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WORLD CUSTOMS ORGANIZATION

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Editorial

The principal theme of this edition of the Journal is customs integrity. This has been an area of research interest for many years, and its recent re-emergence in the literature is reflective of the ongoing prevalence of corrupt customs practices in many countries of the world. No administration is immune from the problem, and it can in no way be considered to be simply a problem of developing countries. The Editorial Board thanks all contributors to the Journal, particularly the Australian Customs and Border Protection Service for the forthright way in which it has addressed its integrity challenges in this edition's special report.

Earlier this month, the 8th PICARD (Partnership in Customs Academic Research and Development) Conference was held in St Petersburg, Russia. The annual conference, which is a joint initiative of the World Customs Organization (WCO) and International Network of Customs Universities (INCU), was again successful in providing a forum for debating matters of mutual interest to WCO members and to those universities and research institutes that are active in the field of customs research, education and training.

There is, however, a clear need for the establishment of a forum that provides academics with a greater opportunity to present the findings of their research activities, and for research candidates to present their proposals to the broader research community. I am therefore pleased to advise that the inaugural global INCU conference will be held in May 2014, the details of which will be announced in November. While the conference will first and foremost be held for the benefit of INCU members, an invitation will be extended to other members of the international community that have an interest in empirical research that informs decision-making in the field of customs and related areas.

I trust that you enjoy the articles selected for this edition of the Journal and invite submissions for the March 2014 edition, the theme for which is trade facilitation.

David Widdowson
Editor-in-Chief

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Section 1

Academic Contributions

Corruption in Customs

Gerard McLinden and Amer Zafar Durrani

Abstract

This paper identifies that no country is immune to the problem of corruption and that the challenges and vulnerabilities faced by customs administrations are ongoing and require constant vigilance and practical strategies to address the problem in a holistic way. Reference is made to the World Customs Organization's (WCO) Revised Arusha Declaration, pointing out that its ten key elements are still relevant and that World Bank projects contribute to efforts to combat corruption and inefficiencies in customs and border management. The ongoing need for customs reform and modernisation programs is highlighted – programs that address institutional weaknesses, including human resource management issues, and ways to improve formal consultative mechanisms between officials and the trading community. Examples are cited of projects that have had some success in Thailand, Cameroon and Afghanistan. The paper concludes that where initiatives have been implemented as part of much wider customs reform and modernisation programs, there is a high correlation between overall improvement in operational effectiveness and integrity enhancement.

Introduction

In 2005 the World Bank published the *Customs Modernization Handbook* which included a chapter on 'Integrity in Customs'. That chapter outlined the scope of the corruption problem and identified a series of very practical strategies that could be employed to deal with it. It drew heavily on the World Customs Organization's (WCO) Revised Arusha Declaration (2003) – a document developed by customs officials and representatives of the trade community who all understand very well the particular challenges and vulnerabilities that customs administrations face. The content of the chapter remains just as relevant today as it was when it was initially prepared so there is no need to go over the same ground again. Likewise, the Arusha Declaration's ten key elements still provide a sound framework for tackling the problem in a holistic way.

The current environment

In spite of meaningful progress in some countries, corruption continues to plague customs administrations around the world regardless of their level of development. Recent high profile cases in many first world countries simply reinforce what we always knew – that no country is immune to the problem and that there are no quick-fix solutions available. The very nature of customs work makes it vulnerable to many forms of corruption from the payment of informal facilitation fees to large scale fraud and other serious criminal activities.

It's a simple fact that customs officials, even at junior levels, enjoy extensive discretionary powers and interact daily with traders who have a strong incentive to influence their decisions. Moreover, the fact that many customs officials work in situations where careful supervision is practically impossible creates an environment ripe for corruption. Add to the mix the poor pay and difficult working conditions

customs officials in many countries have to contend with as well as very little probability of getting caught and it is no real surprise that Customs continues to be perceived as amongst the most corrupt of government institutions. Complicating matters further is the fact that many corrupt transactions occur side-by-side with honest ones and are conducted between parties that are frequently part of the same extended informal social and business network. As a former Secretary General of the WCO noted:

> There are few public agencies in which the classic pre-conditions for institutional corruption are so conveniently presented as in a Customs administration. The potent mixture of administrative monopoly coupled with the exercise of wide discretion, particularly in a work environment that may lack proper systems of control and accountability, can easily lead to corruption.[1]

Unfortunately, almost every function performed by Customs is vulnerable to corruption including the assessment of origin, value and classification; cargo examination; the administration of concessions, suspense, exemption and drawback schemes; post clearance audit; transit operations; passenger processing; the issuing of various licences and approvals; and in recent times, access to authorised or preferred trader schemes which confer special privileges to selected traders.

Anti-corruption plans and tools

With the support of the WCO and various development partners, including the World Bank, most customs administrations around the world have now developed anti-corruption plans of one form or another. Often they are heavily based on various elements of the Arusha Declaration and were developed using the WCO's anti-corruption tools. As it's relatively easy to do and is a reasonable first step, many customs administrations start by issuing a code of conduct that sets very clear standards of behaviour expected of officials, often backed by education campaigns. Indeed, in customs offices around the world it is common to see posters placed in public areas setting out the kind of professional behaviour traders should expect from customs officials. Often they state that integrity is one of the administration's core values and that corrupt activities by officials or traders will be punished severely.

In practice, it is difficult to assess whether they have any real impact on behaviour. Few officials or traders engage in corrupt activities simply because they are unaware it is against the rules. Likewise, introducing severe penalties for corruption is a helpful part of an overall anti-corruption strategy but is likely to have little impact if the probability of actually getting caught remains low. To have major impact on the problem, anti-corruption efforts need to be comprehensive and sustained over the long term and focused where reforms are likely to make the most difference.

Customs reform and modernisation

In recent years there has been an emerging trend for anti-corruption initiatives to be introduced as part of wider customs reform and modernisation programs based on key WCO instruments such as the Revised Kyoto Convention. This is a positive development and makes good sense as it provides an opportunity to tackle the two fundamental issues of motive and opportunity at the same time in a comprehensive and meaningful way. A series of over 100 trade facilitation needs assessments conducted in the last few years under a World Trade Organization (WTO) program showed that almost every customs administration in the world is pursuing a reform and modernisation program of one form or another often with support provided by various development partners.

Reform efforts typically focus on the introduction of contemporary risk-based approaches to cargo processing and include the reengineering of systems and procedures to simplify and remove points which are vulnerable to corruption, the introduction or expansion of automated systems to limit opportunities for face-to-face interaction between officials and traders, and on improving transparency

and accountability mechanisms including by publishing the criteria upon which officials are entitled to exercise official delegations. These reforms all reduce the opportunities available for corrupt officials and traders to engage in inappropriate activities and all contribute to improving customs effectiveness.

In addition, customs reform and modernisation programs typically address institutional weaknesses including human resource management issues such as recruitment, promotion, mobility, remuneration, recognition, and competency gaps. They typically also focus on improving formal consultative mechanisms between officials and the trading community. In recent years, reform and modernisation programs have frequently been extended to include other government agencies involved in the processing and clearance of goods. New initiatives such as national single window systems and one-stop border posts based on collaborative border management models have expanded the scope and coverage of reform efforts and acknowledge that corruption and inefficiency at the border are not customs problems alone.

With some notable exceptions, such as the Thai Customs Formality Service Fee (FSF) initiative (see Box 1), these programs have been more successful in reducing opportunities for corruption than reducing motives, with little genuine attention paid so far to improving the salary and conditions of customs and border management officials. Many officials remain on extremely low salaries and the temptation to supplement their meagre incomes through informal means continues to be high. This is an area where increased attention needs to be paid by the development community. It is highly unlikely that officials will wholeheartedly support any major reforms that remove opportunities for rent-seeking and improve transparency unless they are combined with meaningful improvements in their conditions of employment.

Fortunately, few governments today resort to the costly and inefficient outsourcing of key roles to inspection companies as a quick-fix solution. This alone is a positive step and reinforces the now widely accepted view that investing in the development of key national institutions such as Customs is more constructive than simply outsourcing activities to private organisations that rarely have any incentives to develop local capacity to take over the services they provide.[2]

Box 1: Thai Customs Formality Services Fee (FSF)

Thai Customs had been attempting to tackle the problem of corruption for many years. It initiated reforms aimed at simplifying formalities and modernising systems and procedures, both to limit opportunities for rent seeking and to reduce incentives for traders to offer bribes to officials. While these efforts were partly successful, it became clear that the low wages paid to customs officials posed a significant barrier to meaningful progress in eliminating corruption.

After exploring a number of options, the Thai authorities decided to pilot the collection of a Formality Service Fee (FSF), with 95% of the proceeds used to supplement staff salaries and 5% to finance the introduction of new technology. The Thai FSF was introduced following extensive consultations with all key stakeholders, including relevant ministries and the private sector. It is tied to a series of other reform and modernisation initiatives.

Since its introduction in 2006, it has been subject to regular, independent evaluation. The results have been very positive, with reported complaints regarding misconduct by customs officials falling significantly from 92 in its first year of operation to 69 in 2007, to just 36 in 2008. Traders, though required to pay the FSF, are generally positive about its introduction as it is predictable, non-negotiable, and subject to a formal receipt, thus eliminating the time and costs incurred in negotiating the informal arrangements that frequently applied previously.

According to a survey conducted in August 2008, 85.7% of economic operators agreed with the continuation of the FSF provided that the modest fee amounts were maintained. A more recent review by the Ministry of Finance also supported its continuation.

Source: Adapted from McLinden et al. 2011, p. 208.

Of course, corruption in any country is rarely restricted to Customs. Public agencies like Customs are simply a microcosm of the society in which they operate. It's rare to find an island of integrity in a sea of corruption. Corruption is a product of poor governance, not the other way around, and this fact needs to be understood in order to devise practical solutions. In spite of these societal limitations, efforts to reduce Customs' corruption are paying real dividends. Data from the World Bank's Logistics Performance Indicators illustrates the significant progress that has been made by customs administrations in recent years, particularly in East Asia and Sub-Saharan Africa. Between 2007 and 2012, the number of respondents citing solicitation of informal payments as high or very high has fallen from 30.41% to 16.92% and 53.67% to 25.69% respectively. Significant but more modest improvements were also recorded in Latin America and the Caribbean as well as in South Asia. While this evidence of widespread improvement is a positive development, and should provide some reinforcement to reformers, there is still a long way to go. Even East Asia's impressive drop to 16.92% is significantly higher than the OECD average which has also fallen from 5.55% in 2007 to 4.27% in 2012.[3] Clearly, there is more work to be done.

The World Bank has supported around 120 customs reform programs over the past twenty years and currently has a portfolio of almost USD400 million devoted to customs modernisation projects. These projects always include anti-corruption activities and have provided the Bank with an opportunity to invest in an institution that remains central to the development ambitions of many countries. The Bank's work on customs reform has also provided an opportunity to work closely with national reformers to pilot a number of innovative strategies. Two of these, in Cameroon and Afghanistan, deserve special mention as the approaches pursued are quite different, reflecting very different circumstances, but have application in many other countries.

The 'integrity action plan' in Cameroon Customs

Commencing in 2010, but building on previous reform efforts, the World Bank, with the support of the WCO, assisted the Cameroon customs administration to introduce a system of performance contracts designed to strengthen the chain of command by holding each link in the chain accountable – with the assistance of activity, performance, control, and risk indicators – to provide an effective decision making tool and to reduce corruption. Cameroon Customs had already carried out steps to strengthen accountability. They included the regular publication of revenue collection data, increased formal consultation with the business community and automation of key customs processes.

However, the Director General was not satisfied with the performance of Customs and wanted to initiate a second wave of reforms; to change the behaviour of front line officials, to reduce corruption and increase organisational performance. Accordingly, she commissioned the development of an integrity action plan with a specific focus on human resource policies through a monitoring and incentive framework. A pilot program was established and performance contracts for officials at the two largest customs offices were developed. In early February 2010, following a dialogue with front line officers and senior management, individual and team performance contracts with measurable indicators were signed. Each inspector's performance was to be assessed through eight indicators; four related to trade facilitation and four related to the customs clearance process and fines. For each indicator, a maximum or minimum value was set based on median monthly values in the three preceding years. An inspector was deemed to have achieved his or her contract if they improved performance by 15% on all indicators by the end of the six-month pilot period. For the best performing inspectors a limited financial bonus was granted along with non-financial recognition.

The results achieved to date are impressive. Between 2009 and 2012 revenues have increased by almost 0.3% of Cameroon GDP. Without the reforms Cameroon Customs would have lost 30 billion FCFA or approximately USD60 million. Moreover, the impact of the program on trade facilitation was positive.

Prior to the implementation of the program, less than 80% of declarations were assessed on the day they were registered compared with 90% now. More importantly, the improvements in customs processes have been noted by the trading community. Based on survey results, only 17% of respondents had a positive perception of the customs officials at the start of the program compared to 90% at the end of the pilot period. According to the survey, the most important impact of the program has been the reduced clearance time and much improved attitude of customs officials. Finally, the contracts have contributed to increased information flow from front line staff to the Director General and her executive management team and are now institutionalised for the four largest customs offices in the country. The contracts also form an important component of the assessment of officials for promotion and transfer.

Customs reform in Afghanistan

In Afghanistan, the World Bank started supporting customs reform efforts in 2004, focusing on infrastructure improvement, automation of customs procedures and clarifying and reforming the roles and responsibilities of the various government agencies operating at the border. Automation, in particular, was seen as a major reform facilitator as it was expected to reduce face-to-face contact and the negotiations that were then a central feature of the Customs-Business relationship. It also increased both transparency and national consistency as traders couldn't simply go to the border station that offered the best deal thus avoiding the 'port shopping' practice that was also common. When the automated system's centralised targeting was overruled by an official at a border post an audit trail would be created that could be monitored and appropriate action taken. Role clarification amongst agencies also reduced somewhat the opportunity for various agencies to apply controls that should normally be managed by Customs.

The results of the initial reforms were impressive. Revenue collection increased (from USD77 million in 2003-04 to more than USD900 million in 2009-10) and truck release times decreased substantially (for Kabul ICD from 428 minutes for Customs in 2003 to 277 minutes in 2006). At border stations such as Torkham and Hairatan, truck release time fell to 39 and 26 minutes respectively (from an average time of almost a day or more). As in the Cameroon case, from 2010 the Afghan Customs Department was also regularly publishing revenue collection data, had increased transparency in procedures and had established mechanisms for regular contact with the business community. An integrity action plan based on the WCO's Arusha Declaration had also been developed and was being implemented.

In spite of these improvements, the overall corruption situation in Afghanistan did not significantly improve. Even the impressive revenue collection performance of Customs and vastly improved border clearance times did little to change the business community's continuing perception that Customs was one of the three most corrupt institutions in the country.[4]

Moreover, due to the specific geo-political issues Afghanistan faces, the threat posed by corruption in Customs was far more serious than just fiscal losses and higher trade transaction costs faced by traders. Major national security issues associated with terrorism and drug trafficking were also at stake with little confidence in the capacity of Customs and other border management agencies to effectively manage border integrity and security. The usual prescriptions had all been tried and were only partially successful at best. Key indicators had improved significantly but corruption continued to be a key feature of the cross border trade environment. Understanding the particular circumstances that contributed to this situation in Afghanistan became a major development objective.

The World Bank, working in collaboration with the Afghan Customs Department and other development partners, developed a new quantitative approach to identifying vulnerabilities to corruption in the customs and border management process. The Governance Analysis Tool (GAT) drew on previous work using detailed business process analysis; a COSO[5] Audit; the WCO Arusha framework; and World Bank's Government Accountability Action Plan (GAAP)[6] guidelines, but tailored the approach to the unique

border management situation in Afghanistan. The GAT tool breaks down individual elements of the border management process into a series of procedural steps and maps the points that are most vulnerable to corruption. Using some sophisticated modelling tools, it also identifies the corrective strategies that have the most impact on addressing the vulnerabilities identified. As such it allows reformers to target specific areas where the impact will be greatest and the probability of success highest.

Using an automated tool to map and assess vulnerabilities and identify the strategies that offer the most return on investment, the tool helped authorities to develop a clear consensus around the next phase of the customs reform and modernisation plan. Interestingly, in the Afghan situation, the arrival, landing and reporting of goods was the most vulnerable stage in the entire import process. Moreover, on careful analysis, it was found that Afghan Customs Department officials were only directly responsible for controlling 30% of the environment they were mandated to control. Effectively, while they were being held responsible for 100% of the integrity failings, they were operationally only responsible for managing less than a third of the border management vulnerabilities. This was instrumental in galvanising support for the priorities that were addressed in the World Bank's second Customs Modernization and Trade Facilitation Project and helped the government clarify agency roles and strengthen customs responsibilities at the border. While developed to align with the particular circumstances and needs of Afghanistan, the GAT is now being developed as a generic tool for application in other border management environments.[7]

Summary

The purpose of this paper is not to suggest that the examples cited are suitable for all customs administrations. They are not. They are included simply to describe some relatively innovative approaches that have shown genuine promise in challenging operational environments. Different environments present different challenges and often require different solutions. The Cameroon example highlights the importance of identifying individual and team accountabilities for performance and the power of accurately measuring results over time.[8] The Afghanistan example shows the value of carefully assessing key vulnerabilities at the process level and targeting reform efforts where they have the most impact and probability of success. It also illustrates the need to look beyond Customs when tackling corruption vulnerabilities at borders.[9] The Thai FSF regime likewise describes one means of tackling the perennial problem of grossly inadequate salaries. A similar approach may be useful in many developing countries where it is difficult for customs officials to survive on their meagre official income without turning to informal payments.

Interestingly, in all the cases cited, the initiatives were implemented as part of much wider customs reform and modernisation programs, suggesting a high correlation between overall improvement in operational effectiveness and integrity enhancement. The general improvements in customs integrity recorded in the World Bank's Logistics Performance Indicators suggest things are progressively improving, particularly in Sub-Saharan Africa and East Asia. Such results are extremely encouraging and should provide some positive reinforcement to reformers. The Logistics Performance Indicators data does, however, also suggest there is still much to be done before many developing countries can reach the relatively high levels of integrity that OECD countries enjoy.

Notes

1 JW Shaver, Secretary General of the WCO, 1994-98.

2 Such a conclusion is not meant to suggest there is no place for outsourcing or private sector participation in Customs but rather simply to note that certain core customs functions such as classification and valuation should be performed by customs officials.

3 *Connecting to compete: trade logistics in the global economy*, Logistics Performance Index and its Indicators, World Bank, 2007 and 2012.

4 Transparency International in 2009-10.

5 See COSO Model of Internal Control, The Committee of Sponsoring Organizations of the Treadway Commission (COSO) methodology. See www.coso.org/IC.htm.

6 The Governance Accountability Action Plan (GAAP) is a standard document used by the World Bank to baseline and then monitor improvements in the governance environment for a project. The GAAP is mostly developed at appraisal and then monitored during project implementation as one of the tools to reduce project implementation's vulnerability to, amongst others, corruption-related governance risks.

7 For more information, see G Mclinden, E Fanta, D Widdowson & T Doyle (eds) 2011, *Border management modernization*, World Bank, Washington, DC. Available at www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2011/01/07/000356161_20110107013015/Rendered/PDF/588450PUB0Bord101public10BOX353816B.pdf.

8 For information on the Cameroon example, see the World Bank's 2011 Good Practice Guide, *Gazing into the mirror II: performance contracts in Cameroon customs*, available at www.worldbank.org/afr/ssatp.

9 For further information on the Afghanistan example, see Chapter 20, 'Integrity risk modeling in the border management context' in McLinden et al. 2011.

Gerard McLinden

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Bordering on corruption: an analysis of corrupt customs practices that impact the trading community

David Widdowson

Abstract

This article analyses various forms of customs corruption that directly or indirectly impact the international trading community. In doing so, it examines some of the practicalities facing reformists, drawing extensively on a series of interviews conducted by the author with members of both the public and private sectors, across Asia, Africa, the Pacific and Middle East.[1] The author rejects the notion that certain types of corruption represent victimless crimes, contending that in all situations the government, and ultimately the community, is a victim of crime. The article includes an examination of ways in which corruption may be addressed, and identifies the need for governments to focus their anti-corruption efforts on initiatives that will increase the likelihood of detecting such offences. While identifying Codes of Conduct as prerequisites for reducing levels of corrupt behaviour, the author highlights the need for both government officials and members of the public to have confidence that any breaches of their provisions will be properly enforced, with no fear of reprisal. The author concludes that the success of any anti-corruption initiative is dependent upon the political, social and cultural environment in which it is based.

Integrity and corruption

We live in an age of technological dependence in which the reliability of electronic systems is becoming increasingly critical. Like any system, these are comprised of a series of interdependent elements, and if one or more of those elements is damaged, the system is likely to become dysfunctional or even fail completely. Data corruption is a leading source of system failure, hence the importance of maintaining data integrity.

