1) (a) CC, this includes breaches in relation to temporary storage or other customs procedures and the failure to satisfy certain procedural requirements (Art. 204 (1) (b) CC). The duties affected by the breach during temporary storage arise from this instrument and thereby from the provisions made in Arts. 43 to 53 CC. This includes the delivery of a summary declaration (Art. 43–45 CC) and the obligation to assign the goods a customs procedure within a period of in general 20 or in case of transport by sea 45 days (Art. 49 CC). The obligations to be observed during the customs procedure usually arise from the authorisations issued by the customs authorities (Art. 87 (1) CC). Despite these breaches a customs debt does not arise according to Art. 206 (1) CC if the satisfaction of the obligations is impossible owing to force majeur or other extraordinary circumstances.

Should the traders commit failures, they must have had an effect on the proper carrying out of the procedure (Art. 204 sub-para. 2 CC). Art. 859 and Art. 860 CCIP regulate exhaustively and without infringing superior law, the circumstances under which this is not the case so that the incurrence of the customs debt may be remedied according to Art. 204 sub-para. 1 CC and thereby not arise. Accordingly, the failure must not have been motivated by the attempt to remove goods from customs supervision and the traders must not have shown any fraudulent or gross negligence (cf. Art. 859, 1.-2. indent CCIP). The ECJ established the conditions under which the participant acts with gross negligence. Accordingly, three essential criteria are to be used when determining gross negligence: the complexity of provisions, the extent of the business activities, and the care which must be exercised.[70] In accordance with Art. 859, 3 indent CCIP, all the necessary formalities must have been complied with in order to correct the situation. The customs debtor must prove that all the requirements laid down in Art. 859 CCIP have been complied with (Art. 860 CCIP) if goods have been consumed or used unlawfully in a free zone or customs warehouse, or if they have disappeared, a customs debt is incurred according to Art. 205 (1) CC.

h. The incurrence of a customs debt on exportation

If goods subject to a customs debt on exportation are exported from the customs territory of the Community, a customs debt on exportation can arise subject to the requirements of Art. 209 (1) CC, 210 (1) CC or 211 (1) CC. As with the customs debt on importation, this also covers cases in which a customs declaration is (usually) delivered, goods have been introduced into the customs territory illegally (smuggled exported goods), or mandatory requirements relating to the exportation procedure have not been fulfilled.

i. The collection of the customs debt

The method of collecting customs debts is regulated in Chapter 3 of the CC. This part of the CC only summarises the individual steps of the taxation procedure in Art. 217–232 CC. Accordingly, the customs authorities must first calculate and record (that is, enter into the accounts) the relevant amount of duties of the customs debt (Art. 217 CC). The term ‘entry in the accounts’ means the administrative act by which the import and export duties to be levied by the competent customs authorities are properly determined and not the entry of this amount in the accounts by the customs authorities which can also take place at a later point in time.[71] Rather, the decision pursuant to Art. 4 no. 5 CC is issued at the same time that the debtor is notified of the amount.[72]

As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with the appropriate procedures. The amount of duty communicated is payable within a maximum period of 10 days (Art. 221 (1), 222 (1) (a) CC). In Germany, this is effected by the issue of a taxation ruling (in accordance with Art. 155 ff. Fiscal Code (Abgabenbenordnung [AO]). In accordance with Art. 223 CC, payment is to be made in cash or by any other means under national law. In Germany, payment can be made by cheque, bank transfer or debit procedure (Art. 224 AO). There is no need to set a payment period according to Art. 222 CC if the trader is entitled to payment facilities. This may take the form of a deferment of payment (Art. 224 ff. CC) or other payment facilities (Art. 229 CC).

Subject to the requirements of Art. 217 (1) sub-paras. (2) and (3) CC, the entry in the accounts can be dispensed with if binding tariff information has been issued (Art. 12 CC) or if the customs debt is only a small amount. If neither of these cases applies, then the entry into the accounts must generally be made within certain periods (Art. 218 CC, Art. 219 CC). A subsequent entry in the accounts is also possible once the authority has established the facts and is able to calculate the relevant amount and determine the customs debtor anew (Art. 220 (1) CC). In certain cases, subsequent entry into the accounts is not required (cf. Art. 220 (2) CC).

As a rule, customs debts on importation or exportation can be levied three years following their incurrence. Communication to the debtor cannot take place once this period has expired unless this period does not apply owing to a legal remedy (Art. 221 (3) CC). In the case of tax evasion, the period

is extended according to the longer national limitation periods applicable to such cases (Art. 214 CC). In order to prevent tax evasion and protect the financial interests of the Community, the European Anti-Fraud Office (OLAF) was created, which is responsible for carrying out investigations together with any other support or co-ordinating measures.

j. The extinction of the customs debt

Art. 233 sub-para. 1 CC lays down the conditions under which a customs debt can be extinguished and lists different cases which are materially diverse. Accordingly, the customs debt will be extinguished by payment of the duties, by limitation, by insolvency or by seizure or confiscation.

k. Remission and repayment of the customs debt

In specific, narrowly defined cases according to Art. 235–242 CC the remission or repayment of import or export duties is possible. **Repayment** means the total or partial refund of import duties or export duties which have been paid; (Art. 235 (a) CC). **Remission** means either a decision to waive all or part of the amount of a customs debt (Art. 235 (b) CC). Both possibilities can also refer to only part of the customs debt (cf. Art. 897 CCIP). In particular, remission or repayment is possible if the duties were not legally owed (Art. 236 CC) or where a customs declaration is invalidated and the duties have been paid (Art. 237 CC), at the time the declaration was made the goods were defective or were damaged before their release or do not comply with the terms of the contract on the basis of which they were imported and are therefore rejected by the importer (Art. 238 CC), or there is a special situation (Art. 239 CC). If the repayment or remission is due to an error, then the original debt will again become payable according to Art. 242 CC.

Repayment or remission according to Art. 236 CC. In particular, import duties can be repaid or remitted according to Art. 236 (1), first alternative CC if the amount was not legally owed when payment was made. This will not only be the case if there has been a typing or calculation error but also if customs relief has not been granted.[73] In addition, Art. 889–891 CCIP covers other special cases in which repayment or remission is possible; this will usually the case if preferential customs treatment or customs relief has not been granted (Art. 889 CCIP) or if a certificate which would lead to a reduced or zero rate of duties has not been taken into account, even if this could be submitted subsequently (Art. 890 CCIP).

Repayment or remission according to Art. 239 CC. According to Art. 239 (1) CC customs debts can be repaid or remitted 'in cases other' than those referred to in Art. 236, 237 and 238. Owing to their general function, the provision is regarded as being an equitable provision. The application of this provision is necessarily ruled out if the facts fall within one of the cases contained in Art. 236, 237 and 238 CC, but not all requirements have been fulfilled.[74]

Art. 239 (1), first indent CCIP, lays down all cases which can lead to repayment or remission. In particular, Art. 900 CCIP contains such a catalogue of cases. In such cases there must not be any intent to deceive or obvious negligence (Art. 899, first indent CCIP). As is the case with Art. 859 CCIP, three important criteria are referred to in order to determine obvious negligence: the complexity of the provisions, the extent of the involvement in business, and care to be exercised.[75]

In addition, repayment or remission can be granted by the Commission 'in special cases'. This will be the case if the competent customs authority believes that the case in question arises owing to infractions by the Commission, that the case is linked to a Community investigation or the duties payable amount to more than 500,000 Euros (cf. Art. 239 (1), second indent CC in connection with Art. 905 CCIP). There is a special case if the trader finds himself in an unusual situation in comparison with other traders in the same field.[76]

C. Outlook

European customs law is being confronted with new challenges arising from globalisation and liberalisation of trade, the growing volume of trade, the necessity of 'just-in-time' deliveries and the increasing automation of business and commerce.[77] At both international and European level, there are many initiatives which contribute to the facilitation of trade by using IT and to the improvement and simplification of customs law.

At international level, **trade facilitation** forms part of the present WTO negotiations following the Doha Ministerial Declaration. At European level these requirements have been transposed by the *e*-Customs Initiative, which forms part of the pan-European *e*-Europe Initiative.[78] In particular, this initiative includes the efforts of the governments of Member States to offer citizens with all services capable of being provided online as part of the *e*-Government Initiative. In addition, this also intends to reinforce the Single Window Principle. This enables the traders to use a uniform Internet portal and thereby the possibility of simple access to provisions and procedures in one location without the involvement of different customs authorities. The different configuration of information technology in the Member States must no longer operate to restrict trade.

In its 'Communication on a simple and paperless environment for customs and trade',[79] the Commission laid down details as to why it is necessary to modernise and simplify European Customs law and thereby the Customs Code, and how this can be achieved. This communication can be regarded as a basic summary of future amendments to the CC and CCIP.

I. Amendments to the Customs Code

The first amendments to the Customs Code were issued in 2005 by the 'Customs Code 2005'. They were taken in response to the terrorist attacks of 11 September 2001 in the USA and laid the basis for a fundamental reform of customs law with the aim of introducing security aspects to secure the 'international supply chain' and electronic customs clearance for a more effective customs clearance. In order to attain these aims, European customs law now provides for the status of 'Authorised Economic Operator' (AEO) and requires the submission of an electronic advance declaration.

1. The Authorised Economic Operator (AEO)

The status of Authorised Economic Operator (AEO) has been incorporated into Art. 5a CC. The creation of this status was one of the central innovations of European customs law introduced as part of the initiative 'Customs Code 2005' and represents a core aspect of the guidelines formulated by the WCO in the SAFE Framework. Art. 5a CC merely regulates the admission criteria. The accompanying implementation provisions entered into force in 2006 following extended negotiations and are listed in Art. 14a ff. CCIP. In addition, the European Commission has published a set of guidelines for Authorised Economic Operators.

The status of Authorised Economic Operator – unknown in European customs law before its reform – can now be obtained by anyone located in the customs area of the European Community (Art. 5a (1) (1) CC). In this context, the term 'economic participant' refers to any person who pursues an activity regulated by customs law (Art. 1 No. 12 CCIP).

In order to obtain this status, the economic participant must submit an application to the competent customs authority. The customs authority responsible is that of the Member State in which the main accounts of the applicant are maintained (Art. 14d (1) a) CCIP). Formally, the application must be made in writing or electronically using the form contained in Annex 1c CCIP. This application must contain all details that are required for the authorisation of the status.

The authorisation requirements, that the economic participant must comply with and satisfy before he

can be certified as an 'authorised economic participant', are geared towards the legal consequences of the status that are listed in Art. 5a (2) CC. According to this provision, the legal consequence of the status is that either the economic participant is granted customs simplifications or reduced inspections or both. These legal consequences are documented by different 'AEO certificates', that is, 'customs simplification' (AEO C), 'safety and security' (AEO S) or both together. Economic participants have been able to apply for these certificates since 1 January 2008.

The compulsory authorisation requirements include a record of compliance of customs provisions (Art. 14h CCIP), a satisfactory system of commercial and transport records that permits suitable customs controls (Art. 14i CCIP), proven financial solvency (Art. 14j CCIP) and (if applicable), evidence of appropriate security standards (Art. 14k CCIP). Negotiations are currently being held with different foreign states, particularly the USA, China and Switzerland that should lead to a mutual recognition of the status subject to these requirements being satisfied.

In the European Community, it is not (yet) compulsory to file an application for this status. All customs simplifications held by the economic participant remain in existence regardless of the application and authorisation of the status. However, it must not be overlooked that AEO status is seen in international trade as a seal of quality that companies holding the status require their business partners to hold as well in order to eliminate the risk of unreliability. To a certain extent, therefore, certification is *de facto* compulsory.

Once the status has been authorised, it is recognised in all Member States of the European Community. This results from the fact that authorisation constitutes a customs law decision pursuant to Art. 6 CC that, as a transnational administrative act, produces a cross-border transnational effect. Negotiations and pilot projects are currently being held with different third party countries (including, for example, the USA, China and Switzerland) in order to achieve a mutual international recognition of the status.

2. Preliminary declaration

European Customs law currently provides that a summary declaration must be submitted once the goods have been brought into the Community customs territory. Thereupon, the customs-approved treatment or use of the goods must be declared within 30 days. The provision was amended by the 'Customs Code 2005' and reform of the implementation provisions in 2006 and shall be binding on all Member States from 1 July 2009.

The Customs Code now expressly states that a summary declaration must be submitted for all goods brought into the customs territory (Art. 36a (1) CC) and, moreover, *before* the goods are brought into the customs territory of the European Community (Art. 36a (3) CC). The only exemption granted in relation to this requirement applies to goods transported by means of transport passing through the territorial waters or airspace of the customs territory without making a stop in this territory (Art. 36a (1) CC).

In addition, an advanced declaration is not required if a customs declaration is submitted immediately instead and the customs offices accordingly waive the requirement of an advanced declaration (Art. 36c (1) CC). In addition, Art. 181c CCIP contains a list of goods that do not require the submission of an advanced declaration (for example, goods in the personal baggage of travellers).

The purpose of advance declarations is to target goods for inspection at border crossings quickly and efficiently. The data submitted by economic participants is therefore compared with risk-relevant parameters using electronic risk analysis pursuant to Art. 13 (2) CC. Only goods deemed to present no risk are to be placed under the temporary storage procedure (Art. 50 CC). This approach aims to strike a balance between the required customs controls and legitimate trade.

As a rule, the advance declaration is to be submitted electronically using data processing software. It can only be made in writing in exceptional circumstances (Art. 36b (2) CC). These exceptions are contained in Art. 199 (1) CCIP and include, for example, the situation where the IT system of the customs

authorities breaks down.

The advance declaration is to be lodged by the person who brings the goods into customs territory, that is, the person who has brought the goods over the border (Art. 36b (3) CC). However, it is also possible that the person who lodges the advance declaration also acts as the declarant or his representative (Art. 36b (4) CC). The information to be provided in the advance declaration is listed in greater detail in Art. 183 CCIP that states that the declaration must contain the data elements listed in Annex 30a CCIP.

The period within which the advance declaration must be lodged prior to the border crossing of the goods is further defined by the implementation provisions of the CCIP. Accordingly, Art. 184a CCIP lists different time-limits for the various transport routes of goods. These range from 24 hours in maritime transportation to one hour in the case of road traffic. These time-limits do not apply under the circumstances listed in Art. 184b (for example, in the case that international conventions provide for different periods or force majeure).

II. The Modernised Customs Code

The Modernised Customs Code (MCC) was adopted by the Council and the European Parliament on 19 February 2008 and will soon be published in the Official Journal.[80] The changes to the CCIP which are necessary to enter the MCC into force will be proposed in June 2008 and shall take effect in 2010. If this is the case, the provisions which make the use of information technology in customs possible and which have a transition period of three years, will apply together with the comprehensively reformed rules of customs law. This will facilitate a uniform, wide-ranging reform.

1. Consolidation of procedural rules

Customs law can only be simplified if the special procedural rules are consolidated and reduced. This will happen by consolidating all 13 customs law procedures, which to date are available to the traders, under three types of procedures. These are importation, exportation and the special customs procedures (storage, use, processing). Thereby, the distinction between ‘customs procedures’ and ‘other types of customs-approved treatment or use’ will be dropped, and the term ‘customs procedure with economic impact’ will also be superfluous. The export and re-export procedures will be consolidated into one uniform export procedure.

2. The new structures in the law relating to customs debts

The rules governing customs debts have been criticised for a long time owing to their complexity. The reform of the CC provides that the customs debt arising from a customs declaration, the customs debt based on irregularities and the remedying of irregularities are to be consolidated under one article. The existing remedy contained in Art. 204 CC which does not allow a customs debt to arise if the failure has not had any effect on the procedure is therefore applicable to all cases of incurrence of a customs debt. The cases which are solved by means of the equitable rule in Art. 239 CC will probably decline in number. Furthermore, a provision of security will apply in all Member States and cover all procedures as well as value-added tax and any excise tax.

Endnotes

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78 COM(2002) 263 final, p. 10.

79 COM(2003) 452 of 24 July 2003.

80 Common Position (EC) No. 17/2007 of 15 October 2007 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to the adoption of a Regulation of the European Parliament and of the Council laying down the Community Customs Code (Modernised Customs Code), Official Journal C 298 E, 12 December 2007, p. 1)

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CUSTOMS AND TRADE FACILITATION: FROM CONCEPTS TO IMPLEMENTATION

Andrew Grainger

This paper builds on research data, tables and diagrams which formed part of Andrew Grainger's (2007) PhD Thesis 'Trade Facilitation and Supply Chain Management: a case study at the interface between business and government'.

Abstract

Trade facilitation is the simplification, harmonisation, standardisation and modernisation of trade procedures. It seeks to reduce trade transaction costs at the interface between business and government and is an agenda item within many customs related activities. These include WTO trade round negotiations, supply chain security initiatives, development and capacity building programs, as well as many customs modernisation programs. However, the implementation of trade facilitation principles is fraught with obstacles. Obstacles identified in this paper include conflicting interests, institutional limitations and lack of knowledge. Policy makers and project managers stand to gain from more substantiated research aimed at deepening their understanding of cross-border operations, its inherent dynamics, stakeholder interests and institutional limitations. Currently such knowledge is seldom found in one place.

Introduction

The concept of trade facilitation is receiving unprecedented attention and is at the heart of numerous initiatives within the customs world. Trade facilitation has become a substantive item within WTO trade round negotiations, it is frequently referred to in supply chain security initiatives, and is a feature within many customs modernisation programs. Trade facilitation is also a significant item within wider aid-for-trade and capacity building initiatives. The term 'trade facilitation' is largely used by institutions that seek to improve the regulatory interface between government bodies and traders at national borders. It is defined by the WTO as: 'The simplification and harmonisation of international trade procedures' where trade procedures are the 'activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade' (WTO 1998).

Within the area of supply chain security, trade facilitation is seen as a concept that can help improve controls and offset the additional burden on legitimate traders. Within WTO trade round negotiation, trade facilitation provides a relatively non-contentious and promising initiative in the non-tariff area. The OECD calculates that each 1% saving in trade related transaction costs yields a worldwide benefit of US$43 billion (OECD 2003). This potential has not gone unnoticed by the donor community. Between 2002 and 2005, donors committed on average US$21 billion per year on more narrowly defined aid for trade projects (OECD & WTO 2007). Spend on trade facilitation specific projects has increased from US$101 million in 2000 to US$391 million in 2006 (WTO/OECD 2008). Trade facilitation is also a substantial feature in many customs modernisation programs. This includes the European Union's Modernised Customs Code and vision for a paperless trade and customs environment (COM(2003)452

final), the Association of Southeast Asian Nations' (ASEAN) commitment to interoperable single window systems, as well as large scale IT projects in Australia, New Zealand and elsewhere.

Although international organisations like the WCO and the United Nations Economic Committee for Europe (UNECE) have produced catalogues of trade facilitation recommendations aimed at improving the trade and customs environment, their implementation is fraught with challenges and difficulties. These can be associated with conflicting interests, institutional limitations and lack of knowledge. This paper takes a closer look at the trade facilitation agenda, concepts and obstacles.

The International Trade Environment

The trade environment is complex and sets a wide field for trade facilitation. It is easy to count 60 or more distinct trade procedures targeting goods, the vehicles that move them (for example, ships, planes and trucks) or their operators (for example, drivers, seafarers, flight crew) (Grainger 2007a). Control objects include: revenue collection; safety and security; environment and health; consumer protection; and trade policy (Table 1). In the majority of countries a significant share of these controls will be performed by Customs or under customs supervision.

Table 1. *Examples of international trade related regulatory activity*

Regulatory Category	Examples of related activity
Revenue Collection	Collection of Customs duties, excise duties and other indirect taxes; payment of duties and fees; management of bonds and other financial securities
Safety and Security	Security and anti smuggling controls; dangerous goods; vehicle checks; immigration and visa formalities; export licences
Environment and Health	Phytosanitary, veterinary and hygiene controls; health and safety measures; CITES controls; ships' waste
Consumer Protection	Product testing; labelling; conformity checks with marketing standards (e.g. fruit and vegetables)
Trade Policy	Administration of quota restrictions; refunds; suspensive regimes

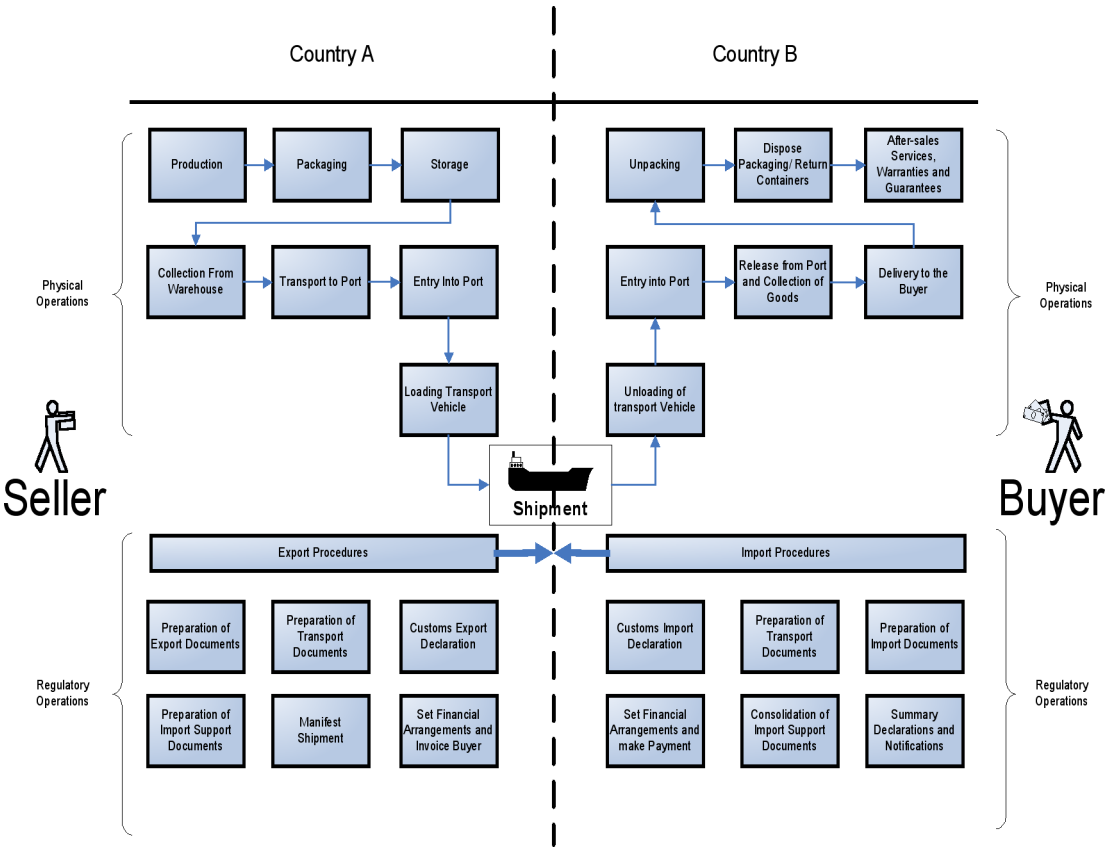
Source: Grainger 2007

Commercial arrangements within international trade are no less complex. The international movement of goods includes a number of operational steps. Prior to export this includes packing, storage, haulage to the port, port entry and customs clearance, and loading onto a vessel. Once arrived in the port of destination, operations include off-loading, storage, release from the port and customs clearance, delivery to the buyer, unpacking, after-sales services (for example, assembly, warranties and guarantees) and more. Depending on the trading terms between buyer and seller, contractual responsibilities for the operations can lie with one or the other party, or it can be split anywhere along the way depending on the Incoterms used (ICC 1999).

In most instances a wide range of intermediaries will be employed to move goods. These include amongst others: transport operators, trucking and haulage companies, freight forwarders, customs brokers, banks and finance companies, insurance companies, port operators and stevedores, and IT systems suppliers. It is not unusual for intermediaries to further subcontract. For instance, a freight forwarder may subcontract to another forwarding company in markets where he has no staff. A haulage company may decide to subcontract on the day because his drivers are caught in traffic jams or otherwise tied up.

Compliance with customs and trade procedures demands a great deal of coordination between the various business entities involved in moving the goods. Seldom will any one party have full view or knowledge of all operational steps. For example, the exporter may know what goods have been consigned to his overseas customer and at what price. The packing company will know in which containers these goods have been stuffed. The freight forwarder will know on which ship the container has been booked and the shipping line will know when and where the goods have been offloaded. The buyer will know what price he has paid for the goods. At each stage of the movement different types of data are generated and different types of information (often containing the same or similar data) are submitted to Customs and other government agencies (Figure 1).

Figure 1. *Business processes in a typical trade transaction*



Source: Grainger 2007c

Every time one of the parties within the supply chain is required to submit information to government agencies, trade transaction costs occur. These might be direct or indirect. Direct transaction costs include immediate compliance costs such as those associated with collecting, producing, transmitting, posting, faxing and processing information required to prepare and submit documents (paper or electronic). Direct transaction costs also include the charges and fees associated with setting up and financing customs bonds and guarantees, testing and use of laboratories, inspections, and stamping of documents. Charges and fees are also levied by many of the intermediaries. For instance, the port stevedore is likely to charge for the delivery of a container to the customs shed. Agents, employed to make customs declarations, will charge for their services. Out-of-hours and fast-tracked operations are likely to attract a premium fee. Indirect trade transactions result from delay at the border, uncertainty about procedures

and requirements, and missed or lost business opportunities. Typically, indirect transaction costs can be associated with inadequate or contradictory documentation, congestion at inspection facilities, lack of staff (especially when operating outside normal working hours), and unforeseen circumstances – such as bad weather or damage to infrastructure and facilities (OECD 2003; Grainger 2007c).

Trade facilitation seeks to remedy trade transaction costs. Trade facilitation recognises that transaction costs are wasteful and undesirable for both business and government. Proponents of trade facilitation will argue that its principles can increase business competitiveness as well as improve efficiency and control.

Defining trade facilitation

This paper has already made reference to the WTO which defines the term trade facilitation as: 'The simplification and harmonisation of international trade procedures' where trade procedures are the 'activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade' (WTO 1998). Many practitioners simply define trade facilitation as the simplification, harmonisation, standardisation and modernisation of trade procedures.

However, other definitions go a little further. For example, the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), defines trade facilitation as 'the simplification, standardization and harmonization of procedures and associated information flows required to move goods from seller to buyer and to make payment' (OECD 2001). By emphasising payment procedures UN/CEFACT acknowledges the role that commercial procedures, banks and other financial institutions play in international trade operations. In fact, much of the information necessary for customs purposes can be found within standard commercial invoices between seller and buyer. Occasionally, the term 'trade facilitation' is also used more literally, and is extended to mean the improvement of transport infrastructure (that is, transport facilitation), removal of government corruption, reduction of customs tariffs, removal of inverted tariffs, resolution of non-tariff trade barriers, export marketing and export promotion.

Common to all trade facilitation definitions is the desire to improve the trade environment and reduce or eliminate any transaction cost between business and government. UN/CEFACT, in its Recommendation No. 4 (1974) is quite explicit on the reformatory objectives of trade facilitation, stating that the trade facilitation program ought to be guided by the '…simplification, harmonization and standardization [of trade procedures] so that transactions become easier, quicker and more economical than before…'. Simplification is '…the process of eliminating all unnecessary elements and duplications in formalities, process and procedures…; harmonization is the alignment of national formalities, procedures, operations and documents with international conventions, standards and practices; [and] standardization is… the process of developing internationally agreed formats for practices and procedures, documents and information'. As such, trade facilitation is at once a political, economic, business, administrative, technical and technological issue (Butterly 2003).

Organisations with an interest in trade facilitation

To a large degree, trade facilitation can be viewed as an extension of the efforts to liberalise international trade. As history shows, trade facilitation is not a new phenomenon. For instance, many medieval European market towns would publicly display the units and measures used for the sale of goods. In some towns, like Bern in Switzerland, these measures can still be found on display today. In more recent history, trade facilitation has become firmly established within the current international trade regime. Organisations with an active interest in trade facilitation are found at the international, regional, national, and even at the local level.

International organisations include the WTO where trade facilitation has become a substantial feature within the Doha trade round. Discussions currently focus on GATT Articles V, VIII and X, covering Freedom of Transit, Fees and Formalities, and Publication and Administration of Trade Regulations. Another very active international body is UNECE which has become the global focus point for trade facilitation recommendations, standards and specifications. UNECE is also home to the UN/CEFACT. UN/CEFACT looks after 33 international recommendations, the most recent one being a recommendation for the Single Window concept (UN/CEFACT 2004). UN/CEFACT also manages various document and electronic messaging standards, including the United Nations electronic Trade Documents (UNeDocs) and Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT). The UNECE is also the home for international agricultural quality standards (UNECE 2006b), classification standards for dangerous goods (UNECE 2006a), and with the International Road and Transport Union (IRU), it also runs the TIR Convention of 1975 (TIR 2005). The latter provides a simplified customs transit regime to signatory countries.

The WCO is an active body with an interest in the field of trade facilitation within the customs world. The WCO has drafted numerous instruments and recommendations that contain trade facilitation principles. Noteworthy examples include the Kyoto Convention which first came into force in 1974, followed by the Revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures adopted in 2006 (1999; WCO 2006). Another, relatively recent instrument that makes direct reference to trade facilitation principles is the Framework of Standards to Secure and Facilitate Global Trade adopted in 2005 (WCO 2005). The WCO is also the home for the Harmonized Commodity Code Description and Coding Systems, and in cooperation with the WTO, the WCO also helps ensure consistency in the technical interpretation of valuation rules and non-preferential origin rules.

Other international organisations active within the wider field of trade facilitation include the International Maritime Organisation (IMO), the International Chamber of Commerce (ICC), the International Civil Aviation Organisation (ICAO) and the International Organization for Standardization (ISO). Helpfully, the UNECE and UNCTAD (United Nations Conference on Trade and Development) produced a 'Compendium of Trade Facilitation' which summarises many of the international recommendations (UN/CEFACT & UNCTAD 2002). In terms of capacity building and economic development much trade facilitation work has also been done by organisations like the World Bank, UNCTAD, OECD and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). A global network of practitioners and policy-makers – including a dedicated website – is maintained by the Facilitation Network for Transport and Trade and the UN Trade Facilitation Network of Partners (see: http://www.gfptt.org).

At the regional level, trade facilitation is an equally significant agenda item. For instance, the European Union has largely removed the internal borders between its 27 members. Operating as a customs union, they share one common external tariff and subscribe to the same custom legislation. Further reform is currently under way to overhaul customs procedures and achieve interoperability amongst member state customs systems (TAXUD/477/2004 2007). Another example of progressing regional integration through customs and trade procedures can be found within the Association of Southeast Asian Nations (ASEAN). Its members have agreed to work towards establishing interoperable single window systems (ASEAN 2005). There are many other regional agreements that include reference to customs and trade procedures. In 2005 there were 183 WTO-registered regional trade agreements in force (WTO 2005). The more prominent ones amongst these are the North American Free Trade Agreement (NAFTA), Mercosur in Latin America, and the Common Market for Eastern and Southern Africa (COMESA).

The reduction of trade related transaction costs is an equally significant agenda item at the national level. Trade facilitation policy objectives might be pursued by national customs administrations, trade ministries or, for that matter, any other government department involved in the governance of the cross-border environment. Many of the recommendations propagated by international organisations have

their roots in national best practice examples. For example, Singapore's pioneering TradeNet has been particularly inspiring for single window projects elsewhere (Teo, Tan & Wei 1997; UN/CEFACT 2004). To help find transaction cost problems and possible solutions, many national customs organisations actively seek to consult with their business stakeholders. Some countries also have dedicated trade facilitation organisations – so-called PRO committees – which offer a degree of independence from the constraints often found within government departments (UN/CEFACT 1974). At the local level, further examples of active trade facilitation work can be found. For instance, many major seaport operators will regularly invite their users, customs officers and other representatives from government to discuss how improvements in day-to-day operations can be achieved.

Scope and concepts

This paper has made reference to a number of organisations with an interest in trade facilitation. Indeed, the list of recommendations and their scope is long. The UN/CEFACT and UNCTAD (2002) compendium to international trade facilitation recommendation covers at least ten areas (Table 2). Trade facilitation for many customs administrations involves activities as varied as agreeing on document and communication standards; providing information and guidance to traders; finding means to cooperate with legitimate traders (for example, through risk-management, meaningful incentives and preferential treatment); co-ordinating control activities with other government departments and avoiding any duplication; listening to trader concerns and finding practical solutions; a commitment to making procedures as simple and transparent as possible; keeping the control burden in proportion to control objectives (for example, unnecessary heavy-handedness is likely to drive trade away or help build up a shadow economy); and adhering to pre-agreed service levels (for example, time taken to clear goods).

Table 2. *Scope covered by international trade facilitation recommendations*

International trade facilitation recommendations cover:

- Trade procedures
- Customs and regulatory bodies
- Provisions for official control procedures applicable to import, export and transit including: general arrangements, customs controls, official documentation, health and safety, financial securities, and transhipment
- Provisions relating to transport and transport equipment, including: air transport; sea transport; and multimodal transport
- Provisions relating to the movement of persons
- Provisions relating to the management of dangerous goods
- Provisions relating to payment procedures
- Provisions relating to the use of information and communication technologies
- Provisions relating to the commercial practices and the use of international standards
- Legal aspects of trade facilitation

Source: UN/CEFACT and UNCTAD 2002

Within the WTO negotiations, trade facilitation currently falls under GATT Articles V, VIII and X. These address the freedom of transit, fees and formalities, and publication and administration of trade regulations. These GATT articles are of immediate relevance to the customs world. In official communications from the WCO to the WTO, suggested content covers those ideas detailed in Table 3.

Table 3. *WCO Trade Facilitation Recommendations under GATT Articles V, VIII and X*

Trade facilitation recommendations under Article V:

- accept commercial documents (e.g. invoice and transport documents) instead of mandating formal regulatory declarations
- set simple and clear procedures for identifying consignments
- ensure non-discrimination of goods
- use of international agreements; and, a commitment to regulatory cooperation

Additional trade facilitation recommendations under Article VIII:

- regulatory fees ought not exceed expenses
- standardization and simplification of customs and trade documents
- coordinated intervention and convergence of regulatory controls
- simplification of governing trade procedures
- the Single Window concept
- use of risk management techniques
- use of information technology
- common data models
- time guidelines for border clearance
- adherence to international customs conventions

Additional trade facilitation recommendations under Article X:

- accessible publication of procedures and requirements
- active provision of information
- procedures for advance and binding rulings
- fair and efficient appeal and tribunal procedures
- use of memoranda of understanding between regulatory bodies and traders

Sources: WTO 2002a; 2002b; 2002c

Similar themes can also be identified in trade facilitation and security discussions (Browning 2003; WCO 2007) where additional security requirements include the introduction of advance notification; more targeted controls; the use of new technologies in physical inspections (for example, scanners) and reporting (IT systems); and the ability to access to information generated up and down the supply chain. Trade facilitation recommendations considered by regulators to offset these additional burdens are equally extensive. Some trade facilitation themes within supply chain security considerations can be found in Table 4.

Table 4. *Trade facilitation focused initiatives in supply chain security*

Generic themes in security and trade facilitation focused initiatives

- use of risk management techniques
- development of partnership programmes
- preferential treatment of authorised firms and individuals
- standardisation of data requirements
- cooperation and mutual recognition of controls between agencies and governments
- replacement of paper documents with the use of electronic reporting systems

Source: Grainger 2006

However, for most practitioners trade facilitation revolves around 'better regulation' and utilising information and communication technology (Grainger 2007c). While the former looks at improving trade procedures from a regulatory point of view, the latter looks at using technology to reduce trade related transaction costs. In total 18 broad concepts can be catalogued that appear to be in the back of the minds of most proponents of trade facilitation. These are summarised in Table 5.

Table 5. *Trade facilitation concepts: a practitioner's observation*

Better regulation:

1. Simple rules and procedures
2. Avoidance of duplication
3. Memoranda of Understand (MoUs)
4. Alignment of procedures and adherence to international conventions
5. Trade consultation
6. Transparent and operable rules and procedures
7. Accommodation of business practices
8. Operational flexibility
9. Customer-service provisions for government administrations
10. Mechanisms for corrections and appeals
11. Fair and consistent enforcement
12. Proportionality of legislation and control to risk
13. Time-release measures
14. Risk management and trader authorisations

Information and communication technology:

15. Standardisation of documents and electronic data requirements
16. Automation
17. Single Window
18. International electronic exchange of trade data

Source: Practitioner observations

Implementing trade facilitation

For most, the benefits of trade facilitation and reduced transaction costs between business and government are self-explanatory. Customs administrations are faced with ever-rising volumes of trade and, at the same time, they are obliged to add yet new layers of controls, for example in the security area (Grainger 2007a). Trade facilitation concepts help customs administrations meet their duties. Similarly, business supply chains are very fluid and no two supply chains appear to be the same. Where businesses

compete in terms of costs, any reduction in trade related transaction costs will yield an advantage. Thus, transaction costs threaten business competitiveness and inhibit Customs' best use of limited control resources. However, despite the immediate utility of trade facilitation for both business and government organisations, the implementation of trade facilitation concepts is often riddled with difficulties. Most of these can be associated with conflicting interests, institutional limitations and lack of knowledge.

Conflicting interests

There are many examples of conflicting interest which hamper successful implementation of trade facilitation initiatives. Sources of conflict may be found between government and business stakeholders; local, national and international interests; government departments (for example, customs and veterinary inspectors); policy priorities; industries; countries (for example, who have different legacy arrangements or IT system suppliers); and between liberal and protectionist trade policy tendencies (Grainger [2008] forthcoming).

To give some examples, most trade and customs procedures enforce a specific obligation on the trader. The relationship is defined as one between compliance and enforcement. Although trade facilitation rhetoric is strong in both camps, many enforcement officers have been trained in an environment where the worst is always assumed. These 'die-hards' find it difficult to give-up the assumption that every trader is a potential smuggler or acknowledge that the majority of traders have legitimate intentions. Evidence of counterproductive heavy handedness can easily be found at most borders. For instance, in a survey of UK importers 19% (N=131) of respondents admitted to actively diverting traffic to an alternative port because of actual or perceived differences in the enforcement of rules and procedures (Grainger 2007b).

The incompatibility of procedures with local operational practices can be another area causing conflicting interest. Customs, on the one hand need to enforce the law, on the other hand, they may find that is not optimally defined to suit the operational needs of business stakeholders. For example, when UK Customs introduced x-ray scanning, they mandated port operators to deliver goods to the x-ray facilities. At container ports, where the port operator owns the handling equipment, this was not much of a problem. However, most RO/RO ports do not have any cargo handling equipment. At these ports, it is customary for lorry drivers to drive straight off the ship, or where rolled-off to the quayside, for hauliers to come and pick up the goods. With Customs' introduction of x-ray equipment truck drivers and hauliers could no longer just leave the ship and drive off the port. Where selected, they need to divert to the customs x-ray facility, causing delay. This delay may even be further compounded by restrictions on maximum working and driving hours. This example illustrates different interests between container port operators and RO/RO port operators. The former do not object to presenting goods to x-ray facilities while the latter face a significant operational burden.

Conflicting interests in the form and shape of the trade environment can also arise through overlaps between different government departments' activities. For example, the avalanche of recent supply chain security controls can be described as 'security spaghetti' (Grainger 2007a) where different government bodies enforce similar procedures with similar control objectives. While trade facilitation principles would advocate a more coordinated and integrated approach – reducing the extent of duplication and overlap – government departments are likely to be resistant to letting-go-of or taking-on new pieces of turf.

Different political priorities can cause a similar problem of conflicting interests. For example, the EU's 'electronic customs initiative' was originally pursued as a trade facilitation initiative (COM(2003)452 final). However, the reform project faced political pressures to fast-track supply chain security components. While the security features of the reform project are now being implemented, much of the promised reform entailing wider trade facilitation principles remains in the making (Grainger [2008] forthcoming).

Conflicting and opposing industry interests also add to the difficulty of implementing trade facilitation. Business is seldom able to speak with one voice. Individual companies as well as industries compete with each other. While all have a common interest in reducing costs, any regulatory reform will impact different companies and industries in different ways. It may even be that some will lose out, even if overall transaction costs are reduced. For example, research has found that economies of scale are at work when complying with trade and customs procedures (Verwaal & Donkers 2002; 2003; Grainger 2007b). Much of the investment required is a fixed cost (for example, purchase of specialist IT systems and employment of dedicated staff). Companies with large trade transaction volumes are better able to offset these fixed costs. In contrast, compliance will be proportionately more expensive for companies with smaller transaction volumes. This latter group of traders will have more of an incentive to employ the services of agents and customs brokers with larger transaction volumes. Any changes to fixed cost requirements (for example, through more efficient trade procedures) will have a direct impact on current business models. Subsequently, responses to proposed changes – even if trade facilitation is the end-goal – are likely to be very different.

Institutional limitations

Many institutional limitations can be identified within the area of trade facilitation. At their core lies a conflict between day-to-day business operations and mechanisms employed to govern the trade environment. While the former is very fluid and can change from one transaction to the next, the latter is embedded within the wider regulatory regime. As such, any regulatory reform accommodating trade facilitation concepts will take time. Issues identified at the local level (for example, within the context of day-to-day port operations) need to be escalated to national level (for example, the national customs headquarters), the regional level (for example, regional bodies like the EU) and international policy level (for example, the WCO, UNECE and WTO) (Grainger 2007a). In the absence of an accommodating regulatory framework many potentially innovative solutions – for instance, the single window concept – can be difficult to put in place.

Legacy arrangements can be equally difficult. Any changes will attract costs. Stakeholders need to be convinced that the costs for migrating tally with the benefits. Given the obvious conflicting interests, convincing stakeholders is a difficult task. Often it requires considerable political capital and resource to help overcome initial resistance. However, the necessary political support is not easily obtained. Customs and trade procedures are often perceived to be overly technical and their inherent complexities are difficult to present. Unless the driver is as emotive as ‘security’, ‘competitiveness’ or ‘development’, it can be a difficult task to entice the necessary political support. Proponents of trade facilitation – within business and Customs – often need to resort to intensive lobbying within the corridors of power and repeatedly argue their case.

Although trade facilitation has recently gained significant momentum as an agenda item, it does not really have a ‘home’ within most countries. Very few nations have a dedicated trade facilitation organisation. Within other organisations trade facilitation is one of many competing agenda items. Subsequently, many of the trade facilitation ideas and concepts can easily be lost. For example, this paper has argued that trade facilitation is about reducing transaction costs. This has utility for both business and government stakeholders. However, rhetoric in the customs world frequently sees trade facilitation as an opposite to control, failing to recognise the benefits to customs administrations (for example, better quality of data, more targeted controls and better use of scarce resources) (Grainger [2008] forthcoming).

Even where conflicting interests and initial institutional limitations have been overcome, the implementation of trade facilitation is riddled with further institutional challenges. For example, many customs administrations distinguish between ‘policy’ and ‘operations’. While the former looks at wider trade governance questions (usually located in the capital), the latter is tasked with implementing and enforcing trade procedures (usually located at the ports and borders). With trade facilitation, which

looks at overcoming operational frustrations and transaction costs, it is essential that those dealing with policy are familiar with operational practices. Where there is a large distance between 'operations' and 'policy' it can be difficult to find the required combination of experiences. This can severely impair trade facilitation motivated initiatives.

Another example of conflict between operations and policy can be found in the way many customs administrations rely on the services of third party IT suppliers. As outlined earlier, many trade facilitation proponents see innovations in information technology as an opportunity to overhaul governing legislation and trade procedures. However, where the IT capabilities are with third parties, it becomes very difficult to engage the administration. Often changes to electronic infrastructure force customs administrations to revisit their contractual relationship with suppliers. These are often tangled up in complex procurement (or donor) procedures. Moreover, the interests of incumbent IT suppliers may not always be compatible with trade facilitation's harmonisation and standardisation objectives. Incumbent IT suppliers often benefit from exclusive contractual arrangements and market leverage through use of proprietary standards and systems. Within a more harmonised and standardised IT framework these incumbents are likely to face greater competition and reduced profit margins subsequent to potential threats from lower cost 'off-the-shelf' solutions and open-source initiatives (for example, akin to UNCTAD's ASYCUDA (Automated SYstem for CUstoms DAta) customs software).

Lack of knowledge

Much of the recent, more quantitative, research is aimed at assessing the benefits of trade facilitation. It draws on the use of models, for example, OECD (2003) and Wilson, Mann and Otsuki (2004). While they do yield satisfactory figures for policy purposes, the operational detail within which trade facilitation seeks to find improvements is less explored. Much of the international recommendations are prescriptive in nature. Their implementation assumes a top-down implementation whereby policy executives take international recommendations and transpose them at home. Donors often draw on survey methodologies to identify whether requirements for implementing international recommendations exist (UN ESCAP 2004; Raven 2005; Widdowson & World Bank 2007).

However, the practicalities of implementing trade facilitation and overcoming conflicting interests and institutional limitations have barely been researched. Trade facilitation focuses on the operational interface between business and government. Thus, a bottom-up approach, whereby solutions to operational frustrations are sought, is just as much merited as the top-down approach. In the absence of dedicated trade facilitation institutions – be it in the form of a PRO committee (UN/CEFACT 1974) or within the mechanisms of public consultation – it can be very difficult to identify operational frustrations at the border and associated scope for trade facilitation. Even where operational officers become aware of problems they need mechanisms to escalate these to the more senior policy levels. Evaluation of operational frustrations and potential for trade facilitation requires a great deal of skill, rarely found in one place. Policy makers as well as project managers have few organisations to turn to. This deficit can add significantly to what are already formidable obstacles to trade facilitation.

Research at the operational interface has barely begun (Grainger 2007c). Trade facilitation is interdisciplinary in nature, bringing together the management disciplines (such as strategy, supply chain management, information technology, transport, operations and logistics), the legal fields (the laws of trade, customs, contract and agency, amongst others) and the political and economic sciences (for example, economics, public administration, international relations and political economy). Few organisations or institutes have yet attempted to bring these many different fields together and apply themselves to researching and evaluating the trade facilitation field.

Conclusions

Trade facilitation is receiving unprecedented attention and has become a feature in WTO negotiations, supply chain security, capacity building and customs modernisation programs. It seeks to find improvements within the trade and customs environment and reduce transaction costs between business and government. Both business and government stakeholders stand to gain from trade facilitation's simplification, harmonisation, standardisation and modernisation objectives. However, the international trade environment is complex. Trade operations can involve a range of different types of business stakeholders. Similarly, Customs is not the only governmental body with an interest in trade related controls. Many other government agencies have a stake in the control of national borders and the movement of goods, too.

Although trade facilitation concepts and recommendations are reasonably well understood and are a substantial agenda item within many worthy organisations, their implementation is wrought with obstacles. Considering the trade environment's complexity, many different, often conflicting, interests are at work. Institutional limitations add further to implementation difficulties. Policy executives tasked with identifying transaction cost problems, evaluating scope for trade facilitation and implementing trade facilitation programs require a wide range of experience and skills. These are seldom found within one single organisation.

The evaluation of trade facilitation type problems is multidisciplinary in nature. Few organisations or institutions have applied themselves to examining the trade facilitation problem in its entirety. Perhaps it is time to move on from prescriptive recommendations and consider the practicalities and difficulties of simplifying, harmonising, standardising and modernising trade procedures. The devil tends to be in the detail, and very little public accessible research that examines the cross-border environment and trade procedures has been conducted. Policy makers and executives would benefit from more substantiated research aimed at deepening their understanding of cross-border operations, their inherent dynamics, stakeholder interests and institutional limitations. Wider use and development of dedicated trade facilitation organisations – for instance, by tying in the non-customs area more efficiently and disentangling the many different business interests – could go a long way to addressing these issues. Considering recent policy interest in trade facilitation, it is surprising how little research is taking place. The case for trade facilitation for most proponents is self-explanatory. Trade transaction costs are a waste and should be avoided. However, the obstacles and forces inhibiting the implementation of trade facilitation are far less understood.

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TRADE FACILITATION – WTO LAW AND ITS REVISION TO FACILITATE GLOBAL TRADE IN GOODS

Carolin Eve Bolhöfer

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Abstract

The article provides an overview of trade facilitation and the relevant World Trade Organization (WTO) law. After introducing the subject, the article describes what trade facilitation entails and demonstrates its economic impact. The focus turns to the current WTO trade facilitation negotiations. In order to assess the potential for revision, relating panel and Appellate Body reports are analysed and the contents of the relevant GATT Articles – namely Articles V, VIII and X of the GATT – are clarified. Furthermore, other multilateral trade agreements are looked at. It is shown that they contain certain principles that are likely to set a trend for matters to be regulated by the WTO. Finally, the article looks at some of the Members' proposals submitted to the WTO Secretariat and gives an outlook on the future of the negotiations.

I. Introduction

The globalisation of the international supply chain in recent years has led to an immense increase in the volume of goods to be cleared by customs authorities. Due to growing competition, companies are producing components and accessories in countries with the highest cost-effectiveness and assembling them close to the delivery area. Furthermore, containers that used to be cleared as one transaction, now often contain a number of smaller shipments that need separate documents and procedures for customs clearance, because of the growth in e-commerce. This change in business environment requires Customs to adapt. In many parts of the world, though, governments have failed to react. With a view to controlling the flow of goods and the transfer of services to protect legitimate interests of parties involved, many countries have kept outdated procedures and extended documentation requirements rather than reduce them. At the same time, the number of customs officials has remained the same or decreased. The resulting delays are apparent. Even though developments in the IT-sector have led to facilitation and expedition of procedures relevant to international trade in many countries, problems still exist due to the lack of interoperability of different national systems. While developed countries have failed to agree on a common IT-system, in developing countries procedures are often still carried out manually.

For traders acting globally, and especially small and medium sized enterprises (SME), the number and complexity of national regulations alone constitute trade barriers. A greater concern is that not only the number of required documentation and applicable procedures is increasing, but that they vary substantially from region to region and from country to country. Both the measures that enterprises have to put in place in order to comply with national and foreign regulations as well as the long clearance time at borders are important cost factors.

Having realised that a reform of customs procedures is necessary and with the aim of cutting red tape, reducing costs and speeding up procedures, several international organisations, among them the World Trade Organization (WTO), have added trade facilitation to their agenda. Also, some countries and regions have introduced trade facilitation policies in recent years. However, due to the fact that a comprehensive international approach has been missing in the past, and that most of the international instruments dealing with the issue are non-binding recommendations, declarations or memoranda of understanding, a lot of governments have not yet taken action. After eight years of being on the WTO agenda as one of the Singapore Issues, Members finally realised the importance of the issue and commenced substantial trade facilitation negotiations in the summer of 2004. The outcome is yet to be seen, but negotiations are concentrating on specific trade facilitation measures. An agreement, even if not as comprehensive as envisioned in the beginning, is becoming more likely.

After describing what trade facilitation entails (sections II. a. and b. below) and demonstrating its economic impact (section II. c. below), this article focuses on the current trade facilitation negotiations being held at the WTO (section III). Relating panel and AB reports are analysed and thereby the contents of the relevant GATT Articles – namely Articles V, VIII and X of the GATT 1994 – are clarified. In order to shed some light on the potential outcome of the current trade facilitation negotiations of the Doha Round, other multilateral trade agreements are looked at in section III. d. It will be shown that they follow a certain pattern and imply certain principles that are likely to set a trend for matters to be regulated by the WTO. In conclusion, after having looked at some of the proposals submitted by Members (section III. e.), the future of trade facilitation in the WTO is assessed.

II. Trade facilitation

a. Explanation of the term

There is no uniform definition of the term 'trade facilitation'. Rather, it is defined differently depending on the discussion forum. While, for example, in 2001 the OECD referred to it as a 'simplification and standardisation of procedures and associated information flows required to move goods internationally from seller to buyer and to pass payments in the other direction', the United Nations Economic Commission for Europe (UN/ECE) defined it as a 'comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practises'. For the purposes of this article, the term will be used as understood by the WTO, the 'simplification and harmonization of international trade procedures, including activities, practices, and formalities involved in collecting, presenting, communicating, and processing data required for the movement of goods in international trade' (WTO 2001).

b. Examples and explanation of measures applied

In order to better understand what trade facilitation is about, it is useful to look at some examples of trade facilitation measures. Typical measures can be entire concepts (Single Window), IT solutions (EDI), standardisation (electronic or paper-based) or simplified procedures (Authorised Economic Operator [AEO]). Furthermore, customs techniques such as risk analysis can speed up customs procedures and thereby facilitate global trade.

The Single Window, for example, is a concept based on the idea that a trader undertaking to move goods internationally needs to turn to one government agency only, either in person or via the Internet, which then forwards the required information provided by the trader to all other relevant government agencies. Such a single entry point simplifies the process for the trader who, in most countries, currently has to turn to several different agencies in order to comply with national trade regulations. Often, the trader has

to present the same information several times and in different forms, sometimes paper based, sometimes electronically. This results in a major bureaucratic effort. The Single Window has the advantage that it can be created in an e-environment as well as in a less advanced environment, for example, in a developing country where the window is not a web interface but a counter window in a (government) agency.

Another typical trade facilitation measure is the introduction of simplified procedures for traders who have acquired a special status, such as the AEO of the European Union (EU). The granting of such status usually depends on one's compliance record in the past or on the outcome of a risk analysis. In the case of the European AEO, a figure established within the framework of the European Commission's (EC) customs security program (CSP), the status is granted when certain criteria relating to the operators' control system, financial solvency and compliance record are met. Once conferred by one EU country, these criteria will not be re-examined in another member country, but this does not automatically confer the right to simplified procedures. It is possible that additional national criteria have to be met in order to benefit from them.

c. Economic impact of trade facilitation

It is said that the economic impact of trade facilitation has always been difficult to measure due to the lack of standard parameters. How, for example, should one measure the benefits resulting from the distribution of the United Nations (UN) layout key, the standard trade document developed by the UN/ECE which forms the basis for the majority of trade and transport documents worldwide? Just as there is no standard definition for trade facilitation, there is no standard concept of a trade facilitation policy. Furthermore, the customs environment in countries is so varied that improvements to certain aspects can bring immense savings in one country, while in another the same measures hardly change anything. However, economists have begun to assess the economic impact of trade facilitation. While in the past mainly country-specific studies have been carried out, newer studies are also trying to estimate the cost reduction potential of trade facilitation worldwide.

In 2004 the World Bank published an analysis of the correlation of trade facilitation and the movement of goods attributed to trade in finished products worldwide in 2000-01 (Wilson, Mann & Otsuki 2004). Having collected and evaluated data from 75 countries, the experts came to the conclusion that the four factors: port efficiency, customs environment, regulation environment and use of e-commerce by enterprises, have far-reaching effects on imports and exports of the individual country. An increase in efficiency in these areas is presumed to also have positive effects on the movement of goods worldwide. It is estimated that if the overall profit of trade facilitation for trade in finished products equalled 377 billion USD, imports and exports would increase in all regions of the world. According to the study, adherence to the provisions of Article V GATT (freedom of transit), represented by the indicator port efficiency, and to the provisions of Article VIII GATT (fees and formalities), represented by the indicator customs environment, would lead to an increase of trade in finished products in the amount of 107 billion USD (Article V) and 33 billion USD (Article VIII). If countries were to publish and apply trade regulations as prescribed by Article X of the GATT, an increase in trade volume of 83 billion USD is be expected. With regard to different regions of the world, the study comes to the conclusion that through trade facilitation measures, most regions would increase their exports rather than their imports, whereby the exports would mainly go into the market of OECD countries. After the findings, Southeast Asia has the largest potential for an increase in imports and exports. In Africa and the Middle East, imports would rise more than exports due to the lack of integration into the market of finished goods and restricted market access to OECD countries. Furthermore, country-specific case studies exist. While in the past studies considered trade facilitation measures undertaken by trade partners in order to assess the benefits of a reform, countries have to start looking at their own level of trade facilitation in order to realise the potential gain of 377 billion USD worldwide. This potential for development has led many countries to initiate national trade facilitation policies.

III. Trade facilitation in the WTO

a. Political background

Trade facilitation as a comprehensive approach to facilitating global trade in goods by reforming customs procedure was added to the WTO's agenda at its 1st Ministerial Conference in Singapore in 1996. Attention was drawn to the subject again in 2001 when this somewhat broad mandate was specified in the Ministerial Declaration launching the Doha Round:

> 27. Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area (WTO Doha WT/MIN(01)/DEC/1).

However, the Cancun Ministerial passed without any results. While discussions mainly revolved around issues such as agriculture and the liberalisation of services, agreement was especially difficult on the Singapore Issues. Members persisted on their controversial positions regarding trade facilitation that were evident in the run-up to the Ministerial. Developing countries and least-developed countries (LDC) refused to take far-reaching obligations upon themselves which bore the risk of becoming defendant in a dispute settlement procedure. The breakthrough was achieved almost one year later, on 1 August 2004, when the 'July Package' was adopted. While other Singapore Issues were dropped, Members took note of the trade facilitation work done so far and agreed to start negotiations on the basis of modalities set forth in Annex D of the package. Besides committing themselves to clarifying and improving the relevant GATT Articles, Members recognised that the principle of special and differential treatment for developing and least-developed countries should extend beyond granting traditional transition periods for the implementation of commitments and that the extent and timing of entering into commitments should be related to the implementation capacities of such countries. Members would not be obliged to undertake investments in infrastructure projects beyond their means, and especially LDCs would only be required to undertake commitments to an extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

At its first meeting after the July session of the General Council, a Negotiating Group on Trade Facilitation was established and negotiations started as envisaged in the second half of 2004. Besides the aim of clarifying and improving relevant aspects of Articles V, VIII and X of the GATT 1994, provisions for an effective cooperation between customs authorities as well as between Customs and other government agencies are envisaged and customs compliance issues are looked at. Moreover, different international organisations have initiated programs in order to help countries to identify their trade needs and priorities. In July 2006, trade facilitation talks were suspended after they appeared to be one of the few issues of the Doha Round negotiations that were heading for agreement on schedule. Members still need to agree on which of the provisions for simplifying customs procedures and cutting trade-related red tape they want to include, and which to leave out.

b. Specific role of the WTO

What makes the approach within the WTO distinctive is that it embraces the work accomplished in other international organisations and thereby bundles their endeavours. The fact that the WTO's quasi-legal dispute settlement mechanism is unique in the enforceability of its decisions is important with regard

to the political value of a potential agreement. But it is not clear yet whether it will apply with regard to trade facilitation measures. It is certain that trade facilitation obligations will have to be customised and that they have to be in line with the capacity level of the individual Member.

c. Articles V, VIII and X of GATT 1994

In order to assess the potential for reforming WTO law to facilitate trade, an analysis is necessary of the existing provisions that are of relevance in this context. In the focus of discussion are the aforementioned Articles V, VIII and X of the GATT 1994, which have not undergone (substantial) reform since 1947. Against the background of the immense change that has taken place in international production and sale in the past 60 years, it is evident that the Articles do not meet the needs of today's world. WTO panels and the organisation's Appellate Body have clarified their meaning and scope in the meantime, but questions remain. The following overview sums up the findings from former disputes between Members that revolve around Articles V, VIII and X GATT and highlights some of the issues that will have to be addressed by Members.

Article V GATT – Goods in transit

Article V GATT defines comprehensively the meaning of transit, stipulates freedom of transit and allows Members to regulate traffic in transit through their territory, as long as the traffic is not unnecessarily delayed or restricted and as long as it is exempted from duties and other charges imposed in respect of transit. An exception is made only in regard to charges for transportation or those that are commensurate with administrative expenses entailed by transit or with the cost of services rendered. All charges and regulations imposed on traffic in transit have to be reasonable with regard to the conditions of the traffic. Also, Members are obliged to treat such traffic to or from the territory of any other Member no less favourably than traffic in transit to or from any third country with respect to charges, regulations and formalities in connection with transit. The interpretative note to the Article states that this applies only to like products being transported on the same route, under like conditions and thereby implies the risk of discrimination. It does not prevent a Member from discriminating against a third country as long as the type of consignment is different, even though there is no reason for the difference in transit procedure. Even if one could argue that the more burdensome customs procedure applied to one type of consignment – where there is no obvious reason – presents an unnecessary delay or restriction, it will be difficult for a complainant to prove the lack of necessity in a dispute.

Members have asserted violation of Article V GATT several times, but the parties to the disputes solved the matter before the establishment of a panel or shortly afterwards. For this reason, Article V GATT has never been interpreted either by a GATT/WTO panel or by the Appellate Body (WTO Secretariat 2002, G/C/W/408). Due to the lack of such guidance, the meaning and scope of the Article's provisions can only be clarified by applying the rules a panel would apply when interpreting the WTO provisions; these being the general rules of interpretation for treaties as stipulated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

From the relating preparatory work on the Havana Charter, it can be drawn that in 1948 parties already saw the need to simplify customs regulations that applied to traffic in transit and to promote the equitable use of facilities required, as this was of great importance especially to landlocked countries (WTO Secretariat 2002, G/C/W/408). This leads the way to the issues that are still pressing today and that will have to be addressed in future trade facilitation negotiations. Discrimination among modes of transport and types of carriers where there is no obvious reason for differing transit procedures, and the special situation of landlocked countries, have to be dealt with. Furthermore, with regard to the requirement that all charges and regulations imposed on traffic in transit are to be reasonable, the term 'reasonable' should be made operational, for example, by defining the case in which a measure is not reasonable and therefore presents a violation of the provision.

Article VIII GATT – Fees and formalities

In contrast to Article V GATT, several disputes settled by a panel or the Appellate Body have revolved around Article VIII GATT, which addresses fees and formalities associated with the import and export of goods (WTO Secretariat 2002, G/C/W/391). The article explicitly limits fees and charges in connection with importation and exportation (other than import/export duties and internal taxes) of goods to the approximate cost of services rendered. In this context, Members also 'recognise the need' for reducing fees and formalities, and 'recognise' that certificates of origin should only be required to the extent that they are strictly indispensable. While panels have clarified the meaning of 'cost of service rendered' in several dispute reports, for example, that the cost of services rendered refers to the cost with respect to *each* importer and therefore hinders Members from calculating them on an ad valorem basis (for more see: *US – Customs User Fee, BISD 35S/245; EEC – Minimum Import Prices, BISD 25S/68; Argentina – Textiles and Apparel, WT/DS56/R & WT/DS56/AB/R; US – Tobacco, BISD 41S/I/131)*. The use of the expression 'recognise' itself makes clear that an obligation to reduce fees and formalities in connection with import and export is not intended *(*despite the panel in *EEC – Bananas II, DS38/R* (unadopted), para. 151). An interpretation along these lines would be clearly against the text of the provision and therefore violating the rules of interpretation. No other conclusion can be drawn from paragraph 2 of the Article, which requires a country, upon request by another country, to review the operation of its laws and regulations in the light of the provision of Article VIII GATT. The paragraph does not stipulate any obligation to take action, for example, reduce or align fees and formalities, even if the country comes to the conclusion that they are too numerous or diverse. Furthermore, Article VIII GATT requires Members not to impose penalties on traders that are out of proportion to the quality of the violation of customs regulations in question. Panel reports have clarified that the forfeiture of a security deposit, for example, in case an importation did not take place within the date specified in an import certificate, is not a charge falling within the Article's paragraph 1 (a), but instead is part of an enforcement mechanism (*EEC – Minimum Import Prices, BISD 25S/68*).

Article X GATT – Transparency and availability of information

The disputes revolving around Article X GATT are numerous (WTO Secretariat 2002, G/C/W/374). It has been clarified that a restraint that affects an unidentified number of economic operators is a 'measure of general application' to which the publication requirement of Article X GATT, paragraph 1 applies. The publication requirement extends to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases (*US – Underwear, WT/DS24/AB/R; Japan – Film, WT/DS44/R*). In another dispute, the panel found that no time limit or delay between publication and entry into force was specified by paragraph 1, but that it prohibits the use of backdated quotas. Also, one panel report states that Members do not have to make information affecting trade available to domestic and foreign suppliers at the same time, nor do they have to do so before they enter into force (*Canada – Alcoholic Drinks, BISD 39S/27*). However, in a different case, the panel noted that paragraph 1 shows the importance of transparency to individual traders and therefore, paragraph 3 (a), stipulating a uniform, impartial and reasonable administration of measures, can involve an examination of the impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, etc. (*Argentina – Bovine Hides, WT/DS155/R*). If information does not have to be made available to different parties at the same time, as long as it is made available as soon as the measure is applied with a view to the disputes mentioned, the question arises concerning at what point the administration is no longer impartial. Because of those obscurities, clear wording, for example, stating the number of days would be helpful. In case of laws and regulations, it would be useful to require publication before their entry into force so that interested parties have the opportunity to comment on them.

With regard to the administration requirement of Article X, paragraph 3 (a) GATT, a panel found that 'uniform' is understood as uniformity of treatment in respect to persons similarly situated. Also,

panels have clarified that the requirement does not apply to the laws, regulations, decisions and rulings themselves, but to their administration, which has to be uniform. The obligation does not only apply to situations where traders or products from WTO Members are concerned, but also where traders or products from non-Member countries are at issue. This general requirement underlines the nature and goal of Article X GATT, which is focused on establishing transparency in Member's administration and not on abolishing discrimination among Members in this regard (*US – Stainless Steel, WT/DS179/R; EC – Bananas III, WT/DS27/AB/R; Argentina – Bovine Hides, WT/DS155/R*). With regard to impartiality, the panel in *Argentina – Bovine Hides* found that in cases where a party with a contrary commercial but no legal interest is allowed to participate in a customs clearance process, there is an inherent danger to a partial application of customs laws because this permits such party to obtain confidential information which it does not have a right to. Such participation would also qualify as unreasonable (*Argentina – Bovine Hides, WT/DS155/R*). This dispute shows that despite all transparency efforts, new trade facilitation regulations have to ensure protection of confidential information.

d. Others

Besides drawing on panel reports referring to Articles V, VIII and X GATT, Members' proposals are inspired by other multilateral trade agreements concluded in specific areas in the past. While the interpretation of the relevant Articles is important for their clarification and strengthening, the structure and principles of other multilateral agreements can lead the way to a comprehensive trade facilitation agreement.

Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Agreement (SPS), for example, aim at harmonisation and recognition of other Members´ conformity assessment procedures. They are very comprehensive with regard to their subject matter and, besides transparency, harmonisation and non-discrimination, they reflect concepts such as least trade restrictiveness. Other agreements that should be taken into account are the ones on Pre-shipment Inspection (PSI), Import Licensing Procedures (ILP) and Rules of Origin (RO). The goal of the PSI, for example, is to make sure that pre-shipment inspections are carried out free of discrimination and without leading to unnecessary delays. The Agreement calls for transparent procedures and also for the protection of confidential information, for the application of international standards in cases where seller and buyer have not agreed on a standard (for example, quality standard) as well as for non-discrimination. It also sets forth an explicit time limit for the issuance of the report (or written explanation for non-issuance) in order to speed up the procedure. The overall aim though, is to phase out pre-shipment inspections. The establishment of transparency, again while confidential business information is protected, is the key purpose of the ILP. In cases where Members introduce new import licensing procedures or change existing ones, they are obliged to publish the relevant information before their entry into force so that traders can become acquainted with them. If possible, this period shall equal 21 days. The Agreement on Rules of Origin aims mainly to harmonise non-preferential rules of origin among Members. Until harmonisation is accomplished, Members have agreed on certain disciplines that also reflect principles such as transparency, non-discrimination, predictability, and expedition of procedures.

e. Proposals submitted by Members

The proposals submitted to the WTO's Secretariat by WTO Members are clearly drawing on these accomplishments and on instruments such as the WCO's Revised Kyoto Convention. They are now on the table for discussion. Many of them are linked to one of the three GATT Articles, while others are related to more broad concepts such as agency cooperation, customs compliance and cross-cutting issues. A comprehensive summary of proposals would go beyond the intended purpose of this article, but can be found on the WTO's website (TN/TF/W/43/Rev.10).