The same principle applies to government administration, where it is imperative to cultivate and maintain employee integrity across the entire organisation and to be intolerant of corrupt behaviour, as its very presence will ultimately lead to a partial or total breakdown of the system. In this context, integrity refers to the observance of a strict and clearly defined code of ethics. Corruption, on the other hand, refers to a breakdown of such integrity.

One government administration that is particularly susceptible to corrupt practices is a country's customs authority. Customs is one of the oldest government institutions; the Romans are credited with introducing the first customs tariff[2] and no doubt the customs officials of the day had a responsibility to ensure that duties were duly paid, and that would-be smugglers were brought to account. It would also be reasonable to assume that some officials made a practice of requiring traders to render to Caesar that which was Caesar's, plus a little extra to line their own pockets. Governments had, however, been waging the war

on corruption long before the days of the Roman Empire. For example, one of the concerns addressed in the Code of Hammurabi, one of the world's oldest known legal codes which dates from about 1780 BC, is the corrupt administration of justice (Asakura 2002).

Customs' susceptibility to corruption is recognised by the World Customs Organization (WCO), the European-based organisation that currently represents 179 of the world's customs administrations.[3] The WCO recognises that, 'the fight against corruption, the safeguarding of integrity and the enhancement of good governance measures are critical to a modern, effective and efficient Customs administration' (WCO 2012, p. 1), and having identified integrity as one of its priorities, the organisation has expressed a commitment to help its members combat corruption.[4] To this end, the organisation has published its Revised Integrity Development Guide (Integrity Guide) (WCO 2012) to provide member administrations with a practical framework to identify and address their integrity development needs.

One of the initial matters addressed in the Integrity Guide is Customs' susceptibility to corruption resulting from the monopoly power that Customs holds over the private sector. Let's face it, if you're not satisfied with the level of service provided by your freight forwarder, you can take your business elsewhere. But there's only one customs administration, which puts it in a very powerful position – and if you don't comply with its requirements, however unreasonable, you won't be taking delivery of your goods.

Forms of corruption

The principal focus of this paper is customs corruption that directly or indirectly impacts the international trading community. Other forms of corruption include practices such as cronyism, nepotism, the misuse of authority or government resources for personal gain, acceptance of bribes in return for awarding government contracts, and circumstances in which officials attempt to pervert the course of justice; for example, by impairing government investigations or prosecutions.

According to Yang, there are essentially two forms of customs corruption. 'The first is simply theft of government resources. A corrupt customs bureaucracy may turn over to the government treasury only a fraction of monies collected from importers, simultaneously falsifying import documentation to mask the revenue theft. The second form of corruption is the extraction of bribes from importers' (Yang 2006, p. 516). The focus of this paper is the latter, although it should be noted that the two forms of corruption are not mutually exclusive. A hybrid situation is an official's acceptance of a bribe in return for facilitating a fraudulent transaction involving, for example, the undervaluation, misclassification or misdescription of an import consignment. In pure revenue terms, the result may be regarded as one of win/win/lose, since the official receives a bribe and the trader's tax payment is reduced, while the government is deprived of revenue.

Yang's second form of corruption includes more prevalent situations such as the acceptance of a bribe in return for speedier clearance of cargo or priority processing of applications for licences and rulings. Such payments, which are variously known as 'tea money', 'facilitation fees', 'speed money', 'informal payments', 'bakshish' and the like, are very common and are often openly discussed at both the national and international level. Throughout the World Bank's 'Doing Business' report, for example, can be found references such as 'There is no official fee; however, an informal fee must be paid to facilitate the application', and 'Although there is no official fee, there may an unofficial administrative fee that depends on negotiation'.[5] Again, considering this situation solely in revenue terms, the outcome may be seen as win/win/neutral. The official receives a bribe, the trader avoids costs associated with delayed delivery or authorisation, and the government receives the duty that is due and payable. Some may describe these as victimless crimes, but crimes nonetheless, as they represent an abuse of process for the purpose of personal gain.

A further example is the acceptance of bribes in return for the facilitation of unlawful activities such as trafficking in illicit drugs or weapons. This may involve active facilitation, for example, authorising the clearance of consignments, or passive facilitation such as 'turning a blind eye'. The supply of information to those who do not have a right of access also falls into this category, including the leaking of commercially or politically sensitive information.

In all cases, the corrupt activity may be initiated by a customs official or another party. The catalyst in the 'facilitation' scenario may, for example, be either a request from a trader: 'I need it urgently, and here's something for your trouble', or an official: 'Your consignment isn't scheduled to be cleared until next week, but for a small consideration I could speed up the process'. Similarly, either party may approach the other with the proposition: 'If we reduce the declared value, we could split the savings in duty'. Collusion of this nature is quite common in some economies where such practices have become an accepted way of doing business, and even those who oppose the practice are aware of its existence and, more importantly, the fact that no action is likely to be taken against those concerned.

Regardless of the form of corruption, the initiator, or the type of activity involved, it is contended that in all such situations the government, and ultimately the community, is a victim of crime. As the United Nations Office on Drugs and Crime (UNODC) observes, corruption should not be regarded as a victimless crime, as in many cases the victim is the general public interest (UNODC 2002, p. 183). Even in the case of cargo 'facilitation', such behaviour represents an abuse of official power which in turn threatens community confidence and trust in public institutions. It also provides selective members of the trading community with an unfair competitive advantage over others, and fails to uphold the law for the general good of society. Furthermore, the existence of systematic corruption in an economy acts as a major deterrent to inwards investment.[6]

Addressing corruption

In order to identify ways of effectively combating corruption, it is firstly necessary to consider the motivations of those involved. Apart from the obvious motivators of greed and personal gain, a key determinant in deciding whether or not to engage in corrupt behaviour is the associated risk, and here two critical factors are the likelihood and consequences of being detected. In this regard, the consequences of being detected are directly related to the sanctions associated with the particular offence, while the likelihood of being detected covers a far broader range of considerations.

First and foremost the act in question must represent an offence in the context of the relevant legislative framework, which requires governments to ensure that appropriate provisions are included in their national legislation in conformity with the various international conventions to which they are a signatory. In this regard, Article 15 of the United Nations Convention Against Corruption (UNCAC), which relates to the bribery of national public officials, states:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

> (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
>
> (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties (UNCAC 2004).

UNCAC Article 16 extends the above requirements to situations relating to bribery of foreign public officials and officials of public international organisations.[7]

Second, the sanction associated with a particular offence should be set at a level that is likely to act as an effective deterrent. In this regard, UNCAC Article 30 states, 'Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence' (UNCAC 2004), or in the words of W.S. Gilbert, 'let the punishment fit the crime'.[8]

The UNCAC provisions also include a requirement that the tax deductibility of expenses that constitute bribes be disallowed.[9] Interestingly, this 'indirect' penalty often has more of an influence on corporate behaviour than the more significant criminal penalties associated with bribery of an official, and in some countries third party intermediary industries have emerged to circumvent this provision. Under these arrangements, a local company is engaged to deal with Customs on behalf of the importer. The importer pays the company an amount that is equivalent to the duty payable, the customs 'facilitation fee' and the company's commission for services rendered, and the company duly issues a receipt which the importer uses for taxation purposes.[10] This mode of operation is consistent with the findings of Friedman, Johnson, Kaufmann and Zoido-Lobaton who conclude that entrepreneurs tend to adopt unlawful practices 'not to avoid official taxes but to reduce the burden of bureaucracy and corruption' (Friedman et al. 2000, p. 459).

This example is reflective of the fact that, despite the existence of legal sanctions, some individuals will not be deterred from engaging in corrupt practices if they believe that the probability of being detected is sufficiently low. This is most clearly demonstrated by those who commit offences which carry the death penalty. For this reason, it is necessary for governments to focus their anti-corruption efforts on initiatives that will increase the likelihood of detecting such offences, which may require a rethink of its customs authority's regulatory framework, governance arrangements, systems, procedures, organisational culture and enforcement capability.

Automation

Removing specific opportunities for corrupt activities is a common strategy employed by many countries, and one that is particularly prevalent is the automation of systems. Indeed, such initiatives are widespread among the numerous reform and modernisation programs aimed at reducing the incidence of corruption within customs administrations. In this regard, the Revised Arusha Declaration (WCO 1993), the WCO's Declaration on good governance and integrity in Customs, identifies automation of customs procedures as an important means of improving the efficiency and effectiveness of customs operations, as well as removing opportunities for corruption.

The automation of systems and procedures also serves to increase the likelihood of such practices being detected. It introduces a high level of transparency into key aspects of customs operations and decision-making, and also provides the administration and other government entities with an effective audit trail for later monitoring and review of administrative decisions and the exercise of official discretion.

The WCO emphasises the need for systems to be designed in such a way as to 'ensure that the most vulnerable points in the manual system are not replicated and that the new system does not simply shift the point of corruption to a part of the process that is not being automated' (WCO 2012, p. 20). That is, however, not as easily achieved as it may sound. Like many initiatives that reduce the opportunity for corrupt activity,[11] the end result of closing one loophole is often the emergence of another. Take automated clearance of import consignments as an example. In some countries it is not uncommon for an importer to pay the duty and receive the relevant clearance but still have a need to negotiate with the customs officer at the cargo terminal before taking delivery of the goods. Some administrations have sought to address this by sending the notification of customs release directly to the Container Terminal Operator (CTO) or freight forwarder.[12] However, even this practice can have the effect of shifting the way in which the bribe is procured, and customs officials are often there to take their cut.

Such collusion with service providers is commonplace. One administration that comes to mind was apparently having difficulty implementing its cargo selectivity regime, through which it was seeking to reduce the amount of detained cargo. Upon analysis it was found that the new system was adversely impacting the revenue flow of the local bond operator and to combat this, customs officials were being offered a percentage of the storage fees in return for restoring detained cargo to 'healthier' levels.[13] This is certainly one area where automated clearance procedures would have assisted in reducing the practice.

'Outsourcing'

A more extreme example of measures that seek to remove the opportunity for corrupt practices is the introduction of Pre-Shipment Inspection (PSI) arrangements whereby critical aspects of regulatory control are essentially outsourced to private companies. In their study entitled 'Tariff Evasion and Customs Corruption: Does PSI Help?', Anson, Cadot and Olarreaga (2003) argue that inefficient customs procedures are often leveraged by customs officials who deliberately obstruct clearance procedures in order to extract bribes from the trading community. Their research focuses on a possible correlation between PSI arrangements and tax evasion (the results of which are inconclusive) but not the potential linkage between PSI activity and customs corruption.

Interestingly, a key premise of their research is that 'customs are assumed purely optimistic, which means that … customs maximize bribe and bonus income net of expected sanctions and the disutility of effort' (Anson, Cadot & Olarreaga 2003, p. 14). In addition, the researchers make an implicit assumption about the integrity of PSI employees, as an apparently fundamental inference of their study is the integrity of PSI reports. This cannot be assumed however, as the establishment of PSI arrangements has in some instances simply shifted corrupt practices from government authorities to private inspection companies.[14]

Code of Conduct

In the fight against corruption, the establishment of a comprehensive and clearly articulated code of conduct is widely regarded as one of the most important weapons in the armoury,[15] a key element of which should be a requirement for officers to report any breach of its provisions. According to the WCO, the code of conduct should set out, 'in very practical and unambiguous terms the behaviour expected of all Customs personnel. Penalties for non-compliance should be articulated in the code, calibrated to correspond to the seriousness of the violation and supported by appropriate administrative and legislative provisions'. To be effective, however, officers must have an unequivocal expectation of such matters being dealt with in a professional, impartial manner with no fear of reprisal whatsoever. For this to occur, the customs leadership team must gain the confidence, respect and trust of its employees. If an officer believes that the matter will be swept under the carpet or that there is the slightest possibility of recrimination, the matter will doubtless go unreported. In this context, the WCO offers the following checklist:

- Is prompt action taken against those who fail to meet integrity standards?
- Is effective legislation in place that protects employees who report breaches of integrity?
- To what extent are employees at all levels encouraged to identify and report breaches of integrity?
- Are employees who come forward to report corrupt practices rewarded or victimised?
- Are penalties for corrupt behaviour sufficient to deter inappropriate behaviour?
- Are effective 'whistleblower' procedures in place?[16]

The extent to which the confidence and trust of employees can be gained will depend on the culture of the organisation, which is heavily influenced by its leadership, particularly the perceived integrity

and political will of its leadership team. In this context, it is pertinent to note that many countries have had such codes of conduct in place for some time, supported by sanctions for breaches of the code in either customs or broader public sector legislation, and yet corruption remains endemic in many administrations throughout the world. Consequently, regardless of how comprehensive the particular code of conduct may be, it must be clear to all concerned that its provisions are properly monitored and strictly enforced. If not, the likelihood of being punished for engaging in corrupt behaviour remains low.

Similarly, it is necessary to instil the same level of confidence and trust in the private sector, which is generally the subject of comparable code of conduct arrangements in line with provisions of agreements such as the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD 1997). In this regard, the Revised Arusha Declaration suggests that administrations could enter into Memoranda of Understanding with industry bodies to support their anti-corruption initiatives. Specifically, the Declaration states:

> Client groups should be encouraged to accept an appropriate level of responsibility and accountability for the problem, and the identification and implementation of practical solutions. The establishment of Memoranda of Understanding between Customs and industry bodies can be useful in this regard. Likewise, the development of codes of conduct for the private sector, which clearly set out standards of professional behaviour, can be useful. Penalties associated with engaging in corrupt behaviour must be sufficient to deter client groups from paying bribes or facilitation fees to obtain preferential treatment.[17]

In 2004 such measures were introduced by Dr Sathit Limpongpan, then Director General of the Royal Thai Customs Department, who was known for his high ethical standards. At that time, demands for 'tea money' were highly regulated by the operational staff of his organisation, with some trading companies expected to pay several thousands of dollars a day.[18] Despite the fact that these were particularly large trading companies, the size of the demand reflects the seriousness of the problem. Dr Limpongpan addressed the matter in three ways.

First, he introduced a 'formality service fee' of 200 Baht[19] which was to replace any informal payments. This provided traders with predictability and certainty, and enabled them to obtain an official receipt for all moneys paid to Customs. Second, he established a Customs Transparency Center through which any complaints of corruption were to be investigated; and third, he entered into formal agreements with members of the trading community through which they agreed not to offer bribes to customs officials, and he undertook to investigate any reported instances of corruption. Several hundred companies signed the agreement in what was a very public display of cooperation.[20]

While this initiative was generally well received throughout the trading community, and appeared to make major inroads in the fight against corruption, it was not entirely successful. One particular trader of high value goods indicated that, following the signing ceremonies, the operational customs officials with responsibility for clearing the company's import consignments imposed higher demands than had previously been the case. The trader agreed to pay and chose not to raise the matter formally with the Director General as he lacked confidence in the system.[21]

In 2005, Chantanusornsiri reported, '... despite the campaign, initiatives to improve internal controls and even the installation of closed-circuit cameras to monitor officials, bribery and corruption continues at clearance points. One auto spare parts exporter said corruption remained "a way of life" to expedite shipments, most notably at Laem Chabang Port, the country's largest port. Even at yesterday's signing ceremony, companies signing up for the anti-corruption initiative insisted that while welcome, the programme was unlikely to lead to major changes any time soon'.

Equally, however, the reform agenda implemented in Thailand had a number of very positive outcomes. For example, Chantanusornsiri further reported that '… initiatives to reduce the discretion of state officials had done much to cut the potential channels for bribes. Reductions in tariff rates and efforts

to accelerate the clearance process through information technology had eliminated over 90% of the opportunities for officials to request bribes, one importer said' (Chantanusornsiri 2005).

Political will

What the private sector is most concerned about is whether the laws, regulations, procedures and administrative guidelines will in fact be enforced. In the absence of such assurance, demonstrated through tangible results, matters are unlikely to change. As previously noted, the success or otherwise of anti-corruption initiatives relies heavily on the perceived integrity and political will of the customs leadership team. In this regard, the WCO rightly acknowledges that the head of Customs and the executive management team have primary responsibility for corruption prevention, and that 'Customs managers and supervisors should adopt a strong leadership role and accept an appropriate level of responsibility and accountability for maintaining high levels of integrity in all aspects of Customs work'.[22] The WCO further notes that 'the administration's integrity and anticorruption strategies can only be successful if they are part of a more general integrity framework that is supported at the highest political level' (WCO 2012, p. 10) and suggests that the Minister should play a role in relation to the integrity performance of the administration.

A few years ago I met with a Customs Minister of a developing country. A number of anti-corruption posters hung on the wall of his office, and we were discussing the 'Stamp out Corruption' campaign which he had recently launched. For effect, he started banging his fist on the desk as he explained his determination to expunge corrupt practices from the customs service. The previous week a senior officer of the administration had been explaining to me the strict formula used by the administration for distributing 'facilitation fees' among the various stakeholders. I therefore wonder how committed this politician was to putting an end to the informal payment arrangements as to do so would have significantly reduced the size of his personal pay packet. Besides, the Director General of that administration was under very clear instructions to ensure that his minister was appropriately taken care of.[23]

A corollary to this situation emerges in those countries in which Customs is continually being pressured by the government to achieve unrealistic revenue targets, the derivation of which is often devoid of any analytical rigour. In one such country an enterprising officer wrote to about 40 companies, advising that the revenue collections were down for the month, and seeking payment of 'their share' of the shortfall. Surprisingly many complied. One trader indicated that, 'the alternative would be an uplift in the value of every consignment until the target is met, so this is a far less painful way of doing business'.[24] The practice was known to and condoned by the area manager, whose continuation in the job depended upon his ongoing achievement of revenue targets. Due to system upgrades within the administration, the practice is now impossible to hide.

Public sector salaries

Some commentators argue that a more fundamental cause of corruption is the inadequacy of public sector wages, particularly in developing economies. For example, in his discussion of strategies to address corruption, Klitgaard (1988) includes the need to review the remuneration levels of officials. Hors (2001), however, concludes that the potential profits that may be gained from corrupt practices are such that remuneration levels are unlikely to influence such behaviour.

The WCO recognises the need to provide customs employees with an adequate salary and other remuneration and conditions to ensure that they are able to maintain a decent standard of living,[25] and in analysing the situation in Cambodia, the United Nations states:

> It is widely acknowledged that civil service pay is inadequate. Comparing the average wage to per capita GDP finds that a Cambodian civil servant only makes slightly more than the annual per capita

> GDP. Cambodia's ratio of the average civil service wage to per capita GDP is one of the lowest in the region. Public officials themselves view low salaries as the most important cause of corruption (UNPAN 2004, p. 12).

This topic touches on another important issue. It's quite easy for commentators to sit at their desks and cite such instances of 'corruption'. However, when public sector salaries are below the poverty line, and an officer explains that without 'facilitation fees' they would be unable to feed their family, it puts the matter in a whole new light. Nevertheless, in this field of research there are many grey areas, so commentary on such matters is probably best left to experts in social justice. In one particular country in which public sector wages are extremely low, bribes of up to AUD20,000 are paid to those responsible for staff appointments in an effort to secure a lucrative post, such as manager of a port or airport, where sources of illegal income may be readily obtained. Successful officers devote their efforts to generating as much income as possible during their term in office. During one of my visits to the country, I met with the customs manager of a large airport who proudly displayed a plaque on the wall of his office which showed that he had successfully completed the WCO integrity training course. At that time I was dealing with a major trading company that claimed to have received a demand for a six-figure yearly payment from this officer to ensure against 'possible impediments' to the clearance of consignments.[26] Two years later the officer was jailed for corrupt conduct. Sometimes the system works.

Conclusions

The success of any anti-corruption initiative is dependent upon the political, social and cultural environment in which it is based. For example, in many countries of the world, if a government official were to seek a bribe, a member of the business community would have no hesitation in blowing the whistle and bringing the matter to the attention of the authorities. In some countries, however, such an act would be life-threatening, and in this regard Customs is simply a reflection of the broader environment in which it operates.

Nevertheless, while some governments and their officials do no more than pay lip service to these important matters, it is apparent that a number of administrations and individuals within those administrations are doing everything in their power to stamp out corruption and lift the level of integrity of their organisation. The problem, as we have seen, is that if the mindset of their society is such that corrupt practices are regarded as acceptable behaviour, they find themselves fighting a very difficult battle. And for the battle to be won, customs officials and members of the public must have sufficient confidence in the system to voluntarily report corrupt conduct. Until that point is reached, the reform process will be a very slow and painful one. As one member of the private sector put it, 'in cases where the entire system is affected, there is nobody for trade and industry to turn to. While it is fine to talk openly about corruption at the WCO, nobody would take the risk to do so at the local level'.[27]

I have seen officers ostracised, abused, demoted and lose their positions over the stance they have taken against corrupt practices. Unfortunately, they live in societies that currently provide them with neither political nor moral support. Achieving meaningful reform in such situations may take many years, as a society's attitude to corruption is unlikely to change overnight; and although some commentators may reject the notion, incremental changes are often all that can be reasonably expected, particularly in those societies in which corruption is endemic.

Interestingly, however, social media is proving to be one of the more powerful weapons in the fight against corruption, with the emergence of public 'name and shame' campaigns on mobile and web-based technologies. Like other social revolutions witnessed this century, the power of social media may prove to be the unlikely champion of integrity. As noted by Lindsey (2013), 'That the future of revolutionary movements in globalized societies will involve social media is assured, but the degree to which it will is yet to be determined'.

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Notes

1 Only those cases that are in the public domain are cited.

2 See Smith 1980 and Asakura 2002.

3 www.wcoomd.org/en/about-us/what-is-the-wco.aspx, viewed 26 September 2013.

4 See, for example, WCO 2013.

5 See, for example, the section on Dealing with Construction Permits in Cambodia.

6 See, for example, Hors 2001.

7 The OECD (1997) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions also provides a legally binding international framework to combat bribery of foreign public officials.

8 W.S. Gilbert, author of the *Mikado*.

9 UNCAC Article 12, Paragraph 4.

10 Author's personal communication with customs officials and company representatives.

11 Ferreira, Engelschalk & Mayville (2007), for example, note that automation reduces face-to-face contact.

12 An arrangement of this kind was, for example, introduced in the Philippines; see Hors 2001.

13 Author's personal communication with customs officials.

14 Author's personal communication with customs officials and company representatives.

15 See, for example, WCO 2012; McLinden 2005.

16 See the Morale and Organisational Culture chapter in the WCO Revised Integrity Development Guide.

17 Revised Arusha Declaration, 10. Relationship with the Private Sector.

18 Author's personal communication with company representatives.

19 See McLinden et al. 2011, p. 208.

20 See Thai Customs 2005.

21 Author's personal communication with company representatives.

22 Revised Arusha Declaration, 1. Leadership and Commitment.

23 Author's personal communication with customs officials.

24 Author's personal communication with company representatives.

25 See the Human Resource Management chapter in the WCO Revised Integrity Development Guide.

26 Author's personal communication with customs officials and company representatives.

27 Internal note of the WCO's Public Sector Consultative Group.

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Managing the risk of corruption in Customs through single window systems

Dennis Ndonga

Abstract

Corruption has hampered the efficiency of customs administrations in many developing countries. However, the problem has taken on a new dimension in the 21st century following the rise in international terrorism. Criminal corruption at border points, where criminal operators offer bribes to customs officials to allow them to smuggle arms and other illegal substances, has posed a great risk to both the internal and international security of many countries. This paper examines how single window systems can be used as a tool to combat customs corruption. It analyses the various facets of customs corruption and discusses its impact on the affected countries. The paper then takes an economic approach to understanding the root cause of customs corruption by following Klitgaard's 1988 analytical framework which states that corruption flourishes in situations where agents have monopoly power over clients, where agents have great discretion, and where accountability of agents to the principal is weak. The paper concludes by evaluating how single window systems can be used to combat customs corruption. It outlines several case studies including the Philippine Bureau of Customs, Georgia Customs and Qatar Customs where the automation of customs processes was credited with reducing corruption in the bureaus. The discussions in this paper aim to show how single window systems can be used as a tool to eliminate customs corruption which has far-reaching consequences.

1. Introduction

Corruption is a cancer that has for decades tarnished the image of customs administrations around the world. Incidences of customs corruption have been well documented in various reports and other media sources. For instance, Global Witness (2009) reported that bribery along the Burma-China border had facilitated the importation of illegally logged Burmese timber to China.[1] United States of America (US) law enforcement agencies have also identified corruption among Mexico customs officers as a key barrier to their collaborative fight against arms trafficking (United States Government Accountability Office [GAO] 2009). While recently, more than twenty-four Australian Customs and Border Protection officers came under investigation for corruption-related offences (McKenzie & Baker 2012). Despite years of awareness, Customs ranks among the most corrupt government institutions in many developing countries. Corruption in Customs differs from that in other government agencies in the sense that most importers and exporters do not view it as a vice. Bribes requested by customs officials to expedite the clearance of goods have become tacitly accepted as a trade transaction cost that is routinely passed down to the clients or consumers (Ferreira, Engelschalk & Mayville 2007, p. 368). This lies with the monopoly powers that customs officials wield leaving clients with no other choice but to accept their corrupt demands.

Nonetheless, customs corruption can result in catastrophic consequences. Since Customs serves several crucial functions as the gatekeeper of the State, enforcer of trade policy and chief revenue collector, corruption at border points can result in the entry of illegal and harmful products, expose domestic industries to unfair competition from dumped imports, and loss of revenue from misclassified or under-valued goods. Moreover, the problem has taken on a new dimension in the 21st century following the recent rise in international terrorism. The smuggling of arms facilitated by corrupt dealings between terrorists and customs officials poses a great risk to both the internal and international security of many countries. Thus, there is a crucial need for governments to tighten customs management and weed out corruption.

This paper discusses how single window systems can be used as a tool to combat customs corruption. Part 2 discusses corruption in general and the types of corruption that occur within customs agencies. Part 3 analyses the causes of corruption using Klitgaard's (1988) framework on corruption. It elaborates how the monopoly powers, discretion and limited accountability of customs agents have resulted in corruption within customs agencies. Part 4 highlights the consequences of customs corruption, outlining its social and economic impacts. Part 5 outlines Klitgaard's strategy for combating customs corruption while focusing on the automation of customs processes. It analyses the role of computerisation in resolving customs corruption as envisioned by various international organisations. The last section of this part gives a summary of how the implementation of single window systems successfully reduced corruption in the Philippine Bureau of Customs, Georgia Customs and the Qatari General Directorate of Customs. Part 6 draws conclusions from this research.

2. Customs corruption

The term 'corruption' covers a range of situations and actions. It is essentially a phenomenon that occurs in both developed and developing countries and impacts various sectors of an economy. Common definitions for the term include the 'outright diversion and conversion of public funds to private use by public officials' (Nwabuzor 2005, p. 122), 'the abuse of public trust for private gain' (Todaro & Smith 2003, p. 711), 'the illegal use of power for personal gain' (Zimring & Johnson 2005, p. 793), and 'the abuse of public office for private gain' (Poverty Reduction and Economic Management [PREM] 1997, p. 8).This paper accepts all the above definitions. In essence, the term carries the idea of a public office contravening its governing rules for private benefit either through acts of bribery, patronage, extortion, nepotism, theft of public assets or diversion of state revenues. Within the context of Customs, corruption would involve the misuse of power by customs officials for private benefit.

2.1 Types of corruption in customs

Corruption has become an established norm in many customs organisations. Customs administrations of transitional economies, in particular, have been ranked amongst the most corrupt government institutions (Transparency International 2008, Table 7). Customs corruption has many faces. The nature of corrupt activities that customs officials typically engage in vary from country to country and range from acts of extortion, patronage, nepotism, embezzlement, kickbacks and cronyism. Quite often such activities are undertaken for a reward given either in cash or kind (Tarar 2010, p. 13).[2] The degrees of such graft also vary from simple acts of 'turning a blind eye' to severe acts of aiding in the smuggling of contraband. Thus, it is difficult to comprehensively expound on all forms of corruption that manifest in Customs. However, Hors (2001) offers a simple classification of the different forms of corrupt activities occurring in Customs. She categorises them into routine, fraudulent and criminal corruption.

2.1.1 Routine corruption

This occurs where private operators pay bribes to customs officials in order to receive a normal or accelerated completion of customs procedures (Hors 2001, p. 9). The gist of such corruption would

involve customs officials demanding bribes to perform their obligations. A manifestation of such corruption would typically encompass customs officials delaying the initiation or conclusion of customs procedures until a bribe is offered to them (Hors 2001, p. 59). The techniques of creating such delays may involve officials promptly attending to files of operators who have paid bribes while making others (non-bribe-paying operators) wait; or the officials may pretend to be absent or engaged elsewhere when a requested action is much needed and only become available once a bribe is paid. For instance, Ferreira, Engelschalk and Mayville (2007, p. 372) report that despite being employed to work 24 hours a day, the customs officials in Cambodia's port of Sihanoukville would end their daily operations at 5.00 pm, and could only be persuaded to work past that time through informal payments. Another expression of routine corruption occurs when customs officials create or threaten to create unwarranted complications in the clearance process. This often takes the form of officials conducting examinations in extreme detail; or requesting documents that are difficult to adduce; or sending the cargo for further controls such as quarantine or any other unnecessary actions that may complicate the clearance process (Hors 2001, p. 59).

2.1.2 Fraudulent corruption

This occurs where operators persuade customs officials to 'turn a blind eye' to certain procedural requirements in order to reduce their tax liability or other import/export obligations (Hors 2001, p. 9). This form of corruption is, in essence, initiated by the operators who seek the customs officials' cooperation in committing fraudulent acts in their favour. It is commonly typified in the form of misdeclaration, misclassification or erroneous valuation of imports/export (Hors 2001, p. 59). In such cases the importers/exporters provide incorrect information regarding the nature, quantity, origin or value of their goods, and collude with customs officials by offering them bribes to ignore the true details. Such misclassification would result in erroneous calculation of duty, quite often lowering the operator's true tax obligation.

2.1.3 Criminal corruption

This occurs where criminal operators offer bribes to customs officials to allow them to smuggle illegal substances (Hors 2001, p. 9). Incidences of colluded drug and arms trafficking with customs officials fall under this category.[3]

3. Causes of corruption

The causes of corruption vary from one situation to the other. Quite often corruption is entrenched in a country's social history, economic policies or bureaucratic traditions and is relative to the particular state of affairs (PREM 1997, p. 12). However, the root cause of corruption may be analytically understood using Klitgaard's framework on corruption. He argues that corruption flourishes 'when agents have monopoly power over clients, when agents have great discretion, and when accountability of agents to the principal is weak' (Klitgaard 1988, p. 74). Accordingly, the framework maintains that corruption is a by-product of unchecked monopoly and discretionary powers.

This framework has particular bearing on the customs environment in several ways discussed below.

3.1 Monopoly/economic rent

The concept of monopoly profit/economic rent applies where one person possesses something unique or special (stemming either from its nature or limited supply) (Myint 2000, p. 36). The logic is that the owner of the unique item can charge an exorbitant rate for its use and this would not affect its demand. In doing so the owner will earn economic rent which will be the extra amount paid over what would normally be paid for a suitable alternative (Myint 2000, p. 36). In relation to corruption, the framework argues that firms with monopoly status (originating either from lack of competition or their control of

a limited natural resource) enjoy higher rent and thus bureaucrats in charge of them enjoy a higher and more valuable control right (Ades & Di Tella 1999, p. 983). Examples of such firms and bureaucrats include the national land registration bodies that are exclusively empowered to register land ownership and land registrars who are the only officials authorised to issue land titles. The valuable control rights are expressed in the fact that clients served by such administrators would be willing to pay an extra amount to manipulate the way they exercise their duties. This makes it easy for such bureaucrats to reap some value 'by surrendering their control rights in exchange for bribes' (Ades & Di Tella 1999, p. 983). Thus, higher economic rent creates a higher incentive for the bureaucrats with controlling powers to engage in corruption.

This concept is relevant to customs agencies as they enjoy an administrative monopoly in the sense that they are usually the only agency with responsibility for certain regulatory and administrative functions relating to import, export and taxation (McLinden 2005, p. 71). This raises customs economic rent when it relates to the procedures, charges and penalties they impose. Consequently, operators anxious to clear their imports/exports through Customs will be willing to pay a price to manipulate the way customs officials exercise their controlling rights. A good example of this is illustrated in instances of fraudulent corruption whereby operators willingly offer bribes to customs administrators, enticing them to abuse the exercise of their control rights by misclassifying imports. Therefore, customs officials can use their monopoly position to acquire bribes from their clients.[4]

3.2 High discretionary powers

This concept encompasses the idea of an absence of decisive rules and regulations governing an economic activity, which are capable of managing all types of contingencies that could arise in the running of that activity (Myint 2000, p. 37). Thus, this gives the relevant administrators some flexibility in interpreting and implementing the rules.

In relation to customs corruption, this concept entails the idea that customs management leaves customs officers with extensive discretion in determining various factors. In practice, the daily agenda for most customs authorities is primarily governed by trade policies (Management Systems International [MSI] 2006, p. 2). Customs is the principal enforcer of various requirements like differential tariffs, rules of origin, anti-dumping measures, quantitative restrictions and trade embargoes (Gill 2001, p. 129). These policies are complex and dynamic in nature as they regulate different aspects of import and export controls. Measures regulating imports often outline guidelines on the goods that can be freely imported and those that are prohibited and subject to import licence requirements; and they identify sensitive local industries and set out tariffs for competing imports; they identify the country's trading partners and lay down favourable import quotas; and they may also ban some imports from particular countries for economic or political reasons (MSI 2006, p. 2). While the export measures mostly grant certain incentives to exporting industries that fulfil specific preconditions (MSI 2006, p. 2). These complexities give customs officials wide discretion in applying the policies to specific cases. In addition, most customs codes are often out-dated as they are subject to regular amendments aimed at keeping them up-to-date with the changing circumstances (Tarar 2010, p. 17). This further makes it difficult for operators to comprehend them at any given time, thereby granting customs officials more discretion in their operations. Similarly, some customs officers lack access to reference prices, which further gives the officials wide discretion in valuing goods and assessing duties and taxes (GTZ 2005, p. 19).

An illustration of how the implementation of trade policies creates room for discretion can be drawn from Myint's elaboration of the classification process for purposes of duty calculation. On this issue, he states:

> An audio cassette player can be regarded as a "luxury consumer electronic product" when it is used for listening to popular songs in the living room of a well-to-do family. But the same cassette can be looked upon as an "educational tool" when used by a student in the language lab of a foreign

> language institute. Likewise, it can also be considered as a "device to propagate religion and to uplift the spiritual well-being and moral standards of the people" when used to broadcast the teachings of a revered monk at a religious gathering (Myint 2000, p. 38).

Following Myint's explanation, the circumstance may be that different import duties are charged depending on whether the cassette player is categorised as a 'luxury consumer electronic product', an educational tool or a religious broadcasting tool. Hence, the application of trade policies leaves a lot of loopholes. Such ambiguities therefore confer enormous discretionary powers on customs officials who often abuse those powers by extorting operators.

3.3 Accountability/lack of efficient controls

The concept of accountability deals with the proper observance of rules and regulations, and the requirement that the enforcer of the regulations be held accountable for their actions. Accountability has a counter effect on corruption in the sense that the more accountable administrators are held, the less likely they are to engage in corrupt activities (Myint 2000, p. 39).

Most cases of customs corruption have been blamed on ineffective accountability mechanisms. Such accountability has often been undermined by two factors: negligible governing rules and the failure to correctly apply the rules. First, governing rules are said to be negligible where the sanctions imposed appear to be insignificant when compared to the potential benefits that can be gained from engaging in corrupt practices. Customs corruption has continued to exist since such activities give officials the opportunity to make a fortune before they are dismissed, and the recovery of the illegal amount (if any) is usually a small portion of the total sum (Tarar 2010, p. 18). Thus, the rules of accountability cannot generate a deterrent effect as the benefits officials gain from the illicit behaviour far outweigh the costs they may incur for such actions.

Second, the failure to correctly apply accountability rules occurs in situations where officials lack the willpower or resources to enforce disciplinary actions. Here the rules meant to hold corrupt customs officials accountable are in place, but are not being enforced. As a result, perpetrators of customs corruption go unpunished. For instance, Hors argues that in Pakistan, one of the disciplinary actions set for dealing with a customs official suspected of corruption was to post them as 'Officer on Special Duty' (OSD). Here they would be excluded from public administration until a special OSD post is created for them. However, the exercise of this measure was never accompanied by any investigation, follow-up action or sanctions. The officers posted as OSD would simply 'manoeuvre their rehabilitation and return to regular assignments' (Hors 2001, p. 18). Moreover, there may be situations of total failure of accountability. This would normally arise where the rules or management mechanisms for holding administrators accountable for their actions may have broken down completely or be non-existent (PREM 1997, pp. 12-13). In the context of Customs, this would imply the lack of proper rules for the review of customs officials' activity or audit.

Thus, the three pre-conditions outlined in Klitgaard's framework have a direct bearing on customs corruption.

4. Consequences of corruption

Corruption in customs negatively impacts a country's image and economy. In essence, it destroys the legitimacy of customs administration by rendering it ineffective and unable to contribute to the government's objectives (McLinden 2005, p. 68). Such practices can further frustrate a country's development goals. One of the major consequences of customs corruption is that it results in the loss of revenue. Corrupt practices such as misclassification, undervaluation of imports or even colluded tax evasion by operators and customs officials have a direct impact on the amount of revenue collected.

A study conducted by Arze del Granado (2007) on public revenue collection confirmed the existence of a negative correlation between corruption and revenue collection, with an increase in the level of corruption resulting in a direct decrease in overall revenue collected. Several case studies have also confirmed similar results. For instance, in 2004, Russia lost USD4.5 billion in duties on European imports which was mainly attributed to false declarations linked to organised corruption (Ferreira, Engelschalk & Mayville 2007, p. 371).While in 2008, the Moldova-Ukraine border lost almost USD113 million to corruption (Wilcox-Daugherty & Holler 2010). Such outcomes can have a crippling effect on a number of economies. Many developing countries rely heavily on customs proceeds as a major source of internal revenue used for development. Thus, a decrease in the amount of duty collected can cause a government to lack investment funds, thereby stalling economic development. Moreover, imported goods that evade value added tax (VAT) distort domestic price signals causing unfair competition which could force tax compliant producers and importers out of business (Ferreira, Engelschalk & Mayville 2007, pp. 370-1). Such an outcome could lead to an increase in unemployment rates thus increasing the fiscal burdens on a country's development prospects.

Furthermore, the delay techniques used by customs officials to solicit bribes in circumstances of routine corruption have a direct impact on the cost of doing business. Such delays may cause economic losses especially in circumstances where time is of the essence, for instance, in the shipment of perishable items. Moreover, the delay may force traders to incur additional expenses such as storage expenses which will be passed on to the price of the goods thereby making them less competitive in the markets (MSI 2006, p. 2). This will ultimately deter domestic companies from engaging in international trade and may also drive away Foreign Direct Investment (FDI). Over 60% of today's global production chain is dominated by just-in-time (JIT) trading systems which cannot tolerate unreliable and unpredictable customs administrations that disrupt the flow of operations (Mbekeani 2010, p. i92). Hence, progressive multinational corporations (MNCs) would simply overlook countries with inefficient customs services as investment locations. In summary, these outcomes will have a negative impact on a country's economic growth as both international trade and FDI are important tools for development.

Customs corruption can endanger the wellbeing of a country's population. Border points controlled by customs officials are one of the main entry points for illegal weapons and drugs. For instance, 70% of the total drugs seized in Germany annually are detected at customs checkpoints (Ferreira, Engelschalk & Mayville 2007, p. 372). The smuggling of prohibited items such as narcotics facilitated through criminal corruption can expose the society to severe public health and law and order issues (MSI 2006, p. 2). Worse still, such practices can have a whole new meaning in the current global environment of intensified concern about the safety of international trade. Existing systems and measures, including quarantine, that are designed to detect weapons of mass destruction and biohazards will be rendered futile if terrorists or smugglers can circumvent them by simply bribing customs officials (McLinden 2005, p. 68).

Such disastrous consequences magnify the importance of finding a solution to the problem of customs corruption.

5. Combating customs corruption

According to Klitgaard (1988, p. 74) corruption can be resolved by implementing a corrective strategy that consists of five distinct but related steps. McLinden reiterates these steps in the context of customs corruption as follows:

- changing administrative systems to remove the corruption-inducing combination of monopoly power combined with officer discretion plus limited accountability
- selecting agents (in this case, customs officials) for incorruptibility as well as job-specific skills

and educational qualifications
- changing the rewards and penalties mix facing agents and clients
- increasing the likelihood that corruption will be detected and punished
- altering attitudes towards corruption (McLinden 2005, p. 72).

The practical implementation of these steps would involve a range of activities. Nonetheless, what is of concern to this section is how single window systems can be used to resolve corruption. Referring to the five-step strategy, the introduction of automation would come as part of the activities necessary to implement a change of administrative systems to remove monopoly power, officer discretion and limited accountability (McLinden 2005, p. 73).

5.1 Role of single window systems in resolving customs corruption

Various international organisations involved in combating customs corruption have recognised the use of automation as an important tool for reducing such practices. From the mid- to late-1980s, the international customs community, through the World Customs Organization (WCO), had been actively involved in efforts to formulate a 'comprehensive integrity and anticorruption strategy' (McLinden 2005, p. 72). These efforts culminated, in 1993, with the adoption of the WCO Arusha Declaration by its members.[5] The Declaration set out a list of twelve practical steps that customs administrations ought to follow when implementing integrity programs. One of the practical steps highlighted was the use of automation. The Declaration recognised automation (including electronic data interchange [EDI]) as a powerful tool against corruption and recommended that its utilisation should take priority in any integrity program. The Declaration was further recognised by the United Nations Conference on Trade and Development (UNCTAD) in 1994 at the Trade Efficiency Symposium held in Columbus, Ohio. Recommendation 11 was passed which stated that:

> Governments should take steps to ensure the highest level of integrity and professional standards within their Customs service. The measures identified by the Customs Cooperation Council in the Arusha Declaration on Integrity in Customs should be implemented. Effective sanctions are also required to discourage low standards of integrity in the trading community (Customs Co-operation Council 1994).