With regard to Article X GATT, which is the broadest of the three relevant GATT Articles, Members want to see the use of the Internet for publication, the establishment of a Single Window or at least enquiry points, a time period between publication and entry into force as well as consultations on new and amended rules and the provision of information on the underlying policy objectives. Furthermore, binding advance rulings in certain specific areas and the release of goods in case of an appeal are up for discussion. In order to maintain und reinforce integrity and ethical conduct among officials, the establishment of a code of conduct and technical assistance to build up capacities and thereby prevent misconduct have been proposed.

In the area of transit, many Members wish to extend the concept of non-discrimination to different modes of transport, types of carriers and types of consignments. Some Members would like to see national treatment applied to traffic in transit. Others see the need for mentioning explicitly the possibility of exceptions justified by legitimate policy objectives (even though Articles XX and XXI GATT apply). With regard to transit fees and charges – to which Article X, paragraph 1 GATT does not apply – proposals include their publication, the prohibition of unpublished ones, and time periods between publication and their entry into force. Also, Members are suggesting that they be reviewed periodically and treated like fees connected with import and export in regard to the fact that they have to be strictly linked to services rendered. The publication of all laws, regulations, requirements and procedures on or in connection with transit is another prominent proposal as well as a time period between the publication of transit formalities and documentation requirements and their entry into force. The use of international standards, improved cooperation (which is essential for landlocked countries) and coordination as well as the clarification of terms, such as 'goods in transit' or 'unnecessary delays' are also likely to form part of a future agreement.

For fees and formalities connected with import and export, the proposals are similar. Specific parameters for charges should be established. They should be published and notified and the collection of unpublished ones should be prohibited. In order to reduce fees and formalities, they are to be reviewed periodically. Furthermore, Members want to prescribe international standards and the acceptance of commercially available information and copies.

IV. Outlook

The proposals are on the table. Members will have to take up negotiations and decide which of them shall be part of a future agreement. Since those WTO decisions that are to become binding on all 150 WTO Members have to be taken by consensus, Members are facing the difficult task of balancing the different interests, not only with regard to trade facilitation but with regard to the Doha negotiations as a whole. An important issue that is still pending is whether future trade facilitation disciplines will be subject to dispute settlement under the Dispute Settlement Understanding (DSU). If this is not the case, an alternative enforcement mechanism will have to be agreed on. It is certain that technical assistance and capacity building for less developed countries are the key to the reform of WTO law. Looking at the potential that trade facilitation presents, especially for the developing world, it is more than desirable that Members manage to agree on an ambitious set of disciplines.

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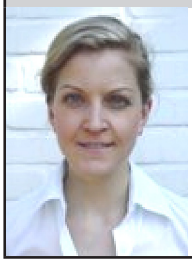

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TRADE FACILITATION IN AFRICA: CHALLENGES AND POSSIBLE SOLUTIONS

Creck Buyonge and Irina Kireeva[1]

There is always something new out of Africa.
Pliny the Elder, Natural History
23 AD – 79 AD

If you're not part of the solution, you're part of the problem.
African Proverb

Abstract

Africa's economic *development* partly depends on reduction of trade transaction costs, which are currently unacceptably high. Therefore, many African governments, working together with international organisations like the United Nations Conference on Trade & Development (UNCTAD), the World Bank, World Customs Organization (WCO) and the World Trade Organization (WTO), have in recent years implemented initiatives that have led to improvement of trade facilitation. In this regard, customs reform and modernisation initiatives in Africa inevitably include elements of trade facilitation. In addition to government initiatives, the private sector has recently organised itself to address the challenges of trade facilitation in Africa. Entry of the private sector requires a convergence of interests with government so as to reduce the existing disconnect in government-private sector relations. This article highlights the progress made in trade facilitation, existing challenges, and customs compliance management imperatives for businesses operating in Africa.

1. Introduction

For the purposes of this article, the term 'trade facilitation' can be defined as 'the simplification and harmonisation of international trade procedures'. These procedures include the 'activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade'.[2] Clearly, this definition relates to a wide range of activities including but not limited to import and export procedures (for example, customs or licensing procedures), transport formalities, payments, insurance, and other financial requirements. However, recently, the definition of trade facilitation has been broadened to include the transparency and professionalism of customs authorities, harmonisation of various standards and conformity to international or regional regulations. In a narrower sense, trade facilitation concerns the movement of goods in cross-border trade.

Over several decades a lot of work on trade facilitation has been carried out by the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic Commission for Europe (UNECE) and the World Customs Organization. UNCTAD estimates that the average customs transaction involves up to 30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60–70% of all data at least once.[3] This is particularly true of Africa not only due to lack of adequate infrastructure in many countries, but also due to a past characterised by poor national governance structures.

With the lowering of tariffs across the globe, the cost of complying with customs formalities has been reported to exceed, in many instances, the cost of duties to be paid. In the modern business environment of timely production and delivery, traders need fast and predictable release of goods. An APEC study estimated that trade facilitation programs would generate gains of about 0.26% of real GDP to APEC,[4] almost double the expected gains from tariff liberalisation, and that the savings in import prices would be between 1–2% of import prices for developing countries in the region.

Some recent studies have tried to determine how time delays affect international trade. Djankov, Freund and Pham Cong (2006) assert that on average, each additional day that a product is delayed prior to being shipped reduces trade by at least one per cent. Another important insight from that work is that the use of averages as indicators of trade facilitation in Africa can be very deceptive because of the large variations across African countries. For example, while it takes 16 days to get a product from the factory to the ship in Mauritius, it takes 116 days in the Central African Republic.[5]

On the other hand, Soloaga, Wilson and Mejia (2006) evaluate the impact of changes in trade facilitation measures on trade for main industrial sectors in Mexico, using four indicators of trade facilitation: port efficiency, customs environment, regulatory environment, and e-commerce use by business (as a proxy for service sector effectiveness).[6]

Finally, the Global Facilitation Partnership for Transportation and Trade[7] conducted the Logistics Perception Index (LPI) in 2006. The LPI survey uses an anonymous, web-based questionnaire which asks the respondent to evaluate their country of residence, as well as eight countries they are dealing with on several logistics dimensions including domestic and international transportation costs, timeliness of shipments, transport and IT infrastructure, Customs and other border procedures, and logistics competence.[8]

The International Chamber of Commerce (ICC) issued a position paper in January 2007, which indicates that there is a growing convergence of interest in trade facilitation from various intergovernmental organisations, donor organisations and the private sector, and articulation of clear steps to be taken to improve the trade facilitation environment.[9] ICC identifies these steps as adoption of the WCO Framework of Standards to Secure and Facilitate Global Trade in June 2005, the coming into force of the WCO Revised Kyoto Convention in February 2007, and the emerging text of the WTO trade facilitation talks.

2. A New Dawn for Africa?

African leaders saw the new millennium as an opportunity to break from a past characterised by escalating poverty levels, underdevelopment and continued marginalisation from meaningful access to developed country markets for goods originating from the continent. In July 2001, the 37th Session of the African Union formally adopted the New Partnership for Africa's Development (NEPAD) as 'a multi-dimensional and long term strategy for Africa's development'.[10] One of the NEPAD objectives is to place African countries on a path of sustainable growth and development, and full integration into the global economy. NEPAD priorities include building and improving infrastructure, and accelerating intra-Africa trade. In short, both the diagnosis and the response to Africa's challenges are known, and there is a continental strategy to make it happen.

The Commission for Africa in its 2005 Report stated:

> Customs urgently need reform. Africa suffers from the highest average customs delays in the world, 12 days on average. Estonia and Lithuania require one day for customs clearance; Ethiopia averages 30 days. Customs procedures are often Byzantine in their complexity… Customs delays add to over 10 per cent to the cost of exports.[11]

In practical terms from a customs perspective, it is noticeable that most African customs administrations are in the process of reforming and modernising. Trade facilitation is becoming more and more attractive

for African leaders due to the need to reduce the costs of doing business and create an environment conducive to enhanced investment for economic growth.

Trade facilitation is a fairly new issue that is currently under discussion from the World Trade Organization (WTO) perspective. Along with other 'Singapore issues', included in the Doha Round of negotiations, it caused a stalemate at the Ministerial meeting in Cancun, often referred to as 'the Cancun deadlock'.

The main reason for the initial unwillingness of African developing or least-developed countries to negotiate on trade facilitation was the understandable fear that implementation of any such agreement would require considerable investment of the governments of these countries in infrastructure, change of operational procedures and human resources. It is at the same time unlikely that the developed countries would need to change anything for implementing any of the trade facilitation measures to be included in such a multilateral trade facilitation agreement.

African countries are now very keen to explore the possibilities provided by trade facilitation whether in the context of the WTO negotiations, regional or country-specific initiatives. New trade facilitation initiatives in Africa address both physical infrastructure (roads, ports, telephone connectivity, etc.) and administrative hurdles.

This position finds support from an August 2006 Report commissioned by the Business Action for Improving Customs Administration in Africa (BAFICAA),[12] an *ad hoc* grouping of multinational companies that are active in Africa. The 2006 Report admits that unstable electricity supplies, congested borders and bureaucratic customs procedures 'make it a challenge to run a business in Africa'.[13] At the same time, the Report acknowledges the recent gains made in customs reform and modernisation and the feeling from business that these gains were less than the optimum. Recommendations towards a customs-business partnership in order to improve the trade facilitation environment whilst increasing compliance and revenue collection are provided.

According to the World Bank, administrative hurdles (for example, customs and tax procedures, clearances and cargo inspections) contribute to 75% of trade facilitation delays.[14] In this case, it is logical to conclude that certain actions by governments and the private sector to remove these administrative barriers are urgently needed. Moreover, where possible, the assistance of intergovernmental and international organisations like the World Customs Organization, United Nations Economic Commission for Africa, the Africa Development Bank and the Bretton Woods institutions, can significantly improve the situation with customs procedures.[15]

Customs reform and modernisation programs, which have been carried out mainly in countries that have adopted the integrated revenue agency model, facilitate benchmarking of procedures and adoption of customs management quality audits.[16] This approach could make a significant part of the NEPAD peer review mechanism on the part of African fiscal agencies in general and customs administrations in particular. At the WTO level, African countries should make the customs modernisation agenda a priority during the negotiations towards a possible Trade Facilitation Agreement, and incorporate inclusion of this issue in seeking to obtain aid for trade from such blocs as the EU.[17]

3. What is the business perspective on improvements of customs procedures?

The BAFICAA Report is unique since it identifies a business perspective on customs developments different from the previous studies on the trade facilitation environment which have been done by the International Monetary Fund, World Bank, individual government agencies, or even research institutions. In terms of scope, the study covered 20 countries in three sub-regions of Sub-Saharan Africa:

- East Africa, including Kenya, Uganda, Tanzania and Zambia

- West Africa with Benin, Côte d'Ivoire, Ghana, Togo, and Nigeria
- Southern Africa with Botswana, Mozambique and South Africa.

3.1 The 'Great Disconnect' or lack of coherence

Private sector respondents to the questionnaire administered in these countries gave the same evaluation or *verdict of the existence of a great disconnect or lack of coherence* on the character of customs officials. In particular:

(a) The most senior officials were helpful and understood the problems faced by businesses.

(b) The frontline officials were officious, indecisive, susceptible to petty corruption, and suspicious of business, even the most transparent and compliant.

In addition to such a *disconnect* between the strategic and the operational levels in Customs, there was a remarkable difference between officials in Eastern Africa, who were generally more business-friendly and understandable than their counterparts in West Africa with the exception of Togo.[18]

3.2 Relations between Customs and business

Firstly, as would be expected, most customs administrations find it difficult to sustain genuine dialogue with business, and the relationship is mutually antagonistic because compliance with customs laws and procedures is often involuntary.[19] Kenya was cited as an exception rather than the rule among the countries surveyed, where customs officials went out of their way to call private sector representatives for meetings. This relationship means that changes in legislation or customs procedures are usually made suddenly without consultation or dialogue with the businesses.

The revenue authorities of Kenya, Uganda, Tanzania and Rwanda have made taxpayer consultation an important part of their approach to achieve voluntary compliance. In addition to holding regular seminars and workshops, Kenya, Tanzania and Rwanda hold an annual event called Taxpayers' Day,[20] which is used to highlight the importance of voluntary tax compliance and to award individuals and companies that performed exceptionally well in various categories. In Uganda, such events are held monthly. Indeed, the study mentioned Rwanda as a country with a good track record in taxpayer consultation and promotion of integrity, although the questionnaire was not administered in Rwanda.

Secondly, relevant information in hard copies or soft publications may not be easily accessible in Help Centres specially established for these purposes. Côte d'Ivoire and Senegal were cited as the only countries where Customs made practical use of the website. Thirdly, risk management is respected more in its absence than its use, as officials routinely override electronic 'Green Channel' assessments and prefer to conduct one hundred per cent verification. In Kenya, importers have complained that after introduction of container scanners, the dwell time of goods at the port has not reduced significantly due to the existing high levels of verification even after electronic scanning has been carried out.

The interviews conducted during the study revealed that there was much less engagement between Customs and businesses in West Africa, compared to East and Southern Africa. Incidentally, most customs administrations in West African countries are paramilitary outfits, while in East and Southern Africa they are civilian.[21] There is closer customs cooperation and consequent facilitation for countries within the more integrated regional economic blocs such as the Common Market for Eastern and Southern Africa (COMESA), the East African Community Customs Union (EACCU), the Southern Africa Development Community (SADC) and the West African Economic & Monetary Union.[22]

However, even within these economic blocs, there are variations. For example, Kenya adopted the SIMBA 2005 IT System,[23] which is different from ASYCUDA,[24] the most widely used customs IT System in Africa.[25] Kenya phased out pre-shipment inspection for customs purposes in July 2005, while Tanzania

has sub-contracted destination inspection to a pre-shipment company, and there is no requirement for any kind of inspection in Uganda.

3.3 Insufficient state of supporting infrastructure

The problems of delays in ports are seen as due to inefficient and ineffective port management rather than lack of the necessary equipment. Africa's key ports, such as Durban (South Africa), Lagos (Nigeria), Mombasa (Kenya) and Tema (Ghana) are heavily congested. The congestion at ports is exacerbated by inefficient rail services – of which Kenya and Uganda Railways Corporations were once legendary.[26] Abidjan (Côte d'Ivoire) is efficient, yet expensive.

Land border crossings are overfilled. However, those borders that have been established for a long time (such as Beitbridge between South Africa and Zimbabwe and Malaba between Kenya and Uganda) seem to have developed a capability to handle higher throughput.

Incidentally, processing at airports, which is normally expected to be more efficient due to the higher freight charges and value of goods, is also not better as it routinely takes days to clear goods. The airports experience lack of inspection equipment like scanners.[27] Storage for perishable or dangerous goods may also be absent or rudimentary.

3.4 Contribution of various agencies to customs delays

Where interaction with Customs is mediated by customs brokers, business people usually get the impression that delays are largely caused by customs authorities. This may be partly true in the case of delays caused by pre-shipment inspection companies sub-contracted by Customs to carry out verification of values, quantities and quality of goods. In other cases, customs usually have limited control over the activities of other government agencies responsible for checking goods standards, phytosanitary and health inspection.

Unless reform and modernisation of Customs is done in tandem with modernisation in these agencies, the gains from Customs may not benefit businesses to the optimum. This does not mean that businesses do not always see the value of the interventions made by other agencies.[28] On the contrary, the intervention of Kenya Bureau of Standards in Pre-shipment Verification of Quality has significantly reduced importation of counterfeit goods into Kenya.

3.5 Corruption in Customs

When there is no enemy within,
the enemies outside cannot hurt you.

African Proverb

Corruption can be defined as the abuse of public power for private gain. Corruption occurs when a public official or employee uses his or her power to solicit or extort bribes. Actions of private persons, bribing and influencing public officials to gain an undue competitive advantage or secure a profitable government contract form another side of corruption.

In Customs, one of the major corruption risks is a high rate of duty to be paid. Sometimes it is easier and cheaper for businessmen to bribe a customs officer than to discharge all duties or to avoid paying customs duties by wrongly declaring goods at customs. Wrong declaration of goods at customs brings risks, that customs officer might reveal the cheating during inspection of cargo.

Many countries have concluded various Free Trade Treaties with other countries, which resulted in cuts of customs duty rates. Duty reduction has also been undertaken as part of negotiations of Economic

Partnership Agreements with the European Union or WTO commitments. Intensifying the existing internal systems of control and outward audit can ensure the elimination of corruption risk.

Putting a limitation on the freedom of action of officers is essential for elimination of corruption risk. If customs procedures are not defined clearly and are complicated, or if there are no clear terms of reference for customs officers, or the procedure of running some activities is not clearly defined, then the freedom of action of officers is virtually unlimited.

It is presumed that bribes which are paid to customs officers are aimed at committing some illegal actions. In some countries in Africa, as in other continents with poor governance and accountability mechanisms, bribes are often paid for legal actions or for the activities that are normally expected to be conducted by the officers as part of their duties. These are the so-called 'facilitation fees'. Payment of such fees pushes up the costs of doing business, and reduces the credibility of citizens in government.

Many multinational companies have adopted Codes of Ethics that prevent their officials from paying bribes, even for minor 'facilitation fees' to customs officials. They generally manage to clear their goods without any illegal payments. For small and medium size enterprises and local companies lacking proper governance structures and Codes of Ethics, such payments to customs are common, especially in countries with Byzantine regulations and low automation, for example, the Democratic Republic of Congo and Nigeria. Clearly, automation of customs processes leads to greater transparency, less human interaction and as a result, diminishes corruption.

The BAFICAA Report indicates that significant improvements were seen in Kenya after introduction of a Customs IT system in 2005. It is important to emphasise that where corruption is known to be present in the African customs administrations surveyed, it is practically never systemic and well organised and mostly tends to exist at the individual levels rather than institutional. In the future, it may be expected that some form of corruption will continue to exist in Customs, particularly in those countries which cannot afford to pay decent salaries to customs officials.[29]

3.6 The problems of illicit trade and Customs

Goods often enter the African market without payment of duties and taxes as a result of collusion between importers, customs brokers and Customs. This is particularly so in Western Africa. Another aspect of illicit trade is importation of counterfeited goods, which was cited in Benin, Tanzania, Togo and Zimbabwe. Anti-counterfeiting activities have had a significant impact in Kenya, Nigeria, Uganda and Zambia. Increased checks as a deterrent to smuggling often led to higher costs on compliant businesses.

The phenomenon of illicit trade and counterfeiting has been estimated by the OECD to cost billions in lost profits to companies and revenue to governments, and represents between 5 to 7 per cent of global trade.[30] Although the WCO has formulated a Model Law on Intellectual Property rights incorporating measures expected to be implemented by customs officials at the border, this has not been adopted at the national level in many African countries where counterfeiting is rampant.[31]

4. Customs compliance management imperatives for businesses operating in Africa

4.1 Creation of the appropriate customs compliance strategy

To minimise the risk of doing business in Africa, companies need to develop a very good understanding of the unique characteristics of the countries in which they are located, given the variations between the different countries in the continent.

Up to 75% of the delays experienced by business can be controlled through actions by customs authorities, other government agencies and the private sector. The private sector appears to be in the shadow, silently complaining without taking any action on its part to improve the situation.

Numerous opportunities for engagement are now opening up in many African countries, and it is up to the private sector to position itself to gain more from this situation. Singly and within coalitions, the private sector can actually provide impetus to customs reform. This obvious fact is often overlooked in Africa due to the poor past record of government transparency and accountability, and the mutually adversarial relationship between Customs and the private sector.

African customs officials are generally well-educated, with a good understanding of the laws they enforce. On the other hand, the level of education and professionalism of the customs brokers that represent importers and exporters does not always match the expectations from customs authorities.[32] This unequal relationship allows manipulation by customs officials of the laws and procedures, which aims at intimidation of brokers with a view to paying facilitation fees for private gain, or to maximising revenue collection to meet set targets, both to the detriment of business people.[33]

A number of multinational companies operating in Africa have hired customs experts to assist them in managing compliance, or they retain customs consultants. These consultants ensure correct choice of tariff classification, proper valuation and declaration of origin. They are also responsible for ensuring correct procedures in relation to the import and export process, movement of goods in transit, and other customs procedures such as warehousing. Further, customs experts protect the company from future risks through prompt and accurate revenue payments and provision of adequate security. Finally, they conduct the necessary background checks on contractors such as transport companies because fraud on the part of suppliers could lead to imposition of punitive penalties.

While such resources cannot replace the necessity for formal consultative mechanisms between the private sector and business, it is only through interaction of customs professionals with customs officials that the acceleration of the ongoing reform and modernisation programs can be achieved.

Most countries lack 'a critical mass' of customs specialist expertise, meaning that decisions that may be expected to be made at the regional level are unnecessarily escalated to headquarters. Decisions take even longer if applications are made by clearing agents as they often lack the knowledge necessary to make a convincing case on behalf of importers and exporters. In Kenya, the major accounting and audit firms have in the last few years recruited customs experts to provide compliance and technical customs consulting services for local companies and overseas companies seeking to invest in the country.

4.2 Level of automation in Customs

Automated systems in Customs provide one of the most important tools for facilitation of trade procedures. Customs automation results in increased transparency in the assessment of duties and taxes, substantial reduction in customs clearance times, and predictability, all leading to direct and indirect savings for both government and traders.

The higher the level of automation of customs procedures in a country, the greater the possibility of detailed inspections, detection of fraud, and firm action including prosecution in court. Early versions of 'ASYCUDA',[34] the preferred customs IT system in Africa, have limited functionality compared to contemporary versions such as 'ASYCUDA++'.

One of the findings of the Tanzania Time Release Study revealed that there was higher customs processing efficiency in stations where 'ASYCUDA++' has been implemented such as Mwalimu Julius Nyerere International Airport (Dar es Salaam) compared to other stations that were still operating with 'ASYCUDA 2.7'. 'ASYCUDA++' supports electronic data interchange. Implementation of new customs

IT systems is often done without adequate internal and external consultation. In Kenya's experience with the implementation of 'SIMBA 2005' in July 2005, a significant segment of the private sector was found unprepared with consequent disruption of business and profits. A number of clearing agents had not paid the requisite fees for training and internet access by July 2005. A court case initiated by one company on behalf of 790 others to compel the Kenya Revenue Authority to revert to the old system was not successful.[35]

Most of the employees of the clearing agents' organisations did not have the knowledge and ability to use computers and technology efficiently. So understandably it was quite a challenge for most of the clearing agents to comply with the requirements for exchange of electronic information with Customs while learning basic IT skills. An important lesson that should be learned is to invest in developing the IT skills of the staff of companies if customs technological developments are to lead to improved levels of trade facilitation.

4.3 Ways to combat fraud and bribery – integrity solutions

Very often, clearing agents connive with customs officials to demand facilitation fees and other payments from importers and exporters, especially when all documentation is not in order. Integrity in African customs administrations has improved in tandem with improved transparency and accountability of African governments.

In the past, many companies operating in Africa, including multinational corporations, routinely paid bribes to public officials as 'facilitation' payments. With the OECD's work against foreign corruption practices by multinational companies from OECD Member States and enactment of enabling legislation in these countries, things are gradually changing. It is now important for companies to develop and implement the Codes of Ethics specifying clearly what is acceptable and unacceptable in dealings with government officials and third party service providers like clearing agents since fraud and corruption is not confined to Customs.

Integrity is one of the cross-cutting elements in the reform and modernisation of customs administrations as a result of public-sector reform activities in individual countries, requirements for government transparency and accountability by bilateral and multilateral donors and international financial institutions, and compliance with the World Trade Organization and the World Customs Organization standards.

5. Practical advice on expediting customs clearance

The Kenya and Tanzania Time Release Study findings point out an important role for companies and third party service providers in expediting clearance of goods, specifically through prior lodgement of documents. It has been noted that prior lodgement alone cuts down the processing by up to half.

It must be admitted that many African customs administrations do not have robust risk management systems enabling discriminatory treatment of importers and exporters on the basis of the risk they pose to loss of revenue or compliance with regulatory requirements.

The mutual distrust between Customs and the private sector does not help the situation. One of the ways in which companies can minimise the risk of delays due to non-compliance is to understand and abide by legal and regulatory requirements so that they can take advantage of existing and future fast-track treatment to companies that comply with the requirements for greater disclosure of information, electronic interface with Customs and a sound financial position among other possible elements.

Since the speed with which goods are cleared from customs control partly depends on the work of third party logistics providers, it is important for companies to vet the ethical practices and competence of such providers. Customs brokers in Africa are, as a rule, small and medium sized enterprises, often

with insufficient working capital and equipment, so they use funds entrusted to them by one company to finance different importations. This causes delays that are unavoidable in such situations (and many times unfairly) attributed to Customs.

The financial stability of customs brokers or other third party providers is therefore one of the issues to be carefully considered in their selection. Others are:

- **Competence of managerial and operational staff**

  Within the East African Customs Union Partner States (Burundi, Kenya, Uganda, Tanzania and Rwanda), there is an agreement by the customs administrations and revenue authorities that customs brokers undergo required, uniform training to enable them to obtain practising certificates issued by Customs as a condition for their licensing. Continuous professional development will also be undertaken for those agents with practising certificates, in collaboration with the International Association of Freight Forwarders (FIATA).[36] Minimum academic requirements for entry and evidence of good performance in qualifying examinations for operational staff would therefore be a good indicator.

- **Membership in a national association of freight forwarders**

  In some countries (such as within the EAC Partner States) membership in a national association is a prerequisite for licensing with Customs. If a clearing agent firm is not a member of a national association, it is a clear sign such a company might be having problematic issues with Customs, and has therefore not been recommended for initial licensing or renewal. However, membership should not be construed as evidence of a firm's integrity or professional standing at the present moment.

- **Agreements with other third party service providers**

  Clearing and forwarding companies provide transportation services within the same firm, or through an arrangement with third parties. Even if the qualifications of the clearing firm could be impeccable, engaging dubious transporters may cause delays if the truck is seized by Customs for one offence or another. For example, a truck conveying goods that have been cleared legally through Customs that are, however, commingled with others which have been smuggled. This may cause the delay of all the goods if the truck and the goods are seized. Increasingly, it is becoming important to examine the whole supply chain to assure yourself of the safe arrival of your goods.

- **Reputation within Customs**

  Customs brokers interact with Customs on a day-to-day basis whether face-to-face or electronically. Therefore, usually customs officials have a good understanding and insight into the competence and integrity of potential agents. It might help to do background checks on a potential agent to reduce risk of loss by agent.

- **Period of operation**

  Keeping all factors constant, a company that has been in operation for a long time without a break is likely to have more sound governance and reputation in comparison with a complete beginner. Since most clearing firms in many countries in Africa are in the small and medium enterprise category, it would be quite risky to entrust the job of clearing large quantity, high value goods to a firm that may not have the capacity to deliver.

6. Recordkeeping in Customs for more transparency and clarity

What does one do when there are customs problems? Whether these problems concern tariff classification, valuation, origin determination or interpretation of a point of law, an expert opinion on the matter and

recommendations as to the problem resolution are required. Inevitably, customs authorities rely on the law (enacted by Parliament), regulations (made by the Government, the Minister or Ministries) to further implement the law, rules made by judicial authorities (providing recommendations for interpretation of the law), and administrative guidelines issued by customs authorities to make decisions on particular cases. The existing legal framework is outside the influence of the customs brokers, although many importers and exporters rely on customs agents' mediation and expertise not realising that solutions provided by them may simply be illegal (that is, suggesting bribery, fraud, falsification of documents, etc.).

Therefore, the reform and modernisation programs in Customs currently under implementation in many African countries should be seen as a part of wider public sector reforms to entrench the rule of law and improve service delivery to citizens. In this regard, customs practices are changing, now relying more and more on mutual understanding of the problems and consultation and negotiation with clients for their resolution rather than the past practices where the word of a customs official was considered to be the final one and the only way to overcome it was to engage in illegal activity.

In Kenya, the private sector is getting increasingly involved, giving preference however, to taking issues to court for determination rather than implementing decisions by the authorities without questioning them. Recent decisions by the courts on applications for judicial review on matters of customs valuation and tariff classification show that the courts are inclined to take a firm stand where it appears that Customs is exceeding its discretionary power, or is not giving the trade sufficient opportunity for redress.

Uganda has enacted a law on tax appeals, which provides that the Chairman of the Tax Appeals Tribunal shall be a judge of the High Court.[37] Requirements for appeal are part of the raft of proposals under discussion towards a World Trade Organization Agreement on Trade Facilitation. Recent developments at the WCO – specifically, the adoption of the Framework of Standards – are also having an impact on the development of mechanisms for redress in case of disagreement with Customs.

It could be suggested to keep a record of all issues that have arisen with Customs over the years and their resolution. These records would help to make convincing arguments and to facilitate resolution of disagreement as the more informed both customs authorities and the trade representatives are, the higher the chances of quicker and fair resolution of disputes in similar situations.

In addition to tracking issues, monitoring of the customs services by keeping statistics as evidence would also facilitate the transparency of Customs. Where there are delays, the recommendations for service improvement can be provided on the basis of the records kept. In addition, this would help reduce the mutual hostility between customs authorities and business representatives.

Traditionally, administrations in Africa have signalled support for a risk management approach to customs work, while in practice, the implementation of customs initiatives based on risk management has been very low. Currently, one of the principles of the reform and modernisation work in many African countries is the use of risk management, which presumes discrimination of clients on the basis of compliance record. Keeping a good record of compliance is one way of ensuring prompt resolution of issues when they arise.

7. Security of trans-border shipments

The aftermath of the September 11, 2001 bomb attacks in the USA from a customs and trade perspective has been greater emphasis on security of the international trade supply chain, not just cargo security. In common with developed countries, many developing countries including those in Africa are focusing attention on controlled access to and use of port and airport facilities in line with International Maritime Organization (IMO)[38] and International Civil Aviation Organization (ICAO)[39] requirements.

Most countries in the East and Southern Africa region have ratified a significant number of IMO conventions, although the pace of ratification has not been matched with implementation.[40] From August 2005 to August 2006, IMO through its Integrated Technical Cooperation Program (ITCP) implemented various activities in the areas of infrastructure, transport and ICT and governance, peace and security in support of NEPAD.

These developments inevitably have an impact on the security arrangements and technological equipment requirements expected of the trade due to the integrated nature of modern supply chains. Efforts have been made to introduce electronic cargo tracking of shipments, specifically in the East and Southern Africa regions. For example, there is a component for integrating electronic cargo tracking systems for Kenya, Uganda, Tanzania and Rwanda under the World Bank's East African Trade & Transport Facilitation Project running from 2006 till 2009.

The actual impact of this project on the ground is expected to be for a longer term. For the moment, importers and exporters have to contend with poor roads, rail and pipeline infrastructure with associated delays and security implications.

How then does one reduce the risk of loss of goods in transit in the current situation? Firstly, each day of delay in the clearance of goods increases the risk of loss of goods due to pilferage, spoilage or other ways. It is therefore important to clear the goods as quickly as possible. Secondly, adequate insurance for the goods in question is advisable, although this would be prohibitive for those countries undergoing conflict. Thirdly, prudent choice of agents and transporters reduces the risk of loss of goods. Finally, movement of trans-border shipments is usually restricted to designated routes by regulation. Customs and other security agencies usually maintain checkpoints along these routes. Explanation should be sought from any transporters reported to have strayed from the designated route, unless the importer/exporter is complicit in such movement.

8. Conclusions

Customs administrations in Africa are going through a period of rapid change, which requires a paradigmatic shift in customs operation. There are ongoing positive developments by Customs to reform and modernise procedures and processes, as well as commendable initiatives by the private sector to take a more proactive approach to improve customs administration for the benefit of governments and business.

The increasing positive engagement of business with Customs has helped identify major trade facilitation weaknesses that if addressed, can help reduce transaction costs in Africa. These include the lack of a service ethos across all customs management levels, adversarial relationship between Customs and business, insufficient or inefficient supporting infrastructure, lack of a facilitation culture in other government departments, corruption and illicit trade. The challenges present opportunities for businesses to engage with Customs to bring about the desired change.

However, businesses need to create customs compliance strategies that reflect an understanding of the Customs business in specific countries. While investments in infrastructure can be expensive, delays can be minimised through cooperation between business, Customs and other government agencies. It is also important to take advantage of information and communication technologies, especially since many administrations are now automating their systems. Human factors will also determine the amount of customs-related delays that can be experienced – specifically the integrity of employees and customs officials.

Due to emerging supply chain security concerns at the global level, businesses across the world, including in many countries in Africa, are required to have more transparency in their operations including mechanisms for vetting third party service providers. The International Maritime Organization,

World Customs Organization and the International Civil Aviation Organization have all adopted global security and facilitation standards that have a great impact on the operations of business, Customs and other government agencies. Many countries are well on the way to complying with these requirements, and businesses not only need to be aware of the developments, but should prepare themselves for implementation. While the challenges that remain are enormous, it is clear that there is progress, and even greater progress is to be expected in the future.