Despite the overwhelming international support for the 1993 Declaration, member countries made little effort to adopt its provisions (McLinden 2005, p. 72). This prompted the WCO to conduct a comprehensive review and in 2003 the Council adopted the Revised Arusha Declaration on Integrity. The latter document consisted of ten elements considered to be crucial to the development and implementation of an all-inclusive and sustainable integrity enhancement program. Automation still featured in the new Declaration and on this it stated:

> Automation or computerization of Customs functions can improve efficiency and effectiveness and remove many opportunities for corruption. Automation can also increase the level of accountability and provide an audit trail for later monitoring and review of administrative decisions and the exercise of official discretion. Where possible, automated systems should be configured in such a way as to minimize the opportunity for the inappropriate exercise of official discretion, face-to-face contact between Customs personnel and clients and the physical handling and transfer of funds (WCO 1993).

The above provision is closely aligned with Klitgaard's framework. The revised Declaration highlights automation as an element designed to reduce monopoly power and the improper use of official discretion by, among other things, reducing face-to-face interaction between Customs and it operators while at the same time increasing the level of accountability by setting a platform for the review of administrative action. The roles of automation as envisaged in the revised Declaration were echoed in the 2005 WCO Compendium of Integrity Best Practices.

The International Monetary Fund (IMF) has also recognised the role of automation in resolving customs corruption. An IMF integrity paper highlights computerisation as one of the factors necessary to ensure customs integrity. On this issue, it states:

> The introduction of computerized support for the processing of customs documents, perhaps more than any other change, provides the opportunity to implement standardized procedures that leave little to the discretion of the officials. A properly designed system ensures that the correct rates of duties and taxes are applied; exemptions are only granted to authorized organizations and for authorized goods and services; the required information and documentation is presented; timeframes for payment are met; and those who do not comply with filing and payment timeframes are identified and follow-up action is taken. In addition, the system can provide useful management information including, for example, identifying transactions that do not meet time standards for processing or individual officers who undertake actions that are out of the ordinary (e.g., physically inspecting too many shipments) (Crotty 2010).

The aforementioned documents reaffirm the international view that customs corruption can be reduced or eliminated by implementing single window systems. The argument is that although computerisation will not change customs monopoly in matters of imports and exports, it will, however, reduce discretion and increase levels of accountability. Automation affects officials' discretion in two ways. First, a well-designed system would streamline processes and substantially reduce face-to-face contact between customs officials and clients (Ferreira, Engelschalk & Mayville 2007, pp. 377-8). This would subsequently minimise opportunities for the inappropriate exercise of officials' discretion. Second, the introduction of computerised systems would also increase customs transparency by improving the accessibility of relevant information. Such systems allow administrators to upload relevant legislation, policy changes and explanatory circulars on the internet where any interested parties can view them and be informed and made aware of their rights and requirements (Ferreira, Engelschalk & Mayville 2007, p. 377). Automated systems also cater for customs accountability by providing an electronic audit trail of all processes which can be relied on for future evaluation and review. This would force customs officials to follow the defined rules and procedures as any corrupt practices would be traceable through the system (Ferreira, Engelschalk & Mayville 2007, pp. 377-8).

However, it must be recognised that what may be calculated and anticipated in theory may not yield the same result when practically applied. In order to fully appreciate automation as a solution to customs corruption, the implementation of such systems should have adduced such result in practical application. Such practical results have been experienced in several agencies including the Philippine Bureau of Customs, Georgia Customs and Qatar Customs.

5.1.1 The Philippine Bureau of Customs

Customs reform in the Philippines started in 1992 with the election of President Fidel Ramos. The newly elected president placed emphasis on the incoming customs commissioner 'to remove all "kalokohan" (foolishness) in customs' (Hors 2001, p. 35). This resulted in the formation of a reform program *Customs Development Towards the Year 2000,* which was to be the vessel to steer Customs to a new era (Hors 2001, p. 35).

The key objective of the program was to increase the efficiency of revenue collection by reducing corruption. This was to be attained through extensive re-engineering of customs processes. One key philosophy behind the program was that it recognised complex bureaucratic procedures requiring face-to-face interactions between importers and customs officers as a key feature of the widespread corruption. Virtually all customs transactions from import/export entries to transit requests required operators to personally interact with officials (Hors 2001, p. 35). Hors (2001, p. 18) argues that since the Bureau of Customs handled an estimated four million transactions annually, with each operation requiring an average of ten detached processes, corruption opportunities could be estimated to amount to not less

than forty million. Thus, the reforms targeted these areas of interaction between customs officials and operators.

The first wave of reform saw the automation of customs processes with the Philippine Bureau of Customs implementing the ASYCUDA (Automated SYstem for CUstoms DAta) software package in 1995 (Bhatnagar 2001). Other customs-related activities were also computerised in order to remove the rampant corruption opportunities. For instance, there were incidences of customs collecting officers fleeing with their cash collections. The reform program dealt with this issue by introducing the Project Abstract Secure (PAS), a joint initiative between the Bureau and the Bankers Association of the Philippines (Parayno 1999, p. 62). PAS required taxes and duties to be paid via a cashless process to an Authorised Agent Bank (AAB). The AAB would then confirm the payment by keying in the payment details into their computer system and then encrypt them 'for the secured electronic transmission of the payment file to Customs via a gateway' (Parayno 1999, p. 62). This new cashless system ensured that customs cashiers did not get an opportunity to abscond with their cash collections.

Another system that boosted integrity in the Bureau was the Automated Customs Operating System (ACOS) which was implemented to facilitate the clearance of shipments through Customs. At the core of ACOS was a risk assessment program SELECTIVITY which analysed the 'risk profiles of shipments by subjecting their particulars (e.g., kinds of goods, tariff rate, country of origin, etc.) with some 18 reference files or screens' (Parayno 1999, p. 63). Previously the task of risk assessment was manually handled by customs officials who would regularly misuse their discretion by delaying or threatening to delay shipment through unnecessary inspection unless a bribe was offered (Hors 2001, p. 59). SELECTIVITY resolved this issue by categorising shipments into high, medium or low risk transactions depending on their particulars (Hors 2001, p. 37). Those profiled as low risk would pass through a green channel that avoided any interaction with customs officials.[6]

The aforementioned automated systems have been credited with reducing corruption in the Philippine Bureau of Customs (MSI 2006, p. 4). The introduction of the various systems played a key role in reducing the extensive discretionary interfaces that customs officials enjoyed and consistently manipulated for their personal gain. Unsurprisingly, although the project received overwhelming support from senior government officials, the media and the private sector, the main opposition to the reform came from junior customs officials who viewed the corrupt practices as a way of enriching themselves (Hors 2001, p. 38-9). However, one should be careful to note that automation has to be accompanied with other reform measures in order to completely eliminate corruption.

5.1.2 Georgia Customs

Prior to 2003 corruption was rife in Georgia's Customs department with numerous incidences of operators paying bribes to customs officials to bring in goods, such as jeans from Turkey and fuel from Russia, without paying duty (World Bank 2012, p. 37). The smuggling of drugs, weapons and explosives was also possible with payment of larger bribes. Corruption had enriched many poorly paid customs officials and created a demand for customs jobs. Prospective applicants viewed customs positions as an investment opportunity and would pay up to USD10,000 to 'purchase' customs employment, with the expectation of recovering profits from bribery (World Bank 2012, p. 37).This unscrupulous recruitment of officials continued to fuel the cycle of corruption in the agency.

Nonetheless, after 2003 the Georgian government made several modifications that positively transformed the agency. A key reform was the introduction of a one-stop-shop system that significantly reduced interaction between customs officials and traders. Previously, importers had to endure the tedious work of going to different customs windows to lodge different processes (World Bank 2012, p. 41). These numerous interaction points created avenues for officials to demand bribes. However, under the new system all processes were relocated to a single window where the operators' documents were assigned a number and processed in back offices thereby eliminating contact with customs officials (World Bank

2012, p. 41). This system both enhanced customs processing and reduced opportunities for corruption.

Additionally, in 2009 the agency implemented an automated risk management system that catalogues importers into risk categories based on fifteen criteria (World Bank 2012, p. 42). The low-risk operators are 'fast tracked' through Customs without exposing them to unnecessary inspections that customs officials used as platforms for soliciting bribes. This resulted in an 8% reduction of declarations being subjected to unwarranted scrutiny between June 2009 and 2011 (World Bank 2012, p. 42). The risk management software was also programmed to select declarations for random checks. This reduced officials' discretion which was being abused by customs officers targeting declarations of operators they could derive bribes from.

The operational layouts introduced by the automated systems have significantly contributed to the decreased level of corruption in Georgia's Customs department by reducing avenues for bribe payment and rent seeking.

5.1.3 Qatari General Directorate of Customs

It has been confirmed by the Qatari General Directorate of Customs (QGDC) that the introduction of the Qatar Customs Clearance Single Window (QCCSW) has reduced corruption and promoted integrity in the QGDC.[7] The QGDC launched the QCCSW project in November 2008 in a bid to, among other things, raise customs capacity to clear goods expeditiously; facilitate the import and export process with Gulf Cooperation Council (GCC) countries and other local partners; create an electronic environment that complies with WCO and World Trade Organisation (WTO) standards; promote transparency in Customs; and enhance the security and safety of international trade. The system essentially provides an electronic interface linking operators with relevant government agencies thereby facilitating customs clearance by integrating information on cargo manifest submission, cargo release modules, goods declaration, duties payment, pre-arrival details, inspection and post-audit clearance (CrimsonLogic 2011). As of December 2012, the system had been launched in four major customs points including Doha Port (launched 26 September 2011), Collins Port (launched 1 April 2012), Messaid Port (launched 2 April 2012) and the Doha International Airport (launched 7 August 2012).

An interview conducted by the author found that prior to implementation of the QCCSW, Qatari Customs had relied on a manual semi-paperless version of the ASYCUDA system and a documentary cycling program (Bin neamah) to govern its clearance process. Both these systems had failed to safeguard against corruption and dishonesty. Though actual corruption incidences were low owing to the country's religious and moral values that completely spurned such practices, the fact that the prevailing systems were vulnerable to corruption was an issue of concern. The QGDC attempted to resolve the problem by establishing an audit and control unit[8] and periodically increasing the salary of customs officials.[9] Though these efforts helped increase integrity levels, they did not reduce the system's high risk of corruption. The manual processing of shipment created avenues for fraudulent corruption to thrive in several key clearance protocols.

- The old protocols allowed for the manual entry of cargo declaration and did not integrate the information provided. This created an opening for unscrupulous operators to defraud Customs by using a single manifest and certificate of origin more than once to declare different imports as the semi-paperless systems could not detect repetition of a declaration code or number. Consequently, such operators could easily misrepresent their declarations which facilitated the smuggling of items and also decreased tax collection as operators would use documents of goods that have lower tax value to declare imports that attract higher taxes and, in some instances, totally avoid paying duty.
- The classification of cargo as per the Harmonized Commodity Description and Coding System (HS code) was entered manually by the clearing company and only verified by customs officials during manual inspection of cargo. This procedure relied heavily on the honesty of clearing agents to classify the goods correctly, and knowledge of customs officials to be able to detect any misclassification

during inspection. As such the process was extremely vulnerable to misclassification from deceitful agents and lack of detection by inexperienced customs officials.

- The value of the duty was calculated by the old system as a percentage of the total value of goods entered by the clearing company. The calculated duty value was only subject to the approval or disapproval of the inspecting customs official. Similarly, this process was dependent on the honesty of clearing agents and the knowledge of the inspecting official on the general value of all imported goods. Thus, the procedure was extremely vulnerable to fraudulent corruption by clearing agents which could easily be overlooked by unapprised customs officials.
- The payment of duty was effected manually through bank deposits, cheque slip or cash payment. This mode of payment was insecure and, in the absence of systematised auditing, was vulnerable to loss of cash and cheques and even misappropriation of payments by the receiving officials.
- The release of cargo from customs perimeters was undertaken manually through issuance of a gate pass. Customs officials would rely on the declaration documents to manually draft and stamp a gate pass that identified the goods that were to be released. The gate pass would be the sole document relied on at the security gates. The efficiency of this procedure relied heavily on the knowledge, attention and honesty of both the operator and the customs official issuing the gate pass. There had been instances where operators were discovered with gate passes that allowed for the release of cargo that was not indicated in their declaration documents.
- Import licence verification was performed manually by customs officials during inspection of cargo and payment of duty. Generally, all trade activity of any company is licensed by the Qatar Ministry of Business and Trade. These entitlements were then manually entered into the customs system by customs officials. This process relied heavily on the knowledge and training of the verifying official. Thus, there were opportunities for deceitful importers to mislead inexperienced or uninformed customs official on their licence entitlement in relation to cargo they had not been licensed to import. In some cases, the verifying customs officials would see no harm where traders were willing to pay tax on the unlicensed cargo, and therefore would incorrectly use their discretion to allow such traders to clear the shipment.

The introduction of the QCCSW tightened customs procedures from corruption risks in several ways.

- The QCCSW integrated the declaration process and thus sealed off gaps that allowed for fraudulent recycling of declaration documents. The new system integrates and stores all entry information. Thus, manifests and certificates of origin entries can only be processed once, and the system would easily detect any repetition of the entry information and reject the duplicate application.
- The system provided an avenue for cross-checking the classification of cargo in accordance with the HS code. Under the system the classification of the cargo is entered by the importing company, which is later accessed by the clearing agent by comparing it through the system with the data provided by the manifest list provided pre-arrival of shipment by the shipping company. The cross-checking of the importer's classified declaration with the manifest ensures uniformity of data. Finally, the cargo classified is cross-checked by customs officials during random inspection.
- The system automated the verification of import duty. Duty value is still calculated as a percentage of the total value entered by the clearing company. However, the QCCSW first verifies the agents declared total value by calculating the average value of similar goods imported previously and in the recent past, and compares this with the declared value. Consequently, the system is able to detect any discrepancies where the declared value significantly varies from the average value of similar goods.
- The QCCSW introduced a new way of making secured payments of duty by catering for online payment transactions through a highly secured online banking system and credit card facilities. This new form of transacting is secure from any loss or misappropriation of payments.
- The system has eliminated the integrity risks associated with the release of cargo through manually processed gate passes. Gate passes are now processed automatically and accurately for shipments

cleared through Customs and an electronically generated slip is relied on to release cargo at customs gates.

- The QCCSW resolved the integrity problems encountered during the licence verification process by electronically verifying licences with the imported cargo. The QCCSW integrates with seventeen government agencies including the Ministry of Business and Trade. In doing so, the system electronically acquires licence information from the Ministry's database and links this information with the declarations made by operators. Consequently, the QCCSW is able to electronically detect unlicensed imports and alert customs officials to the unauthorised cargo. Additionally, the fact that all system processes and alerts are visible to all officials and subject to future auditing has further reduced instances of customs officials abusing their discretion by allowing unlicensed cargo to pass.

These changes introduced by the QCCSW have greatly improved integrity levels in the QGDC.

6. Conclusions

Customs corruption remains an issue of international concern that strongly affects many developing countries. Occurrences of routine, fraudulent and criminal corruption do not just impede customs efficiency but can further result in social and economic upheavals that will both hinder development and threaten international security. As indicated in Klitgaard's framework, these incidences stem from the monopoly and discretionary powers that customs officials wield without proper accountability measures. A key strategy of resolving such corruption is by implementing single window systems. The WCO, IMF and UNCTAD have recognised automation as a tool for decreasing officials' discretion and increasing accountability thereby reducing customs corruption. The introduction of single window systems in several agencies including the Philippines, Georgia and Qatar Customs has successfully decreased corruption by substantially reducing face-to-face contact between customs officials and clients; increasing customs transparency by improving the accessibility of relevant information; and tightening customs accountability by providing an electronic audit trail of all processes. Thus, the introduction of single window systems in developing countries is guaranteed to have a positive influence in the fight against customs corruption.

However, automation by itself does not provide a comprehensive solution to customs corruption. The introduction of single window systems has to be accompanied with other integrity measures in order to thoroughly eliminate corruption in Customs.[10] Notwithstanding, automation remains an important technical tool for implementing an anticorruption program.

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Notes

1 Global Witness 2009: in 2005 the Chinese government banned the importation of Burmese timber in an effort to support the Burmese government's crackdown on illegal logging that had depleted much of Burma's northern forests in the Kachin state. However, corruption along the Burma-China border has facilitated the continued illegal importation of Burmese timber into China by unscrupulous timber traders.

2 In some cases, corrupt customs officials have been known to accept gift rewards of an item from the importer's cargo or discount sale of the item. See Tarar 2010.

3 For instance, the Revolutionary Armed Forces of Colombia (FARC), which is one of the world's wealthiest terrorist groups has been known to bribe Colombian customs officials to allow them to import arms and run their drug trafficking network. See Rotberg 2010, p. 185.

4 In illustrating economic rent, Myint (2000, p. 36) takes the example of a minor bureaucrat working in a business licensing office of a government ministry who is responsible for typing, stamping and getting the relevant authorisation for a grant of licence. He argues that business executives engaged in the relevant line of trade would be anxious to have their letters typed, stamped and forwarded and, because of this, they would be willing to pay a price for this 'special' service. Thus, the minor bureaucrat with the monopoly on these functions can use their position to acquire economic rent from their clients.

5 Arusha Declaration of the Customs Co-operation Council concerning Integrity in Customs.

6 Though the concept behind the SELECTIVITY risk management program appears to be a fitting solution to the corruption problem, its practical application has led to several problems that have rendered it ineffective, such as its inability to maintain account-based monitoring and analysis; problems related to it being prone to manipulation by unscrupulous individuals who manipulate the entry information to obtain a preferred routing result, and others. For more information, see Center for Economic Policy Reform (CEPR) Team 2005.

7 The author conducted a series of email interviews with a manager at the General Directorate of Customs, State of Qatar, from October 2012 to January 2013. All information concerning the Qatar customs clearance single window system presented in this article was acquired from this series of interviews. Reference materials can be supplied on request.

8 The audit and control unit was established in 2003 and tasked with the function of conducting random auditing of customs declarations (at least 5% of all declarations made in every port), reviewing customs procedures and auditing customs financial records. See note 7.

9 The first review of customs officials' salaries was done in April 2005 and increased by 70%. In December 2007, the salaries were increased by 20%. In April 2009, they were increased by 50% and finally, by 60% in September 2010. These increases in salary helped tackle incidences of bribery within the QGDC. See note 7.

10 The introduction of automation may shift the point of corruption to other customs processes that are not automated. Thus comprehensive customs reform is necessary in order to eradicate corruption. Other reform measures aimed at improving customs integrity include the recruitment and training of new staff; raising customs officials' salaries and investing in new technologies. See McLinden 2005.

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Does anti-corruption legislation work?

A Keith Thompson

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Abstract

This article presents a critical evaluation of the anti-corruption legislation existing for the past 15 years and changes to this legislation; turning specifically to discussion of the amendments to the *Foreign Corrupt Practices Act 1977* (US), the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, the United Nations Convention against Corruption, the *Bribery Act 2010* (UK) and relevant Australian legislation. The article discusses the philosophy behind current measures to curb international corruption practices and the consequences and messages sent when corruption cases are settled out of court. The article takes a sceptical view of the future of abolishing anti-corruption practices in countries where corruption is a quantitative issue, unless first world countries provide a strong moral philosophy on anti-corruption enforcement. Finally this article suggests several new measures that could be implemented in order to eliminate corruption practices including incentivised whistleblowing legislation and educational strategies.

I Introduction

In his foreword to the United Nations Convention Against Corruption (UNCAC) in 2003, Kofi Annan said that:

> Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of human life, and allows organized crime, terrorism and other threats to human security to flourish.
>
> This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.[1]

For His Excellency, the UNCAC 'complement[ed] ... the United Nations Convention against Transnational Organized Crime'[2] by implementing 'preventive measures and the criminalisation of the most prevalent forms of corruption in both public and private sectors'.[3] The 'major breakthrough' was the requirement that 'Member States ... return assets obtained through corruption to the country from which they were stolen'.[4]

But while the US particularly has had spectacular enforcement success in the last decade if the volume of financial recovery is an appropriate measure of success,[5] many questions about the effectiveness,

consistency and the morality of that enforcement remain. In part, that is because the US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have pragmatically preferred to settle the largest cases rather than litigate them.[6] Sometimes that appears to be because the US Government does not want to lose their best contractors.[7] Other times, one senses that the US Government does not want to prosecute large multinational corporations into extinction and kill hundreds of thousands of jobs. But there are moral ironies in official US willingness to settle such cases when 'the price is right' or when the political or economic cost of a full blown prosecution would be too high.

This essay will suggest that the patchwork of 'supply side'[8] international anti- corruption legislation is a good beginning but has a long way to go if the governments of the world are to become effective in stamping out bribery and corruption. Though the flurry of improvements in 'supply side' international Anti-Bribery legislation during the last 15 years suggest that the first world has bought into the fight against corruption, selective enforcement practices with little resulting jurisprudence, arguably entrench big business in its historical view that corruption and enforcement expenses are simply a cost of doing business.[9] The UNCAC addresses the 'demand side' of the international corruption equation, but it is submitted that many countries with significant 'demand side' problems are receiving mixed messages about international commitment to the elimination of bribery since many of the world's largest bribers continue to function on a grand scale without visible sanction, despite extensive press releases vaunting successful enforcement. The new supply side enforcement rules also cast an anxiety producing shadow across well intentioned small business and NGOs which fear that their best efforts in difficult environments may yet prove their undoing. The US DoJ and SEC only seem interested in following through with prosecutions where they get good publicity for doing so[10] and where the economic consequences to the US economy are minor. The prosecution of Hollywood movie directors Gerald and Patricia Green provides a case in point. Though prosecution appeals against the six month prison sentences both received were ultimately dropped,[11] the Green's US$1.8 million dollar payment to the former governor of the Tourism Authority of Thailand in return for $13.5 million worth of contracts to run the Thai film festival[12] was not significant to the US economy or to that nation's political and military interests. Prosecuting the Hollywood couple got the DoJ good headlines, but the officers and employees of Johnson and Johnson who were responsible for the *Foreign Corrupt Practices Act 1977* (US) (FCPA) violations in that much larger case, were not even named in the resulting Deferred Prosecution Agreement, nor were they personally prosecuted.[13]

In Part II, I will summarise the most significant changes in international anti- corruption legislation during the last 15 years. I will review the late 20th century amendments to the FCPA, the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention), the UNCAC, the *Bribery Act 2010* (UK) and the relevant Australian legislation including the proposal to follow the UK in abolishing the 'facilitation payments' exception to existing anti-bribery law. In Part III, I will discuss the philosophy behind existing measures to curb international corrupt practices and I will highlight the uncertainty and even cynicism that naturally result when such cases are settled out of court. In particular, I will question whether efforts to punish first world offenders who can settle if they have enough money will ever convince third world recipients of graft that there is anything morally wrong with their lesser opportunism. I will suggest that the world is unlikely to succeed in its war against bribery and corruption until it can articulate and demonstrate, a morally coherent and credible philosophy that is convincing in countries where there are larger 'demand side' corruption problems. In Part IV, I will discuss new and different ways that the elimination of bribery and corruption could be addressed including education campaigns to criminalise such activity in 'demand side' countries and the use of incentivised whistleblower legislation all around the world. I will conclude the essay by suggesting that law and policy makers in the first world have much work to do if they are to convincingly educate hearts and minds through the whole world that bribery and corruption are evil crimes which simply must be eliminated.

II Recent developments in international anti-corruption law

Concern about foreign corrupt practice is at least as old as Cicero's ancient Roman concern that political men and generals were going to dissipate and destroy the empire by their greedy and immoral efforts to make money out of foreign countries. Edmund Burke's long struggle to bring Warren Hastings to trial in connection with the corrupt activities of the British East India Company in the 18th century manifests similar concern. But in both of those cases, the attacks on foreign corrupt practice were prosecuted under laws which envisioned only domestic jurisdiction. Buying into that intellectual template, most modem nations have passed laws which proscribe the corruption of their own public officials. But the US FCPA broke new conceptual ground in 1977 when it sought to extend the reach of its domestic laws into foreign theatres by proscribing certain payments to the officials of foreign countries.

A *The US FCPA*

The US FCPA[14] has two main elements: first it amplifies the transparent accounting requirements which originated in the *Securities Exchange Act 1934* (US) and gives them multinational application where US corporations are concerned and secondly, it criminalises the bribery of 'foreign officials'. While foreign observers may be inclined to dismiss the transparent accounting requirements as generality or mere gloss upon the substantial anti-bribery provisions, in practice they form an integral part of DoJ and SEC prosecution strategy. That is because it can be difficult to prove the bribery offences since many elements of those offences take place overseas and in secretive settings. But all US corporations have to file accounting documents with the SEC and if they have omitted material payments or mis-described those payments, when challenged with accounting or reporting irregularity, they can do little more than defend with 'mea culpa' responses.[15] The SEC uses the transparent accounting requirements as a coverall prosecution backstop, analogous to the use of the 1872 mail and wire fraud statutes,[16] to prosecute all manner of scams since the 1960s and 1970s.

The 1998 amendments to the 'foreign official' section of the statute reflect the practical difficulty the US had encountered in sustaining prosecutions involving foreign players. It also signalled the increased interest which the US federal authorities were to take in combating international bribery in the future. While the 1998 amendments did not add a lot of teeth to the enforcement tools and definitions already provided in the original 1977 legislation, they did extend the reach of the legislation beyond foreign officials to anyone else who was involved in a foreign corrupt practice which touched the US in some way. But the domestic 1998 amendments to the US FCPA were not the primary focus of the change to foreign corrupt practice prosecution and enforcement that year. Rather, those changes were the final step that US enforcement authorities had long perceived were necessary if the US was ever to be effective in its efforts to criminalise and prosecute foreign corrupt practice which touched and damaged US trade and economic interests. Domestic legislation alone would not suffice. The proscription of foreign corrupt practice had to become a legitimate international concern.

The effort to criminalise foreign corrupt practice internationally began with first steps to craft an OECD Convention in 1989.[17] The 1998 amendments to the US FCPA purposely coincided with the US signature and ratification of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention'). That Convention is discussed in more detail below. The OECD Convention was the real harbinger of sea change in foreign corrupt practice enforcement and was promoted by the US for that purpose. Since 1998, the US has been able to formally requisition assistance from the foreign countries which have signed the OECD Convention when necessary to prosecute offences under its domestic FCPA legislation. From 1977, it was always an offence for any officer or employee of an issuer of securities (in effect, a US public listed company) to corruptly influence or induce a foreign official in violation of her lawful duty, to give or promise anything of value to obtain or retain business.

The 1998 changes to the existing US legislation:

- extended the definition of foreign official to include an 'officer or employee of a public international organisation' instead of just the officers and employees of foreign governments, departments, agencies or instrumentalities';
- added actually 'securing any improper advantage' to the original offences of 'influencing' and 'inducing';
- clarified that corruption done outside the US was still actionable even if not done through 'the mails or any means or instrumentality of interstate commerce';
- extended the availability of the 'facilitating payments' and 'affirmative defences' previously only available to public companies,[18] to other corporations and individuals resident in the US; and
- enabled the prosecution of overseas corporations and foreign nationals who advanced a corruption plan while they are in the US.[19]

What really happened in 1998 is that the US completed an agenda which began in the 1980s; thereafter the DoJ and SEC were finally able to get serious about enforcement. The *International Bribery and Fair Competition Act 1998* was passed and signed by President Clinton on 10 November 1998 after the US signed the OECD Convention on 17 December 1997 and the US Senate approved and advised ratification of that Convention on 31 July 1998.[20] Since that time, the assigned FCPA teams within the DoJ and SEC have been strengthened and directed to aggressively pursue offences. But neither of those teams have been given the power to suspend or debar corrupt corporations and individuals from being US government contractors, that power rests with the relevant procuring agencies.[21] While the suspension or debarment of any contractor by any US government agency adds that contractor to a register maintained by the Excluded Party Listing Service (EPLS)[22] and prevents any other US federal agency from contracting with that contractor,[23] exceptions can be, and self-evidently are, negotiated. While the additional US Federal Government's Federal Awardee Performance and Integrity Information System (FAPIIS)[24] has been 'developed to maintain "specific information on the integrity and performance of covered Federal agency contractors and grantees"',[25] it is noteworthy that '[s]ix of the 10 most prolific contractors with the US Government, including the Lockheed Martin Corporation, The Boeing Company, General Dynamics Corporation, Raytheon Company, L-3 Communications, and BAE Systems, [have] either violated the FCPA or engaged in activities that allegedly implicate the FCPA's antibribery provisions'[26] and have not been sanctioned with debarment or suspension. The mixed message which flows into the world from this fact will be discussed in Part III.

B *The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*

The OECD convention shows the imprimatur of US influence and that was confirmed by President Clinton when he signed his amendments to the US FCPA in 1998. He said:

> This Act makes certain changes in existing law to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD) ... The United States has led the effort to curb international bribery. We have long believed bribery is inconsistent with democratic values, such as good governance and the rule of law. It is also contrary to basic principles of fair competition and harmful to efforts to promote economic development ... The OECD Convention – which represents the culmination of many years of sustained diplomatic effort – is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions ... The United States intends to work diligently, through the monitoring-process to be established under the

OECD, to ensure that the Convention is widely ratified and fully implemented. We will continue our leadership in the international fight against corruption.[27]

President Clinton's speech is not empty rhetoric. One cannot read the OECD Convention without being impressed by the US influence. The definitions of the offence of bribery and of who constitutes a foreign public official, mirror the language of the US FCPA, including the correlated adjustment to the US FCPA which added the 'officials or agents of public international organisations' at the time when the OECD Convention was first signed. That correlation is clearly not a fault. If bribery and corruption are to be successfully criminalised around the world in a manner which will best facilitate international cooperation in the resulting enforcement efforts and prosecution, then loopholes will be reduced to the extent that the legislation in different countries is synchronised.

The drafters of the OECD Convention evidently had some difficulty with proposed US prosecutorial technique and discretion. While the core of Article 5 states that nation parties 'shall not be influenced by considerations of national economic influence, the potential effect upon relations with another State or the identity of the natural or legal persons involved', that required commitment is diluted by the opening sentence of the same Article which states that '[i]nvestigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party'. It appears that the US did not want the Convention to dictate prosecution methodology, since they already knew that their pragmatic plea bargaining approach was viewed with scepticism in a number of OECD nations.

The cultural difficulty underlying comparative prosecution methodology is highlighted by the official commentary on Article 5 of the Convention adopted by the original Negotiating Conference on 21 November 1997. That commentary confirms the core of the Article by stating that 'the independence of prosecution ... is not to be subject to improper influence by concerns of a political nature'. But despite the concern about improper political influence, both the language of Article 3 about sanctions, and the official commentary on its fourth paragraph, do not require the disqualification of bribers from public procurement processes. Rather Article 3 says only that OECD members should 'consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official'. The commentators explain that 'temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities' were prominent '[a]mong the civil or administrative sanctions other than non-criminal fines which might be imposed upon legal persons for an act of bribery of a foreign public official'. However, such civil impositions are the last sanction listed and the final text of the Convention does not require the imposition of such disqualification and in the US as noted above, the power to impose such bans has not been placed in the hands of the prosecutors.

Still, the OECD Convention has galvanised some of the most powerful economies in the world into legislating against bribery and corruption and into cooperation with the US in multinational prosecutions. Part of the reason why the OECD Convention holds the attention of its member states is its 'system of private peer review [which] ... subjects signatory nations to periodic reviews by teams of specialists from at least two other states'.[28] The Munich Prosecutors Office in Germany (Germany being listed in the Annex to the Convention as the second largest exporter in the OECD only slightly behind the US itself), has substantially cooperated with the US in the prosecution of Siemens AG, and both countries shared the $1.6 billion in penalties that were extracted[29] in the largest successful enforcement action in the world so far.[30] Similarly, the US DoJ 'worked with British authorities on matters involving BAE'[31] which resulted in a $400 million fine, the third largest fine in the world to date.[32] However, again, BAE has not been debarred from either UK or US procurement contracts because debarment could 'ruin BAE, which employs more than 100,000 people and is the biggest supplier to the British Armed Forces'.[33]

But it was not until after the US arrest of former British solicitor Jeffrey Tesler[34] that the UK seem to have committed to update their anti-corruption legislation to the OECD standard. Tesler was arrested in London in February 2009,[35] extradited to the US after a long fight[36] and eventually signed a plea

agreement with the US prosecutors under which he agreed to disgorge more than US$148 million from a multitude of international bank accounts.[37] He had assisted Kellog, Brown and Root, a Houston based firm, 'to steer bribe money ... to Nigerian officials to win more than $6 billion in contracts for liquefied natural gas facilities'.[38] The updated UK legislation, the *Bribery Act 2010* (UK), came into effect in June 2011 and coincided closely with Tesler's eventual appearance and plea agreement in a Houston court.[39]

In its core provisions, the OECD Convention obliges signatories, and invites other states to join signatories, in agreeing:

- to criminalise the bribery of foreign officials;
- to punish all legal persons complicit with dissuasive criminal and non-criminal sanctions;
- to enlarge statutes of limitations to allow adequate time in which to investigate and prosecute corruption offences;
- to require transparent accounting by all legal persons and to prohibit the establishment of off-the-book accounts and the use of other false documents to hide bribery; and
- to cooperate with other party nations with extradition treaties to ensure successful prosecutions, bank secrecy practices notwithstanding.

The OECD has not left the fight against Bribery to the words of the Convention since 1997. There have been many different kinds of follow up as anticipated in Article 12, including recommendations adopted since[40] to further combat the bribery of foreign officials in December 2006,[41] and May[42] and November 2009.[43] Demonstration that the recommendations have been taken seriously is manifest again in the passage of the *Bribery Act 2010* (UK) and in Australia's 2011 release of a discussion paper to solicit public comment on whether the Australian Government should legislate to remove the facilitation payments defence from its existing foreign anti-bribery legislation. Annexure 1 to the November 2009 Recommendation also shows that the OECD secretariat is alert to the jurisprudential issues which arise as corruption prosecutions are undertaken. By way of example, it now advises party states to implement Article 1 'in such a way that it does not provide a defence or exception where the foreign official solicits a bribe'.[44] However, it is not yet clear whether any form of duress will negative [*sic*] the intent which is still a necessary element of corruption charges under most of the legislation which has been passed in response to state obligations under the OECD Convention. But the clear intent of the Convention is to discourage foreign bribery with a fear factor which will outweigh the intimidation that may be exerted by corrupt officials in countries which have not signed the Convention.

C *The United Nations Convention Against Corruption*

The United Nations Convention was adopted on 31 October 2003 in Yucatan Mexico[45] and came into force on 14 December 2005; 90 days after Ecuador became the 30th country to ratify it.[46] The UN Convention is a much more ambitious project than the OECD Convention. It seeks to eliminate every kind of corruption (not just that which involves foreign public officials) and to provide member states with guidance on how to begin their fight both domestically and internationally. It sets out why UN member states should want to fight corruption (see Kofi Annan's introductory statement when the Convention was first adopted),[47] describes in general terms the legislative measures so far considered likely to be effective in identifying and criminalising corruption and then encourages and in some cases, obliges State Parties to establish identified criminal offences with the infrastructure considered necessary to make them work. It then sets out how State Parties should cooperate when offenders against the 'crimes created' are subtle international conspirators.

Kofi Annan was hopeful when he introduced the Convention, but one senses he was under no illusions that meaningful implementation would be the work of several lifetimes. As mentioned in the introduction to this essay, he considered the requirement that 'Member States ... return assets obtained through corruption to the country from which they were stolen' was a breakthrough.[48] But the fourth session of

the Conference of the State Parties to the Convention convened in Marrakech 24-28 October 2011,[49] noted many difficulties and implicit slow progress because it is difficult to 'establish ... [and prove] a link between proceeds of corruption in the requested State and the crime committed in the requesting State'.[50] Indeed, it is difficult to imagine, no matter how good the international cooperation is, how one could 'establish title to or ownership of property acquired through the commission of an offence'[51] and 'to pay compensation or damages to another State Party that has been harmed by such offences'.[52] This is because when a bribe is paid, the most likely owner of the moneys corruptly paid is the corporation whose executive paid the bribe and not the foreign government whose official received a contractually undisclosed additional payment in return for the influence which resulted in the award of the relevant business. To make either that foreign government or the home government of the corporation whose official gave the bribe, the legal owner of the property which constituted the bribe or the profit that resulted from its payment, requires very careful drafting indeed. It would be easier to agree a regime for recovering the bribe and the resulting profit and the allocation of same between the State Parties involved; such an allocation regime would also do away with the need to prove how the two State Parties concerned were harmed by the relevant offences.

But despite these complexities and the problems one can readily see in the reports of the four succeeding conferences of the State Parties,[53] the UNCAC has clearly increased international commitment to fight corruption and the proliferation of Anti-Money-Laundering and Counter-Terrorism instruments around the world since 2003 are well known to all commercial lawyers. Indeed, even lay persons opening new bank accounts since 2003 recognise that they must provide much more personal identification than was required in the 20th century before they could do so. Thus in this respect, Kofi Annan was surely correct when he referred to the United Nations Convention against Transnational Organised Crime as a 'landmark'[54] and he was also correct to expect that these instruments together[55] would make it more difficult for corrupt officials 'to hide their illicit gains'.[56]

D *The* **Bribery Act 2010** *(UK)*

Like the UNCAC, the new UK legislation is not limited to foreign bribery, and in the process of creating a national and international bribery code for all the countries comprising the UK, the requirements of the OECD Convention have all been implemented. However, there are some novelties, including an exception which may dilute the overall credibility of the new legislation in the third world; that exception is s 13's carve out of approved bribery payments by spies and soldiers on active duty. But unlike the practical exemption of high value corporations and military contractors from the reach of all possible sanctions in the US, the carve out in the UK legislation is transparent. The UK has not gone as far with the extra-territoriality of its jurisdiction as the US FCPA since even the new legislation would not have allowed the successful US proceedings against Jeffrey Tesler if he was not British or a British resident.[57] The difference under s 78dd(3)(f) of the US FCPA is that 'any natural person other than a national of the United States' is fair game if that person or anyone acting on her [sic] behalf, 'ma[d]e use of the mails or any means or instrumentality of interstate commerce' to further a corrupt payment.[58] However, the British legislation can still reach corrupt activities that have no connection with the UK[59] as is the US position.[60]

The requirement that the prosecution prove intent in UK legislation is more obvious than in the US FCPA; s 6(2) of the *Bribery Act 2010* (UK) says that a briber must 'intend to obtain or retain business or' (italics added) a business advantage. Under the FCPA, the prosecution must prove the accused 'corruptly' offered a bribe 'in order to assist ... in obtaining or retaining business'.[61] It is arguable that the use of the word 'corruptly' begs the question of whether the payer of the bribe intended the payment just a little; it implies that a payment made to a foreign official is either corrupt or not corrupt, whereas there may be other explanations for a payment which are less than wholly corrupt. While good defence lawyers will still be able to insist that intent be proven under the US formulation of the crime, the recent OECD recommendation that Article 1 of the Convention be implemented 'in such a way that it does not

provide a defence or exception where the foreign public official solicits [the] bribe',[62] confirms that there is pressure to remove all possible defences including those which may arise by virtue of common law when a defendant can suggest some other motive for a payment than that required by the statute.

Both the reluctance to go all the way and claim US-style extra-territorial jurisdiction and the retention of a requirement to clearly prove good old fashioned criminal intent as an element of crime in the new UK law, manifest either a conservative wish to stick with well established drafting rules, a greater commitment to the rights of a person accused of corruption than exists in the US, or both. The resulting implication that the US is willing to sacrifice even foundational democratic human rights in the quest for 'fair competition'[63] is one more irony which will make it harder to convince the developing world that the anti-corruption push is anything more than a Trojan horse to enable the better marketing of imperialist US business interests.