Endnotes

1 The authors would like to thank His Excellency Mr Alloys Mutabingwa, Ambassador of Rwanda to Tanzania and Special Representative of the Government of Rwanda to ICTR (Arusha) for his comments and suggestions on the earlier draft of this article. The authors are grateful to Bernard O'Connor, Professor Hans-Michael Wolffgang and Professor David Widdowson for their encouragement and enthusiasm during the work on the article. Any opinions or mistakes are those of the authors.

2 See SITPRO 2007, Guide to the WTO Trade Facilitation Negotiations, www.sitpro.org.uk.

3 Trade and Development Report 2004, http://www.unctad.org.

4 Asia-Pacific Economic Cooperation, http://www.apecsec.org.sg/apec.html.

5 Djankov, S, Freund, C & Pham Cong, S 2006, *Trading on time*, World Bank, Washington, DC.

6 Soloaga, I, Wilson, JS & Mejia, A 2006, *Moving forward faster: trade facilitation reform and Mexican competitiveness*, World Bank Policy Research Working Paper 3953, June 2006. Global Facilitation Partnership for Transport and Trade 2006, Logistics Perception Index Survey, http://www.gfptt.org/lpi, viewed 30 January 2008.

7 The Global Facilitation Partnership for Transport and Trade (GFP) is a collaborative tool for practitioners involved in trade and transport facilitation. It is hosted by the World Bank. Partner organisations include World Customs Organization (WCO), United Nations Conference on Trade & Development (UNCTAD), International Road Transport Union (IRU), BULPRO at the Bulgarian Chamber of Commerce & Industry, The International Air Cargo Association (TIACA), United Nations Economic Commission for Europe (UNECE), and United Nations Industrial Development Organization (UNIDO).

8 Source: www.gfptt.org/uploadedEditorImages/00000310.pdf, viewed 30 January 2008.

9 International Chamber of Commerce 2007, *The international business perspective on capacity building to improve trade facilitation,*

www.iccwbo.org/uploadedFilesICC/policy/customs/pages/The_Business_Perspective_on_Capacity_Building(1).pdf viewed 30 January 2008.

10 NEPAD 2004, NEPAD: an introduction, NEPAD Secretariat.

11 Commission for Africa 2005, *Our common interest*, London, UK; for more information consult www.commissionforafrica.org, viewed 30 January 2008.

12 The current corporate sponsors of BAFICAA are Unilever, British American Tobacco and Diageo. The initiative is receiving financial support from the Commonwealth Business Council.

13 McTiernan, A 2006, *Customs and business in Africa: a better way forward together*, BAFICAA.

14 World Bank 2005, *Doing business in 2006: creating jobs.*

15 See Evdokia Moise (n.d.) for information on the benefits and costs of trade facilitation, www.oecd.org/ech/tradepolicy, viewed 30 January 2008.

16 The Revenue Authorities of Kenya, Tanzania, Rwanda and Uganda are jointly implementing a Quality Management Manual with priorities on review and benchmarking of internal processes and procedures, adoption of a client and public focus, human resource quality, organisational structure and functioning. This approach is borrowed from the ISO categories of quality with specific adaptation to revenue administration. Kenya Revenue Authority is working towards achieving ISO certification.

17 See also Endnote 11.

18 See in particular Endnote 14 on Quality Management Manual implementation by the Revenue Authorities of Kenya, Tanzania, Rwanda and Uganda.

19 It should be noted that traditionally most tax compliance is *ipso facto* involuntary, thus creating a hostile and unfriendly environment. The dialogue is rarely genuine for lack of common interest. Yet, there are some exceptions or at least attempts to change the situation. For example, taxpayer education and sensitisation in East Africa (in particular, in Kenya, Uganda, Tanzania and Rwanda) found to be a civic approach that inculcates a friendly atmosphere. It all culminates into an annual event called Taxpayer's Day in recognition of a voluntary spirit amongst some of the taxpayers.

20 Celebrated on 2 November, for more information consult http://www.kra.go.ke/news/newsurataxweek121205.html, viewed 30 January 2008.

21 On a visit to Senegal in 2002, one of the authors of this paper (Creck Buyonge) was surprised to learn that the customs administration of Senegal, a uniformed force, did not employ women. However, there was very close cooperation between Customs and business.

22 In French, Union Economique et Monétaire Ouest Africaine (UEMOA). UEMOA is a grouping of the following Francophone countries that was established by a Treaty signed in January 1994: Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo. In May 1997, Guinea-Bissau became its eighth member state. UEMOA is a customs union and a monetary union between some of the members of the Economic Community of West African States (ECOWAS). In addition to those in UEMOA, ECOWAS comprises Cape Verde, the Gambia, Ghana, Guinea, Liberia, Nigeria and Sierra Leone (15 member countries in total). The founder members of the East African Community Customs Union are Kenya, Uganda and Tanzania. In December 2006, Burundi and Rwanda were admitted into the Union. Members of COMESA are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Finally, SADC comprises Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

23 For more information consult http://www.kra.go.ke/pdf/publications/manifestmanual.pdf, viewed 30 January 2008.

24 For more information consult http://www.asycuda.org/, viewed 30 January 2008.

25 SIMBA 2005 is an open system, developed with technical assistance from Senegal and using Senegal's Gainde 2000 as a platform. This study in South-South cooperation does not roll back the hopes for interconnectivity between the various IT systems in use by African countries. The United States Agency for International Development (USAID) East and Central Africa Global Competitiveness Hub (ECA Trade Hub) have done a proof of concept on the interoperability of Kenya's SIMBA and Uganda's ASYCUDA – and it worked! As of March 2007, the customs administrations of the Kenya and Uganda revenue authorities were piloting a system of electronic exchange of data to support enforcement. The vision of the Revenue Authorities Data Exchange (RADEX) project is to extend it in order to cover other countries and use IT to track goods movement instead of manual escorts.

26 In December 2006, the Kenya and Uganda governments finalised the joint concession of the two railways to one private sector operator (Rift Valley Railways) for 5 years for transportation of passengers and 25 years for cargo with the support of a World Bank credit under the East African Trade & Transport Facilitation Project. It is still too early to gauge the impact of this change on the efficiency and effectiveness of the railways operations in the two countries.

27 This is in spite of the fact that as part of the quality program implementation by 2004, all EA Revenue Authorities had purchased and installed scanners at all airports.

28 The Report mentions a case of one country where Air Force personnel were present in sea ports. In another case, a Democratic Republic of Congo government agency set up an office in Mombasa to collect levies on Congo-bound goods in transit, apparently without the authorisation or knowledge of the Government. While the traders understood the levy collected in Mombasa as an advance payment, they were charged again for the same goods on importation to Congo. These contradictions will often be encountered in countries in conflict, or those emerging from war.

29 While in transit from one African country to Angola, one of the authors of this article (Creck Buyonge) was met at the airport by customs officials to facilitate transit. There were all sorts of unauthorised persons at the only luggage belt, where one had to pay a fee to get a boarding pass even after purchasing an airline ticket or for transfer of the passenger's luggage from one terminal to another. This country was just emerging from war, and government officials had not been paid their salaries for years.

30 OECD 1998, 'The economic impact of counterfeiting', cited in Robert J Shapiro & Kevin A Hasset 2005, *The economic value of intellectual property*, USA for Innovation, www.usaforinnovation.org, viewed 30 January 2008.

31 WCO, Model provisions for national legislation to implement fair and effective border measures consistent with the agreement on trade-related aspects of Intellectual Property Rights, available at http://www.wcoipr.org/wcoipr/gfx/ModelLawfinal.doc, viewed 30 January 2008.

32 The development of a private sector customs resource is one of the recommendations of the BAFICAA report, as a result of the observation that customs brokers in Africa are often part of the problem of delays, not the solution.

33 It should be borne in mind that most customs administrations in Africa are within integrated revenue agencies, meaning that the motivation to maximise revenue is very high as the key measure for their success is the revenue they collect vis-à-vis set targets. For a recent evaluation of the revenue authority model, see Kidd, WJ & Crandall, M 2006, 'Revenue authorities: issues and problems in evaluating their success' (October 2006), IMF Working Paper No. 06/240, available at http://ssm.com/abstract=944078.

34 The acronym ASYCUDA is derived from Automated SYstem for CUstoms DAta. ASYCUDA was developed by UNCTAD for use by developing country members. See also Endnote 22.

35 Buyonge, C 2005, 'People and technology: preliminary lessons from Kenya's implementation of a new customs information technology system', Paper presented at the Government of Mozambique/Commonwealth Secretariat Workshop on Best Practices in Information Technology and Trade Facilitation Systems, 17-18 August 2005, Maputo, Mozambique (available in the Mozambique Customs website).

36 FIATA, in French 'Fédération Internationale des Associations de Transitaires et Assimilés', in English 'International Federation of Freight Forwarders Associations', in German 'Internationale Föderation der Spediteurorganisationen', was founded in Vienna, Austria on 31 May 1926. This trade association representing freight forwarding and logistics firms, for more information consult http://www.fiata.com/, viewed 30 January 2008.

37 Government of Uganda 1997, The Tax Appeals Tribunals Act, Acts Supplement to the Uganda Gazette No. 81, Vol. XC of 31 December 1997. Section 4(2) of the Act states: 'A person is not qualified to be appointed Chairperson of the Tribunal unless he or she is qualified to be appointed a Judge of the High Court'.

38 The IMO amended the Safety of Life at Sea (SOLAS) Convention and International Ship and Port Security Code (ISPS) after September 11 to provide for various security protocols for port facilities and the qualifications of staff that are working in such facilities.

39 New ICAO rules require advanced despatch of passenger information to the destination airport before departure of aircraft, and greater attention to the physical security of airport facilities through perimeter fencing and presence of armed security to reduce chances of terrorist attacks.

40 Muindi, J-P 2001, 'Implementation of IMO Conventions, Resolutions and Codes in the Eastern and South African Region' during the 14th international symposium on the transport of dangerous goods, Johannesburg, South Africa 3-5 September 2001, www.pmaesa.org/documentation.

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FINDING OUT WHAT'S IN A 'NET FREE-AT-COMMUNITY-FRONTIER PRICE'

Santiago Ibáñez Marsilla

This article has been prepared in the context of a Research Project.[1]

Abstract

In the European Union (EU), antidumping duties are calculated in most cases based on the 'net free-at-Community-frontier price' of the goods. In this paper the relevance of customs valuation rules in determining such 'net free-at-Community-frontier price' is analysed, building on two rulings of the European Court of Justice (ECJ) and a ruling from an English Court.

Introduction

Valuation is relevant in the context of Antidumping Duties (ADD) at two different stages:

First, in order to ascertain whether dumping exists, we need to establish the 'export price' of the goods (that is, the price actually paid or payable for the product when sold for export from the exporting country to the Community) and their 'normal value' (a value usually based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country).[2] Inasmuch as the normal value is higher than the export value, a margin of dumping will be determined to exist. When this dumping causes damage to the European industry, ADD will be established.

Second, once ADD have been established, we need to determine the amount to be paid as a result on each import covered by the ADD Regulation. In this regard, each ADD Regulation can provide a different means to calculate the ADD due. Most of the time, though, ADD are calculated by reference to the 'net free-at-Community-frontier price' of the goods.

Neither 'export price', nor 'normal value', nor 'net free-at-Community-frontier price' are values referred to in the Customs Valuation Code[3] (CVC). Therefore, in principle at least, one could expect that customs valuation rules should have no relevance for ADD purposes. This impression is further reinforced by the CVC itself, since at the General Introductory Commentary it states that the Members recognise that 'valuation procedures should not be used to combat dumping'.[4] Admittedly, the aim of this provision is not to preclude the relevance of customs valuation rules in the field of ADD, but rather to avoid that antidumping considerations might have an impact on customs valuation, which could interfere with the objectives of neutrality and uniformity which are so dear to the CVC. Nevertheless, it also reflects a well established specificity of valuation rules in the context of ADD.

The European Court of Justice (ECJ) rulings

When the Courts have to ascertain the 'net free-at-Community-frontier price' of the goods they find themselves in a very uncomfortable position because there is no legal concept for it and there is not even any further indication about its detailed content. The situation is especially troublesome when the goods have not been imported as a result of a sale and, therefore, there is no 'price' at all, or when the 'price' provided by the importer is not acceptable for any reason, as when it is a related party transaction and the 'price' is not at arm's length. But difficulties are not limited to those extreme cases since there are many

situations where the inclusion of an element in the price can be dubious and the ADD rules provide no guidance to decide whether it is correct to make such inclusion or not.

Facing these difficulties, the ECJ stated in *Nakajima All Precision Co. Ltd v. Council of the European Communities* (case C-69/89, 5 July 1991) that 'anti-dumping duties are imposed on the net free-at-Community-frontier price before duty, that is to say, on the Customs duty (c.i.f. price) of the imports'.[5] With this laconic reference, the ECJ announces that it will rely on customs valuation rules in order to fill this legal gap. The use of customs valuation rules to determine the net free-at-Community-frontier price for ADD purposes is confirmed by the ECJ in *Indústria e Comércio Têxtil* (case C-93/96, 29 May 1997). The Court establishes that 'the free-at-Community-frontier price, to which the anti-dumping duty is applied, corresponds to the customs value of the imported goods, as defined by Article 3(1) of Council Regulation (EEC) No. 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), namely the transaction value, that is to say, the price actually paid or payable for the goods when sold for export to the customs territory of the Community'.[6]

Reliance on customs valuation rules to obtain further guidance in determining the net free-at-Community-frontier price seems to make sense. Customs valuation provisions contain a detailed set of rules that deal with many elements whose inclusion in the price might otherwise cause some doubts. On the other hand, regulations establishing ADD systematically provide that 'unless otherwise specified, the provisions in force concerning customs duties shall apply'. Therefore, ADD Regulations direct us to the Customs Code[7] to complete its provisions, setting a legal basis to apply customs valuation rules to fill the gaps in the expression 'net free-at-Community-frontier price'.

In any case, the ECJ paragraph reproduced above deserves some criticism. It first asserts that 'the free-at-Community-frontier price…corresponds to the customs value of the imported goods'; then it identifies 'customs value' with the transaction value (namely the transaction value); and finally, it identifies transaction value with the price actually paid or payable for the goods when sold for export (that is to say, the price…). The ECJ incurs here an oversimplification. Transaction value is not just the price actually paid or payable for the goods when sold for export, since some adjustments must be made on such price to arrive at transaction value. And transaction value is just one of the methods for customs valuation and therefore it is incorrect to make both concepts equivalent.

Herrera Ydáñez had already warned about the error that is made when identifying the expressions 'transaction value' and 'price paid or payable', when he stated that, 'It must be noted that the expressions "price paid or payable" and "transaction value" are not always coincidental, as it has sometimes been assumed. The confusion could have its root in the fact that Article 1 of the Agreement – on Implementation of Article VII of the GATT – establishes that "transaction value is the price actually paid or payable"; but the definition does not end there, since next, the Article further provides that "adjusted in accordance with the provisions of Article 8" '.[8]

The lack of technical accuracy on the part of the ECJ causes some trouble when trying to ascertain the impact of its reasoning in future cases. It could be argued that the ECJ is limiting the scope of relevant customs valuation provisions for ADD to those that refer to the 'price actually paid or payable for the goods when sold for export', as they have been construed by the authors and the ECJ itself. That is to say, as far as both ADD Regulations and customs valuation rules refer to a 'price', the legal concept for it should be equivalent. Another option would be to extend the scope of relevant customs valuation provisions to those that establish transaction value, and thus the provisions dealing with adjustments to the price should also be taken into account. And yet another option would be to recognise relevance to all customs valuation provisions when determining the 'net free-at-Community-frontier price' for ADD purposes.

In the *Indústria e Comércio Têxtil* case, the issue discussed was the impact of financing arrangements on the price. The ECJ applies the rules on customs valuation according to which charges for interest under

a financing arrangement entered into by the buyer and relating to the purchase of imported goods are not to be included in the customs value, provided that the charges are distinguished from the price actually paid or payable for the goods, that the financing arrangement has been made in writing and that, where required, the buyer can demonstrate not only that such goods are actually sold at the price declared as the price actually paid or payable, but also that the claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when, the finance was provided.

The discussion in the *Indústria e Comércio Têxtil* case refers to the elements that are part of the 'price' (that is, whether or not interests resulting from a financing arrangement are part of the price); it does not extend to adjustments to the price or to the use of different customs valuation methods. Therefore, this case makes clear that the provisions of customs valuation regarding to the price are relevant to construe the concept of price when applying ADD (if they are to be calculated based on the 'net free-at-Community-frontier price'). But, as we have signalled before, it remains to be seen if the customs valuation provisions dealing with adjustments to the price (Articles 32 and 33, Customs Code) and with alternative customs valuation methods (Articles 30 and 31, Customs Code) are also relevant – and to what extent and under which limitations – in the context of ADD.

The *Watchorn* case

The London Tribunal Centre had to address this issue in the *Watchorn* case.[9] Watchorn made imports of Russian ammonium nitrate which, at the time of entry, was subject to ADD. The ADD was calculated as the difference between ECU 102.9 per tonne net of product and the net c.i.f. price, Community frontier before customs clearance.[10] Note that, this being the calculation formula, the higher the net c.i.f. price, Community frontier, the lesser the amount of ADD. By doing so, the ADD Regulation in this case tried to encourage exporters to fix a minimum price equal to ECU 102.9 per tonne. So the importer wanted to uphold a net c.i.f. price as high as possible (at least ECU 102.9 per tonne, to avoid ADD being levied), whereas the Administration tried to argue that this value should be lower.

The Administration wanted to have the net c.i.f. price calculated based on the price in a subsequent sale in the Community and allowing for a deduction of the costs and profits incurred after importation, and based that method of calculation on Article 2.10 of Regulation (EC) 384/96 (the antidumping Basic Regulation), that provides such method of calculation for those cases in which there is no export price or it is unreliable.[11] Note, however, that we are not looking for an 'export price', nor a substitute for it, for that matter – we are looking for a net c.i.f. price. As we have explained before, 'export price' is relevant to determine if there is dumping and to what extent (by comparison with the normal value), and hence, whether an ADD Regulation should be adopted. But once ADD are established, we have to calculate the amount to be levied based on the criteria set by the relevant ADD Regulation, in this case, based on the net c.i.f. price. As the Court observes, 'Regulation 384/96 has a separate and different function from Regulation 2022/95. The former is concerned with prescribing the procedure to be adopted by the EC institutions in establishing an export price for the purpose of adopting a Regulation that imposes ADD. Regulation 384/96 says nothing about the procedure to be followed by national customs authorities in applying such a regulation once adopted. In particular, it says nothing about the determination of c.i.f. prices for the purpose of such a regulation' (at paragraph 13). The Court rules that there is no provision directing the authorities to rely on the valuation methods of Article 2 Regulation 384/96 when determining a net c.i.f. price, and also rejects that they can be applicable by analogy.

Nevertheless, the Court sees that additional valuation rules are needed, if only because 'it is unthinkable that the regulatory framework should fail to cover the situation where no net c.i.f. price exists, either because consignor and consignee are the same person or because the declared c.i.f. price is a sham' (at paragraph 16). That makes the Court turn its eyes to the Customs Code (CC), which contains the set of general rules for the application of the Common Customs Tariff. The Court also observes that, as it

is the case in each ADD Regulation, Regulation 2022/95 provided that 'unless otherwise specified, the provisions in force concerning Customs duties shall apply'. Another argument to resort to the valuation methods established in the CC are the ECJ rulings *Nakajima* and *Indústria e Comércio Têxtil*, to which we have referred above.

The Customs authority resisted this finding. Quite tellingly, they argued that 'Article 29 – CC, which regulates transaction value – in conjunction with the required adjustments referred to in Articles 32 and 33 – is designed to ensure that the transaction value is kept up to an amount, appropriate for ad valorem duty purposes'. Here the rationale of the ECJ's *Chatain* case strongly resonates.[12] According to this view, in applying customs valuation rules, customs authorities must fight under-valuation, but customs valuation rules are not intended to fight over-valuation. In our view, setting aside the merits of such a position under the previous international valuation standard, the Brussels Definition of Value, this interpretation is completely incompatible with the GATT Valuation Code, which intends to establish 'a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values' (General Introductory Commentary); Article 7 further provides that 'No customs value shall be determined under the provisions of this Article on the basis of: …(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values; … (f) minimum customs values; or (g) arbitrary or fictitious values'. Over-valuation results in an arbitrary or fictitious value, which is precluded by the GATT Code; it is also contrary to uniformity. The GATT Code provides many arguments to reach the conclusion that over-valuation, even when it is made on the part of the importer, is not an acceptable valuation.

In this regard, when Articles 2 and 3 regulate transaction value of identical/similar goods, they provide that 'If, in applying this Article, more than one transaction value of identical/similar goods is found, *the lowest such value shall be used* to determine the customs value of the imported goods'. In Annex 1 to the Valuation Code, the Interpretative Notes to Articles 2 and 3 provide (at 5) that 'A condition for adjustment because of different commercial levels or different quantities is that such adjustment, *whether it leads to an increase or a decrease in the value*, be made only on the basis of demonstrated evidence that clearly establishes the reasonableness and accuracy of the adjustments'.

When setting the criteria under which the price in a related party transaction is an acceptable basis for transaction value, Article 1.2 of the GATT Code provides that 'In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted *provided that the relationship did not influence the price*'. Here the Code makes no difference as to the effect of the relationship; transaction value is not applicable whenever the relationship has had an influence on the price, no matter if that influence results in a lower price or if it results in a higher price.[13]

Once it has soundly established that the CC provisions on valuation apply, the Court states nevertheless that 'at all events, recourse to Articles 30 to 33 for ADD valuation purposes, calls for a purposive and adaptative construction of those provisions' (at paragraph 23). For reasons that we will explain below, we completely agree with this finding of the Court. And then it goes on to state that 'the procedures and safeguards cannot, however, be disregarded. The importer is entitled to a measure of legal certainty. He must be accorded his right to choose the order of application of the methods prescribed in Article 30.2 CC', that is, to apply computed value over deductive value. The Court also finds that the customs authorities should have observed the provision in Article 181a CCIP that establishes the procedure and guarantees that apply when the authorities decide to resort to a valuation method other than transaction value when they are not satisfied that the declared value represents the total amount paid or payable. On these grounds the Court decides that failure to comply with the prescribed procedure, set in Article 181a CCIP, invalidates the post clearance demand.

Here we have a very interesting element for our discussion. If, as the ECJ has decided, customs valuation rules are relevant for the determination of a 'net free-at-Community-frontier price', then – the London Tribunal Centre feels – we should all go down the road to conclude that the provisions established

in connection with the customs value determination should also apply in the context of the value determination for ADD purposes and, in particular, those provisions on procedures and guarantees for the taxpayer, such as that found in Article 181a CCIP.

Some reflections

We tend to agree with the findings of the London Tribunal Centre in the *Watchorn* case. In our view, all customs valuation provisions (and not just those referring to the price) should be taken into account when determining the 'net free-at-Community-frontier price'. But, whereas customs valuation provisions and interpretation criteria regarding the 'price actually paid or payable for the goods when sold for export to the customs territory of the Community' can be applied without restrictions to determine the 'net free-at-Community-frontier price', the same cannot be said about the rules providing adjustments to the price and the rules providing alternative valuation methods.

On the one hand, we think that ADD Regulations that direct the authorities to calculate ADD based on the 'net free-at-Community-frontier price', lacking further rules to ascertain such price, must be supplemented by additional valuation rules. And those valuation rules can be no other than those provided for in the Customs Code, that is, customs valuation rules. But as the London Tribunal Centre concedes, 'recourse to Articles 30 to 33 for ADD valuation purposes, calls for a purposive and adaptative construction of those provisions'. And the devil is in the details.

As an example of such 'adaptative construction' needed, we feel that so-called 'assists' provide a good case of an adjustment under customs valuation rules that, in our view, would make no sense in the context of determining the amount of ADD. The concept of 'assist' is laid down in Article 32 of the Customs Code, which provides that:

> In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:
>
> (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:
>
> (i) materials, components, parts and similar items incorporated in the imported goods,
>
> (ii) tools, dies, moulds and similar items used in the production of the imported goods,
>
> (iii) materials consumed in the production of the imported goods,
>
> (iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods;

An example will help us illustrate this idea. Imagine that a European importer supplies the foreign manufacturer, free of charge, with European made chips which are then incorporated into electronic devices which are subsequently imported into the Community. According to customs valuation rules, the transaction value of the electronic devices shall be the price actually paid or payable to the manufacturer of the electronic devices plus the value of the chips (the chips are an 'assist' under Article 32.1.(b).(i) of the Customs Code and, thus, an upward adjustment to the price has to be made). It is counter-intuitive, but the fact is that an element of the goods which was manufactured in Europe (the chips) will increase the value of imported goods (the electronic devices), and therefore will be deemed as imported for customs duty purposes. It is interesting to note, however, that in this case the importer may apply for the outward processing procedure. This procedure would result in a deduction in customs duties equal to the duties that would be levied for the temporarily exported merchandise (the chips), if they were imported

from the country where the goods (the electronic devices) were originating. So the net result for customs duties, when the importer applies for the outward processing procedure, is that duties will be assessed on the total value of the electronic devices (including an addition for the value of the chips) and a deduction equal to the duties applicable to the chips will be granted. (Notice that electronic devices and chips could be subject to different tariffs, so the result would not be the same if we merely assessed duties on the price of the electronic devices without any addition for the value of the chips.)

Now imagine that these electronic devices are subject to ADD, calculated as a percentage of their 'net free-at-Community-frontier price'. If we apply customs valuation rules, including rules on adjustments, to determine the 'net free-at-Community-frontier price', then the basis to calculate the ADD would be the price paid for the electronic devices plus the value of the chips (the 'assists'). However, in determining ADD the importer could not rely on any deduction arising from the fact that the chips were made in Europe, even in the context of the outward processing procedure. This is because Article 590.1 of the Implementing Provisions to the Customs Code (IPCC) provides that 'for the calculation of the amount to be deducted, no account shall be taken of anti-dumping duties and countervailing duties'. Therefore, the importer would be paying ADD on the total value of the electronic devices (including the chips), and the fact that these chips were made in Europe would not affect the amount of ADD to be paid.

What we would have then is that the circumstance that the chips were made in Europe is relevant for the calculation of customs duties, but irrelevant for the calculation of ADD. This does not make sense when we take into account that the purpose of ADD is to protect the Community industry against foreign producers that sell for export to the Community at a price lower than the normal price in their domestic market. It is hard to see how a foreign manufacturer can harm Community producers inasmuch as it is using Community-made inputs. It can harm Community producers underpricing its own manufacturing and foreign-source inputs, but by not charging for the assists that the importer provided free of charge, the exporter can not harm Community producers. Quite to the contrary, Community producers of the 'assists' would be harmed if the fact that an input is made in the Community were irrelevant for the calculation of ADD. If that were the case, the importer would have no incentive to use 'assists' made in the Community. If we apply ADD on the price paid to the seller *and* on the value of the assist, we are applying ADD against a Community input. We would be using ADD to protect Community manufacturers – of electronic devices – against Community manufacturers – of chips – which is absurd.

In our view, an 'assist' made in the Community should not be added to the price for ADD valuation purposes, and so this could well be a case of 'adaptative construction' of customs valuation provisions (the same could be said about royalty payments made to a European company when such royalty payments determine an addition to the price according to Article 32.1.(c) CC). Of course, we have chosen an element we feel quite certain about how it should be dealt with. But, as we have said before, the devil is in the details. Imagine the 'assist' provided by the importer – the chip – was not made in the Community but in Japan. Imagine that antidumping duties are provided for the electronic devices manufactured in China and Vietnam. Should, in this case, the value of the 'assist' be added to the price when determining the 'net free-at-Community-frontier price'? Here we feel rather inclined to decide on the affirmative (and therefore, that ADD should also be levied on the value of the assist). The importer in this case could not rely on the outward processing procedure in respect of the assist, and therefore no deduction would be made for customs duty purposes. It thus seems that there is no need to apply any compensation for ADD either. And we would not be indirectly applying ADD against a Community input; we are now assuming it is a Japanese input. Some practical reasons also favour this decision. Community authorities have supervisory powers over Community manufacturers, but they lack any authority over both Japanese and Chinese manufacturers. How could the Community authorities fight a collusion of Japanese and Chinese manufacturers regarding the relative value of their products?

To make things more complicated, we think that the solution should be different when ADD are calculated based on the difference between the 'net free-at-Community-frontier price' and a minimum target price,

as in the *Watchorn* case. If that were the method of calculation of the amount of ADD to be paid, we think that in determining the 'net free-at-Community-frontier price' both assists and royalty payments should be computed, thus reducing the amount of ADD to be paid. The reason for this different outcome is that the price commanded by the exporter does not include all the costs incurred to produce and sell the goods. The importer in this case will not be able to sell in the Community at the price paid to the exporter plus a mark-up for profit, because the importer will also need to recover the cost of the assists and of the royalty payments. Therefore, the harm to Community producers would not be measured adequately by the difference between the price commanded by the exporter and the target price, but rather by the difference between the total cost of having the imported goods (that is, the price paid by the importer plus other costs such as assists and royalty payments) and the target price.

As a general rule that could be helpful in construing customs valuation rules in the context of ADD, it is important to bear in mind that through ADD we are trying to create a protection against the commercially harmful behaviour of foreign producers. The amount of ADD should reflect the extent to which that behaviour is damaging domestic producers. Inasmuch as it is established that inputs made in the Community are involved, it seems reasonable that no ADD should be levied on that portion of the value of the goods imported, whatever the method to determine the base of the ADD.

Conclusions

In determining a 'net free-at-Community-frontier price' customs valuation rules apply in as far as such expression might not provide enough directions in order to decide whether an element of cost should be taken into account or not. Once we decide that customs valuation rules apply, it should follow that, when that is the case, procedures and guarantees established for customs valuation in respect of customs duties should also apply in the context of valuation for ADD purposes.

However, the applicability of customs valuation rules for ADD purposes produces results which are far from fully satisfactory, since their purpose and design follow a different underlying logic than that of ADD. A case in point has been presented, regarding 'assists' made in the Community, where the automatic application of customs valuation rules would produce undesirable results. If customs valuation rules cannot be applied automatically, and instead an in-depth analysis in light of the purposes and underlying logic of ADD is required in each case, what we get is an important degree of legal uncertainty for all the subjects affected (importers, authorities and judges). It is for the EU Commission to elaborate a legal framework that sets clear rules that ensure uniformity and fairness on this issue.

Endnotes

1 Research Project GV 2007-068.

2 The legal concepts of 'export price' and 'normal value' are laid down in article 2 of Council Regulation (EC) No. 384/96, on protection against dumped imports from countries not members of the European Community.

3 Agreement on Implementation of Article VII of the General Agreement on Tariffs And Trade 1994 (Customs Valuation Code, 'CVC').

4 GATT 1994, CVC.

5 ECJ judgment of 7 May 1991, Case C-69/89, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, ECR 1991 I – 2069, at paragraph 105.

6 ECJ judgment of 29 May 1997, Case C-93/96, *Indústria e Comércio Têxtil,* at paragraph 14.

7 Council Regulation (EEC) No. 2913/1992 of 12 October 1992, establishing the Community Customs Code (referred to as 'Customs Code' or 'CC').

8 Herrera Ydáñez, R 1988, *Valoración de mercancías a efectos aduaneros*, Escuela de la Hacienda Pública-Ministerio de Economía y Hacienda, Madrid, p. 57 (the translation into English in the text is ours). The same idea is expressed in Ibàñez Marsilla, S 2002, *La valoración de las importaciones. Régimen tributario y experiencia internacional*, McGraw-Hill, Madrid, pp. 81-82. In the EU the concept of transaction value is laid down in Article 29 of the Customs Code.

9 Robin Watchorn & Rosemary Watchorn, T/A Robin Watchorn Marketing and The Commissioners of Customs and Excise, London Tribunal Centre, 31 January 2000; 1, 2 and 3 February 2000. This ruling can be obtained at: http://www.financeandtaxtribunals.gov.uk/Documents/decisions/custduties/C00117.pdf.

10 Council Regulation (EC) No. 2022/95 of 21 June 2005.

11 Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

12 ECJ judgment of 24 April 1980, Case 65/79, *Procureur de la République v. Rene Chatain ECR 1980*. For a more in-depth analysis of this ECJ ruling, see Ibàñez Marsilla, S 2002,'La trascendencia de la valoración aduanera en el Impuesto sobre Sociedades. Especial referencia al transfer pricing', *Revista Española de Derecho Financiero*, no. 113, pp. 47-98, especially at pp. 53-63.

13 This seems also the opinion of the US Customs (see 19 CFR 152.103 (1) (2) (ii)), a fact which is relevant when put in relation with the 'uniformity' goal of the GATT Code (especially when there are no good arguments for the case against). Leonard Lehman stresses, in this regard, that customs valuation is not just relevant for duty purposes, but 'for the accurate reporting of the actual value of import trade' (1981, 'New valuation concepts under the trade Agreements Act of 1979', *New York Law School Law Review*, vol. 26, p. 513). However, for us the strongest argument in favour of this view results from a finalist interpretation of the GATT Code as a tool of mutual assurance against a protectionist backlash. In this light, overvaluation is simply unacceptable.

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CUSTOMS AND TRADE FACILITATION IN THE EAST AFRICAN COMMUNITY (EAC)

Edward Kafeero

Abstract

This article expounds and evaluates the contribution of Customs to trade facilitation within the East African Community (EAC). It is developed against the background of trade facilitation as understood by the World Trade Organization (WTO). Hence, it examines *how* and *to what extent* the trade facilitation-related aspects of the WTO are (or are not) reflected in the EAC customs law and administration. The World Customs Organization's Trade facilitation instruments, particularly the Revised Kyoto Convention, are also considered. After scrutinising the EAC customs law and administration, suggestions are made for better coordination, harmonisation and simplification of international trade/customs procedures within the EAC.