The other novelty in the new *Bribery Act 2010* (UK) is not so much the requirement in s 10 that no prosecution can be launched without the consent of the Director of Public Prosecutions (or equivalent officer), but the repeated requirement that such office-holder must make that decision to prosecute personally. That requirement can be the subject of a number of different interpretations including the most obvious one that the decision to prosecute should not be the mere rubber stamping of a recommendation to prosecute by a subordinate. But in the context of the OECD Convention and subsequent recommendations it seems more likely that this repeated provision is the UK's best effort to ensure that its foreign bribery prosecution decisions are made by officials completely independent of contemporary national political or economic interests; however, it remains to be seen whether the formula will work or not. What seems implicit in the requirement is that the relevant prosecuting office holder is considered to have a fiduciary duty to act in a certain way. The current English Director of Public Prosecution, Keir Starmer QC, is reassuring when he states:

> I am separated from Government through the device of superintendence. Ever since the infamous Campbell case in 1924, the right of the Law Officers of the Crown and the DPP to reach their decisions without political interference has been held inviolate ... the Protocol that I and others signed with the Attorney General in July of this year [2009] ... set[s] out publicly for the first time the independence of the public prosecutor to take decisions in individual cases.
>
> No Government may instruct me as to what to do: neither by the same token, can any member of the public. The public prosecutor's sole responsibility is to see justice done and it is this element of impartiality; of independence; of non- alignment with any vested interest; that provides the public prosecutor with the strength to take difficult decisions.[64]

Starmer does admit superintendence by the Attorney-General who is a government officer accountable to parliament;[65] he notes that he feels a duty to 'public interest factors ... that ... reflect current social attitudes';[66] and he notes that the discretion necessarily vested in prosecutors 'can mask corruption and malevolence'.[67]

There is however, no requirement that he take account of his country's international economic or political interests when he makes 'prosecute or not to prosecute' decisions. And it is the independence of these decisions which are a large concern when we review the exercise of the prosecutorial discretion manifest in settlement of FCPA cases in the US. Starmer's further talk of 'tempering justice with mercy; acting out of compassion;[68] his commitment to transparency,[69] his asserted commitment to and understanding of the human rights set out in the European Convention on Human Rights,[70] his willing submission to new judicial oversight[71] and his allegiance to justice itself[72] – all provide one with a sense that the international public can be fairly comfortable with his independence and his separation from national economic and political interest factors. However, just as the DoJ and SEC prosecutors in the US do not have authority to bar corrupt contractors from future government procurement contractors, so in the UK it is not evident that the Director of Public Prosecutions has any significant input into decisions

whether corporations and individuals prosecuted or convicted as bribers should have or retain access to future British government contracts. And it is evident that BAE retains such access though effectively convicted of an FCPA crime which resulted in a US$400 million fine.[73]

E *The Criminal Code of Australia and the Bribery of Foreign Officials*

Like the new UK legislation, the Australian Criminal Code covers both domestic and international bribery but Division 70 relates specifically to the bribery of foreign officials and was enacted by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* as Australia's response to its obligations under the OECD Convention.[74] Like the FCPA and the *Bribery Act 2010* (UK), the Australian legislation 'addresses ... the supply side of the international bribery equation'[75] but leaves the demand side relatively untouched.[76] Like the UK legislation, it implements the OECD Convention directives closely and follows the US language in many respects. But unlike the FCPA, the Australian legislation explicitly requires that the objectionable offer of benefit be made 'with the intention of influencing'[77] (italics added) the relevant official 'to obtain or retain business'.[78]

The Australian legislation includes a longer list of those who constitute foreign public officials and includes the employees and office holders of 'public international organisations',[79] the change made to the US FCPA in 1998 to reflect the heightened requirements of the OECD Convention. But though the Australian definition expressly includes 'member[s] of the ... judiciary or magistracy of a foreign country'[80] in its more exploded style of definition, such judicial officers are also included in the US and UK definitions.[81] For practical purposes, these differences are only differences in drafting style. The US statute includes bribes to party officials and candidates for future political office[82] and it is not superficially obvious that bribing such officials would offend either the UK or Australian legislation. For in the UK 'foreign public official' includes only 'an individual who exercises a public function for or on behalf of a country or territory ... or for any public agency or public enterprise of that country or territory'.[83] And similarly, the Australian legislation includes only an 'individual who holds *or performs* the duties of an appointment, office or position under a law', (italics added) custom or convention 'of a foreign country or of part of a foreign country'.[84]

There are differences in drafting style are when it comes to proving the required intent or corrupt knowledge which constitute the bribery offence. In the US legislation, that is spelled out in the definition of what constitutes 'knowing'.[85] 'If [a] person is [either] aware ... or ... has a firm belief of corrupt conduct or that it 'is substantially certain to occur', that person 'knows' sufficiently to be proven guilty of corrupt conduct unless 'the person actually believes that [the] circumstances [which enabled the bribery] do ... not exist'.[86] These rules of interpretation apply whether the defendant is an individual or a corporation.

In Australia, Division 12 of the Criminal Code identifies 'fault elements other than negligence'[87] which will subject bodies corporate to criminal liability, but with modifications made necessary because they are not individuals.[88] Thus a body corporate can be criminally liable:

- if it was negligent or reckless in failing to prevent the payment of a bribe;
- if its corporate culture encouraged, tolerated or led to the payment of the bribe, or
- if it simply failed to create and maintain a culture in which compliance with anti-bribery law was required.[89]

These heightened and arguably strict liability[90] requirements are not imposed on individuals and this again marks a contrast with the US position. The UK anti- bribery legislation is not as harsh towards corporations concerning foreign corrupt practices as the Australian Criminal Code, but it does create an additional corporate offence that does not apply to individuals. That arises when the body corporate has not set 'in place adequate procedures designed to prevent persons associated with [the body corporate] from undertaking' corrupt conduct.[91]

Australia has been obedient in following the wishes of its ally, the US, in implementing foreign corrupt practices legislation,[92] and similarly has not automatically acceded to the OECD suggestion that the facilitation payments defence should be removed from its legislation.[93] Rather, it has released a discussion paper for comment from the Australian public before deciding whether and how to implement the OECD recommendation.

The main reason why that discussion paper suggests that the facilitation payments defence should be removed is so that Australia returns to compliance with international treaty obligations and because the continued existence of the defence is inconsistent with other international laws to which Australian companies are now subject.[94] The reasons for retaining the facilitation payments defence[95] are all said to be premised in corruption.[96] Other remedial measures proposed to make the Australian legislation compliant with the UNCAC and the most recent recommendations under the OECD Convention,[97] all manifest the wish to make the worldwide legislation consistent but also to make successful prosecution easier. In particular, proving foreign bribery would be easier if the prosecution did not have to prove that a bribe was offered to influence a specific individual. That does not seem objectionable, but the discussion paper downplays duress as a factor in some foreign bribery when it says that:

> [r]esearch and the reported experiences of a number of companies demonstrate that refusing to pay public officials can result in savings and reduced delays as demands for payment can decline when a business is known to be a 'non- lucrative' target.[98]

The discussion paper also acknowledges that 'large businesses have greater bargaining power to refuse demands',[99] but discounts the serious anxiety that can arise when a corporate official is asked for even a small and supposedly legal payment at a third world airport. While a corporate official will probably doubt the legitimacy of the requested payment, the prospect of detention in an unsavoury place surely negatives the moral culpability of such a facilitation payment in lay minds. Yet this natural moral response is ignored in the international drive to make prosecution easier. In the long term, laws need a sound moral base if they are to obtain and retain their credibility with those whom they are enacted to protect and control.

III The philosophical foundations for anti-corruption law

The Preambles to the OECD Convention and the UNCAC and Kofi Annan's foreword to the latter, adequately set out why the world has come to realise and now fights against the evil of corruption. The OECD Convention Preamble states that:

> [B]ribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.[100]

The OECD thus 'consider[s] that all countries share a responsibility to combat'[101] corruption. This justification for the Convention was restated word for word in the most recent Recommendation adopted by the OECD's Council for the Convention's implementation on 26 November 2009.[102] Before the Convention was adopted in 1996, the OECD's Development Assistance Committee on 6-7 May 1996 had recorded their 'concern with corruption' as follows:[103]

- it undermines good governance;
- it wastes scarce resources for development, whether from aid or from other public or private sources, with far-reaching effects throughout the economy;
- it undermines the credibility of, and public support for, development co-operation and devalues the reputation and efforts of all who work to support sustainable development; and
- it compromises open and transparent competition on the basis of price and quality.[104]

The Preamble to the UNCAC says that '[t]he State Parties to the Convention' have prepared it because of many concerns including their:

> Concern ... about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,
>
> Concern ... about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,
>
> Concern ... about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States [and because they were]
>
> ... [c]onvinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law.[105]

The theme is not only that corruption undermines economic growth and the opportunities that proceed from growth, but it undermines human confidence that a truly just society can ever be achieved. If corruption is not systematically addressed, increasing despair that legal and social justice can ever be achieved, could see the whole world descend into a state of endless crime and violence.[106] The case for answering corruption is the more pressing in the 21st century because all nations are increasingly connected in the global village. While some of the least corrupt nations have historically been insulated from the havoc wrought by endemic corruption in other nations, without commitment to spreading the economic virtues which enhance confidence and development, there is significant risk that corruption could spoil the economies of even those nations which have achieved significant levels of law obedience in the past.[107]

Certainly the world understands that no nation can achieve significant economic growth to enhance the living standards of the majority of its citizens where a favoured few steal assets and distort genuinely free enterprise with bribes to secure and retain business. But while there is no doubt that the world understands both the danger that corruption poses and the pressing need to eliminate it, this essay has raised questions about the effectiveness of existing supply side international legal efforts to criminalise corruption. Some of those questions may arise as matters of pure cultural difference,[108] but some anti-corruption enforcement practices raise compelling questions about the underlying integrity and legitimate purpose of the OECD and UNCAC Conventions.

At core, as the UNCAC, the *Bribery Act 2010* (UK) and the Australian Criminal Code recognise, corruption is a two part equation; for corruption to prosper there has to be both a bribe supplier and a bribe requestor. While all three of these instruments recognise both sides of the equation, they and the US FCPA have really only tackled the supply side of the equation to date. Certainly the anti-bribery laws of the UK and Australia proscribe domestic demand side corruption as well. But it is the demand side of the corruption equation in foreign countries with a culture of 'grand corruption'[109] that needs to be effectively addressed. Though the OECD Convention is completely focused on supply side corruption, the UNCAC is not and recognises the need for all nations to ratify and adopt its commitments.

Those UNCAC commitments include: promises to develop laws and policies against all corruption;[110] the development of law and other measures to criminalise all forms of corruption for corporate and natural persons including the obstruction of justice;[111] enlarging statutes of limitation to ensure there is adequate time to investigate and prosecute corruption offences which can be notoriously difficult to prove;[112] passing laws that enable the freezing, seizure, confiscation and tracing of assets and funds used in or received from offences accepted under the UNCAC;[113] passing laws and developing programs that protect witnesses, experts and victims;[114] creating mechanisms that overcome the obstacles created by bank secrecy laws;[115] cooperation with other State Parties as they seek to investigate and prosecute their

own laws against corruption;[116] and the development of laws and methods that enable the recovery of ill-gotten or ill-used assets.[117] The UNCAC also anticipated the need to provide technical support to State Parties that could not do all these things by themselves,[118] and the UN Office on Drugs and Crime has even provided a legislative guide to assist all State Parties in the implementation of the Convention.[119]

But outside the US, there is little evidence that corruption investigation and prosecution is gathering pace. Certainly Germany[120] and the UK[121] have cooperated with the US in some of their international investigations, but even in those two countries, there have been very few investigations resulting in prosecutions outside of those prompted by the US.[122] The recent Australian discussion paper which discusses whether Australian foreign corrupt practices law should be tightened, admits that the Australian authorities have commenced only two prosecutions and that they are incomplete.[123] In its 2010 Guide to Foreign Corrupt Practices Law,[124] a British-based multinational law firm discussed the approach taken to enforcement in 15 countries. It reported that investigations into foreign corrupt practices were occurring in Belgium, France, Germany, the Netherlands, Poland, Spain, Sweden, the UK and the US, but that successful prosecutions had resulted in only Germany, Spain, the UK and the US.[125] In 2006, Poland created 'a new powerful anti-corruption agency to fight corruption and the current government aims to cut back bureaucracy which is seen to be a root of corruption' and though there are 'numerous investigations ... underway ... [Linklaters] are not aware of any successful prosecutions for foreign corrupt practices'.[126]

In The People's Republic of China, 'prosecutions are not uncommon' for 'domestic bribery ... in conjunction with the efforts being made by the Chinese government to build a credible market system', but 'to date, no prosecutions have been brought in the PRC for foreign corrupt practices.[127] However this last report predates the successful prosecution of 'four employees of the Australian mining company Rio Tinto (including one Australian citizen). China originally accused the four ... of espionage, but those charges were reduced to allegations of commercial bribery and stealing trade secrets stemming from Rio Tinto's negotiations with Chinese officials over iron ore prices'.[128] Warin, Diamant and Pfenning report further that:

> Chinese authorities are increasingly enforcing laws punishing corruption in business and government. Between 2003 and 2008, China convicted more than 120,000 people for corruption-related crimes. This figure marked a 12% increase from the previous five-year period. Notably, of the 120,000 convicted, 4,525 were government officials above the county level, a 78% increase from the previous five years ... China prosecuted 6,227 cases of domestic commercial bribery involving 1.65 billion yuan (about $242 million) in 2008, which marked a small decline from 2007, in which authorities handled 7,450 cases of commercial bribery involving 2.12 billion yuan (about $310 million). In the largely government-owned banking sector, an extensive audit, completed in January 2008, revealed 445 cases of irregularities or misconduct, involving nearly 860 billion yuan (about $126 billion), and led to termination of 177 bank managers.
>
> Whether these eye-popping figures – all released by the government and largely unverifiable – reveal amplified enforcement, increased corruption, stepped-up public relations efforts, or a combination of these is impossible to determine, but it is clear that the Chinese government continues to roll out new initiatives in its fight against corruption ... the increased prosecution of senior government officials is undeniably the most visible aspect of the Chinese corruption crackdown.[129]

Some will be inclined to discount these reports garnered from PRC government sources as spin designed to reassure the West that China is a safe place to invest. But the perception of spin and the Chinese focus on convincing the West that it is serious about fighting corruption, also demonstrate that there are two sides to the issue of culture in the corruption equation. For just as the West is sceptical about the reliability of the Chinese focus on corruption fighting, so the rest of the world is sceptical about the West's reasons for its war on foreign corruption. In the case of China, sceptics think that China is willing to manufacture statistics to encourage Western business. In the case of the US in particular, many less developed nations will observe President Clinton's transparent endorsement of the OECD Convention

because it encourages 'fair competition ... [and will oblige] our major competitors ... to criminalize the bribery of foreign officials'[130] with an understanding nod. That is because, for better or for worse, the US is widely perceived as being obsessed with money and business to the extinction of all other values. But if that perception is fair, and even if it is not, given that 'perception is reality', what should the US, other developed nations in the West and the umbrella international institutions which are interested in eliminating foreign corrupt practices do about it?

A *Adverse Perceptions of Anti-Corruption Laws*

The suggestion that 'corruption is just a culturally different way of doing business' has been noted previously from Gayle Hill.[131] And there is a sense in which this suggestion resonates with the idea that human rights do not comport with 'Asian values' and may thus be regarded as one more example of western cultural imperialism.[132] But though China and some other countries do not accept that western-style human rights are universal values, China's war on domestic corruption does seem to demonstrate that it has accepted that corruption is universally bad for business.[133] But that does not mean either that China agrees with everything the US and the West do with regard to fighting corruption[134] or that the rest of the world is ad idem with the West and the US on fighting corruption either. Indeed, it is possible that the nations which have not signed on to the OECD Convention in particular are sceptical of the moral integrity of the law and contemporary enforcement practices. Issues likely to promote scepticism include, first that save in the case of the US, foreign corrupt practice investigations and prosecutions do not demonstrate a high degree of commitment to this war. It is not possible to single out a single reason for that lack of commitment, but it does seem reasonable to infer that those nations that have sought to implement the OECD Convention and UNCAC are not finding their resulting laws easy to investigate, prosecute or enforce. Secondly, even though the OECD Convention expressly stipulates that 'considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved'[135] are to be excluded from prosecution decisions, it is self-evident that national economic interest is having considerable influence upon enforcement practices. Thirdly, none of the funding realised from fines and disgorgement penalties in the US has been made available to assist other nations with education and enforcement such as might address such corruption from the demand side of the corruption equation. Finally, no major western corporation 'found guilty' of foreign corrupt practice has been permanently barred from all government or international procurement contracts, if there was any sanction against procurement contract access at all.

These factors lead not only to scepticism but to cynicism for just as the West is interested in promoting democracy and human rights values most vigorously in those areas of the world where it has significant economic interests, so the West only seems interested in enforcing foreign corrupt practices laws when it is profitable and when it does not compromise their national economic interests – despite the lofty language of Article 5 of the OECD Convention to the contrary.

Justifications for such cynicism abound. Indeed it is submitted that there is not a single US prosecution decision that cannot be explained in purely economic terms. The Green,[136] Johnson and Johnson,[137] and BAE[138] cases have already been mentioned. But there are many other examples. Jessica Tillipman reports that 'the top 10 most expensive settlements in FCPA history include eight large US Government contractors: Siemens AG, Halliburton/KBR, BAE Systems, JGC Corporation, Daimler AG, Alcatel-Lucent, Panalpina and Johnson & Johnson'.[139] '[T]he companies that settled the three most expensive FCPA enforcement actions to date, and together paid approximately $1.8 billion in fines (Siemens AG, $800 million; Halliburton/KBR, $579 million; BAE Systems, $400 million), also obtained over $10 billion in US Government contracts in FY 2010.[140] Tillipman continues and explains that:

> [t]he top 10 corporate settlements total nearly $3.2 billion in fines and penalties. Fines against individuals are similarly large. Between 1998 and October 2010, more than $2 billion in criminal fines were imposed against individuals. This number includes several sizable monetary payouts by

> individuals, including the eighth most expensive FCPA enforcement action to date against Jeffrey Tesler, totalling $148,964,568;[141]

and that

> [F]rom 2004 to date, over $1 billion [in addition to fines] has been disgorged ... FCPA disgorgements can total hundreds of millions of dollars as with Siemens ($350 million), KBR ($177 million), and Snamprogetti ($125 million).[142]

Paul Carrington makes a similar argument. He notes that:

> James Giffen, an American citizen, was indicted in 2003 for bribing President Nursultan Nazarbaev of Kazakhstan on behalf of Mobil, Texaco, Phillips/Conoco, and BP. His alleged offense gained public attention in 2000. After four years of investigation, Giffen was charged with thirteen counts of violating the FCPA and thirty-six counts of criminal money laundering. President Nazarbaev, who has been a friend of American foreign policy in the Middle East, was critical of the prosecution, perhaps sensing that he could even lose his office as a result of it. Prospective government witnesses were even said to have received death threats. In his defense, Giffen alleged that he had been regularly debriefed by United States government officials, and claimed that 'by the time of the transactions at the heart of the indictment, [he] understood himself to be working not only for the government of Kazakhstan, but also for ... United States government agencies' ... the trial has been repeatedly postponed. It will perhaps be held some day, but maybe Kazakhstan is too important to the United States for the Department of Justice to continue the case.[143]

In their FCPA blog, Richard Cassin and Ethics Media 360 recorded on 13 July 2011 that:

> Armor Holdings Inc, a military and law enforcement equipment company formerly listed on the NYSE and now owned by BAE Systems agreed to pay $16 million to resolve FCPA violations arising from bribes to secure UN contracts and covering up the payments;[144]

on 27 July 2011, that:

> Diageo PLC agreed to pay the SEC $16.4 million to resolve FCPA offenses that stretched over six years and involved bribes to foreign officials in India, Thailand, and South Korea. The London-based maker of many top liquor brands – including Johnnie Walker and Windsor Scotch whiskeys – paid $2.7 million in bribes through subsidiaries for sales and tax benefits;[145]

and on 15 September 2011, that:

> Bridgestone Corporation agreed to plead guilty and pay a $28 million criminal fine for its role in conspiracies to rig bids and make corrupt payments to foreign government officials in Latin America. The Tokyo-based maker of marine hose and other industrial products was charged with conspiring to violate the Sherman Act and the Foreign Corrupt Practices Act.[146]

But it is not just in the US that political and economic interest can be seen as the driving force behind the decision to prosecute, settle or not. The decision to settle the BAE case noted above was publicly predicated upon the preservation of 100,000 jobs[147] in addition no doubt, to the unstated need to retain BAE as a viable and innovative supplier of essential military technology in the West. Paul Carrington is critical of the political considerations which have influenced the British anti-corruption prosecution efforts despite the prohibition in the OECD Convention. He writes that:

> having recently enacted its criminal law as required by the OECD Convention, [in 2004, the United Kingdom] initiated an inquiry into bribes allegedly paid by BAE Systems, the British weapons firm, to secure contracts with the government of Saudi Arabia. In November 2006, it was reported that Saudi Arabia ... threatened to break diplomatic relations with the United Kingdom if the investigation was not dropped. The next month, the investigation was dropped after the British government determined

> that 'the wider public interest' 'outweighed the need to maintain the rule of law' ... on appeal the House of Lords affirmed the Prime Minister's action in calling off the prosecution.[148]

Carrington's own cynicism is thinly veiled when he observes in conclusion that '[t]he Serious Fraud Office [UK] has yet to demonstrate the will to punish the corruption of foreign officials by British firms seeking to gain an advantage for the Office's fellow countrymen'.[149]

Why are these reports which show the influence of political and economic considerations in Western foreign corrupt practice prosecutions likely to lead to scepticism in non-western countries and particularly developing nations? The simple answer is that Western enforcement practices reveal an objective lack of integrity.

First, it is the pursuit of 'improper advantage'[150] that lies at the heart of bribery; if a payment or other inducement were legal, proper or fair, it would not constitute a bribe. The affirmative defences in the US FCPA[151] also show that it is the impropriety of a payment which constitutes the heart of the crime. But to non-Western eyes, the payment of money to settle a bribery case looks just like the payment of another bribe. And from a moral perspective, it is no answer to say that the settlement payment is different because it was legal. Why was it legal? Because it was paid to a government official or department with official approval? How is that morally different to a third-world beholder who thinks a payment to a Prime Minister or his department is similarly a payment to an official? The perceptual inconsistency that results is not helped when there is no non-monetary consequence to the corporation nor punitive personal consequence for the senior corporate executives most directly involved.