I. Introduction

Cooperation in trade liberalisation and development is one of the fundamental pillars of the East African Community (EAC).[1] For this purpose, the EAC Partner States agreed in the EAC Treaty of 1999 'to establish among themselves…a Customs Union, a Common Market, subsequently a Monetary Union and ultimately, a Political Federation.[2] The East African Community Customs Union (EACCU) commenced its operations within Kenya, Tanzania and Uganda on 1 January 2005. Burundi and Rwanda acceded to the EAC in July 2007.

In the EAC, as in many other countries, Customs[3] is on the forefront of the various agencies that intervene in international trade in goods. Customs is, for instance, deeply involved in controlling goods which cross borders, determining goods' nomenclature and origin, and collecting revenue as well as administering trade policies. Hence, the manner in which Customs operates highly affects international trade either negatively or positively. In other words, the manner in which Customs operates can either complicate or simplify the international trade in goods. And this introduces us to the concept of trade facilitation.

There are a number of definitions of trade facilitation used by different authors and different organisations. The United Nations Economic Commission for Europe (UN/ECE), for instance, defines it as a 'comprehensive and integrated approach to reducing the complexity and costs of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practices'.[4] And the International Chamber of Commerce considers Trade Facilitation as relating to improvements in the efficiency of administrative and logistic steps associated with the international trade of goods.[5] Cutting short the list of examples, it is important to stress that many of the various definitions refer to reducing the time and costs of the trade transaction process.

For the scope of this article, the term 'trade facilitation' will be used as defined by the World Trade Organization (WTO) as the 'simplification and harmonisation of international trade procedures; where trade procedures are the activities, practices, and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade' (WTO

1998). In line with this concept and keeping track of the WTO negotiations[6] in this area, this article expounds and evaluates Customs' contribution to trade facilitation within the EAC.

II. Publication and administration of the EAC's customs law

Article X, GATT 1994 provides for publication of trade-related laws, regulations, rulings and agreements in a prompt and accessible manner; restraint from enforcing measures of general application prior to their publication; and administration of the above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and reasonable manner. Thus, it stipulates the institution of tribunals or procedures for the, *inter alia*, prompt review and correction of administrative action relating to customs matters. Fundamentally, all this is aimed at attaining transparency. These provisions are crucial for trade facilitation, for instance, a trader from country A needs to know the relevant trade laws and practices in country B in order to maximise the trade benefits. Moreover, information should not only be available but it should also be simple and easily accessible even to small and medium-sized enterprises (SMEs).

The importance of publication and administration of trade regulations in international trade is even demonstrated by the many disputes revolving around Article X, GATT 1994. These include, for example, the *Japan – Film case*[7] where the panel referred to the *Panel Report on US – Underwear*[8] when interpreting the term 'of general application' as follows:

> …inasmuch as the Article X: 1 requirement applies to all administrative rulings of general application, it should also extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases.

A. Publication of the EAC's customs law

The customs law of the EAC consists of relevant provisions of the EAC Treaty, the *Protocol on the Establishment of the East African Community Customs Union* (EACCU Protocol) and its annexes, regulations and directives made by the Council of Ministers of the EAC, applicable decisions made by the East African Court of Justice, Acts of the Community enacted by the East African Legislative Assembly, and relevant principles of international law.

Many of these customs laws, regulations, judicial decisions and administrative rulings are published. For example, the EACCU itself is established by Article 2 (1) of the EACCU Protocol. And this Protocol is founded on the provisions of Articles 2, 5 and 75 of the *EAC Treaty – 1999.* Moreover, the *East African Community Customs Management Act, 2004* and the *East African Community Customs Management Regulations, 2006* have been published. Though many of the relevant customs laws have been published, provisions of Article X, GATT 1994 are still far from being thoroughly observed within the EAC.

Inadequacy with regard to 'prompt publications' has been observed in the East African Community. For example, while the EAC customs law *officially* came into effect on 1 January 2005, it was *actually* a month later that this law became applicable in Uganda. Commenting on this issue, the Commissioner General of the Uganda Revenue Authority said that Uganda would wait for a month, and the intermediate period would be used for publicity and distribution of the new law to customs staff, clearing agents and importers.[9]

The publication problem becomes even more acute with respect to the manner/mode of publication and the distribution of the published laws. Well, passed laws are officially published in the East African Community Gazette. But, the big question is whether the stakeholders and possible stakeholders have easy access to this gazette. For instance, it was noted during a seminar[10] held in Dar es Salaam (two years after the commencement of the EACCU) that no well-bound copy of the East African Community Customs Management Act had been produced. Such an important Act was on mere pamphlets held by a few 'EAC Customs insiders'!

The few selected examples given above show how Article X:1, GATT 1994 is violated within the EAC, which violation greatly hampers trade facilitation. This author, therefore, maintains that all trade-related laws, regulations, rulings and agreements which affect Customs' processes, conditions and procedures ought to be published and made easily and cheaply available not only via the East African Community Gazette but also electronically (via the Internet) to all stakeholders all over the world.

B. Language

Successful trade effectively requires effective communication. And effective communication requires mastery of language. Article 137 of the *EAC Treaty — 1999* stipulates English as the official language, while Kiswahili is the *lingua franca* of the EAC. Currently, however, almost all EAC laws are available *only* in English – and that is a problem! It is noted here that not all stakeholders are conversant in and with English. There are some traders involved in intra-East African trade, even within Kenya, Tanzania, and Uganda, who cannot adequately understand the legal, administrative texts written in English. In this regard, small and medium-sized enterprises (SMEs) – which are a majority in the EAC – are particularly affected.

Moreover, Rwanda and Burundi have long had French as their official language. It should also be noted that the Democratic Republic of Congo, particularly the eastern part, is a key player in EAC trade. Yet French and Kiswahili are the best medium of communication within that region.

It would, therefore, be a very big contribution to trade facilitation if EAC customs laws were translated into Kiswahili and French. In this connection, Kiswahili should be emphasised, especially for the stakeholders in Uganda. There is already a strong move to popularise Kiswahili in Uganda.[11] This momentum should be maintained.

C. Legal proceedings and appeals

Instituting judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters is another indispensable aspect of transparency which is necessary for trade facilitation. This issue is not only treated by Article X:3, GATT 1994 but also by the Revised Kyoto Convention in General Annex, Chapter 10 and the accompanying guidelines.

It is observed that this important aspect of trade facilitation is catered for in EAC customs law. Cases may not only be settled administratively[12] but also through competent courts within the Partner States. Moreover, by including the provision for the release of goods pending the outcome of the appeal procedures 'upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner,'[13] the legislators in this particular aspect proved committed to trade facilitation.

III. Fees and formalities connected with importation and exportation in the East African Community

It is a fact that fees and formalities connected with importation and exportation can constitute a big hindrance to trade facilitation. Considered here are all fees and charges of whatever character in connection with importation or exportation 'with exception of import and export duties as well as internal taxes within the scope of Article III, GATT 1994'.[14] Such fees, charges, formalities and requirements may relate to consular transactions, such as consular invoices and certificates; licensing; exchange control; statistical services; documents, documentation and certification; analysis and inspection, and so forth.

The existence of some of these formalities and charges is, of course, justifiable. For example, the second interpretative note to Article VIII, GATT 1994 recognises that requiring the production of certificates of origin is not *as such* inconsistent with the Article in question. However, 'the production of certificates of origin should only be required to the extent that is strictly indispensable' (the emphasis is mine). In short, Article VIII seeks trade facilitation by reducing non-tariff fees and charges and other procedures – especially when they are applied in a protectionist manner. Fees and formalities as understood within the context of Article VIII, GATT 1994 can also be a hindrance to trade facilitation within the East African Community as will be further elaborated.

A. Official fees and charges

There are fees and charges contained within the EAC customs law, which are qualified in this article with the word 'official'. Such fees contain, for instance, overtime fees (Regulation 6, *EAC Customs Management Regulations, 2006*), fees for cautionary visits (Regulation 8), fees for Customs revenue (Regulation 9), licence fees (Regulation 217), and fees for services to the public (Regulation 216) as indicated in the table below.

Table 1. *Fees for services to the public*

Service or Certificate	**Fees**
Certification of a copy of any document	US$5.00
(b) Insurance of a landing certificate, for each original entry in which goods are entered	US$10.00
Transhipment	US$10.00
Transfer of ownership	US$10.00
Issuance of certificate of weight for a consignment	US$5.00
Approval of alterations in the marks, numbers or other particulars in any document submitted to Customs, other than an inward manifest	US$5.00
Cancellation of entries	US$10.00
Issuance or certification of any other certificate or document issued by Customs	US$5.00
Amendment of an inward report	US$10.00

Source: EAC Customs Management Regulations 2006

These fees and charges may not necessarily contravene Article VIII, GATT 1994 and may not necessarily hamper trade facilitation. There is even a provision in Chapter 3 of the General Annex to the Revised Kyoto Convention that addresses the issue of fees and charges for additional services. This is Standard 3.2, which stipulates that any expenses for customs procedures outside the designated business hours or away from a customs office may be chargeable by Customs. But there is a caution that the amount of such charges should be limited to the approximate cost of the services rendered. While the abovementioned official fees and charges may be justifiable, there is certainly a real problem with regard to non-official ones.

B. Non-official fees and charges

Despite the fact that some EAC Partner States signed the World Customs Organization (WCO) *Arusha Declaration,* which is a fundamental tool of a global approach to preventing corruption and increasing the level of integrity in Customs, corruption is still rampant within EAC Customs. And non-official fees and charges are some of the indicators of corruption. Bribes are paid by traders at various levels of the trade transactions. Worse still, some East African stakeholders seem to be so much used to corruption

that they consider it normal![15] Bribes may be paid to Customs officials to shorten the process of clearance so as to have a quicker release of goods. Some officials in charge of licensing (which is part of EAC customs law) may ignore some cumbersome processes if they are offered a bribe, and so forth. Such fees do not only hinder trade facilitation but also undermine the very spirit of genuine East African cooperation.

In the last ten years, however, there have been some attempts to improve integrity in Customs within the EAC. In this connection, some integrity seminars and workshops have been conducted by the respective revenue authorities of the Partner States. In 2001 for instance, an integrity workshop was conducted at the launch of a new ethics and anti-corruption campaign, during which the Ethics and Integrity Committee was created in the Uganda Revenue Authority.[16] In May 2005, Kenya also held workshops on integrity and, since then, Kenya Revenue Authority embarked on a nationwide integrity sensitisation and training program.[17]

At a general and regional level, the Kenya Anti-Corruption Commission, the Inspectorate of Government of Uganda and the Prevention and Combating of Corruption Bureau of Tanzania launched the East African Association of Anti-Corruption Authorities (EAAACA) on 9 November 2007. The Anti-Corruption agencies of Rwanda and Burundi are also expected to join shortly. The main aim of the association is to cooperate in preventing and combating corruption in the East African Community.[18]

In an effort to enhance integrity in EAC Customs, full use of the integrity instruments developed by the WCO is recommended. These instruments include the Revised Arusha Declaration, the Integrity Development Guide and the WCO Compendium of Integrity Best Practices. Moreover, commitment to the Nairobi Resolution on Integrity, which was signed by the participants of the High Level Workshop on Integrity in East and Southern Africa Region (held in Nairobi, Kenya from 20-23 February 2007), is needed.

Enhancing integrity is a long term goal. Many of the initiatives to enhance integrity such as those mentioned above, are commendable and should be carried forward. Further, it is suggested that some initiatives should be extended to primary schools, secondary schools and tertiary institutions for it is there that future customs officials are educated. Also of great importance is the improvement of enforcement mechanisms in such a way that culprits of corruption are actually made to pay for all the losses and injuries they cause.

C. Procedures and formalities

The performance of trade procedures involves not only Customs but also other agencies such as freight forwarders, insurers, immigration authorities, police, plant inspectors, bankers, brokers, standards institutes, health, port authorities, and many more. However, the procedures and formalities treated here are those in which Customs is particularly involved.

Apart from the provisions of Article VIII:1(c) of GATT 1994, it should be noted that the *Revised Kyoto Convention* has a lot to offer to trade facilitation through its key standards, principles and best practices that contribute to the simplification and harmonisation of customs procedures and formalities. Such procedures and principles include standardised and minimum requests, minimum intervention and the use of risk management, separation of release from clearance, audit-based control, maximum use of information and communication technology, specially simplified procedures for authorised traders, and cooperation with other agencies as well as cooperation with foreign counterparts.

1. Legal Framework

Turning to the East African Community, one cannot fail to observe that many of the WTO/WCO trade facilitation principles, standards and recommended practices regarding import and export procedures and formalities have been incorporated in the EAC customs law. For instance, Article 6 of the EACCU

Protocol enumerates some basic strategies through which trade facilitation can be realised. These strategies include:

- reducing the number and volume of documentation required with respect to trade among the Partner States
- adopting common standards of documentation and procedures within the EAC where international requirements do not suit the conditions prevailing among Partner States
- regularly reviewing the procedures adopted in international trade and transport facilitation with a view of simplifying and adopting them for use by the Partner States
- promoting the development and adoption of common solutions to problems in trade facilitation among Partner States.

Additionally, the East African Community Customs Management Act, 2004 borrowed many of the principles, standards and recommended practices contained in the Revised Kyoto Convention such as transit (Sections 85-87), inward and outward processing (Sections 167-170), application information technology (Sections 187-192), export processing zones (Sections 167-170), and many others.

At a practical or implementation level, there is much being done albeit with some difficulties. An exhaustive description of the status quo with regard to 'tangible' harmonisation and simplification of customs procedures and formalities in the EAC would certainly go beyond the scope of this article. Thus, in the following paragraphs, only the outstanding strategies and actions are considered.

2. Information and Communication Technology

Maximum use of information and communication technology (ICT) is very important, *inter alia*, for efficient clearance procedures, uniform application of customs law, effective implementation of risk management, efficient revenue collection, effective data analysis and efficient production of trade statistics.[19] In July 2005, Kenya introduced the new Customs Reform Modernisation program (also known as *Simba 2005*). Tanzania and Uganda use ASYCUDA++.[20] In the ICT sector, the Rwandan Revenue Authority is also performing well. These ICT systems have contributed a lot, for instance, by reducing the time for clearance and release. Electronic filing of customs documents has been introduced, document processing (in Kenya) has been centralised, and the level of transparency has generally increased.[21] *Simba 2005* and ASYCUDA++ are *essentially* interoperable but using one ICT system in the whole EACCU would certainly be better. Moreover, it would be worthwhile to study other ICT systems used elsewhere, which might work better in future for the whole of the EAC.

3. Simplified procedures for authorised traders

The use of risk management and audit-based control makes *specially* simplified procedures available for traders that are authorised by Customs at a certain level of compliance with regulations. Chapter 3 (Transitional Standard 3.32) of the Revised Kyoto Convention set some specially simplified procedures which are:

- release of minimum information
- clearance at the declarant's premises
- periodic goods declaration
- self-assessment of duties and taxes by using own commercial records
- lodgement by entry in the corporate records.

Simplified procedures for authorised traders are already (to some extent) in use within the EAC. The use of ASYCUDA++, which classifies imports depending on their risk under 'Green', 'Yellow' or 'Red', already allows automatic release of goods for compliant traders. Imports which are labelled 'Yellow' are then subjected to scanning and then proceed for release or physical verification.

Additionally, with regard to the recent global developments in Supply Chain Security initiatives,[22] EAC Partner States may be said to implement the Authorised Economic Operator (AEO) program albeit at different stages. While the AEO program is still at a conceptual level in Rwanda and Uganda, Tanzania is implementing a 'Compliant Trader Scheme' (focused on revenue only), and Kenya is already at a pilot stage of a full AEO program (Buyonge 2007). In summary, it is noted that there is a considerable need for cooperation at a regional level such that procedures concerning authorised traders are harmonised within the EAC.

4. The Single Window concept

It has been reiterated that there are different agencies that intervene in international trade. If, for example, inspection of goods is undertaken separately by different border agencies, or if an importer has to present different documents (worse still, in paper form) to different agencies, it is clear that a lot of time *and money* is wasted in those procedures. That is why the Single Window concept, whereby a trader submits the required information *once* to a single designated authority (preferably Customs) for multiple purposes can be a great instrument of trade facilitation.

With regard to inter-agencies' cooperation, there is certainly much that needs to be done in the EAC. In Kenya, for instance, import/export inspection and certification procedures involve many government bodies which include Customs, Kenya Bureau of Standards, Kenya Plant Health Inspectorate, Pest Control Products Board, the Ministry of Agriculture and the Ministry of Livestock Development. These bodies do not collaborate adequately. This causes duplication of functions and wastage of resources thereby hindering efficiency in trade. And the situation is not very different in the other East African countries. The Single Window concept (preferably at the EAC level) would therefore be desirable.

As some authors have suggested,[23] the Single Window concept needs to be supplemented by the *One Stop Shop* which allows the performance of all necessary checks, controls, and administrative formalities at the same place, at the same time. With the finalisation of setting regional standards (in December 2007) and the foreseen centralisation of customs collection at the first point of entry,[24] there is hope that a Single Window will be developed and implemented in the EAC.

IV. Transit within the East African Community

'Freedom of Transit' is the title given to Article V, GATT 1994. This Article defines 'transit' and provides for freedom of transit, regulation of traffic in transit (urging Members to avoid unnecessary delays or restrictions), setting reasonable charges and regulations for traffic in transit, non-discrimination – with regard to like products as well as air transit of goods. It is clear that some of these transit issues[25] go beyond the strictly Customs domain. The following paragraphs will put more emphasis on those transit aspects in which Customs is strictly present, which have not yet been addressed in section III above, and which have a significant impact on trade facilitation in the EAC.

Unfortunately, transit procedures are some of the troubling non-tariff barriers to the intra-EAC trade. The fact, for instance, that there are differences in axle load and Gross Vehicle Mass amongst EAC Partner States leads to a situation whereby Tanzanian trucks transiting through Kenya, en route to Uganda, have to strip off excess cargo to avoid financial penalties for overloading. Of course, this is costly in terms of time and money. Moreover, Kenyan demand for a customs insurance bond (about US$200 per 20-foot container) on transit goods destined to Uganda, Rwanda and Burundi affects traders,[26] and one wonders whether such an amount would violate Article V:4, GATT 1994.

Delays at roadblocks are also a reality in the EAC. This is mostly connected with the corruption issue which was elaborated above. Many traders report that police officers stop vehicles with goods in transit at various roadblocks, yet officially, they are only supposed to stop vehicles based on proof that goods being transported are suspicious. Additionally, although this is an infrastructural problem and hence, out

of the scope of the concept of trade facilitation followed in this article, it is noted that transit is very much affected by the poor transport systems in the region.

However, there are some positive developments in the region which are related to transit. The establishment of the Malaba joint border post (on the Kenya/Uganda border) is a good example of improved coordination and cooperation amongst authorities in the EAC. Moreover, with the credits from the World Bank (approved on 24 January 2006), there is progressive improvement in transit matters in the EAC through, *inter alia*, the setting up of more joint border posts.

V. Conclusions

In his opening speech during the World Customs Forum 2007,[27] the Secretary General of the World Customs Organization, Mr Michel Danet, referred to trade as an 'international public good to be safeguarded and facilitated'. This view, also shared by this author, is not only remaining in international discussion forums but also gradually pervading Customs in the EAC. Hence, taking into consideration the relevant provisions of the World Trade Organization, as well as other international 'champions' of trade facilitation such as the Revised Kyoto Convention, Customs in the EAC is slowly but surely getting involved in trade facilitation.

So far, many commendable strategies have been taken by Customs in the EAC, and some of these have been addressed in this article. At this juncture however, a few points must be stressed. The establishment of a unified *East African Customs Authority*[28] by 2010 can lead to trade facilitation only if there is a formidable amendment of EAC customs law so as to enable better coordination among all stakeholders in all the EAC Partner States. It is also advisable that such reform makes use of the various WCO trade facilitation-related instruments.

Finally, the current efforts to develop an EAC Customs Curriculum[29] are laudable for there are some EAC-specific aspects that need to be handled. In this regard, one cannot but think of *integrity* and the *dissemination of information*. More commitment is needed.

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Endnotes

1 *EAC Treaty - 1999*, Article 74.

2 *EAC Treaty - 1999*, Article 5, p. 15.

3 Chapter 2 of the *General Annex to the Revised Kyoto Convention* defines 'Customs' as the Government Service which is responsible for the administration of Customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.

4 UN/ECE 2002, Trade facilitation in a global trade environment (Advance copy), Forum on Trade Facilitation, Committee for Trade, Industry and Enterprise Development, TRADE/2002/21, 21 March 2002, para. 43, p. 15.

5 WTO July 2007, Discussion Paper: Updated International Chamber of Commerce Recommendations for an Agreement on Trade Facilitation.

6 It should be noted that all the EAC Partner States are also Members of both the World Trade Organization and the World Customs Organization.

7 WT/DS44/R, Report of the Panel, 31 March 1998, *Japan - Measures affecting consumer photographic film and paper.*

8 WT/DS24/AB/R, Report of the Appellate Body, 10 February 1997, *United States - Restrictions on imports of cotton and man-made fibre underwear.*

9 *The Daily Monitor,* 6 January 2005.

10 Seminar title: 'Support to the Harmonisation of Trade and Customs Policies of the East African Community', 6-10 November 2006, Dar es Salaam, Tanzania; Organised by *InWEnt gGmbH.*

11 'Leaders to learn Kiswahili', *Sunday Monitor*, 1 August 2007.

12 See Section 219, *EAC Customs Management Act, 2004*.

13 See Section 229 (6), *EAC Customs Management Act, 2004*.

14 See Article VIII, GATT 1994.

15 One of the traders interviewed by this author put it simply: 'You bribe (Customs) and prosper or you stick to the ethical principles and perish!'.

16 De Wulf & Sokol 2004.

17 See KRA homepage.

18 http://www.kacc.go.ke/WHATSNEW.ASP?ID=97, viewed 11 April 2008.

19 See Chapter 7 of the *Revised Kyoto Convention*.

20 The acronym ASYCUDA is derived from Automated SYstem for CUstoms DAta. The system was developed by UNCTAD for use by developing country members.

21 Buyonge 2007, pp. 55-62.

22 For more information about AEO, see the Framework of Standards, adopted by the WCO Council in 2007.

23 Lux & Malone 2006.

24 The EAC Development Strategy 2006-2010.

25 For example, in paragraph 2, Article V, GATT 1994.

26 The Gross Vehicle Mass is 54 tonnes (in Kenya), 46 tonnes (in Uganda) and 56 tonnes (in Tanzania). See EABC, *Proposed mechanism for the elimination of NTBs in EAC*.

27 WCO 11-12 December 2007, World Customs Forum 2007/WCO SAFE Framework of Standards, Brussels, Belgium.

28 The EAC Development Strategy 2006-2010.

29 Rwanda Revenue Authority 2008, *Revenue Magazine*, no. 20, p. 45.

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KEY CONTROLS IN THE ADMINISTRATION OF EXCISE DUTIES

Rob Preece

Abstract

With a general reduction in import tariffs, governments are placing increasing importance on excise taxation as a means of generating a reliable stream of sustainable income. Further, excise is playing a greater role in broader government policies as a form of taxation which can be used to influence consumption of certain products, generally on health or environmental protection grounds. Thus, the effective collection of excise duties is becoming a high national priority in many countries.

This paper examines 'key controls' in ensuring that excise revenues are properly managed. These controls centre on the requirements to license all excisable dealings and for licensees to properly record and report against relevant activities relating to these dealings. The relationship between the excise system, the associated risks and these key controls in a successful excise administration is examined.

Defining an excise system

For the purposes of this paper, the term 'excise' relates to an indirect form of taxation which is applied to a narrow base of goods (and often services) which are primarily 'luxury' or 'consumer based' in nature. Excise taxation is common throughout most countries, being an important component of their overall tax systems.

Excise taxes are classified by the Organisation for Economic Co-operation and Development (OECD) as being those taxes which are:

> levied on particular products, or on a limited range of products…imposed at any stage of production or distribution and are usually assessed by reference to the weight or strength or quantity of the product, but sometimes by reference to the value.[1]

Excise is not a value added tax (VAT) or sales tax, which the OECD differentiates by reference to the application of such taxes (and tax credits for business inputs) at each stage or tier within the supply chain, as well as a generally broader tax base.[2] Excise is not usually levied instead of such taxes but rather, levied in addition to such taxes.

This paper recognises that in many countries the term 'excise' is not used, rather we see similar commodity and service-based taxes which meet this OECD classification for excise being known by their local titles, for example, 'Consumption Tax'[3] or 'Special Consumption Tax'[4]. In some cases these taxes may have a very limited base or be specific to a single type of commodity such as a 'Fuel Tax'[5] or a 'Tobacco Tax'[6]. The term 'excise' as used in this paper should be considered as including each country's taxes that are classified as an 'excise' by the OECD.

Excise can also be levied on imported goods, in which case they are often referred to as 'like goods', that is, ' or goods', that is, which are like those domestically manufactured goods subject to excise. Excise

duties in this context are generally collected by the local Customs agency at the time they are declared at importation, along with any customs duties and VAT. Under the OECD classification of taxes, where an excise duty is to be collected from imported goods, it is not considered to be a 'customs' duty, but is considered to be an excise tax.[7]

This does raise an interesting issue as the traditional 'Customs and Excise Department' is slowly being replaced by two separate entities: a customs agency with increasing border security focus, and an inland revenue agency with responsibility for revenue collections including excise taxes and VATs. Notwithstanding this, wherever excise duties are applied to 'like' goods, both the relevant legislation, and the administration of this excise by the appropriate agency, should mirror those which apply to the equivalent locally produced excisable good.

This requirement stems from Article III of the General Agreement on Tariffs and Trade (GATT), which provides for the same treatment to be afforded to domestically produced goods as that being applied to like imported goods, 'so as not to afford any protection to domestic production'[8]. Therefore, in this context and for the purposes of this paper, it is assumed that consistency is in place between domestically produced excisable goods and like imported goods in terms of:

- excise duty rates
- concessions to excise duty rates
- administrative and other compliance requirements, such as reporting, registration, licensing, duty payment arrangements, etc.
- expectations in terms of compliance standards.

What are the major components of an excise system?

All excise systems across the world are slightly different in terms of commodities and services taxed, the manner of taxation, the rates of excise and the taxing point. However, the basic objectives of an excise system are universal in that all excise duties due and payable should be properly brought to account and paid by the due date.

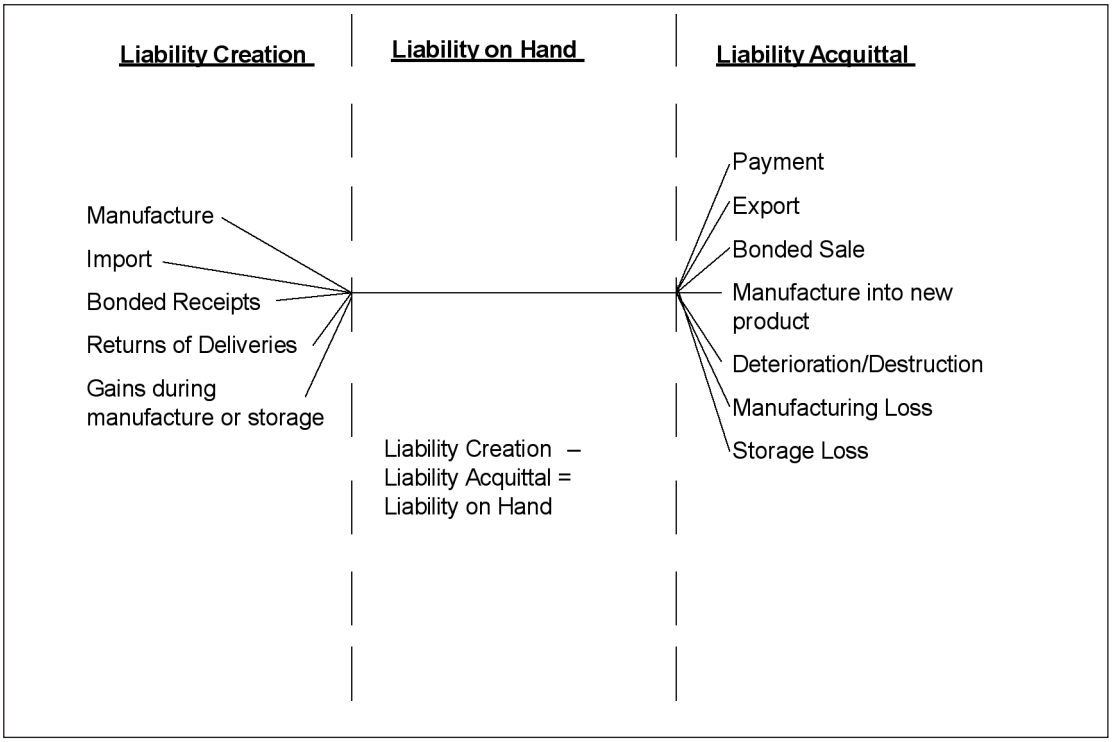
To begin examining the relationship between this objective and the key controls of an excise system which is the purpose of this paper, it is necessary to first break down a typical excise taxation system into three critical areas of operation: excise liability creation; excise liability on hand, and excise liability acquittal. Figure 1 'Tracking excise liabilities' is a diagrammatical representation of these three components and their relationship.

Figure 1 below breaks down the excise taxation system into the three components identified. The first component comprises the creation of excise liabilities. An entity within the excise system can create an excise liability in one of several ways, including:

- domestic manufacture or production of goods which are subject to excise. The situation however, may be somewhat different for services, in which case the liability may not actually be created until the service is performed
- import of 'like' goods which are subject to excise
- receipt of excisable goods from other bonded entities in which the excise liability has been transferred from that other entity
- returns of goods from the market place for which the entity has paid excise or is liable to pay excise but for which that excise or excise liability can be credited or refunded and the goods placed back into a bonded status
- gains in product volumes during either the manufacturing or storage operation.

Once an excise liability has been created, the entity holding that liability needs to be able to either properly acquit the liability or be able to account for that liability in the form of stock on hand or expected losses. Acquittal of excise liability can occur in many different ways, but primarily it is the good or service passing through the 'taxing point' and appropriate excise duties being remitted by the licensee.

Figure 1. *Tracking excise liabilities. Source: Preece.*



The taxing point can be described as the 'trigger', or the point at which the legislation provides for the liability over the excisable goods or services to be recognised and brought to account for the purposes of payment of the appropriate duty. Whilst excise duty may not be reported and paid at the time the goods pass the taxing point, such as in systems that offer deferred or periodic settlement of duty, passing the taxing point will serve to confirm the following factors:

- the rate of excise in force for the calculation of the duty
- the accounting period for which the excise duty liability must be reported
- the due date for reporting the liability
- the due date for excise duty payment.

The taxing point will vary from excise system to excise system and will be aligned with how the government views the tax. If excise is viewed locally as a 'production tax' or 'manufacturing tax', then the taxing point will be closer to the place of manufacture, for example, delivery from the production area into storage, delivery from licensed excise manufacturer's premises, or collected with any import duty at the time of importation. Alternatively, if excise is viewed more as 'consumption tax', then the taxing point is more likely to be at a point where the good or service enters the market for retail sale, perhaps at the end of a long supply chain.

Dependent upon local excise laws and administrative arrangements, excise liabilities may also be acquitted in several other ways. The nature of manufacture often gives rise to loss or waste of materials during production and it is common to find systems in which otherwise excisable goods can be 'written off' if they are lost, destroyed or laid to waste as part of the production process and will not be entering the domestic market for sale or consumption.

Similarly, the storage of excisable goods can also see damage, destruction and other forms of deterioration which result in those goods being sent on commercial grounds for some form of destruction or recycling processes, rather than being delivered into the market. In addition, the nature of some excisable goods will see other forms of production and storage losses such as evaporation, spillages, and pipe and tank dregs that are generally seen in volatile liquids like petroleum fuels and alcohol.

The notable aspect of such losses is that the excisable goods involved will not be delivered into the domestic market and as such may give rise to an acquittal of the excise liability which had attached to the goods upon their production or importation.

A final area of excise liability acquittal comes from other sales or transfers of excisable goods and services which acquit the liability by way of those goods meeting some prescribed conditions over their end-use or destination. In terms of end-use, certain prescribed end-uses may give rise to an acquittal of excise liability including use of a raw material input in the production of a non-excisable good, or the use of the product in a manner that the government does not intend to be excisable. Perhaps the best example of these circumstances arises for distilled spirits, in which consumption as a beverage is to be subject to excise, however, distilled spirits as a raw material input to the manufacture of paint, lacquers, dyes, aerosols, etc., should not be so taxed. Alternatively, there may be an excise on motor vehicles, however, certain vehicles such as ambulances, fire-fighting trucks, or vehicles used by say, the police force are exempt from excise, and upon fulfilling the specifications of such a delivery, the liability is acquitted.

Sales of excisable goods and services may also be exported to off-shore markets in which case, in the absence of any export duties, excise duties are not generally payable or are 'zero rated' or 'exempted'. The basic principle which is followed in many excise systems is that if the good or service is not to be consumed in the domestic market, then there will be no excise payable. The confirmation of export status in such cases will acquit any liability. Sales of excisable goods may also be made to other entities that deal in excisable goods and have the necessary licensing and approvals to receive excisable products from manufacturers or importers. Such parties may be:

- regional wholesalers sitting down the supply chain supplying retailers, and who will pay the excise
- other manufacturers who will value add or undertake some further processing over the goods
- duty free shops for departing passengers or foreign tourists, or
- ship and aircraft catering service providers, supplying stores for ships and aircraft undertaking international voyages.