Secondly, there is some justification behind the notion that the West can legislate anything it wants if there is significant economic and political justification to do so. While some in the West still subscribe to the theory that law must have a justification in morality to be 'legal', or at least to have credibility, the positivist idea that a law is legal if it was enacted in a procedurally correct manner by recognised lawmakers,[152] is regarded as a sign of decadence in some more conservative and religious cultures. This context undermines the general validity of western anti-corruption laws in cultures where law is only valid if it is 'moral' and 'right'.

Thirdly, and in clear deference to the idea that 'justice must not only be done but be seen to be done',[153] Article 5 of the OECD Convention states that the '[i]nvestigation and prosecution of ... bribery ... shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[154] But how does a third-world beholder perceive the fact that most of the US government's top 10 procurement contractors are still alive and well despite the fact that six of them have been guilty of the payment of bribes on a scale that few in the third world can even comprehend?[155] And if principle is important, why is it that the English House of Lords would uphold Tony Blair's decision to call off the prosecution of BAE after Saudi Arabia threatened to suspend diplomatic relations with the UK if the prosecution continued?[156] Though the OECD Convention conceded that investigations and prosecutions must be 'subject to the applicable rules and principles of each Party',[157] where there is no trial and no visible punitive consequence to major corporations, no one in the third world is convinced that western corrupt practice enforcement is about justice. While imprisonment has resulted in some cases, it is only 'the little guys' and foreigners that seem to take those falls.

Fourthly, if the West is really serious about eliminating bribery and corruption, how is it that so little has been done to combat bribery on the demand side of the corruption equation? It cannot be about money because it is very clear that there is plenty of money which could be tapped to pay for demand side education and enforcement. Why is it that the OECD is not highly visible in promoting for example, education programs that criminalise corruption at all levels all over the world – and why are they not providing expatriate mentors who could help build capacity in third-world prosecution teams feeding off whistleblowers encouraged by rewards flowing from successful prosecutions?

The answer to all these questions lies in the obvious insight that there are economic and political limits to the interests of the West and those limits have little connection with universally recognised standards of morality despite pretensions to the contrary.

IV How can we effectively fight corruption on both the demand and supply sides of the equation?

In the introduction to this essay, I summarised that 'law and policy makers in the first world have much work to do if they are to convincingly educate hearts and minds through the whole world that bribery and corruption are evil crimes which simply must be eliminated'. The idea that the engineering of successful societal change depends upon popular understanding and acceptance of the relevant laws is well known in the West. There is a large body of literature about the connection between the acceptance of law and its enforceability in many disciplines including legal theory and sociology. But it is more recently well known because of the West's invasion of Iraq to depose Saddam Hussein so as to neutralise or destroy his weapons of mass destruction. To successfully rebuild Iraqi society with democratic principles overlaid upon traditional values, all the participants in the law reform process recognised it was necessary to win the hearts and minds of the people. But this understanding seems to have been largely ignored where the implementation of the OECD Convention and the UNCAC are concerned.

While the UNCAC fully recognises that corruption has both a supply and a demand side, international enforcement emphasis seems focused on the supply side in the developed OECD nations. That perception may be the simple result of the volume of sensational press reports in West. However, the western nations which have passed anti-corruption legislation are more inclined to cite their OECD obligations than those that arise under the UNCAC. Further, the legislation from the US, the UK and Australia discussed in this article, clearly respond to the mandates of the OECD Convention and all three countries have adopted OECD language with primary focus upon the supply side of anti- corruption enforcement. But at least in part this criticism is unfair. It is unfair because each of these three nations have also ramped up their legislation proscribing domestic demand side corruption during the period since the OECD was passed – and even the US cannot pass legislation with extra-territorial reach sufficient to proscribe demand side corruption in other countries. So what more could be done?

A *Education in 'Demand Countries'*

It is submitted that demand countries currently have neither the will nor the resource to educate their citizens about the evils of corruption. Citizens of developed nations can readily understand the connections between corruption and stunted economic growth and between corruption and lawlessness. However, these connections need to be spelled out for the citizens of less developed nations before any legislative and enforcement campaigns could gain traction. Because literacy levels are lower in most demand countries, careful consideration needs to be given to how best to reach the people. Anti- DVD/ video piracy advertisements in developed nations are successfully displayed in movie theatres and in the trailers for rental and domestic purchased DVDs and videos. But where the generality of the populace do not have the resource to go to movie theatres or to rent non-pirated DVDs and videos, effective campaigns must rely on billboards and perhaps free to air television campaigns to achieve any degree of target market penetration.

But it is not just market penetration that must be thought about differently in the third world. Since it is very likely that the citizens of less developed nations do not understand that foreign corrupt practices cause extensive damage to their national economies and thus their individual standards of living, clever advertising campaigns will need to be crafted that connect the necessary dots for third world consumers. This is no easy task since for many in the third world, payments that are improper by western standards are an integral part of established culture where most scramble for whatever dollars they can earn as

unlicensed street vendors. This educational task is huge. By comparison, western efforts to criminalise drunk driving by media education are a piece of cake. To be successful, media campaigns designed for the third world consumption should be planned for years and decades rather than days and months. This education is a 'long haul' project and it is self-evident that the developed nations have to be thoroughly committed or it will never get off the ground.

B *Re-Structured Enforcement Emphasis in the West*

Mass educational campaigns will never gain traction in the third world if western enforcement practices continue to send mixed messages. Unless the West moves to honestly implement the OECD prohibition on economic and political influence in their prosecution and enforcement practices, it is doubtful that any education campaign will achieve credibility in less developed nations. Therefore what? Western nations need to start punishing the 'important corporations' which offend foreign corrupt practice laws in convincing and unmistakeable ways. The most obvious missing sanction is debarment from any future government procurement contract no matter who the offender is, how important the technology the offending corporation has to sell or how many jobs are at stake. But it seems doubtful that any western government will have the political courage to take such a stand. That unlikelihood and the anxiety the suggestion causes, is a parable for the effort that will be required to change the corruption paradigm in the developing world. For the fact that political leaders in the West would shrink at the prospect of denying Halliburton or BAE any future government procurement contracts, demonstrates that the heart and mind of the West is no more committed to solving the international corruption problem than are the governments of third world countries who are thoroughly daunted by what the West expects of them under the UNCAC. What then can be done realistically?

Paul Carrington adds a number of other suggestions. He begins by citing the Civil Law Convention on Corruption adopted by the Council of Europe in 1999[158] which obliges signatories 'to authorize civil actions for compensation of firms damaged by corrupt practices.[159] He notes a 'civil action brought by a foreign government in an American court ... in 2009 by the Republic of Iraq ... against ninety-three defendants alleged to have participated in frauds associated with the United Nations oil-for-food program ... [in which] Iraq seeks $10 billion as compensation'.[160] Carrington speculates that the case was brought by US attorneys contingent upon success'[161] and suggests that such innovative use of US jurisdictional reach may yet prove a useful pattern to overcome the economic and political anxieties that western states feel when their OECD covenants say they should prosecute cases that their national interest says they should not prosecute.[162]

Carrington's primary idea is that the 'relator claims' allowed under the *False Claims Amendment Act 1986* (US) and also known as 'Lincoln's Law', could be used for foreign cases in the US and/or copied in other countries with corruption problems.[163] Under this law, private citizens can bring claims on behalf of the government against 'those engaged in corrupt practices for harm resulting from the taking of bribes by its officers'.[164] The law is called 'Lincoln's Law' because it has its roots in legislation President Lincoln passed in 1862 after he dismissed his Secretary of War 'for paying his friends twice the market price for cavalry horses that turned out to be afflicted with 'every disease horseflesh is heir to'.[165] The 1986 update of this old False Claims Act imposes 'treble damages liability on those engaged in corrupt practices causing harm to the federal government'.[166] Carrington says 'such private enforcement proceedings by citizens in civil actions [are] perceived to be more effective in deterring corrupt practices than criminal law enforcement'[167] for a number of reasons. First, the civil standard of proof applies. Relators are only required to prove guilt on the balance of probabilities rather than beyond reasonable doubt.[168] Secondly, 'private citizen-relator[s like prosecutors can] ... compel disclosure of possible evidence' against parties and non-parties.[169] Thirdly, 'unlike civil plaintiff[s] in England or most other nations, [relators are] ... ordinarily not liable for the legal expenses of the defense even if he and/or the government is unsuccessful in proving the case.[170] In Lincoln's day, 'numerous relators came forward

in the name of the United States to pursue claims against private contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall.[171]

Carrington does not address the much greater proof difficulties that arise in modem international foreign corrupt practices cases. For example, it will be difficult for modern relators to produce such tangible evidence as 'triggerless rifles'. It will also be more difficult to prove that a government suffered loss because of corrupt payments involved in the construction of a billion dollar power station than showing the true market price of a horse in Lincoln's Civil War America. But Carrington's point is that whistle-blower laws with financial incentives are a credible enforcement tool that have not been significantly explored for potential in the foreign corrupt practices context. He does cite an FCPA case in the US where a senior employee became a witness against his employers in return for a reduced sentence[172] and says there are '[m]ore than a few' recent US relator cases where the 'relators have been able to retire in wealth after revealing frauds on the government ... committed by their former employers'.[173] And as noted above,[174] Carrington sees foreign corrupt enforcement potential if US-style contingent fee litigation could be exported to other jurisdictions. Certainly the fees flowing to whistleblowers from US false claims prosecutions would seem likely to provide grand incentives to informants from the third world. But maybe not since even the 2007 doubling of the US$25 million bounty on Osama Bin Laden's head'[175] did not produce him and US officials have confirmed that they would not be paying a bounty since 'his death was the result of electronic intelligence and not information from any one informant'.[176]

Carrington's fallback position is that even if only the OECD nations experimented with such private law initiatives, '[s]uch empowerment of private enforcement might significantly enhance the deterrent effect of the laws enacted pursuant to the present Conventions'.[177] Alternatively, the already long reach of the US FCPA jurisdiction could be legislatively extended 'to enable a citizen of another nation, such as Kazakhstan, to take on the role of a relator to bring suit in an American court in the name of his government'.[178] 'The United Kingdom, Korea and the Netherlands ... [already] have laws to reward and protect whistleblowers who alert prosecutors to frauds on their governments'[179] so that 'culture shock'[180] need not arise at this suggestion. But Carrington is doubtful that foreign governments would relieve relators of the burden of conducting such litigation, particularly if the targets were high government officials and perhaps even 'the president of the republic'.[181] Carrington further concedes that even a successful judgment would only be valuable to the extent that there were assets in the US which could be seized to meet it.[182] And he foresees other problems including that by 'longstanding international tradition ... the courts of one nation do not enforce the public revenue or punitive laws of another',[183] and that '[s]ome Europeans, Asians and Africans may already resent the pretentiousness of American courts sitting as 'world courts' as they are sometimes prone to do.[184] So Carrington finally retreats to the suggestion that '[t]he World Bank ... with the support of the International Chamber of Commerce or the United Nations, could create a [new] legal forum ... that could enable and reward effective private enforcement of international anticorruption law.[185]

All of this discussion of alternative enforcement methods that could be investigated simply suggests that even the first world has not really committed to eliminating corruption anywhere. For while the US has reaped a harvest of fines and penalties from the cases it has prosecuted particularly since 1998, the failure of even other OECD nations to follow suit and the general failure of the West to explore alternative enforcement methodologies as would occur if there was real moral commitment, witness that the war on corruption has not really started. US apologists may point to the combined DoJ/SEC enforcement results as an answer to this 'not serious' charge. But even their yields at more than $100 million in 2007; $850 million in 2008; $620 million in 2009; $1.8 billion in 2010 and $480 million in 2011,[186] pale into insignificance when compared with World Bank's 2002 estimate 'that bribes totalling a trillion dollars were paid' worldwide in just that one year.[187] So long as the largest bribers in the US continue to trade, no amount of education in the third world will ever convince those peoples that there is any reason for domestic culture to change.

V Conclusion

The world is not yet serious about eliminating corruption. If the world was serious and believed that corruption is the 'insidious plague' that Kofi Annan condemned in 2003,[188] the governments of wealthy nations together with international institutions around the world, would have studied effective education and enforcement; and the results of implementation on both the supply and demand sides of the corruption equation would be obvious in all manner of countries. Instead the US stands alone in its enforcement efforts and even looks hypocritical since it has not imprisoned or bankrupted anyone who looks important.

While these statements may appear harsh, they are not. The world is bright enough to have made a dent in corruption since the OECD Convention and UNCAC were passed if it had the will and altruism to do so. The truth is that there are enough Conventions, there is enough money and there are enough jails; but sadly there are also plenty of corrupt officials and politicians.

Notes

1 *United Nations Convention Against Corruption*, 2004, Foreword, p. iii (UNCAC).

2 Ibid.

3 Ibid.

4 Ibid.

5 See for example Tillipman J, 'The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences', The George Washington University Law School Legal Studies Research Paper No 548, http://ssrn.com/abstract=924333 (see also *Briefing Papers*, Thomson West, No 11-9, 2011), http://scholarship.law.gwu.edu/cgilviewcontent.cgi?article=1037&context=faculty_publications) where she says at page 2 that '[t]he United States is currently the world leader in foreign antibribery enforcement ... due to a sharp rise in FCPA enforcement activity in the past decade ... breaking records, not only in the number of corporate prosecutions, but also in total penalties imposed'. She cites 2010 FCPA enforcement penalties alone above $1.7 billion.

US law firm Arnold and Porter note the US$1.8 billion total of 'criminal fines, civil monetary penalties, disgorgement, and prejudgment interest levied in 2010 was more than the two previous years combined, US$645 million in 2009 and US$901 million in 2008' but cite a great deal of additional evidence that FCPA enforcement will remain a high priority for the US Department of Justice and Securities Exchange Commission (Arnold and Porter, *FCPA newsletter_FINAL 144* (Summer 2011)).

6 Tillipman, above n 5, 2-3.

7 Tillipman, above n 5, 2-3; 10-11.

8 In her commentary of 'Australian Laws Prohibiting Foreign Bribery', Gayle Hill distinguishes between the 'supply side' and the 'demand side' 'of the international bribery equation'. Legislation on the supply side criminalises the payment of bribes, but 'does not address the very real issues that operate on the "demand side" of the bribery equation' (Hill G, *Australian Laws Prohibiting Foreign Bribery* (2000), Australian Mining and Petroleum Law Association Yearbook, 2, www.transparency.org.au/documents/Australian%20Laws%20Prohibiting%2OForeign%20Bribery.pdf).

In the original commentary on the OECD Convention adopted on 21 November 1997, those drafters distinguished between 'active' and 'passive' bribery which correspond respectively to Hill's reference to the supply and demand side of the international bribery equation (*OECD Convention*, (2011), OECD, Preamble, 14, (*OECD Convention*), www.oecd.org/dataoecd/4/18/38028044.pdf).

9 Tillipman, above n 5, 7 disagrees with this, citing a Department of Justice press release to the contrary (her nn 8, Department of Justice Press Release No 11-596, 10 May 2011) and notes the size of the fines, the fact that corporations cannot pay the fines imposed personally upon corporate officers, and the disgorgement and forfeiture penalties in addition to fines as evidence to the contrary. The regular use of deferred prosecution agreements in the case of politically and economically important corporate wrongdoers, coupled with the fact that none of the really large government contractors has ever lost its government contractor status, is evidence to the contrary.

10 Tillipman, above n 5, 7 citing the remarks of Assistant US Attorney-General Lanny A Breuer at the 24th National Conference on the FCPA on 16 November 2010 that 'prosecuting individuals – and levying substantial criminal fines against corporations – are the best ways to capture the attention of the business community'.

11 Richard L Cassin and Ethics Media 360, 'A Survey of FCPA Sentences' on FCPA Blog (28 February 2012), 3-5, 10, www.fcpablog.com/blog/tag/gerald-green.

12 Ibid 7.

13 Scribd, 'Johnson & Johnson Deferred Prosecution Agreement', Scribd Blog, (11 April 2011), 15, www.scribd.com/doc/52727873/Johnson-Johnson-Deferred-Prosecution-Agreement.

14 The *US Foreign Corrupt Practices Act 1977* is Chapter 2B of Title 15 of the *United States Code* (FCPA)

15 Warin, Diamant and Pfenning note that 'the SEC does not need to show any corrupt intent to bring enforcement actions against companies for violating the books-and- records provision'. Joseph F Warin, Michael S Diamant and Jill M Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5(1) *Virginia Law & Business Review* 34, 47.

16 *US Code* Title 18, ss 1341 and 1343.

17 OECD, 'Information sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (November 2002), www.oecd.org/dataoecd/52/24/2406452.pdf.

18 These defences did not exist in the original 1977 FCPA as enacted during the Carter Presidency. They were inserted during President Reagan's tenure by the *Omnibus Trade and Competitiveness Act 1988*, Title V, and were a compromise. The Reagan administration wanted to decriminalise foreign corrupt practices but instead created affirmative defences and a facilitation payments exception. FCPA Professor, 'President's Day' on FCPA a Forum Devoted to the Foreign Corrupt Practices Act, (21 February 2011) www.fcpaprofessor.com/presidents-day.

19 vLex, '15 *USC* 78 – Sec 78dd-1. Prohibited foreign trade by issuers' (2012), http://us-code.vlex.com/vid/prohibited-trade-practices-issuers-19231259. See also www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

20 William J Clinton, 'Statement by the President' (10 November 1998), www.justice.gov/criminal/fraud/fcpa/docs/signing.pdf.

21 Tillipman, above n 5, 10.

22 Ibid 9.

23 Ibid. Tillipman reports that the EPLS is often relied upon by local government as well and can therefore result in a listed contractor losing or becoming ineligible to bid on domestic local government work as well.

24 Ibid 10.

25 Ibid, quoting Past Performance Information Retrieval System. The site which Tillipman refers to is not functioning properly as of the time of this publication. However another site which explains how PPIRS works and which includes additional hyperlinks may be accessed at http://govwin.com/knowledge/past-performance-ppirs.

26 lbid 2.

27 Clinton, above n 20.

28 Carrington P, 'International Corrupt Practices Law' 32 *Michigan Journal of International Law* 129, 140 quoting Fabrizio Pagani, *Peer Review: A Tool For Co-Operation and Change, An Analysis of OECD Working Method*, OECD SG/LEG (2002) 1 (11 September 2002), www/oecd/org/dataoecd/33/16/1955285.pdf.

29 Gail De George, *Capital Thinking Magazine*, Feature Story, 2010, Patton Boggs LLP, www.capitalthinkingmagazine.com/featurestory.html.

30 Tillipman, above n 5, 3.

31 De George, above n 29.

32 Tillipman, above n 5, 3.

33 Ibid 13, quoting Power, 'Serious Fraud Office to Reinterview BAE Chiefs Over Alleged Bribes', *The Times*, 18 December 2009, www.armsdeal-vpo.co.za/articles15/serious.html.

34 Rob Evans, *The Guardian*, 'UK lawyer admits in US trial to bribing Nigerian officials' (11 March 2011), www.guardian.co.uk/law/2011/mar11/us-extradition-bribery-tesler.

35 Michael Graczyk, *Bloomsberg Businessweek*, 'Attorney, British lawyer pleads guilty to bribery' (11 March 2011), www.businessweek.com/ap/financialnews/D9LT80O00.htm.

36 Samuel Rubenfeld, *The Wall Street Journal*, WSJ Blogs, 'Jeffrey Tesler Pleads Guilty to Two FCPA Counts' (11 March 2011), http://blogs.wsj.com/corruption-currents/2011/03/11/jeffrey-tesler-pleads-guilty-to-two-fcpa-counts.

37 Ibid. This site includes access to a copy of Tesler's Plea Agreement including reference to 16 foreign bank accounts to be disgorged, all of them in Switzerland and Israel.

38 Graczyk, above n 35.

39 Ibid.

40 The first OECD anti-corruption recommendation predated the Convention itself on 6-7 May 1996 and was focused on the elimination of corruption in bilateral aid procurement, 38, www.oecd.org/dataoecd/4/18/38028044.pdf.

41 Ibid 35, obliging signatories to take measures to deter bribery in international business transactions benefiting from official export credit support.

42 Ibid 33, requiring explicit legislation by signatory states disallowing the tax deductibility of bribes.

43 Ibid 20-32, requiring inter alia, awareness raising initiatives, the elimination of indirect support for foreign bribery, the denial of public procurement contracts, the elimination of the small facilitation payments defence to bribery charges, and heightened financial disclosure requirements of all material contingent liabilities (including the likely legal costs and consequences of anti-bribery prosecutions), and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign officials.

44 Ibid 28.

45 UN Resolution 58/4.

46 UNCAC, Article 68(1). See also http://en.wikipedia.org/wiki/United_Nations_Convention_against_Corruption.

47 UNCAC, Foreword, iii, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

48 Ibid.

49 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption (2012), www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.

50 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption,' CAC/COSP 4 Resolutions and Decisions' (2012) 8, www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session4-resolutions.html.

51 *UNCAC*, Article 53(a).

52 *UNCAC*, Article 53(b).

53 United Nations Office on Drugs and Crime, Conference of the State Parties to the United Nations Convention Against Corruption (2012), www.unodc.org/unodc/en/treaties/CAC/CAC-COSP.html.