In these situations however, it should be noted that the excise liability is actually being transferred to another entity rather than being acquitted from the system altogether. Thus the excise liability in this situation is being transferred 'off the books' at one business and 'on to the books' at another business, thus simultaneously re-establishing in a new location the same liability as was acquitted. In some jurisdictions, this type of liability transfer is not 'simultaneous' rather the controls around the transfer will have one entity retaining the liability right up to the point where that liability is indeed accepted into the books at its destination.

Key controls operating in an excise system

Having broken down the excise system into the three components: excise liability creation; excise liability on-hand; and excise liability acquittals; and then having further identified the objectives for an

excise system, we can begin to look at what are considered the key controls in use by administrations to meet their objectives. To facilitate this discussion, we will follow Figure 2 below, which attempts to illustrate the relationship between the components of the excise systems and relevant key controls. In this case, these key controls are considered to include the licensing or registration of all excisable activities, and then the preparation of records and accounts for reporting those excisable activities to the relevant agency.

Figure 2. *Key controls in excise administration. Source: Preece.*

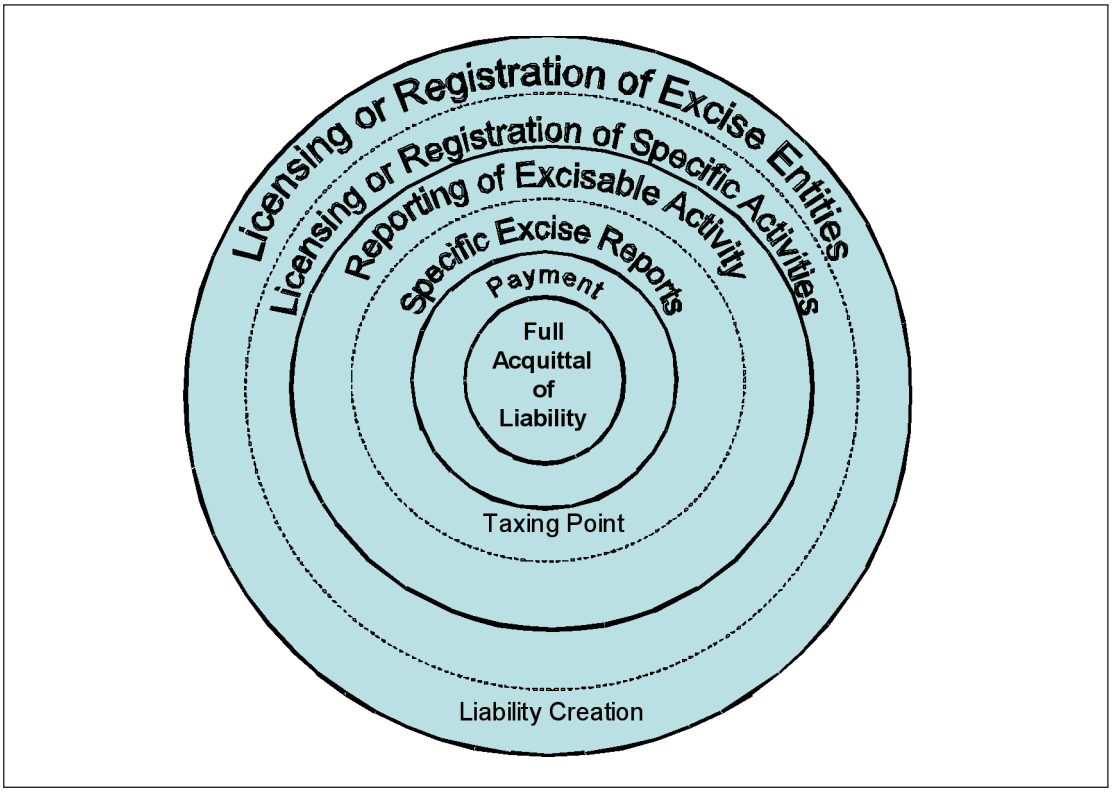


Figure 2 comprises a circle with several layers, with the outermost representing all excise liabilities created in the tax system. The layers move inwards to the point where we have full acquittal of all of the excise liability which has been created.

The layers in between represent the different layers of control which then apply as activities such as manufacture, storage, sales and deliveries occur, as well as identifying the points where excise duties become payable and are paid.

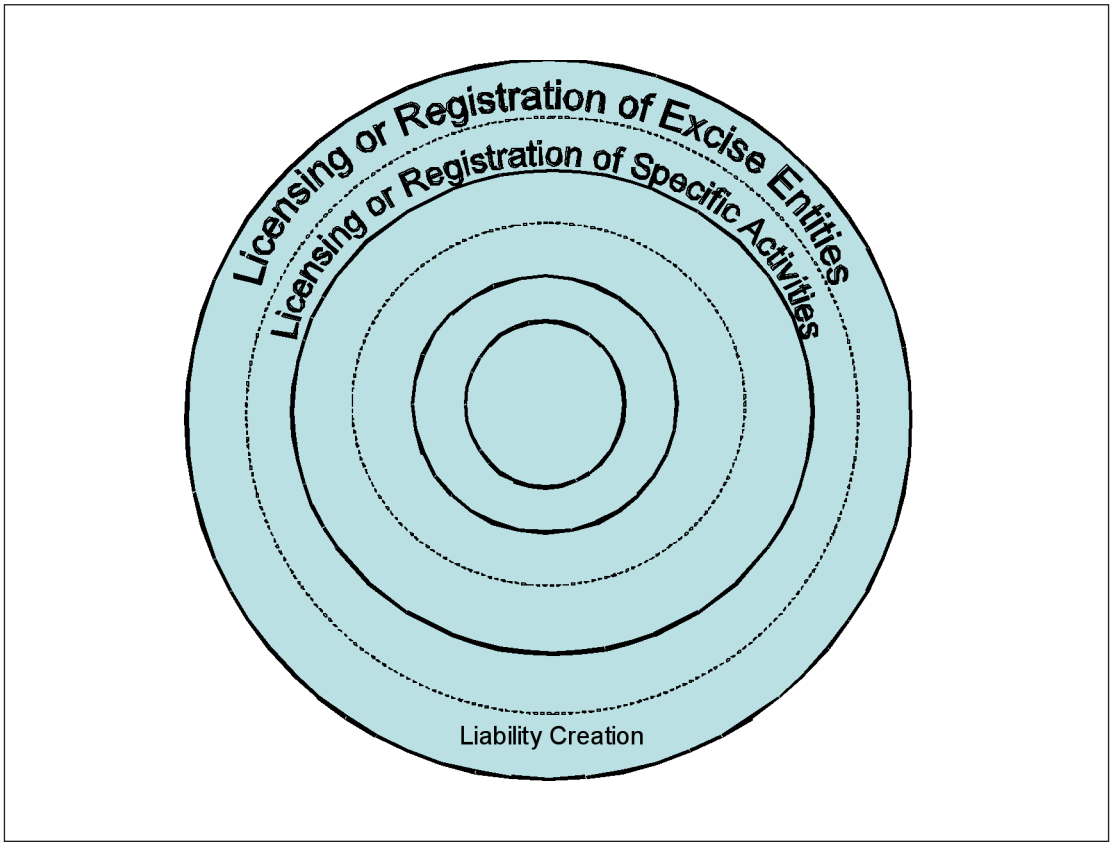
As mentioned above, the outermost layer represents all excise liabilities created within the system, be that by manufacture, importation, service delivery, bonded receipts or gains in product. In response to the need to identify all excise liability creation, the primary control in an effective excise administration is to apply a licensing or registration regime in which all those dealing with excisable goods first require such licensing or registration to do so.

In terms of use of the description 'dealing in excisable goods', it is contemplated that this applies to all activities including manufacture, import, storage, performance, and delivery, being brought into a registration system. Dealing in such excisable goods without the necessary registration or licensing then generally becomes a criminal offence against the relevant legislation.[9]

Licensing as a control

In having a legal requirement for all entities dealing in excisable goods to be registered, licensed or in some way identified, the administering agency has full knowledge as to who is operating within the excise system and therefore will be creating excise liabilities.

Figure 3. *Primary control of excise activity. Source: Preece.*



The outer circle itself is then divided in two, the outermost ring capturing the primary control of requiring all excise activity to be licensed or registered, and the innermost ring providing for a range of 'subsidiary' controls relating to the licensing regime. These subsidiary controls assist in the operation of the primary licensing control by restricting licenses or registrations to specified goods or specified activities.

The concept of this primary control of licensing is to ensure that all excise liabilities which are created can be identified, be that through manufacture of excisable goods, delivery of excisable services, import of excisable goods, or other acquisitions. The control operates primarily from the administering agency having full knowledge as to where excisable operations are taking place for the purposes of monitoring and tracking any liabilities which are created.

The actual 'granting' of such registration or licensing contributes to the effectiveness of the control by way of a 'review process' in which the adequacy of the applicant as a licensed entity within the excise system is assessed. The review process over the application enables the administering agency to reject an applicant who may pose an unacceptable risk of non-compliance and loss of revenue. Alternatively, the agency can ensure modifications are undertaken to any part of the applicant's operations it considers to be an unacceptable risk of non-compliance and loss of revenue.

Figure 4 below is an extract from the Australian excise system, in which the criteria for seeking an excise license are prescribed within the *Excise Act 1901*. The Australian Taxation Office, as administering agency, will grant or refuse an excise license based upon prescribed criteria.

The Australian excise licensing system would be considered quite rigid in the context of many other excise-type licensing or registration systems, and places considerable onus on the applicant to demonstrate that they are a bona-fide business with the full set of resources and skills for dealing in excisable goods. Further, that both the business and key personnel have sound compliance records in all taxation matters, and that there are no other aspects that put the excise revenue being generated by the business at risk of not being paid or being paid late.

Working with this over-arching control of licensing are any number of subsidiary controls such as the ability to then restrict or condition in some way, the operation of that license with a view to protecting the excise revenue.[10] At the first level, a license or registration can be issued against a tight scope, or in practical terms, issued for a specific activity, a certain location, a sole commodity, or a sole service delivery, any of which serve to further reduce risks to the revenue. For example, licences can be issued on the following basis:

- a single excise activity such as distillation of spirits, refining of crude oil, supply of lottery tickets, recycling of motor vehicle tyres, etc., and
- to be conducted at a single business address or location, such as a street address.

Alternatively, a single business with operations across the whole supply chain may have a licence issued for that purpose. For example, take a motor vehicle company involved in all aspects of the supply chain, a licence could be issued in the following manner:

- to a single business entity, and
- for the manufacture, movement, storage and sale of excisable cars, and
- for the manufacturing plant, the storage depots, the regional distribution depots, and perhaps the car dealerships where orders for sales are taken from customers and new vehicles delivered for delivery to those customers.

The result of scoping licences in this manner is to restrict the applicant to a single activity, or single range of related activities, at known and identifiable locations. The objectives of such restrictions are to allow administering agencies to control the nature of operations that will be conducted and to be able to reconcile such risk factors as the nature of the business applying for a licence against the type of operation for which the licence is sought.

Apart from setting the scope of a licence or registration, the licence or registration itself can then be further conditioned. These conditions will also form part of the outer ring (or primary licensing control) as shown in Figure 2, providing further subsidiary controls to the licensing or registration process designed to mitigate risks of revenue loss. Again, these conditions can be made specific dependent upon the applicant or the nature of the applicant's business.

Common forms of licence or registration conditions could include:

- the creation and maintenance of business records to a standard set by the administering agency, and which are capable of demonstrating compliance, and/or
- full and free access being available to those records, to the premises licensed, to the production machinery, to relevant apparatus such as flow meters, gauges and scales, and to any raw materials, partly manufactured goods and finished goods on the premises, and/or
- notification of changes to relevant operational matters such as replacement of key personnel, financial systems, measuring equipment or any other material change, and/or
- the lodgement of some form of documentary (or cash) security relating to the size of potential excise liabilities, to be held in the event of revenue loss from the licensed entity.

Figure 4. *Section 39A, Excise Act 1901, Commonwealth of Australia, pp. 24-25.*

Who can be granted an excise license in Australia?

39A It is in the Collector's discretion whether to grant licence

(1) The Collector may grant, or refuse to grant, a licence.

(2) Without limiting subsection (1) but subject to subsection (3), the Collector may refuse to grant a licence if, in the Collector's opinion:

(a) where the applicant is a natural person—the applicant is not a fit and proper person; or

(b) where the applicant is a partnership—any of the partners is not a fit and proper person; or

(c) where the applicant is a company—any director, officer or shareholder of the company who would participate in the management or control of the company is not a fit and proper person; or

(d) a natural person who would participate in the management or control of the premises in relation to which the licence is sought is not a fit and proper person; or

(e) where the applicant is a company—the company is not a fit and proper company; or

(f) the applicant is an associate (within the meaning of the *Income Tax Assessment Act 1997*) of a person who is not:

(i) a fit and proper person; or

(ii) a fit and proper company; or

(fa) if the applicant is a natural person—he or she does not have, and he or she does not have available to him or her, the skills and experience to carry out the activity that would be authorised by the licence; or

(fb) if the applicant is a company—the company does not have available to it the skills and experience to carry out the activity that would be authorised by the licence; or

(g) in relation to an application for a manufacturer licence or storage licence—the physical security of the premises in relation to which the licence is sought is not adequate having regard to:

(i) the nature of the premises; or

(ii) the kinds and quantity of goods that would be kept at the premises; or

(iii) the procedures and methods that would be adopted by the applicant to ensure the security of goods at the premises; or

(h) in relation to an application for a producer licence or dealer licence—the physical security of the storage place on the premises in relation to which the licence is sought is not adequate having regard to:

(i) the nature of the storage place; or

(ii) the quantity of tobacco leaf that would be kept at the storage place; or

(iii) the procedures and methods that would be adopted by the applicant to ensure the security of tobacco leaf at the storage place; or

(i) in relation to an application for a manufacturer licence or storage licence—the plant and equipment that would be used in relation to goods at the premises in relation to which the licence is sought are not suitable having regard to the nature of those goods and the premises; or

(ia) the applicant would not have a market for goods of a kind the licence would relate to; or

(j) the applicant would not be able to keep proper books of account or records to enable the CEO adequately to audit those books or records; or

(k) in relation to an application for a storage licence—the grant of the licence would delay liability for duty; or

(l) refusal to grant the licence is necessary to protect the revenue.

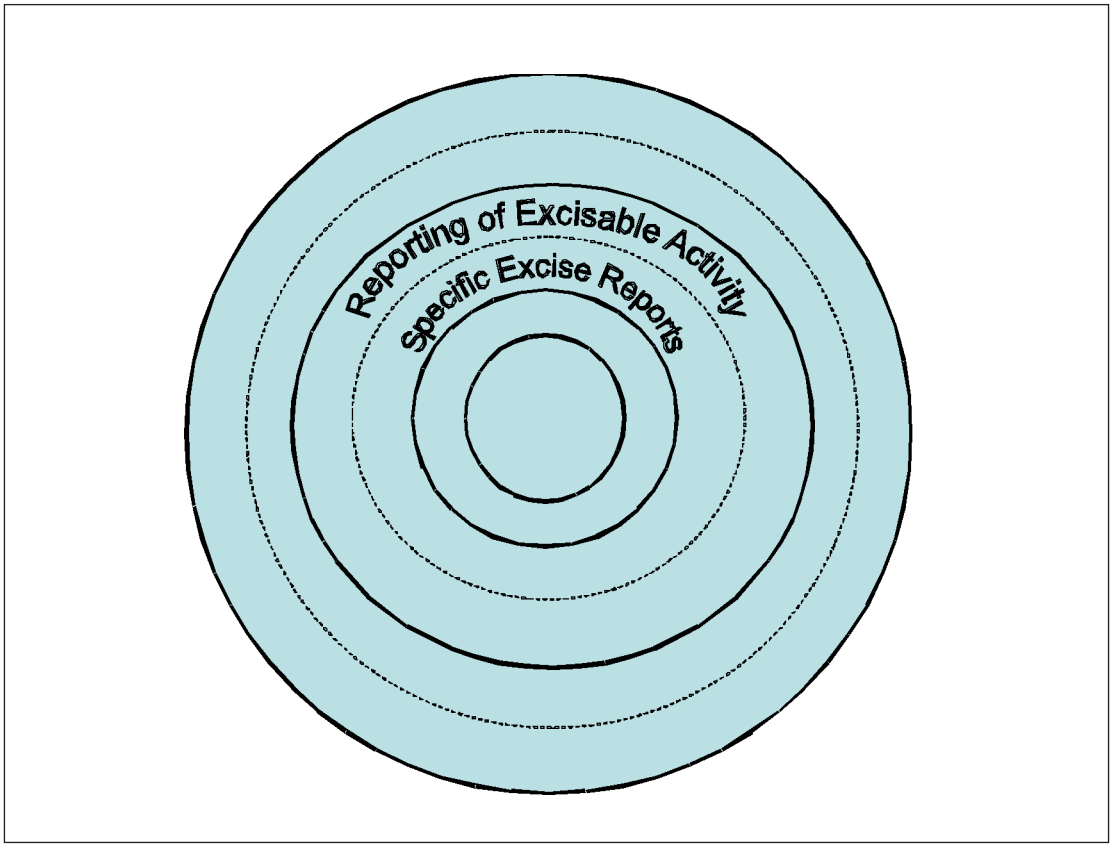
Recording and reporting

Returning to Figure 2, we then move inwards towards the centre of the circle into the second ring and examine the key control of licensees reporting on their excise operations. This form of control relates to what information the licensee will capture and record for the purposes of reporting to the administering agency.

These types of reports are used for tracking excise liabilities as we saw in Figure 1, and monitoring the risks to that excise liability as it moves from creation to acquittal. The process of reporting licensee operational details is being made simpler for both industry and revenue agencies with the increasing use of electronic returns based upon, or created directly from, the licensee's usual commercial records.

In Figure 2, this key control of licensee reporting is again separated into an outer ring which sets the objective, the control being in this case the legal or administrative requirement to make reports to the relevant agency, and an inner ring which then requires those reports to relate directly to the nature of the excise dealings.

Figure 5. *Reporting of excise operations. Source: Preece.*



In looking at the sorts of activities to be monitored in this way, the main areas of activity which we expect to have some form of monitoring will relate to the three key components of an excise system as we examined in Figure 1, that is, excise liability creation, excise liability, excise liabilities on hand, and the acquittal of excise liabilities.

In terms of reporting against excise liability creation, we need to consider the means by which that liability is created. Looking at the detail of Figure 1, we established that such liabilities are created

through: the manufacture or production of excisable goods and services, import of excisable goods, receipts on bonded stock, or through gains. In terms of reporting in this context, the issue becomes one of establishing the right liability that has been created and now sits accurately in the licensee's records.

For liability creation originating from imports of finished excisable goods or receipts of finished excisable goods from other licensees, that liability can be reconciled fairly comfortably through reference to the relevant transactions conducted with the local Customs agency (possibly the same agency administering excise), or reference to the records of the business that has despatched the finished goods.

The issue of liability creation from manufacture is somewhat different and more complex. The objective in such circumstances is to be able to reconcile raw material inputs to final production of excisable goods. Many factors make this a difficult process and these factors include:

- the nature of the raw material, for example, how much sugar is in the fruit being fermented to make liquor
- whether there is wastage of raw materials as part of the production process
- whether there are losses of raw materials, partly manufactured or manufactured products as part of the production process, such as liquids left in pipes or tanks
- the efficiency of the production process, that is, can all raw materials be recovered
- whether there are processes such as sampling for quality control, sampling for fill, sampling for strength, etc., which require finished goods to be consumed as part of the overall manufacturing process.

Figure 6 below represents an excise report which monitors production for the purposes of ensuring all liabilities from manufacture are captured. In this case, Figure 6 relates to the distillation of spirits in Belize.[11]

Using Figure 6, we can see that the records to be kept by distillers facilitate the reconciliation of raw material inputs, in this case a mash of material for fermentation, a 'wash' of fermented material for distillation, and the resultant spirit from distillation. The purpose of such records allows officials to find a ratio of fermentable materials to a fermented wash, or how much fermented ethyl alcohol is produced during the fermentation process. From this point, the alcohol present in the final distilled spirit product can be compared with the alcohol present in the fermented wash that went into the distillation.

Whilst we would expect variations in ethyl alcohol produced from batch to batch as raw materials are fermented, the ratio of fermented alcohol to raw material inputs should become clear over time. Indeed, we should see a range of expected production where a specified amount of raw materials is used. Deviations from that expected range would see the licensee called to account as it could mean the potential for undeclared production. Likewise, the expected efficiency of the distillation operation will become apparent over time as the amount of alcohol recovered in distillation is compared with the amount of alcohol in the fermented mash which was put into the distillation process. Again, deviations from the expected range of alcohol recovery in the still could mean undeclared production.

These same principles will apply to the manufacture of any excisable goods; in particular, where raw material and other inputs can be measured against final production figures and efficiencies in production established.

The types of records we see at Figure 6 deal exclusively with production, and as such are likely to be associated only with that component of the licensee's business. Once excisable goods are manufactured (or imported) as finished goods, a number of activities are likely to occur in which the liability created is subsequently acquitted, transferred or written-off in some way. For licensed manufactures this information would then be recorded separately. As a result, we generally see finished goods from production (from a Figure 6 type record) being translated into a Figure 7 type record which we will now discuss.

Figure 6. *Record Book, Schedule 2, Excise Regulations Act Revised 2000.*

PERIOD FROM … TO:

WASH ACCOUNT:

Wash set up:
b. Date
b. Number of vat
b. Number of gallons
b. Density before fermentation
b. Temperature of wash

Wash attenuated:
b. Density after fermentation
b. Temperature of wash
b. Number of degrees attenuated
b. Date
b. Number of vats distilled
b. Gallons of wash distilled

SPIRIT ACCOUNT:

Spirit Manufactured:
a. Liquid gallons from still
a. Strength
a. Number of proof gallons
a. Average attenuation of wash
a. Return of proof spirits per cent of wash per 5 deg. of attenuation

Signature of Distiller:
Signature of Excise:

a. To be filled in by the proper officer when delivering spirit from receiver to distiller.
b. To be filled in by or on behalf of the distiller as the respective operations proceed.

Figure 7 below is a generic return dealing with the movements of excisable goods in and out of a licensed warehouse in the United Kingdom[12] – be that part of a manufacturing operation or a separate stock warehouse operation. The return itself tracks liability by starting with an opening balance for the accounting period, then adding to that liability from the different categories of receipt. For example, using the fields from Figure 7, we see excise liability being created from production (as per our discussion on Figure 6 above), imports, gains, transfers in from other bonded warehouses, or adjustments.

Liability is then deducted through various categories such as duty paid deliveries into the home market, exports, diplomatic sales, losses, and destructions of stock. This leaves a closing balance of liabilities for the accounting period, a balance that can, if desired, be verified through physical means such as a stock take.

Payment of excise and acquittal of liabilities

The final component we need to look at in the tracking of excise liabilities is the area of liability acquittal. From Figure 1 we know that excise liabilities can be acquitted in several different ways, and we see how these can apply through the reporting requirements such as those outlined in Figure 7 below, as there will be an auditable relationship between say, item 10 'Home (duty paid)' and duty payment reports; item 11 'To export…& ship stores' and export declarations; and item 14 'To other duty free uses' and duty payment reports.

As such, we now move into the innermost rings of Figure 2 circle which relate to the controls over excise duty payments and final acquittal of excise liabilities. It is also important to note that certain deliveries past the taxing point may in fact not give rise to an excise payment, for example, goods or services classified as having a 'free' rate, or some other concession which effectively reduces the rate to zero. Such goods and services may include exports, ship's stores, diplomatic sales, or sales to government. In support of these types of excise free sales, reporting of such deliveries over the accounting period is still required and allows for monitoring by the local excise administering agency.

As a result of this, the ring in Figure 2 titled 'Payment' relates to all goods and services passing the taxing point with the actual 'taxing point' indicated as being located at the edge of these two inner rings. Once all the excise liabilities which have been created have been brought properly to account either through proper payment, export, destruction, etc., then we have moved into the centre of the circle and achieved our main excise tax system objective of full acquittal.

On a licensed premise by licensed premise basis, liability is acquitted by either the goods or services passing the 'taxing' point and being brought to account with appropriate payment of excise duties, or the liability being in some way 'written-off' through losses, destruction or deterioration of goods whilst they are still within the licensed premises. Alternatively, liability can be acquitted at the individual licensee operation by the effective transfer of that liability to another licensed party – although for the excise system as a whole, the liability remains and a new risk is created through these liability transfers and further discussion appears later.

The principal liability acquittal mechanism will be the goods or services passing the taxing point and triggering the requirement for the liability to be brought to account and remitted. Just exactly when this liability is brought to account and remitted will depend on local excise law, but increasingly this process is self-assessed and the reporting and payment of excise duties relating to deliveries of goods and services are performed periodically.[13] However, in many jurisdictions some excisable commodities, or some excise licensees, are required to 'pre-pay' excise prior to the taxing point. In fact, they cannot deliver such goods past the taxing point unless the excise duty has been paid.

This approach can be achieved through several means. Firstly, the licensee may need to make some form of declaration or return relating to excisable goods intended to be delivered, pay an amount of excise duty relating to those intended deliveries, and await some form of clearance or other authority that delivery can take place.[14] This could, for example, be upon assessment as to the accuracy of the return, or perhaps the clearance of funds when paid in the form of a cheque.

The alternative approach to 'pre-payment' is through a tax strip stamp system, such as that shown as an illustrative example in Figure 9 below,[15] in which licensees again estimate deliveries, calculate their excise liabilities, acquire tax strip stamps to that value and affix them to individual product packaging

Figure 7. *HM Revenue & Customs Stock Return.*

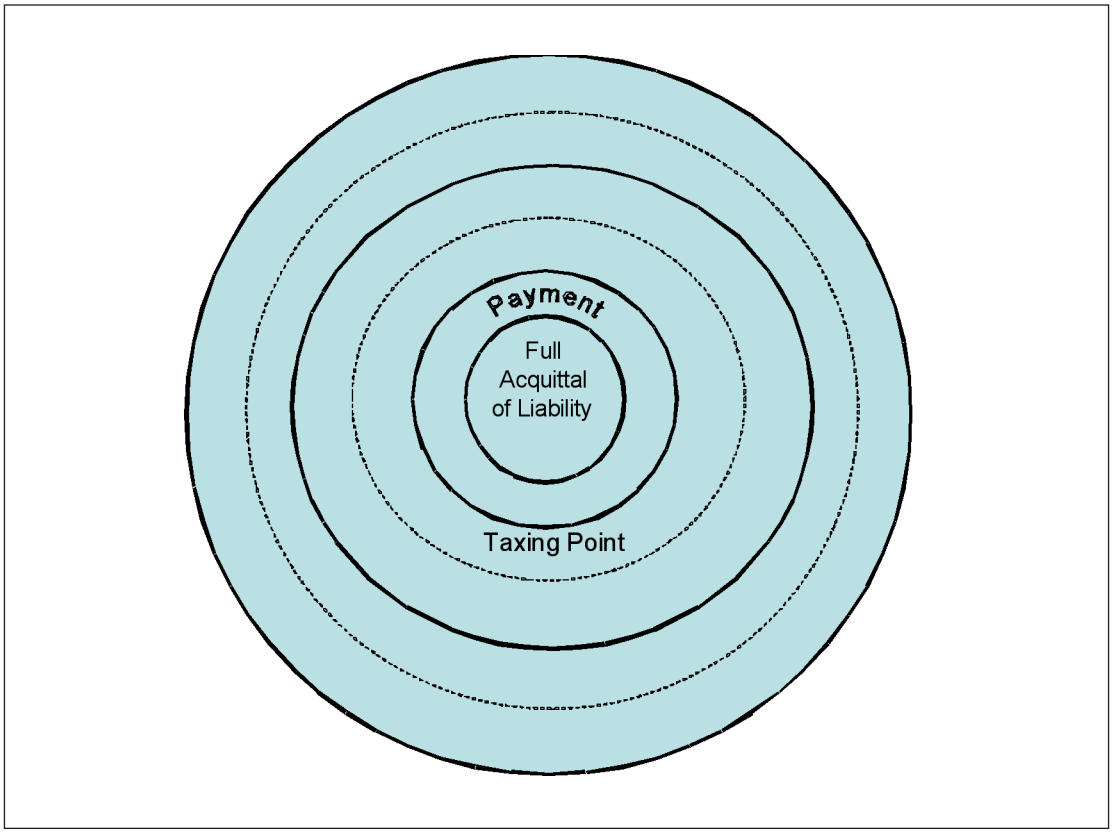
		Section B Stock Return		
Classification				
Unit of Measure				
		Number of cases	Number of units	Quantity
Stock in w/h at start of period				
Adjustment	1			
Reason for adjustment	2			
Receipts for period				
From importation (non EU)	3			
From EU	4			
From UK production sites and other w/h	5			
Other	6			
Gains storage	7			
Increases from operations	8			
Removals during period	9			
Home (duty paid)	10			
To export (outside EU) & ship stores	11			
To other UK w/h	12			
To EU	13			
To other d/f uses	14			
Losses allowed in storage	15			
Reductions/losses from ops	16			
Authorised destructions	17			
Stock in w/h at end of period	18			

prior to delivery. Tax strip stamps are most popular with tobacco and alcohol products which by nature are subject to high tax rates, and are vulnerable to high levels of tax evasion, but can be used for other commodities.

The main objective of the use of tax strip stamps is as a control over tax avoidance, although their use has been extended to controlling counterfeit products. The tax strip stamp is both a means of reconciling taxes paid against volumes of excisable product leaving a bonded warehouse and as a real time indication as to whether a product in the marketplace has had the appropriate tax paid.

At least 40 countries employ strip stamps on excisable products for anti-avoidance (and anti-counterfeiting) purposes. Their use is limited to a small range of excisable goods, and within this narrow range, there are often further limitations such as liquor of a certain strength.[16] The main exception is the United Kingdom which recently introduced tax strip stamps for all liquor exceeding 30% alcohol by volume,[17] on the basis of combating tax fraud. However, the use of such tax strip stamps is in decline with the advent of greater self assessment of tax liabilities supported by fully automated reporting and processing systems.[18]

Figure 8. *Payment and full acquittal of liability. Source: Preece.*



In such self assessment based excise systems, pre-payment is not the preferred form of excise reporting and payment, rather excise liabilities are reported and paid on a periodic basis. This means that licensees operate to an accounting period for which any deliveries past the taxing point are reported for that period, and this report and associated payment of excise are filed on a due date set for each accounting period.

To illustrate this point, Figure 10 below comprises the 'schedule' (or working sheet) which forms part of a periodic excise payment return. Figure 10 is an extract from the schedule to the 'Automobiles and Non-essential Products' return,[19] as required by the Philippines Bureau of Internal Revenue, relating only to the deliveries of excisable non-essential goods. Note that the licensee is reporting both taxable and non-taxable deliveries on a quantity and value basis, and the final 'total excise tax due' will become a single line liability reported on the actual excise return main page.

The extent to which reporting deliveries occurs depends on the local excise administration. However, there are several common key objectives in any such excise payment return. Firstly, the total excise duty due and payable needs to reconcile with the physical payment made by the licensee, whether that be by an electronic transfer, cash or cheque. Secondly, the administering agency can use the detail relating to volume or values of the differing types of deliveries to remotely monitor the nature and extent of both excisable and concessional sales with a view to establishing norms in such sales. Finally, there are statistical objectives, allowing agencies to monitor revenue receipts and sales across industry sectors, like operations, or across the entire excise system.

With the nature of excise duties, particularly as they relate to manufacturing and distributing goods, there will be a need for adjustments to these periodic return amounts. Whilst it is common in the compilation

Figure 9. *Tax strip stamp example.*

of any type of tax return to find errors and omissions for adjusting, excise manufacturers in particular are also dealing with issues such as:

- incorrect deliveries such as incorrect stock, or incorrect volumes or quantities selected to fill orders
- returns of stock due to those reasons above, or due perhaps to a fault or deficiency in the product, or customer simply seeking a return and refund
- incorrect classification of deliveries such as domestic sale being classified as an export, an end use requirement not being fulfilled, or a required end user not taking delivery
- failures in recording and measuring systems detected such as pipes, flow-meters, gauges or scales
- incorrect delivery date reported causing payment to occur in wrong accounting period
- the goods deteriorate, perish, break or otherwise become unsaleable.

These adjustment issues are generally addressed in two ways. Firstly, allowing for the adjustment to apply to the excise return for the current (or to a future) accounting period being reported. If we return to Figure 10 below, we can note the provision in the excise return document which permits the making of adjustments which will impact on the excise payable on the current return. Notwithstanding, as with any details provided on an excise return, the statements need to be supported by appropriate records to substantiate the adjustments being sought.

Alternatively, a document separate to a return could be required in which the licensee seeks application for the administering agency to grant a refund of excise payable. This refund could be payable to a nominated bank account, by cheque, or by a credit of excise tax which can be applied against a future excise payment. This process is also used in those situations in which excisable goods have not been delivered and the licensee wishes only that the relevant liability be 'written-off' their books.

In those jurisdictions in which a separate application process is in place, they will also require a similar process for licensees to make any increasing adjustments or provide for those situations where additional excise duties need to be reported and paid. Here, similar errors and circumstances to those listed above have actually caused under-payments of excise which need to be declared and remitted.

In terms of refunds, credits, or write-off of excise duties, it is generally a requirement that the licensee has to meet various criteria or be subject to certain conditions in order to be granted an excise refund or credit.[20] Often these criteria are prescribed in law, and are designed to ensure that excise refund policy is not 'under-writing' poor business or commercial decisions. As excise can often be a major cost component of the price of such goods, easy access to full refunds does remove certain risks from a business.

Figure 11 below is an extract from the Canadian application for an excise refund,[21] a process which requires the applicant to provide the nature of the circumstance or situation which gives rise to the entitlement. The extract provides for our information, the list of 'eligible reasons' for which a refund can be sought.

Returning to the issue of transferring liabilities, we had identified this as both a means of acquitting excise liabilities (and creating a new excise liability), and as a risk to the revenue within the excise

Figure 10. *Extract – Excise Tax Return and Schedule for Automobiles and Non-Essential Goods.*

EXCISE TAX RETURN for AUTOMOBILES & NON-ESSENTIAL GOODS
Part III PAYMENTS AND APPLICATIONS

					Amount
16	Excise tax due				
17	Less: Balanced carried over from previous return	17A			
	Creditable excise tax, if applicable	17B		17C	
18	Net tax due (overpayment)			18	
19	Less: Tax paid on returns previously filed for the same period, if amended			19	
20	Tax still due/(Overpayment)			20	
21	Add penalties				
	Surcharges	21A			
	Interest	21B			
	Compromise	21C		21D	
22	Amount payable			22	
23	Less: Payment made today			23	
24	Balance to be carried over to next return			24	

Schedule

	Summary or removals and excise due on:						
			No. Units	No. Units	Sell Price Mk Value	Sell Price Mk Value	Excise Tax Due
ATC XG	**Non-essential products**	**Rate**	**Exempt / Un Bond**	**Taxable**	**Exempt / Un Bond**	**Taxable**	
100	Jewelry, Pearls, Precious and semi-precious stones	20%					
110	Perfumes and toilet waters	20%					
120	Yachts and other vessels for pleasure or sport	20%					
	Total Tax Due						

system. This risk relates to the ability or otherwise to properly track the excise liabilities in the same manner we track liability through a licensed business operation from manufacture to distribution.

In other words, one licensee may acquit their excise liability by way of a bonded sale to another licensee, however, that licensee identified as the customer never receives or accepts into their accounts this new excise liability. Whilst one licensee may have acquitted their liability, our excise taxation system as a whole still has excise liabilities to manage (see Figure 2). It is simply that another licensee has taken possession of that liability and it requires the agency to be able to track this, if required.

As such, we will look at one final type of excise report which relates to the effective transfer of excise liabilities between licensed entities. Such reporting is generally performed prior to the transfer occurring on a 'permission' basis, such as in Figure 12 below which comprises a permit for the moving of excisable goods within the Republic of Indonesia.[22] The permit provides sufficient details which evidence an acquittal of excise liabilities from the nominated licensee despatching the goods, and further provides details as to which licensee will be subsequently creating in their records that same liability. The permit also involves a degree of accountability, with the permit holder responsible for the excisable goods moving in accordance with their permission, including the arrival at the nominated destination.

Figure 11. *Extract – Application for Refund/Deduction of Excise Taxes, Canada.*

CANADA REVENUE AGENCY

APPLICATION FOR REFUND/DEDUCTION OF EXCISE TAXES

Enter the reason you are eligible for a refund/deduction of taxes.

· Export of vehicles
· Refund of tax where foreign taxes paid or where
· Payment where warranty
· Exported goods products for sale in foreign duty free shop (tobacco only)
· Use as ships' stores
· Goods in inventory at time of licensing
· Diesel fuel used in the generation of electricity
· Use by province
· Subsequent exempt sale
· Tax paid in error
· Eligible bad debts
· Motor fuel purchased by diplomats
· Drawbacks
· Other

Note: Only one "Reason for Refund" may be used per application.

It has been recognised that with the growth in trade of excisable commodities, single movement permit arrangements are a hindrance to business and a drain on the resources of administering agencies.

However, the area of movements of excisable goods remains, universally, a high risk to the revenue, and so other options have been developed to address these issues.

The European Union has these risks multiplied somewhat by the permitted movement of excisable goods across national borders. Its response has been to propose the construction of a computerised system in which licensees would enter details of excisable movements allowing for both real time surveillance of these movements and the ability to enhance enforcement-related activities such as inspections and verifications.[23]

Figure 12: *Republic of Indonesia Permit to move excisable products between licensed premises.*

Central Excise Series

Permit for transport of un-manufactured products on which duty has not been paid

Shri/Messrs.....holder(s) of Licence No.....is/are permitted between .....(hrs.) on the..... day of .....(month) in the year ..... and (hrs.) on the ..... day of (month) in the year..... to transport together from Shri/Messrs.....(Name, address and Licence No.) to Shri/Messrs..... (Name, address and Licence No.) the under-mentioned goods:

Number of packages:
Description of packages:
Marks and Numbers:
Description:
Tariff Classification:
Gross weight:
Net weight:
Manner of transport:
Route:
Place:.....Date:

Signature:
.....of Central Excise

Alternatively, where certain risk factors can be mitigated, a 'blanket' type permit can be granted to a licensee to move excisable goods between agreed licensed locations.[24] Such a system introduces a degree of continuity for businesses, whilst allowing risks to be managed through the process of assessing both the licensee seeking the approval, and each of the licensees nominated for receipt of the applicant's excisable goods. Details of each individual movement, as say, in Figure 12 below, are maintained in the records of both the despatcher and receiver for later compliance activity.

Conclusions

To conclude, we return to Figure 2 which outlines the relationship between the risks in administering a successful excise system and the key controls of licensing and licensee recording and reporting. We see that it is important to identify all liabilities entering the excise system, and this is achieved primarily through the legal requirement to register or license all excisable dealings. In this way the relevant body administering the excise system has knowledge of or about all those entities which will be creating excise liabilities. With this knowledge in place, the appropriate recording and reporting of those activities provide for the ability for administering agencies to track these liabilities from creation to acquittal, with the further ability to monitor and identify potential risks to the revenue from any aspect of the excise system.

Endnotes

1 OECD 2004, Classification of taxes and interpretative guide, paragraph 61, classification sub-heading 5121.

2 OECD 2004, Classification of taxes and interpretative guide, paragraphs 53-58, classification heading 5100, sub-headings 5110-5113.

3 In addition to a broad-based Value Added Tax, China has a Consumption Tax applicable to refined oil, motor vehicles, motor cycles, tyres, skin care products, certain wood products, watches, golf products, tobacco, and liquors.

4 In addition to a broad-based Value Added Tax Viet Nam has a Special Consumption Tax on liquor, tobacco, motor vehicles, refined oil, beverages, air conditioners, playing cards, gambling, golf memberships, massage and karaoke.

5 Australia has a Fuel Tax in addition to a Goods and Services Tax, whilst Chile has a Fuel Tax in addition to its Value Added Tax.

6 Chile has a Tobacco Tax in addition to the Value Added Tax.

7 OECD 2004, Classification of taxes and interpretative guide, paragraph 62, classification 5123.

8 Paragraphs 1, 2 and 4 GATT Article III 'National Treatment on Internal Taxation and Regulation'.

9 For example, Section 10 *Excise Act 2001* (Canada); Sub-section 8(1) *Excise Act 2058* (Nepal); Section 16 Sales Tax, *Customs & Excise Act 2000* (Bhutan); Sections 60 *Customs & Excise Act 1964* (South Africa); Section 26 *Excise Act 1901* (Australia); etc.

10 See examples of the authority for the making of conditions for excise licenses, as follows: *United Provinces Excise Act 1910* Part I Chapter VI (Uttar Pradesh India); *Excise Act 1958* sub-section 5(2) (Nepal); *Excise Tax Law 2001* Part II Article 5 (Montenegro); *Excise Act 1901* Section 39D (Australia).

11 See http://www.customs.gov.bz/excise_regulations.pdf.

12 See http:customs.hmrc.gov.uk/channelsPortalWebApp/downloadFile%3FcontentID%3DHMCE_CL_000452.

13 Traditionally, excise factories had a permanent Customs or Excise officer located on site for which all receipts and deliveries were processed by this officer. This arrangement does still exist in some countries for certain commodities, for example, petroleum refineries in Thailand, but is becoming rare.

14 Both the United States Alcohol & Tobacco Tax & Trade Bureau, and the Australian Taxation Office have a dual payment 'pre-payment' and 'periodic payment' system, with higher risk operations or non-compliers likely to be restricted to a pre-payment/ pre clearance arrangement.

15 Tax strip stamps, revenue stamps or fiscal stamps are common to central and eastern Europe, many Asian jurisdictions and becoming increasingly common in Africa.

16 United Kingdom House of Commons *Hansard* 30 March 2004, see 'Spirits tax'.

17 The Duty Stamps (Amendment of Paragraph 1(3) of Schedule 2A to the *Alcoholic Liquor Duties Act 1979*) Order 2006.

18 See, for example, the United States which in 1985 repealed its 1954 tax stamp legislation for marking distilled spirits.

19 See ftp://ftp.bir.gov.ph/webadmin1/pdf/107792200%20AN(Aug)%20complete.pdf.

20 Apart from Canada Figure 6, see also, for example: Regulations 60-64 Customs & Excise Regulations 1996 (New Zealand); Regulation 50 Excise Regulations 1925 (Australia) paragraphs (1)(a) – (1)(zzd); or beer under Sub-part T, clauses 25.181 – 25.284 Code of Federal Regulations (United States); or Central Excise Rules 2002 / Export of Service Rules 2005, Customs and Central Excise Duty Drawback Rules 1995 (India).

21 See http://www.cra-arc.gc.ca/E/pbg/ef/n15/n15-06e.pdf.

22 See http://www.beacukai.go.id/en/cukai/status.php.

23 Decision No. 1152/2003/EC of the European Parliament and of the Council of 16 June 2003 on computerising the movement and surveillance of excisable products.

24 See, for example, section 61A *Excise Act 1901* (Australia) which provides for a provision to permit movements of excisable goods. Such permissions are available in 'single' or 'continuing' format, with continuing movement permissions structured to allow a licensee to move excisable goods on a continuing basis to approved locations listed in a schedule to the permission. Applicants must demonstrate a commercial relationship exists with the nominated licensees in the schedule.

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International Network of Customs Universities

WORLD CUSTOMS ORGANIZATION

Section 2

Practitioner Contributions

PERSPECTIVES OF CUSTOMS IN THE 21ST CENTURY: FROM THE EXPERIENCES OF JAPAN CUSTOMS

Yukiyasu Aoyama

Abstract

The role of customs authorities throughout the world is increasing to respond both to the rapid changes in the international trade environment and to domestic issues. Japan Customs is committed to making the utmost efforts to accomplish its mission. However, the efforts of a single customs administration are not sufficient to adequately cope with the activities of trans-border criminal organisations, terrorists, etc. The importance of Customs' role has become more significant, domestically and globally. Customs administrations across the world must cooperate to ensure sustainable development globally.

The circumstances surrounding Japan Customs

As economic globalisation continues to accelerate, international trade is growing substantially faster than the growth of the world economy. Countries around the world are actively participating in the WTO Doha Round negotiations, and meanwhile making their move towards forming bilateral/regional economic partnerships and cooperative agreements. In Asia especially, where the economic growth is the most vibrant, there are ongoing discussions on regional frameworks such as ASEAN, ASEAN+3, ASEAN+6, and APEC in addition to the many bilateral Free Trade Agreements/Economic Partnership Agreements (FTAs/EPAs) being negotiated and agreed. On the other hand, when we look at the domestic situation in Japan, there are many issues to be tackled, such as economic disparities between urban and rural areas, coping with an ageing society, and the reconstruction of public finance. The Government of Japan is increasingly expected to optimise its operations to ensure the safe and stable lives of its people.

Under these rapidly changing circumstances surrounding our country, Japan has to cope with two challenges at the same time. One is to reform its domestic systems and the other is to build more open relationships with countries around the world. Taking these situations into account, Japan Customs, as a border enforcement authority, is making the following efforts to meet these challenges.

Recent trends in policy developments

In order to tackle all the relevant issues that it faces, Japan Customs has set three primary missions, namely:

- realising a safe and secure society,
- collecting customs duties and domestic consumption taxes in an appropriate and fair manner, and
- further facilitating trade procedures.

In line with these primary missions, Japan Customs is emphasising and promoting the following policies.

1. Security and safety

Japan Customs is actively implementing border control measures. In order to strengthen counter-measures for smuggling and terrorism, Japan Customs has deployed inspection equipment such as large scale X-ray inspection systems across the country and has been engaged in the research and development of new inspection equipment using advanced technologies including terahertz wave and biosensor equipment. To protect Intellectual Property Rights (IPR), Japan Customs has amended its law on border enforcement measures as necessary, such as expanding the scope of rights to be protected. IPR enforcement procedures have also been refined to allow rights holders and importers to request Customs to consult with the competent authorities such as Japan Patent Office and specialists such as patent attorneys. Moreover, from April 2005, Tokyo Customs has employed and posted two patent attorneys to its IPR Center to serve as advisory staff to customs officials so as to perform IPR border enforcement in a more effective manner. As a result of these reforms to strengthen IPR border enforcement, the recent record of import suspension of IPR infringing goods is showing an increasing trend.

Since the effort of Japan alone or customs administrations alone is not sufficient to ensure the security and safety of international trade, Japan Customs is working on developing cooperative relationships with foreign customs authorities and building partnerships with relevant domestic Ministries and agencies.

The scope of border control expected to be performed by Customs is not limited to areas such as anti-smuggling or terrorism. Japan Customs considers that customs authorities must also respond to the environmental issues which represent a common challenge to the international community. In this context, at the ASEM (Asia-Europe Meeting) Customs Directors-General - Commissioners Meeting held in November 2007 in Japan, I, as the Chairperson, raised Customs' contribution to environmental issues as one of the agenda items for the first time.[1] The meeting recommended that customs authorities should strictly enforce the Multilateral Environmental Agreements (MEAs) such as the Basel Convention and the Montreal Protocol, to protect the Ozone layer and to control the cross-border movement of hazardous waste. It was also recommended that customs authorities should continue international dialogue and cooperation to solve these global problems.[2]

2. Customs as the responsible revenue authority

Japan Customs is formulating and implementing the appropriate and fair tax/tariff policies to realise a healthy national economy and robust public finance. Japan Customs collected customs duties and consumption tax totalling about 5.4 trillion yen (approximately $US47 billion) in the financial year 2006. This is about 10% of the total national tax revenue, which indicates that Japan Customs is working as an important revenue agency along with other relevant agencies such as the National Tax Agency. In partnership with the National Tax Agency, Japan Customs is collecting duties and taxes in a fair and appropriate manner with due consideration to the effectiveness of its operations. In order to ensure the fair and appropriate collection, Japan Customs has implemented an 'Advance Ruling System' for correct import duty declaration, 'Post Clearance Audit' for appropriate duty taxation, and 'Criminal Investigation' to elucidate violations of Customs Laws.

3. Customer convenience and security

Japan Customs has been applying a risk-based customs clearance system for more than 40 years to ensure the security and facilitation of international trade. Japan Customs has developed its Authorised Economic Operator (AEO) program to further enhance this approach, having launched this program for importers in 2001. The simplified customs procedures have been introduced for importers, exporters, and warehouse operators that meet certain compliance criteria. Furthermore, in this year's law revision, Japan Customs is reviewing the AEO program to expand the scope of the participants to other businesses in the international trade, such as customs brokers, forwarders and carriers, in cooperation with relevant agencies such as the Ministry of Land, Infrastructure and Transport (MLIT) which is in charge of the

transportation industry. As for international partnerships regarding AEO, Japan Customs is conducting consultations/discussions with countries such as the USA, EU, Australia, and New Zealand to establish mutual recognition of AEO programs. Japan Customs is carrying this movement forward based on the idea that mutual recognition of AEO programs could maximise the benefits for honest stakeholders, and that this is a totally different approach to the existing international customs cooperation regime which has put its focus on 'negative' information exchange for enforcement purposes.

Japan Customs is also working towards more efficient customs clearance procedures by making full use of IT. The NACCS[3] (Nippon Automated Customs Clearance System) that was introduced in 1978 is playing a key role in achieving prompt customs clearance, and in 2003, the Government of Japan introduced the Single Window System (SWS). In order to further promote the use of IT, Japan Customs, in cooperation with relevant agencies, will establish the 'new NACCS center' that will manage the next generation Single Window System scheduled to be introduced in October 2008.[4]

4. International activities

Japan Customs is actively contributing to the WTO Doha Round negotiations as a trade negotiator, while promoting regional frameworks such as APEC, ASEM, and bilateral FTAs/EPAs, so as to address the issues attributed to the globalisation of the world economy and the challenges within its domestic economy. In addition to these international frameworks, Japan Customs focuses on the activities of the WCO. Japan Customs is actively committed to the planning and implementation of WCO policies, not only in existing work areas such as classification and valuation, but also for the promotion of the Framework of Standards to Secure and Facilitate Trade (FOS), the enhancement of capacity building including a regional framework such as the establishment of the Regional Office for Capacity Building (ROCB), and so on. Moreover, Japan Customs is a big contributor to the WCO in terms of personnel and budget. We are prepared to enhance these contributions in the future.

5. Efficient administrative management

The Government of Japan is prioritising structural reform for effective and appropriate management of public administration. In order to ensure efficiency and to appropriately assess the performance of its operations, Japan Customs conducts policy evaluations every year and announces the result to ensure transparency for its stakeholders.

As high integrity is a necessary basis for appropriate administrative management, Japan Customs is also implementing performance reviews of customs officers, and conducting training to maintain integrity.

Reforms

With the recent trend in customs policy management mentioned above, Japan Customs has been conducting the following reforms.

1. Legal framework

In order to promote trade facilitation and to enhance security, Japan Customs has been reviewing relevant laws and regulations every year, based on the recommendations of the 'Council on Customs, Tariff, Foreign Exchange, and Other Transactions' and opinions received from stakeholders, and has amended them in consultation with the Cabinet Legislation Bureau and Ministry of Justice, as appropriate.[5] For instance, Japan Customs amended the law to introduce the AEO program in accordance with these recommendations. In order to strengthen border enforcement, penal regulations and the investigation process have been reviewed and strengthened for the offences of smuggling of illicit guns, goods infringing intellectual property rights, etc. In terms of tax policies, Japan Customs has introduced a surcharge for deficient declarations to ensure more appropriate and fairer tax collection.

2. Organisational restructuring

The organisational structure must be suitable to meet the challenges we are facing today. In this regard, Japan Customs has integrated its enforcement functions and strengthened its intelligence units. The organisation of regional customs houses has been restructured to ensure that cargo control procedures, which used to be dealt with separately by different sections, are managed by a single division. As a result, Japan Customs has achieved unified control of cargo, from lading/unlading, via Hozei (bonded) areas, through to domestic delivery. The intelligence function has been reinforced by merging all the intelligence units into one special division.[6]

3. IT system – promotion of a Single Window System (SWS)

Japan Customs has been making efforts to promote efficient and facilitated customs procedures by making full use of IT. In particular, the computerisation of customs procedures is being promoted through NACCS which was introduced in 1978. Japan Customs evaluates the efficiency of its operations and reviews and updates them where necessary. In terms of recent developments, a Single Window System (SWS) was introduced in 2003 under close liaison with relevant agencies with responsibility for trade-related procedures such as food sanitary, plant quarantine, animal quarantine, and vessel clearance. Now Japan Customs is developing the next generation SWS to provide greater efficiency, in consultation with other relevant agencies, and by reference to the New Zealand Customs' experience on inter-agency cooperation as a useful guide. Japan Customs is taking the lead in this project among other agencies.[7]

4. Development of high-technology inspection equipment

Constant research and development of new technology is also necessary to counteract increasingly complex and sophisticated fraud and smuggling. Japan Customs is engaged in the research and development of inspection equipment using high-technology including terahertz wave and biosensor technology which can detect illicit materials and goods more accurately. Japan Customs will continue such efforts and deploy these high-precision inspection tools.

Japan Customs has also launched a project to develop inspection equipment, on the recommendations of the 'Council for Science and Technology Policy' chaired by the Prime Minister, in cooperation with National Institute of Advanced Industrial Science and Technology, Tokyo University and Kyushu University. In this regard, we have set two directions: firstly we focus on improving research and development of inspection equipment; and secondly, we aim to establish a new compendium of basic technology which can be used in the research and development of new technology.

5. Human resources development

The implementation of appropriate training for customs officers is absolutely necessary to update customs operations. Since customs officers are required to acquire highly technical knowledge and practical expertise, these training programs must be aligned with actual policies and operations. In this regard, Japan Customs is conducting such training constantly at the Customs Training Institute, and continuously reviewing its training programs, incorporating opinions from industry, academia and government agencies, to cover relevant issues such as anti-terrorism measures and multilateral/bilateral trade facilitation.

6. Strengthening the partnership among government, industry and academia

To ensure the success of these reforms, not only Customs' effort but partnerships with industry, government agencies and academia are essential. Opinions from the various sectors are necessary to ensure the effectiveness of customs policy revisions. In this regard, Japan Customs is holding discussions on policy revisions with industry and academia through the 'Council on Customs, Tariff, Foreign Exchange, and Other Transactions' and other study groups.

Importance of international cooperation

The role of the customs authority is increasing to respond to both the rapid change in the international trading environment and domestic issues, not only in Japan but throughout the world. The effort of individual customs administrations is not enough to cope with the activities of trans-border criminal organisations or terrorists. The importance of Customs' role to ensure the world's sustainable development has become more significant, not only domestically but globally. Having these facts in mind, all customs administrations must work cooperatively to accomplish their mission through the following measures.

1. Strengthening capacity building

The problems every customs administration is facing have been globalising. In this context, capacity building of developing countries' customs is an important issue. Considering that the customs administrations of developing countries and Japan are important partners in international trade, Japan Customs puts a high priority on capacity building in terms of both amount and quality. We believe that high-level capacity building assistance should be provided, with sufficient cooperation from each donor, to meet the needs of developing countries. Japan Customs is actively undertaking activities including regional/national seminars which meet the recipients' needs, and promotion of coordination among donors. We believe that elements of the WCO's network such as the Regional Offices for Capacity Building (ROCB) and the Regional Training Centres (RTC) must be fully utilised and should play a central role in capacity building.[8]

2. Improving expertise

With the rapidly changing international situation, Customs is expected to respond to emerging issues such as countermeasures for international terrorism including proliferation of weapons of mass destruction (WMD), goods infringing intellectual property rights, environmentally harmful materials, and money laundering activities, as well as addressing newly arising problems in traditional fields such as classification, valuation, customs laboratory analysis, rules of origin, customs statistics,[9] and drug and firearms smuggling. For this reason, we have to develop experts with advanced techniques in areas such as inspection equipment, rule making, information exchange, and ICT. The existing training programs performed by individual customs administrations are not enough to cope with the current globalising issues that we face. From this standpoint, we must strengthen the existing capacity building being provided by developed countries to developing countries. And at the same time, in order to raise the overall level of the capacity of Customs, especially in terms of advanced techniques, we have to start implementing 'newly defined' capacity building in which advanced techniques are developed and shared among all customs administrations. It is also important to establish a new framework which will provide information on each country's status of implementation of WCO instruments, so that other countries can utilise the information as a reference when implementing such measures. In this regard, it would be useful to establish a 'library' in the WCO that provides best practices of member countries in terms of the legal framework and the utilisation of newly developed techniques for enforcement, in order to provide a reference for those countries which need the experience of those precedents.

3. Strengthening international cooperation

International cooperation must be strengthened in order to address the above mentioned issues. In particular, the WCO, which is the sole intergovernmental organisation tasked with customs issues, must provide strong leadership on the common challenges that members are facing. For this reason, the WCO administration should be reformed. By improving its internal governance, the WCO should create a mechanism whereby each member can participate in the policymaking discussion and decision making, so that members' needs may be increasingly reflected in its operations. As the scope of Customs' mission has been increasing, the WCO should also expand and deepen its cooperation with various stakeholders

such as scientists/technicians on advanced technology, the legal community (both members of the bar and academia), and specialists in organisational management, in addition to its cooperation with international organisations such as the WTO, World Bank, and WIPO.

Conclusions

Customs is the public service at the border that is tasked to ensure a safe and secure society, collect duties and taxes, and promote trade facilitation. While the legal framework in each country is different, we share these same goals. For instance, FOS and Provisional Standards Employed by Customs for Uniform Rights Enforcement (SECURE) which have been agreed at the WCO are major attempts to establish common standards to address these common issues that every customs administration is facing today. Moreover, all customs administrations must enhance their capacity to accomplish their mission. As I described above, Japan Customs is committed to making the utmost efforts for this purpose. I would like to urge all customs administrations across the world to work in cooperation to realise sustainable development globally, sharing my thoughts. Every customs administration must exert its effort to approach the ultimate goal. We must recognise that, while the mission for Customs is becoming complex in the 21st Century, every customs agency is examined on its competitiveness, and judged accordingly.

Endnotes

1 Environmental issues will be the main topic at the G8 Hokkaido-Toyako Summit to be held in Japan this year.

2 Yokohama Declaration, available at http://www.aseminfoboard.org/Calendar/OfficialsMeetings/ .

3 NACCS originally stood for 'Nippon Air Cargo Clearance System' when it was established in 1978. This was changed in 1991 when the scope was expanded to sea cargoes.

4 Many trade-related procedures coordinated by six Ministries, such as food sanitary, plant quarantine, animal quarantine, vessel clearance, crew landing permission, and trade control will be processed in the next generation SWS.

5 Japan Customs also consults with professors on tax law, criminal law, administrative law, international law, etc.

6 Japan Customs is working in cooperation with the National Police Agency, Japan Coast Guard, Public Security Intelligence Agency, etc., under the instruction of the 'Headquarters for the Promotion of Measures Against Transnational Organisation Crime and Other Relative Issues and International Terrorism' chaired by the Chief Cabinet Secretary.

7 Japan Customs is coordinating this project by the order of the Prime Minister's Office.

8 Available at http://www.wcoomd.org/ .

9 Please refer to the speech by Mr Andrei Belyaninov, Head of the Federal Customs Service, Russian Federation, at the WCO Council Session in June 2007.

Yukiyasu Aoyama

Yukiyasu Aoyama is the Director-General of Customs and Tariff Bureau, Ministry of Finance (MOF), Japan. He joined the MOF in 1975. During his 33 years' career in the Government of Japan, he has been engaged in Customs affairs for 15 years. He has also held eminent positions in various fields, including as the Assistant Commissioner of Criminal Investigation Division in Tokyo Regional Taxation Bureau, Superintendent General of Wakayama Prefectural Police Headquarters, Director of Coordination Division in the Environmental Policy Bureau in the Ministry of the Environment, Director-General of Yokohama Customs, and Deputy Director-General of Customs and Tariff Bureau. He has an academic career as a Visiting Professor at the Faculty of Law, University of Tokyo.

LOGISTICS, SECURITY AND COMPLIANCE: THE PART TO BE PLAYED BY AUTHORISED ECONOMIC OPERATORS (AEOs) AND DATA MANAGEMENT

Doug Tweddle

Abstract

Enhanced security, compliance and logistics management in both the private and public sectors (including Customs) is dependent on accurate, comprehensive data from trusted, compliant companies. Rather than building our international trade supply chain procedures on outdated paper-based systems and principles, developments in private sector technology and regulatory data requirements, such as the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), United Nations electronic Trade Documents (UNeDocs), and the World Customs Organization (WCO) Data Sets, are steering us towards a Cross Border Data Reference Model that will drive a Master Document and an Internet-based seamless data pipeline. This requires a re-think of our traditional way of managing the customs business and takes the Framework of Standards and the Authorised Economic Operator (AEO) concept to new heights of private, public partnerships, thereby removing the need for extra layers of border management bureaucracy and replacing them with new and exciting models for integrated border management.

Security, facilitation and data

Total trade in the UK is growing: from 25% of GDP in 1970 to 60% in 2006 or £735 billion. Intra-EU trade represents just over half of this. UK trade will continue to grow at about 5% a year with port traffic increasing by weight by over 30% by 2030. This reflects the global increase in trade. The use of containers to handle higher value general cargo and other commodities continues to grow. Forecasts project world port container throughput growth of 505 to 611 million TEUs in 2015; 2.4 times 1999 throughput of 210 million TEUs.

About 95% of goods consumed or produced in the UK come and go by sea.

This increase in trade is applying pressure on all aspects of the international supply-chain and in particular, on three of the most important aspects — logistics, security and compliance. Accurate, efficient and coordinated data management using state-of-the-art technology is essential in meeting this challenge.

In the future government authorities, including customs administrations, will seek to obtain data in electronic format directly from the originator of the information. This will require the facility for data interchange between the Business-to-Business (B2B) component of the United Nations electronic Trade Documents (UNeDocs) data model and the World Customs Organization (WCO) Data Model. This data exchange will only be possible if the data structures and the information requirements of the Business-to-

Government (B2G) layer in the UNeDocs and the WCO Data Models are harmonised through a common reference data model. This will be a globalised requirement, setting globalised standards and procedures which will impact developed and developing countries alike.

This need for greater security and trade facilitation along with the demand for data from modern electronic businesses and commerce are driving the change from the outdated transactions and systems which have, for many years, been modelled on the presentation of hard-copy invoices, bills of lading, certificates, licences and manifests.

Framework of Standards and Authorised Economic Operators (AEOs)

In June 2002 the WCO recognised the need for both better security and better trade facilitation and formed a Joint Customs-Industry Task Force on Security and Facilitation. This, in turn, led to the High Level Strategic Group (HLSG) and ultimately, to the adoption of the WCO SAFE *Framework of Standards to Secure and Facilitate Global Trade* in June 2005.

The main objectives of the SAFE Framework are to secure and facilitate global trade through the establishment of cooperative arrangements between Customs, trade and other government agencies in order to promote the seamless movement of goods through secure international trade supply chains. Key elements of this will be the mutual recognition of controls and information which will allow a broader and more comprehensive view of the global supply chain and create the opportunity to eliminate duplication and multiple reporting requirements.

This encourages and makes it easier for buyers and sellers to move goods between countries. But companies, small and large, involved in international trade between the major trading zones have faced a steep increase in administrative burdens in recent years, with larger and larger volumes of information required to comply with import, export, transit and security and related regulatory requirements. Many of the requirements are duplicated for different governmental authorities and represent a waste of resources of both the individual states and the exporters.

In 2005 the WCO SAFE Framework of Standards and the Security Amendment to the European Community Customs Code both included the need to recognise legitimate, compliant businesses that will work in partnership with Customs within the international trade supply chain business. These companies are known as Authorised Economic Operators (AEOs) and in Europe, this system came into effect from 1 January 2008.

There are other AEO initiatives in various countries around the world and parallel programs such as Customs-Trade Partnership Against Terrorism (C-TPAT) in the United States and Partners in Protection in Canada.

An AEO is an economic operator who, by virtue of satisfying certain criteria, is considered to be reliable in their Customs-related operations. Consequently, AEOs are entitled to trade facilitation benefits such as:

- a lower risk score which will be incorporated into Customs' risk management systems and be used to determine the frequency of physical and documentary checks by Customs
- consignments may be fast-tracked through customs controls. Holding an AEO security and safety certificate does not mean consignments will not be subject to examination for prohibited or restricted goods or on behalf of other government agencies. However, if they are selected for examination, they will receive priority over non AEOs
- when the requirement to make pre-arrival/pre-departure summary declarations is introduced in the EC in July 2009, AEOs will be able to omit certain data elements from the declaration

- being allocated recognised status (across the EC)
- an industry 'kite mark' and useful marketing tool.

Depending on the type of AEO certificate applied for and authorised, these can include either easier access to certain customs simplifications or certain facilitations from customs security and safety controls, or both.

The aim is to provide business with an internationally recognised quality mark which will indicate that their role in the international supply chain is secure and their customs controls and procedures are efficient and compliant. An operator with AEO security and safety status implies that, apart from being reliable in the traditional financial and customs terms, the company is also compliant in respect of security and safety standards and can, therefore, be considered as a 'secure' trader and thus a reliable trading partner.

Like AEO, the C-TPAT is a joint US Government-business initiative designed to strengthen the overall supply chain and border security working through close cooperation with the ultimate owners of the supply chain — importers, carriers, brokers, warehouse operators and manufacturers.

Mutual assistance and recognition

While the AEO-type systems will enhance the Customs-to-Business relationship, the sharing of data between businesses and Customs at the global level and the sharing of risk management and information between customs administrations remains critical to decision making and meeting regulatory requirements. Mutual recognition of AEOs and customs systems requires international conventions and legal gateways, and the sharing of trade-based data requires confidentiality safeguards and assurances.

The Johannesburg Convention recognises the increased global concern for the security and facilitation of the international trade supply chain, and that offences against customs law are prejudicial to the security of the Contracting Parties and their economic, commercial, fiscal, social, public health and cultural interests.

Along with the 1977 Nairobi Convention on Mutual Administrative Assistance, the Johannesburg Convention also recognises that the international exchange of information is an essential component of effective risk management and that such exchange of information should be based on clear legal provisions.

The lack of coordination between customs administrations and between Customs and business has become a more prominent issue in recent years with the requirements for faster information delivery, in advance of shipping, for security and other purposes, and the expanding requirements of data standardisation in international supply chains. The ability to handle data efficiently and swiftly has become a key element in international competitiveness, especially in international supply chains.

The seamless data pipeline

Much work has been done to eliminate redundancies and duplication in the submission of data to government authorities. The ultimate outcome is a simplified process with a standard set of data and messages that traders will use to meet government requirements for the declaration and release of cargo, goods, means of transport and crew in international cross border transactions.

Hi-tech, secure, single data provision and management solutions offer the possibility of creating seamless, electronic processes between businesses, between trade and government, and also between the relevant governmental agencies. This facilitates submission of information for various purposes and ensures equity of treatment, harmonisation and transparency with greater predictability. Furthermore, electronic

processes must be considered more secure by both the economic operator and by government, since integrity and standardisation are then improved.

While the primary objective is the single submission of data, establishing a Single Window or a seamless, integrated data pipeline necessitates a major rationalisation of the current approach and requirements.

The goal is to encompass the entire trade transaction process for cross border trade, in particular the trade, transport, finance and the Business-to-Government (B2G) processes using, at least, UN/CEFACT, UNeDocs and the WCO Data Model.

The government sector has recognised the extent of the problem of increasing trade and diminishing public resources and skills. Diagnostic examinations have produced clear evidence of the need to radically change the way Customs conducts its business and much work still needs to be done to clarify the role of Customs in the 21st century.

The private sector however, driven extensively by competition, the need to cut overheads and the logical need for security and efficiencies, has been making considerable advances.

Process management software applications, for example, can provide real-time shipment visibility and security monitoring to ensure that containers and cargo have not been tampered with. Customers can monitor the actual movements of their assets and shipments, as read through the Radio Frequency Identification (RFID) network, against their previously planned movement. Alerts can be used to notify security, operational managers and Customs if there is a breach in security or a diversion from an approved route. By increasing monitoring and visibility of goods flowing through the supply chain, real-time sensor tags allow companies to maintain the financial and security integrity of the international trade supply chain. By also capturing and managing the data through a seamless, integrated data pipeline, both the data and the movement of the goods can be monitored, the risks assessed and the appropriate level of control exercised.

But the current situation is very different from the vision of better data management and better security from track and trace technology. Much of the information that is currently input into the regulatory cross border processes originates from the private sector stakeholders in the supply chain process. Even in today's supply chains, traders continue to re-enter this data in the formats required by the different regulatory bodies. This re-entering of data is highly inefficient and does not meet today's security requirements.

The trade has identified the need for faster information delivery, often in advance of shipping, for security and other purposes, and the need for data standardisation. In both the government and commercial sectors the ability to handle data quickly and efficiently improves international competitiveness and risk management, especially in international supply chains. International organisations and governments themselves have also recognised, in the main, that import and export regulatory and security requirements associated with the movement of goods, people and transport are best served through private and public, integrated border management services driven by information technology-based intelligence.

Conclusions

There is a need for an integrated and globally supported international data model to cover the exchange of data throughout the entire cross border process. The WCO Data Model will not be extended to cover all trade related non-government areas, and UNeDocs will not define the data requirements for Customs and other government agencies. Not having an integrated international data model for the entire cross border process causes major problems for international supply chain operators and administrators as they have to prepare multiple copies of information in different formats for different countries and for different processes.

The concept of a seamless, electronic integrated data pipeline, based on a total trade transaction model, would allow:

- the receipt of data about an impending transaction at the earliest possible time, or data testing on an ongoing basis
- the data relating to the shipment of a consignment to grow as the goods move along the supply chain and as carriers, circumstances and locations change
- agencies that have the legal right to receive and/or view the data to do so
- data inconsistencies and human re-keying errors to be reduced
- whole-of-government and international risk assessments to be undertaken
- the progress of the transaction to be fully monitored with a single point of response for the trader, resulting in faster release and clearance
- a transaction history to be maintained for reuse and statistical purposes
- the effort in dealing with government agencies to be reduced and in some cases, this reduction would be significant
- for the data from the consignor in the exporting country to be transmitted to the consignee in the importing country resulting in benefits to the trader, transport industry stakeholders and government agencies
- the movement (export) data to be used to pre-populate the (import) data and/or verify the import data. Inconsistencies would be identified and resolved earlier and standard data sets would be stabilised.

Implementation of an integrated data model for cross border trade will require strong support from governments and trade and promotion of the concept to key stakeholders. The WCO must take a leading role in the development of this model.

Doug Tweddle

Doug Tweddle is currently the Director, Customs and International, within HM Revenue and Customs in the United Kingdom. He has policy responsibility for supply chain security, Authorised Economic Operators, UK Customs processes and procedures, the UK contribution to the EU/China Safe and Secure Trade Lane pilot and UK Customs contribution to the EC FP7 funded INTEGRITY consortium. He also has responsibility for the UK's relationship with international Customs organisations including the European Commission and the World Customs Organization. He actively contributes to the Customs in the 21st Century debate, and is a candidate for the next Secretary General of the World Customs Organization. His five years at the WCO as Director Compliance and Facilitation were extremely successful in delivering the revised Kyoto Convention and completing the global RILO network. He also chaired the WCO's Supply Chain Security Task Force which led to the development of the SAFE standards.

CUSTOMS REFORM IN THE MIDDLE EAST: Experience of the Kingdom of Bahrain

Clay Kerswell

Abstract

Customs administrations in the Middle East are responding to the challenges of rapidly growing economies with increased reliance on international trade combined with strategic security issues more complex than those experienced by many economies. Under the direction and guidance of the President of Customs, His Excellency, Shaikh Daij bin Salman Al Khalifa, the customs administration of the Kingdom of Bahrain is employing a range of strategies, including the adoption of a number of technology based solutions, to help it meet the challenges of the 21st century customs administration.

Introduction

The Kingdom of Bahrain lies some 26 kilometres off the east coast of Saudi Arabia, in perhaps the most strategically important body of water in the world, the Arabian Gulf. All sea traffic entering the gulf must pass through the Strait of Hormuz, the 54 kilometre wide channel through which 40% of the world's oil supply must pass. This geographic location brings with it a number of border and supply chain security demands not made of many other customs administrations.

Bahrain was an important Middle East trade centre as far back as 4000 BC. While Bahrain's importance as a trading hub declined over the intervening 6,000 years, its future importance was assured in 1932 when it became the first place on the Arabian Peninsula to start commercial production of oil.

Today the level of economic growth in the Gulf is staggering and while traditionally international (non-oil) trade has been a disproportionately low contributor to GDP, that is changing as other economic opportunities are seized. The Middle East is also experiencing close to the highest population growth rates in the world, dramatically increasing the size of domestic and regional markets.

In order for their economies to fully reap the benefits available through the expansion of global trade, regional customs administrations are modernising their procedures to make their economies more attractive to industry and investors. At the same time they are responding to increased border and supply chain security demands being experienced by customs administrations globally, but with an additional geographic complexity.

Bahrain was an early regional leader in trade and logistic services, but recent rapid advances by neighbouring economies have eroded much of this advantage. Against this background Customs Affairs in Bahrain is undertaking a modernisation program that will allow it to deliver the type of services demanded by its Government, the community and international trading partners.

As with most Gulf Cooperation Council (GCC)[1] administrations, Bahrain's customs control environment involves a real-time, 100 per cent physical intervention regime, as specified under the unified customs code. While this has served the country well for many years, it is becoming increasingly evident that such a strategy is unsustainable in the long term and is not capable of delivering the level of border security required in the contemporary global trading environment. Equally, the focus internationally on

customs administrations' role in supply chain security now requires Customs to perform activities and deliver a broader range of services, necessary to 'facilitate' trade, than is possible under the traditional 'gatekeeper' approach.

Drivers for change

Economic growth. By far the biggest force for change is the need to maintain and improve economic growth. Bahrain is attempting to diversify its economy and trade will form an important part of this. While much success has already been achieved in making Bahrain a regional hub for banking and financial services, the Government of Bahrain realises that trade is one of the keys to economic growth and that a modern, efficient and effective customs service is crucial to encourage trade.

King Fahad Causeway. Completed in 1986, this 26 kilometre long causeway links Bahrain with the east coast of Saudi Arabia. Traffic movements can exceed 13,000 vehicles daily and this can include upwards of 600 trucks. A great number of these trucks carry sand, rock and cement, the necessary ingredients to fuel Bahrain's ever expanding coastline and associated construction industry. It allows Bahrain to act as a gateway logistics hub for the Western Gulf, the Caucasian (CIS), Central Asian and even Eastern European states.

The actual customs and immigration control point is located on a man-made island, midway between the two countries. Because of the need to maintain adequate levels of border security, the volume of traffic at peak times can place extreme demands on Customs resulting in significant delays. Recently, construction of a second, even longer, causeway linking Bahrain with Qatar has been announced. While Bahrain is notionally an island nation, such 'land borders' create new and demanding challenges for Customs.

Success. While success can bring its own rewards, it can also be a problem. An interesting phenomenon in Bahrain is the 'pull effect' of successful trade facilitation strategies. While Bahrain would be the first to admit that it still has a long way to go to achieve the desired reforms, the fact is that regionally, international trade through Bahrain is already more attractive than other options. This demonstrates the 'relativity' of the success of reforms. It is also an interesting example of market forces at work, something that is often hard to demonstrate in the context of customs modernisation. While this is desirable, it means Customs has to be able to deal with a larger volume of transactions than its small population of around 600,000 would suggest.

One obvious example of this is the global express carrier DHL which has established a regional hub in Bahrain. From here, consignments destined for the Western Gulf are distributed by road, across the King Fahad Causeway through Saudi Arabia. The recent announcement of a GCC 'Common market' is likely to further compound this issue, with customs borders truly disappearing within the GCC and business freer to choose where commodities are imported and exported.

Shaikh Khalifa bin Salman Super Port. The new Shaikh Khalifa bin Salman Port (KBSP) at Hidd is scheduled to open in late 2008. The contract to operate this state-of-the-art port has been awarded to APM Terminals. KBSP is capable of processing 10,000 TEU at any one time. It is a purpose-built 800 hectare facility, built on reclaimed land, connected to the mainland and the existing port by a series of causeways. The development also includes free zones and industrial areas. KBSP is designed to be what is known in logistics terms as a 'multi modal' transshipment hub, allowing easy and quick access between land, air and sea transport. This concept allows traders to choose between combinations of multiple transport options to achieve the best balance of cost and speed.

Facilitation by Customs is the key to making this concept attractive to traders by ensuring maximum efficiency.

Modernisation strategies

To allow it to respond to all of these demands, Customs Affairs in Bahrain has, under the direction of the President of Customs, developed a comprehensive modernisation strategy. As a result of this strategy, Bahrain will continue to invest heavily in new technology (IT systems, non-intrusive scanners, electronic monitoring systems), the use of detector dogs, staff development and, where necessary, the engagement of technical experts and consultants. Participation in the WCO Columbus program is also seen as a key element of the modernisation strategy.

Some of the important lessons that have resulted through this program are detailed below.

Speed of reforms. As many observers on customs modernisation have already noted, reforms need to happen quickly enough to maintain momentum and overcome possible resistance (De Wulf 2005, p. 13), but not too quickly so as to leave parts of the organisation (or supporting stakeholders) behind. The appropriate 'pace' for reforms has to be assessed on a case-by-case basis and will undoubtedly be different in every instance. There is also a need to constantly reassess this pace so as to match the prevailing circumstances.

Walk before you can run. One important factor that will determine the pace of a reform program is an administration's capacity to absorb the necessary reforms. Bahrain is a relatively small customs administration of some 600 staff. It is important to acknowledge that there is only so much reform any organisation can absorb at any one time and still deliver the statutory services required by it. While the business sector would undoubtedly like to see instant reforms, not only is this not possible, it is also undesirable. Industry and Customs need time to adapt to and accept change.

Integrated compliance strategy. A risk managed approach to compliance cannot be adopted without a raft of supporting strategies to help improve levels of voluntary compliance. The 'gatekeeper' or a transactional, real time intervention approach to compliance reinforces a culture of non-compliance with clients. In such an environment the adoption of risk management would initially result in risk profiles covering most transactions. Greater levels of voluntary compliance, encouraged by the standard formula of likelihood and consequence of detection on one hand and ability to comply on the other, are necessary to allow any meaningful profiling to occur and risk management to be successful. Without these supporting initiatives the 'problems' that are resulting in low levels of compliance are still present (Sparrow 2000, pp. 194-203).

And then what? It's not just knowing what needs to be done, but how to go about doing it. While technical advisers and consultants can tell you what is wrong and what needs to be done, the administration has to have the capacity to do something with this advice, and translate it into actions.

It appears to be this 'lost in translation' aspect that limits the effectiveness of many modernisation programs. Organisational and managerial capability, including change and project management skills are, in the early stages of a reform program, perhaps even more important than 'technical' assistance in areas such as targeting or auditing. While, as an example, a WCO 'Columbus' diagnostic study can result in a wealth of valuable and useful information to help frame a reform program, without the capacity to do something with this advice its value cannot be fully realised.

Need for reforms to be visible. Shaikh Daij himself has acknowledged that it is not enough for an organisation to modernise; it also needs to look and feel modernised. An important aspect of Bahrain's reform strategy is to ensure that the organisation can demonstrate to the rest of the world what it has done. While investment in technology will of itself often deliver this, Bahrain is also focusing on areas like office accommodation, equipment and corporate image as a whole.

This makes good commercial sense. Investors in Bahrain will be able to easily see it has a modern and well equipped customs administration. For officers, it will help them to have pride and help build a more

positive culture; a professional image often translates into a more professional attitude to work and performance. From an operational perspective, it is hoped this will result in a more positive compliance culture among clients who will be presented with a physical change in Customs, helping to identify it as a new and modernised organisation. It also helps maintain support at a political level. As has often been said, actions speak louder than words.

Conclusions

The reform program in Bahrain is only in its early stages but already significant progress is being experienced. The difficulties of reforming an individual administration that is part of a broader Customs Union, with a common customs code, have also been identified. It is also apparent that even with political will and adequate resources and funding, customs reform cannot be 'imposed'; it needs to be an organic process and cannot be rushed. To do so would put at risk the sustainability of any reforms.

The specific challenges for smaller administrations, particularly in relation to organisational capacity should not be overlooked. This can result in it actually being more difficult to achieve reform. Finally, particularly with regard to their impact on global supply chains and management of strategic security threats, the experience of smaller administrations can be equally relevant when developing customs reform strategies.

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Endnote

1 The GCC is a customs union established in 1981 by the states of Bahrain, Kuwait, Qatar, Saudi Arabia, the UAE and Oman.

Clay Kerswell

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HS 2007: NOTES OF THE TARIFF NOMENCLATURE AND THE ADDITIONAL NOTES OF THE EC

Carsten Weerth

Abstract

The fundamental rules for the classification of goods into a customs tariff which complies with the Harmonized System for the Description and Coding of Goods (HS) are according to General Rule 1, the six general rules of classification, the terms of headings and the notes (and according to General Rule 6 the terms of subheadings and subheading notes). The rules of the tariff schedule are complex, and whilst the overall numbers of headings and subheadings are known, the notes of the HS-nomenclature, the combined nomenclature (CN) and the Common Customs Tariff (CCT) of the European Community (EC) have not been examined in a systematic way. This paper identifies all notes (and subheading notes) which are in force worldwide as at HS 2007 (for sections and chapters) and examines also the sections and chapters for which the EC has established further so-called 'additional notes', which are valid only within the EC.

The HS 2007 contains 380 notes and 56 subheading notes which are valid worldwide, and the EC has added 98 additional notes within the CN and the CCT (as of May 2007). The 534 notes that accompany the 1,221 HS-headings, 5,052 HS-subheadings and 9,720 CN-subheadings are proof of the complexity of the rules of the CCT which contains more than 16,500 legal rules for the classification of goods.

A. Introduction

1. Fundamentals of Tariff Classification

Customs classification of goods into the tariff scheme of the HS-nomenclature is complex and depends on numerous rules: according to General Rule 1 that are solely the terms of headings and notes; and according to General Rule 6, that are the terms of subheadings and subheading notes (Weerth 2008a).

2. Legal basis

These compounds of the HS-nomenclature are identical in more than 200 countries and economic regions which are using the HS-nomenclature as the basis for their tariff schemes and economic statistics, because the HS members have agreed (in article 3, para. 1, letter A HS), to apply the structure of the HS-nomenclature and only to create further divisions within their tariffs (according to article 3, para. 3 HS), when these do not contradict the system and structure of the HS-nomenclature. Within the EC,

the nomenclature is further divided by the so-called 'combined nomenclature',[1] which allows further subdivisions of the HS-nomenclature (in article 1, para. 2, Reg-CN) and the possibility of the creation of 'additional notes', which are only valid within the EC.

3. Scope of rules HS 2007 / CN 2007

But how many rules have to be regarded for the classification of goods into the combined nomenclature (CN) and the Common Customs Tariff (CCT) of the EC?

The nomenclature of the HS 2007 comprises 21 sections, 96 chapters (chapters 01-97, chapter 77 is not in use), 1,221 HS-headings (a further 34 headings are not in use [Weerth 2007]), and 5,052 HS-subheadings (Statistisches Bundesamt 2007).

The Reg-CN incorporates fully the HS-nomenclature and adds 9,720 CN-subheadings (Statistisches Bundesamt 2007).

Within the HS-nomenclature there are notes and subheading notes in front of sections and chapters. The EC applies these HS-notes and HS-subheading notes and furthermore, adds so-called 'additional notes'.

There are three different types of notes within the Common Customs Tariff of the EC of which two types are valid worldwide (HS-notes and HS-subheading notes) whereas the third type, the so-called 'additional notes' of the CN, are only valid within the EC.

The notes of the HS-nomenclature have not previously been in the focus of systematic research and have only been examined in depth twice (Theis 2003; Weerth 2004), with both examinations attempting to classify the notes in terms of aims, contents and usage.

B. Examination of the notes

1. Material examined and methods

This examination was conducted with the CN 2007 (OJ 2006, No. L 302/1).

All notes were identified and are shown in a figure according to their placement (Figure 1). Furthermore, all introductions, changes and cancellations of additional notes were identified with the help of the Official Journal of the European Union (OJ).

2. Results

The results are shown in Figure 1.

All in all, 534 notes were identified: 380 notes, 56 subheading notes and 98 additional notes.

No HS notes or subheading notes appear in front of sections III, VIII, IX, X, XII, XIII, XIV, XVIII, XIX, XX, XXI or chapters 50 and 53.

Only subheading notes appear in front of chapters 52, 81 and 88 (there are no notes at all). Only additional notes appear in front of chapter 53 (notes and subheading notes do not appear there). The largest number of notes and subheading notes appear in front of chapter 48 (19 notes).

Sixty-two of 98 additional notes (63%) relate to chapters 01-24 (agricultural goods). Mostly these notes are concerned with the legal definition of certain meanings and the definition of special methods for the analysis of goods.

Figure 1: *All notes, subheading notes (HS 2007) and additional notes (CN 2007). As at 28 May 2007, Diplom-Finanzwirt (FH) Carsten Weerth, BSc, Bremen.*

Section/Chapter	Note	Subheading Note	Additional Note
I	2	-	-
II	1	-	-
III	-	-	-
IV	1	-	-
V	-	-	-
VI	3	-	-
VII	2	-	-
VIII	-	-	-
IX	-	-	-
X	-	-	-
XI	13	2	-
XII	-	-	-
XIII	-	-	-
XIV	-	-	-
XV	8	-	-
XVI	5	-	3
XVII	5	-	2
XVIII	-	-	-
XIX	-	-	-
XX	-	-	-
XXI	-	-	-
01	1	-	-
02	1	-	7
03	2	-	-
04	4	2	1
05	4	-	-
06	2	-	-
07	4	-	1
08	3	-	3
09	2	-	1
10	2	1	2
11	3	-	2
12	5	1	-
13	1	-	-
14	3	-	-
15	4	1	4
16	2	2	2
17	1	1	7
18	2	-	2
19	4	-	2
20	6	3	8
21	3	-	4
22	3	1	11
23	1	1	5
24	1	-	-
25	4	-	-
26	3	2	-
27	3	4	6
28	8	-	-
29	8	2	-
30	4	-	1
31	6	-	-
32	6	-	-
33	4	-	-
34	5	-	-
35	2	-	1
36	2	-	-
37	2	-	2
38	6	2	-
39	11	2	1
40	9	-	1
41	3	-	-
42	3	-	1
43	5	-	-
44	6	1	2
45	1	-	-
46	3	-	-
47	1	-	-
48	12	7	-
49	6	-	-
50	-	-	-
51	1	-	-
52	-	1	-
53	-	-	2
54	2	-	-
55	1	-	-
56	4	-	-
57	2	-	-
58	7	-	-
59	7	-	-
60	3	-	-
61	10	-	3
62	9	-	2
63	3	-	-
64	4	1	-
65	2	-	-
66	2	-	-
67	3	-	-
68	2	-	-
69	2	-	-
70	5	1	-
71	11	3	-
72	3	2	1
73	2	-	-
74	1	1	-
75	1	2	-
76	1	2	-
78	1	1	-
79	1	1	-
80	1	1	-
81	-	1	-
82	3	-	-
83	2	-	-
84	9	2	2
85	9	1	2
86	3	-	-
87	4	-	-
88	-	1	-
89	1	-	3
90	7	-	1
91	4	-	-
92	2	-	-
93	2	-	-
94	4	-	-
95	5	-	-
96	4	-	-
97	5	-	-
All	380	56	98

3. Discussion

The overall number of notes does not indicate anything about their content or length. Some notes are very long but are counted as one note due to their further subdivision by letters (for example, additional note 2 of chapter 02, note 4 of section XI, note 1 of chapter 72, and note 5 of chapter 84).

Five hundred and thirty-four different notes, 1,221 positions and 9,720 CN subheadings underline the complexity of the rules for customs classification of goods in the HS-nomenclature, tariff schemes worldwide and in the combined nomenclature (and the Common Customs Tariff) of the EC.

Three hundred and eighty notes of HS 2007 will remain in force worldwide for at least the next four years until the next HS revision is due in 2011-2012. The same applies for 56 subheading notes of HS 2007. Furthermore, in May 2007, there were 98 additional notes of the CN, which were valid within the EC only. The number of these additional notes varies, because they can be introduced, changed, or cancelled independently by the European Commission – something which may occur regularly during the course of a year (Figure 2).

Figure 2: *Changes to additional notes during the years of 2003-2006*

Year	Notes Changed
2003	1
2004	5
2005	0
2006	4
All	10

For the CN, which is re-published each year in the OJ of the EU (about 900 pages), there were ten introductions, changes or cancellations of additional notes within the years 2003 to 2006. However, it remains uncertain how often additional notes will be changed in future publications of the CN nomenclature.

The EC has the option, with the help of the additional notes, to influence the definition of certain goods and methods of analysis which, consequently, means the classification of goods within the CN and the CCT. But the EC is not allowed to alter the meaning of HS headings or HS subheadings. The legal regulation of methods of analysis for certain goods and the definition of non-defined legal terms is very helpful and understandable, however, these alterations should be affirmed by the WCO and be used worldwide (within the HS-nomenclature). The addition of notes (definitions and methods of analysis) which apply only within the EC may lead to further obstruction of world trade (non-tariff measures) and distortions of the applications of the HS-nomenclature (for example, when there are different views about the use of certain terms in Southern America, or Asia and the EC; the same applies to analysing methods – these should be determined worldwide within the HS-nomenclature).

Additional notes are subtle and not publicly understood, poorly valued instruments for the management of the trade policy of the EC, because they are being used for an EC-friendly application of the CCT (for example, by using definitions of certain goods or terms or the definition of methods for analysing certain goods).

Sixty-three per cent of the additional notes relate to chapters 01-24 (agricultural goods) – apparently the EC has a strong interest in this agricultural sector to apply the nomenclature and the CCT in a rather strict and rigid way. These observations are in line with results of the WTO Trade policy review, that is, that the highest measures of EC-Tariff protection are applied within the agricultural sector (WTO 2007) – the EC is still applying a strong protectionism regarding agricultural products.

C. Conclusions

Notes are of fundamental meaning for the customs classification of goods into a tariff scheme. They are the only legal basis in addition to the terms of the headings and subheadings according to General Rules 1 and 6.

The EC has, with the help of the additional notes, an opportunity to influence the classification of goods (by using additional notes to define certain products better or to define special methods for analysing certain goods) and thereby, to influence the classification of imported goods in the CN and the CCT.

An examination of all notes of the HS 2007 and the CN 2007 (CCT) has identified 380 notes, 56 subheading notes and 98 additional notes for the combined nomenclature and the CCT of the EC. The 534 accompany the 1,221 HS-headings, 5,052 HS-subheadings and 9,720 CN-subheadings; proof of the complexity of the rules of the CCT which contain more than 16,500 legal rules for the classification of goods. The numerous notes are an obstacle to the uniform usage of a tariff scheme for economic operators, customs officers and courts. This is because of their placement in front of a section/chapter (without a direct link within the text of the heading or subheading). They present – depending on the point of view – the possibility or risk of non-uniform application of the CCT.

Endnote

1 Council Regulation (EEC) No. 2658/87 as of 23 July 1987 on the tariff and statistical – combined – nomenclature and on the Common Customs Tariff, Official Journal of the European Union (OJ) EEC 1987, No. L 256/1, Reg-CN.

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WORLD CUSTOMS ORGANIZATION

Section 3

Letters to the Editor

Dear Sir

I wish to draw your readers' attention to new regulations that affect China Customs' Trade Compliance Program.

The aims of the new regulations are to continue China Customs' modernisation efforts, encourage informed trade compliance, improve customs-trade partnership, and implement the WCO Framework of Standards to Secure and Facilitate Global Trade. After consulting with the trade, China Customs Administration recently announced the new regulations concerning customs compliance and trade facilitation, to take effect from 1 April 2008. Briefly, these regulations address:

1. Classification of Importers of Record. In accordance with the regulations, based on the internal control level, business performance, compliance records, and other information, Customs will classify the importers of record (IORs) and customs brokers into categories of AA (AA Program), A, B, C, and D. While the IORs of Class B will be treated normally and the IORs of Classes C and D will receive no benefits but more inspections and audits, the IORs of Classes A and AA will enjoy enormous benefits of trade facilitation.

2. Eligibility, requirements and benefits for IORs of Classes A and AA. To be qualified as a **Class A IOR**, the company shall, (1) submit an application to upgrade its class; (2) be the IOR registered with Customs; (3) be a Class B IOR for more than 12 months; (4) have no smuggling offence and activity, or other activities violating customs laws and regulations in the past 12 months; (5) have no activity of importing or exporting goods that infringe intellectual property rights in the past 12 months; (6) have no delay in payments of revenue to Customs in the past 12 months; (7) have imports and exports volume beyond US$500,000.00; (8) have customs entry errors lower than 3%; (9) have sound recordkeeping and accounting systems; (10) comply with laws, regulations and customs procedures; (11) submit an annual business management report to customs; (12) have no bad records with other government agencies such as Commerce, Central Bank, Tax, Industry and Business Administration, Commodity Quality Inspection, Foreign Exchange.

The Class A IORs will receive trade facilitation benefits from Customs in: (1) remote filing and goods release at the port of entry; (2) customs inspection at the production site, if necessary; (3) privileged fast inspection and release; (4) advance customs entry before the goods arrive at the port of entry; (5) 24/7 urgent customs clearance; (5) waiver of customs bond or cash deposit requirement for processing a trade operation.

To be qualified as a **Class AA IOR,** in addition to the requirements for the Class A IOR, the company must, (1) submit an application; (2) be a Class A IOR for more than 12 months; (3) have annual import and export volume beyond US$30 million; (4) pass the customs audit and verification for the program and meet the internal control, trade compliance and security in trade requirements; (5) submit an annual financial audit report, annual business management and internal control report, and biannual import-export business report.

In addition to the benefits for the Class A IOR, the Class AA IOR will receive extra benefits in (1) trusted customs release; (2) a customs account manager coordinating customs and trade questions; (3) direct customs release after the entry passes the electronic review; and (4) waiver of cargo inspection under normal circumstances.

A new IOR needs to start from a Class B IOR, and then apply to upgrade 12 months later.

Since Customs brokers are also classified as AA, A, B, C, and D level, the importer of record must be very careful in selecting its customs broker and avoid hiring a customs broker below Class B.

3. Implementation rules and standards to be deployed. With the announcement of the new regulations, China Customs is working on the implementation rules, standards and systems, such as Importer Compliance Assessment System, and Internal Control Standards. We understand that the AA Program of

China Customs is a good Chinese version of AEO and adopts the best practices from the Importer Self-Assessment Program (ISA). Further inputs from the trade will make the AA Program of China Customs a more cost-effective customs compliance and trade facilitation program.

4. To be an active Importer of Record in China. Importer of Record in China is a legal entity which has permission from Commerce for international trade, is registered with Customs and legally deals directly with Customs and other government agencies. Prior to China's entry into the WTO, international trade was restricted and only a few state-owned and private trading companies were allowed to conduct international trade. Since China joined the WTO, most of the international trade activities are allowed to be conducted by foreign-investor companies and private companies.

With the completion of the registration process, most of the foreign-investor companies obtained the general trading privilege and the Customs ID. However, based on our observation, and to avoid the technical customs and trade questions, and compliance problems, a good number of the foreign-investor companies with trading rights, especially the distributors, in China, still hire the local trading companies as IOR by paying a service fee to the trade agents which employ customs brokers to clear goods from customs, but themselves act only as 'consignees'. This approach may not only raise business cost but increase customs and trade compliance risk that the 'consignees' eventually will have to bear. Moreover, since customs and other government agencies legally only transact with the IORs for international trade, the 'consignees' lose the opportunity of the benefits from the trade compliance and facilitation programs. We advise that the legal entities of the multinational companies in China should be the active IORs and centralise, if necessary and feasible, their trade activities in China for effectively and efficiently dealing with China Customs and other Chinese government agencies.

Yours faithfully

Zhaokang Jiang
Sandler, Travis & Rosenberg, P.A.
Beijing, People's Republic of China

Dear Sir

I refer to your article on the changing role of Customs which was published in the first issue of the *World Customs Journal*. In that article you discussed the traditional role and functions of customs authorities as well as their new emerging responsibilities. After reading the article, I thought it might be a good opportunity to write to you and inform you and the readers of the Journal of my research in the area of customs relating specifically to regulation of offshore oil and gas installations.

With the increasing number of offshore oil and gas platforms on the continental shelf areas around the world, their regulation is becoming a completely new area of responsibility for some customs authorities. Moreover, customs authorities that already have responsibilities in the regulation of the offshore petroleum industry may find that they have to devote more time and resources to fulfil these responsibilities.

Customs may be involved in the regulation of various activities relating to offshore oil and gas installations including the attachment of installations to the seabed, the movement of people, animals, ships, aircraft, goods and stores to and from offshore platforms, the export and import of platforms, as well as some operational aspects such as the export of oil and gas directly from platforms. More recently, as a result of developments in international maritime security law, many customs authorities have also become responsible for ensuring compliance with certain maritime security requirements applicable to offshore facilities. Customs officers usually have additional enforcement powers available to them under these maritime security provisions.

However, in the international context, my research has shown that, so far, no significant international initiatives have been pursued in this area of law by international organisations or individual countries. There are currently no commonly accepted international principles that specifically address the issue of customs control of offshore resources installations. The Revised Kyoto Convention is silent on the issue of customs regulation of offshore platforms and to the best of my knowledge, the World Customs Organization (WCO) has not issued any recommendations or guidelines with respect to regulation and control of offshore installations by Customs authorities. There is also a general lack of literature on this topic and information is not readily available.

I have previously raised this issue in Australia in a publication on this topic where I examined Australian legislation. Now the new *World Customs Journal* seems to be the most appropriate publication to raise this issue again, but this time on the international scale. The purpose of this letter is to draw the attention of readers and those involved in customs research to this topic, and to generate further discussion and interest in this area of research. It also calls on the industry, researchers and government officials to work towards developing international rules, recommendations or guidelines relating to customs regulation of offshore installations, and the extent of customs control over offshore oil and gas operations.

I thank you in advance for giving me the opportunity to comment on this matter and I also congratulate the Editorial Board on the successful launch of this exciting publication.

Yours faithfully

Mikhail Kashubsky, BA, LL.B, LL.M
Director, Centre for Offshore Energy Law and Policy (COELP)
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International Network of Customs Universities

WORLD CUSTOMS ORGANIZATION

Section 4

Reference Material

GUIDELINES FOR CONTRIBUTORS

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

Research and theory

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

Original research and theoretical papers submitted will be anonymously refereed. This process may result in delays in publication, especially where modifications to papers are suggested to the author/s by the referees. Authors submitting original items that relate to research and theory are asked to include the following details separately from the body of the article:

- title of the paper
- names, positions, organisations, and contact details of each author
- bionotes (no more than 50 words for each author) together with a recent photograph for possible publication in the Journal
- an abstract of no more than 100 words for papers up to 5,000 words, **or for longer papers**, a summary of up to 600 words depending on the length and complexity of the paper.

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

Practical applications, including case studies, issues and solutions

These items are generally between 2,000 and 5,000 words per article. Authors of these items are asked to include bionotes (no more than 50 words for each author) together with a recent photograph for possible publication in the Journal. The Editorial Board will review articles that relate to practical applications.

Reviews of books, publications, systems and practices

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

Letters to the Editor

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

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

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

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

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

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Christopher Dallimore obtained an Honours degree in Law and German at Cardiff University in 1993 and a Magister Legum at Trier University in 1994. He moved to Germany in 1996 and currently works for the Trusted Trade Alliance Europe GmbH, a subsidiary of the Aussenwirtschaftsberatungsgesellschaft mbH in Münster. He is also active as a translator of legal texts, many of which have been published. He has recently submitted his doctoral thesis, 'Navigating uncharted waters: Does the Container Security Initiative comply with WTO law?'.

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Elaine Eccleston, BA, MA, developed the Information and Knowledge Management subjects taught at the University of Canberra. She was Manager, Information and Knowledge Management at the Australian Trade Commission, and has worked in these fields for the Australian Taxation Office, the Department of Foreign Affairs & Trade, and as Manager, Information & Records Management, BP Oil UK. Currently, she is Manager, Academic Programs at the Centre for Customs and Excise Studies at the University of Canberra.