54 *UNCAC*, Foreword, iii.

55 *The United Nations Convention against Transnational Organized Crime and the United Nations Convention Against Corruption*.

56 *UNCAC*, Foreword, iii.

57 *Bribery Act 2010* (UK), c 23, s 12(4).

58 US FCPA s 78dd(3)(a). Note that 'Pankesh Patel, a UK citizen ... [avoided US jurisdiction in a 2010 case because the relevant mailing] occurred in the United Kingdom', [and] ... was not 'in the territory of the United States' (Tillipman, above n 5, 6 citing Superseding Indictment, *United States v Gonsalves*, No 09-cr-00338, at 33 (16 April 2010) and Minute Entry No 09-cr-00335 (DDC 6 June 2011) from the same case.

59 *Bribery Act 2010* (UK), c 23, s 3(6).

60 The US legislation does not require a connection with the US, but s 78dd(1)(g) was added in the Clinton amendment of 1998 and out of an abundance of caution, confirms that no 'United States person' that is an officer of a public company may do any of the corrupt things listed 'outside the United States'.

61 US FCPA s 78dd(l)(a).

62 OECD, 'OECD Convention' and related documents' (2011) 28, www.oecd.org/dataoecd/4/18/38028044.pdf.

63 Clinton, above n 20.

64 The Crown Prosecution Service, 'Public prosecution service annual lecture - the role of the prosecutor in a modem democracy' (21 October 2009), www.cps.gov.uk/news/articles/publicprosecution-service-annual lecture-the_role_of_the_prosecutor_in_a_modern_democracy/index.html.

65 Ibid.

66 Ibid 11.

67 Ibid 4.

68 Ibid 2.

69 Ibid 3.

70 Ibid 5.

71 Ibid 4-5.

72 Ibid 8.

73 Above nn 26, 31-33 and supporting text.

74 Hill, above n 8, 1-2.

75 Ibid 2.

76 Both the UK and Australian legislation criminalise the payment and the solicitation of domestic bribes as well. But neither government has expended significant resource in public education to effectively criminalise domestic corruption in the public mind. What is likely required to achieve that result is discussed in Part III of this essay.

77 *Australian Criminal Code* (ACC), Division 70.2(1)(c).

78 ACC, Division 70.2(1)(c)(i).

79 ACC, Division 70.1, definition of foreign public official subclauses (g)-(j) inclusive.

80 Ibid.

81 The US definition of foreign official (s 78dd(l)(f)) includes 'any officer or employee of a foreign government or any department, agency or instrumentality ... or any person acting in an official capacity for or on behalf of any such government department, agency or instrumentality'. In s 6(5) of the *Bribery Act 2010* (UK), 'foreign public official means an individual who holds a legislative, administrative or judicial position of any kind'.

82 US FCPA ss 78dd(l)(a)(2) and 78dd(2)(a)(2).

83 *Bribery Act 2010* (UK), c 23, s 6(5)(b).

84 ACC, Division 70.1, definition of foreign public official subclauses (c)-(d).

85 US FCPA s 78dd(1)(f)(2) and 78dd(2)(h)(3).

86 ACC, Division 70.1, definition of foreign public official subclauses (c)-(d).

87 Ibid, Division 12.3.

88 Ibid, Division 12.1(1).

89 Ibid, Division 12.3(2) and 12.4.

90 Ibid, Division 12.5. This provision says that '[a] body corporate can only rely on s 9.2 (mistake of fact [strict liability]) ... if the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted an offence and the body corporate proves that it exercised due diligence to prevent that conduct.' Due diligence is then itself strictly defined.

91 *Bribery Act 2010* (UK), c 23, s 7(2).

92 Note that the 15 November 2011 Discussion Paper released by the Australian Government's Attorney-General's Department titled 'Assessing the 'facilitation payments' defence to the Foreign Bribery offence and other measures'(*Australian Discussion Paper*) states at [21] that the Australian legislation was modelled on the FCPA, www.ag.gov.au/foreignbribery.

93 The FCPA retains its 'facilitation defence', but US prosecutorial practice including deferred prosecution practices suggest that the defence no longer provides much protection at all.

94 Australian Discussion Paper [23].

95 Ibid [24]. The reasons cited are 'competitive disadvantage, duress and uneven playing field'.

96 Ibid.

97 Ibid [28]-[38] discuss clarifying 'when a benefit is legitimately due' (so that a court considering a case can consider whether the amount paid gives the lie to the suggestion that it was legitimate); removing the requirement that the prosecution prove an intent to bribe one particular official as opposed to someone; and removing the arguably duplicative requirement in domestic cases to prove both 'intent' and 'dishonesty'.

98 Ibid [23].

99 Ibid [24].

100 OECD Convention, Preamble, www.oecd.org/dataoecd/4/18/38028044.pdf.

101 Ibid.

102 Ibid 20.

103 Ibid 38.

104 Ibid.

105 UNCAC Preamble, 5-6, www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

106 Hill, above n 8, 1, 16. Gayle Hill notes from the 9th International Anti-Corruption Conference in Durban, South Africa in October 1999, the Durban Commitment to effective action against corruption lest 'the world beyond year 2000' experience deepened poverty, 'the eroded legitimacy of [existing] governments, human rights abuses proliferate[d]; ... [with] the democratic gains of the past 50 years ... destroyed'.

107 Ibid 1, where Hill also notes from 9th International Anti-Corruption Conference in Durban, that 'the problem of corruption has reached such a scale and penetrated institutions to such an extent that policy makers and business people around the world are being forced to confront the issue as a major problem for the developing world as well as the industrialised world'. She continues, '[c]orruption bears with special cruelty upon the world's most poor or peoples. It debases human rights and degrades the environment. It derails development and destroys confidence in democracy and the legitimacy of governments. It undermines human dignity and it universally condemned by the world's major religions'.

108 Ibid where Hill cites a Transparency International Paper as authority for the idea that some defend bribery as 'a victimless crime ... [which] keeps the wheels of commerce turning and enabling business people to overcome onerous and unnecessarily detailed legal requirements' 'The OECD Convention: Sharp Edged Sword or Blunt Weapon?' (31 March 2000). She also notes that 'some seek and rationalize corrupt payments as a 'cultural' rather than a 'criminal' phenomenon which ... citizens

of western democracies, cannot hope to understand ... [without] ethical re-education to remove [their] prejudices [so as to embrace a different way of doing business'. But she debunks this 'different way of doing business' as a debilitating scourge.

109 Ibid, where Hill uses this term to identify both societies which have traditionally accepted corruption as a 'different way of doing business', and corruption which transcends national boundaries.

110 UNCA C Chapter II, Articles 5-14.

111 Ibid Chapter Ill, Articles 15-42.

112 Ibid Article 29.

113 Ibid Article 31.

114 Ibid Article 32.

115 Ibid Article 40.

116 Ibid Chapter IV, Articles 43-50.

117 Ibid Chapter V, Articles 51-59.

118 Ibid Chapters VI and VII, Articles 60-64.

119 Australian Discussion Paper, [19].

120 De George, above n 29.

121 Ibid.

122 Linklaters, 'Your Guide' (2010) 5 and 15, http://linklaters.com/pdfs/mkt/london/A12659424.pdf.

123 Australian Discussion Paper, [17]. The two companies which are subject to foreign corruption enforcement action are listed as Securency and Note Printing Australia. Some of the international commentators appear to be misinformed since David Weiss wrote in 2009 that 'major prosecutions' were underway 'in Australia, France, Germany and other OECD Member States'. David Weiss, 'The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence' 30 *Michigan Journal of international Law* 471, 495.

124 Linklaters, above n 122.

125 Ibid.

126 Ibid 9.

127 Ibid 8.

128 Warin, Diamant and Pfenning, above n 15, 34 and 41-42.

129 Ibid 37-38.

130 Clinton, above n 20.

131 Hill, above n 8, 1.

132 See for example Pereenboom R (ed.), *Asian Discourses of Rule of Law*, (Routledge Taylor Francis Group, 2004) 113, where Pereenboom notes that while Chinese leaders have endorsed the rule of law, they have not sanctioned the liberal democratic version believing instead that stability and economic growth and more important than democracy and civil and political liberties.

133 Above nn 127-129 and supporting text.

134 Carrington, above n 28, 129 and 141 where the author notes that China was not among the 'thirty-six nations [which] ... ratified the OECD Convention within a decade'. Note however that China is not one of the 34 member countries which comprise the OECD and only four other nations (Argentina, Brazil, Bulgaria and South Africa) have adopted it. Directorate for Financial and Enterprise Affairs 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (May 2011), www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html.

135 OECD Convention, Article 5.

136 Richard L Cassin and Ethics Media 360, above nn 11, 12 and supporting text.

137 Scribd, 'Johnson & Johnson Deferred Prosecution Agreement', above n 13 and supporting text.

138 Above nn 31-33 and supporting text.

139 Tillipman, above n 5 2.

140 Ibid 3.

141 Ibid 7.

142 Ibid.

143 Carrington, above n 28, 129, 138-139.

144 Cassin and Ethics Media 360 FCPA Blog, above n 11, 6.

145 Ibid.

146 Ibid.

147 Tillipman, above n 5, 11. See also n 33 and supporting text.

148 Carrington, above n 28, 129, 144.

149 Ibid 145.

150 For example see FCPA s 78dd(l)(a)(1)(A)(iii), s 78dd(l)(a)(2)(A)(iii) and s 78dd(l)(a)(3)(A)(iii) in relation to 'issuers'. The same provision exactly appears in the respective equivalent sub-sections of s 78dd(2) and 78dd(3) in relation to 'domestic concerns' and 'persons other than issuers and domestic concerns'.

151 See FCPA ss 78dd(1)(c), 78dd(2)(c) and 78dd(3)(c).

152 The debate about whether natural law or positivist legal theory is a more useful tool in jurisprudential analysis lies well beyond the scope of this essay. That debate which has outgrown the more historical debate as to which of the two theoretical ways on analysing law was the more correct, seems largely to have accepted that both theories are useful in explaining different aspects of the nature and function of law. For a collection of essays which traverse many of the nuances in the current literature, see Coleman JL (ed.), *Hart's Postscript, Essays on the Postscript to the Concept of Law*, (Oxford University Press, 2001).

153 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256; [1923] All ER 233 (Lord Hewart CJ). A more complete version of what he said is that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

154 OECD Convention, Article 5.

155 Tillipman, above n 5, 2.

156 Carrington, above n 28, 129, 144.

157 OECD Convention, Article 5.

158 Carrington, above n 28, 129, 146, referring to Civil Law Convention on Corruption, (4 November 1999) European Treaty Series No 174, http://conventions.coe.int/Treaty/EN/Reports/Html/l74.htm.

159 Carrington, above n 28, 129, 146 referring to European Consultative Assembly, *Explanatory Report to the Civil Law Convention on Corruption* 1(a)(6)(1999) http://conventions.coe.int/Treaty/EN/Reports/Html/l74.htm.

160 Carrington, above n 28, 135.

161 Ibid. One of the law firms representing the government of Iraq reports that the '[d]efendants' motions to dismiss the complaint, as well as plaintiffs' opposition to those motions have been fully briefed and are *sub judice*.' (Bernstein Leibhart LLP 'Featured Cases - Iraq Complex Litigation, *Republic of Iraq v ABB AG*', www.bernlieb.com/featured-cases/Iraq-Complex-Litigation/index.html.

162 Carrington, above n 28, 135, 146-147.

163 Ibid 150-151, 154.

164 Ibid 150.

165 Ibid.

166 Ibid.

167 Ibid.

168 Ibid 150-151.

169 Ibid 151.

170 Ibid.

171 Ibid 150.

172 Ibid 136-137 where Albert Jack Stanley became a witness in the SEC and Department of Justice cases against Halliburton for bribery in Nigeria.

173 Ibid 151-152 citing Department of Justice, *Eli Lily and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-label Promotions of Zyprexa*, (15 January 2009), www.Justice.gov.opa.pr/2009/09-civ-038.html; Nev Office of the Att'yGen, *Masto Announces $400 Million Nationwide Settlement with Merck*, (7 February 2008), www.drugfraudsettlement.com/news/Nevada-Media-Release.pdf; Goldbery Kohn, *AMERIGROUP Announces Settlement in Largest Ever False Claims Case*, (22 July 2008), www.goldbergkohn.com/news-firm-1096.html. See also examples in Carrington's text (above n 28) involving employees of Pfizer and Northrup Grumman corporations where fees of $51.5 million were awarded to the 'primary whistleblower' and 'perhaps as much as $100 million' to 'nine of its former salesmen' respectively.

174 Above nn 161-163 and supporting text.

175 Wikipedia, 'Osama Bin Laden'.

176 *Daily Mail* UK, Online Mail, 'No one will receive the $25m bounty placed on Bin Laden's head, US Officials reveal' (20 May 2011), www.dailymail.co.ukl/news/article-1 388820/U-S-officials-said-getting-25m-bounty-placed-Osama-bin-Ladens-head.html.

177 Carrington, above n 28, 154.

178 Ibid 155.

179 Ibid 154.

180 Ibid.

181 Ibid 157.

182 Ibid.

183 Ibid 158.

184 Ibid.

185 Ibid 164.

186 Arnold and Porter, above n 5, 5.

187 Carrington above n 28, 131 citing Rose-Ackerman S, (Bjorn Lomborg [ed.]) *Governance and Corruption*, in Global Crises, Global Solutions 2004, 301, 301.

188 UNCAC, Foreword, iii (above n 1 and supporting text).

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Reducing the illicit trade in tobacco products in the ASEAN Region: a review of the Protocol to Eliminate Illicit Trade in Tobacco Products

Gryphon Sou and Rob Preece

Abstract

In November 2012, the fifth session of the Conference of Parties (COP) to the Framework Convention on Tobacco Control (FCTC) adopted the *Protocol to Eliminate Illicit Trade in Tobacco*. This paper examines the Protocol in the context of the illicit trade in tobacco products across South East Asia and highlights those areas of the Protocol which can be effective in reducing that illicit trade, and how the region could approach a coordinated implementation of those key provisions. Details of the current extent of illicit trade in the region, and of the main *modus operandi* of those active in that trade, are provided by the World Customs Organization's (WCO) Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP). This sets the context from which the key elements of the Protocol are analysed for their potential value as mechanisms to directly address regional risks. The paper then examines the question of implementation and discusses those Articles of the Protocol which will require a degree of regional coordination to be fully effective. This regional examination also includes the need for some degree of standardised or consistent approach to implementation of the key Articles to eliminate 'weak points' in the regional supply chains for tobacco.

The current situation in South East Asia

The nature of the illicit trade in any product means that those involved in that trade will seek to 'hide' their dealings and leave little or no trace of their activities. As a result, we may never get precise data on the size, extent and value of this unlawful business despite the fact that there have been many attempts to provide such detail. In terms of tobacco and tobacco products, there is little doubt that these products are illicitly traded in significant volumes and the authors outline 'what we know' as to the size, extent and *modus operandi* of that trade in the South East Asian region. This analysis is based on both market research data, and on seizure reports and investigations conducted by the World Customs Organization's (WCO) Regional Intelligence Liaison Office for Asia and the Pacific (RILO AP).

Whilst tobacco remains a low cost but highly taxed product, the profits to be made from illicit activity will continue to motivate criminals not only to continue their activities[1] but to be creative in terms of how they conduct those activities. As can be seen from recent WCO and WCO RILO AP seizure activity for the region, there are already a number of sophisticated methods in place, all operating with the intention of having un-taxed tobacco enter a market without detection by the relevant customs and/or taxation authorities. These *modus operandi* appear not to be unique to South East Asia but have been found by the WCO to be in use in many regions. In summary, the main types of illicit activities detected to date fall into the following categories:

- Mis-description of the contents of an import or export consignment that contains tobacco products
- Movement of containers through multiple ports, including free ports/free zones, where repacking may occur, until an opportunity for diversion presents itself
- Round trip 'exports' originating in the region to outside the region with containers returning without being off-loaded in stated destinations
- Excessive importation of finished cigarettes for repacking and re-export in such quantities that authorities are unable to control the re-exportation process
- Non-licensed or 'underground' production facilities producing undeclared cigarettes for distribution into domestic and regional markets
- Non-containerised shipments moving across land, river and some sea borders without declaration (Sou 2013a, 2013b).

Using these types of illicit activities as a reference, and using actual case study materials, this paper now looks at the illicit trade in tobacco in South East Asia. This will serve as an excellent platform to begin an analysis of the potential impact for the region of the *Protocol to Eliminate the Illicit Trade in Tobacco* (the Protocol) in terms of its Articles.

The South East Asian region is considered a primary 'destination' for the illicit trade in tobacco, although significant quantities of illicit product are manufactured within the region for intra- and inter-regional distribution. Penetration of illicit tobacco has been put at between 7% and 9% of the regional market as a whole although there are some significant differences when looking at the size of the illicit trade on a country-by-country basis (Euromonitor 2013, pp. 27-28, 31-32, 58).

To date, the largest single seizure was in the order of 43.3 million sticks in Malaysia in early 2009 (WCO 2011, p. 10). Malaysia is noted as a market which is regularly reported as having the region's highest illicit penetration with non-tax paid cigarettes making up between 36% and 40% of total cigarette consumption.[2] At the other end of the problem, we see Singapore with an illicit market penetration of around 5% of cigarette sales (Euromonitor 2013), with most markets in the region seemingly reporting illicit sales in the order of 9% to 11% of total consumption.

In terms of what this may mean to the region, Table 1 attempts to capture the potential government revenue losses from tobacco excise taxes during 2011 by applying the 7% to 9% illicit market share for the region as estimated by Euromonitor in its 2012 report on global illicit trade activities.

Table 1: Potential loss of government revenue from the illicit trade in tobacco in South East Asia during 2011

Country	**2011 Tobacco tax in USD[3]**
Brunei Darussalam	9,612,000.00
Cambodia	16,444,000.00
Indonesia	7,591,000,000.00
Laos PDR	26,623,000.00
Malaysia	1,645,570,000.00
Myanmar	275,000.00
Philippines	1,136,000,000.00
Singapore	750,000,000.00
Thailand	1,906,000,000.00
Vietnam	649,000,000.00
TOTAL	**13,730,524,000.00**
Illicit estimate of 7% to 9%[4] = revenue loss	**1,033,480,000.00 to 1,357,964,000.00**

Source: Euromonitor 2013.

Based on Table 1, approximately USD13.73 billion was paid in tobacco taxes in 2011, which represents 91% to 93% of total consumption if we are to accept the Euromonitor data, meaning total tobacco tax losses in South East Asia of up to USD1.35 billion. So, how is this occurring?

The illicit trade in tobacco in the region is part of a global supply business as well as being a market for it. The region's proximity to China is an issue, with the Chinese reportedly producing somewhere between 93 and 168 billion counterfeit cigarettes per annum, and with some estimates up to 400 billion per annum, in what has been described as a domestic tobacco industry that has been 'redesigned' to service the black markets of the world (von Lampe, Kurti, Shen & Antonopoulos 2012, p. 44). China is also a lot more complex than just simply being an illicit tobacco exporter. Today, China is itself a large tobacco products consumer market with its own thriving domestic illicit trade – not just for cigarettes diverted without tax being paid but as a destination point for 'western branded' smuggled cigarettes (von Lampe et al. 2012, p. 44).

Using China as a source, Case Study 1 below represents the use of both South East Asia and 'free ports' to successfully divert non-tax paid cigarettes into a market. This multi-port consigning of tobacco products is a common approach as it increases the difficulty for authorities to track the consignment, and will often include the tobacco moving through a free port or free zone where customs controls are generally not applied in the same manner as they are to import/export cargo arriving or departing from a regular port, in this case allowing for repacking into unmarked boxes.

Case Study 1: Transit through and back for diversion in South East Asia

In this example, containers of cigarettes were exported from China as the source country and consigned to a Free Trade Zone in Mauritius. In the Free Trade Zone, the cigarettes were de-vanned and repacked. Instead of the original packages bearing cigarette source information, the syndicate used plain cartons to contain the cigarettes (see photograph below). Therefore, the new cartons obscured the cargo information and jeopardised any national tracking or tracing systems. Eventually, the cigarettes were loaded onto the same containers and returned to the South East Asian region and, eventually, back to China. The diversion (see map below) across the Indian Ocean and South China Sea took three months.

Source: Photograph and map courtesy of RILO AP.

South East Asian countries clearly act as transit countries for both regional and global illicit tobacco activities. Project Crocodile, which is based in the WCO's RILO AP, maintains a database of all suspicious import and export consignments as they relate to the illicit trade in tobacco. Reported by 18 customs agencies which are signatory to the project, during 2012 some 688 suspect export notifications and 321 suspect import notifications were received for analysis and dissemination to 'at risk' countries (WCO 2013, p. 15). South East Asian nations involved in the reporting of suspect movements in the project included Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

Included in the discussion of suspect transit activity is that of the supply to one country of tobacco products far in excess of those required to meet domestic demand. In this case, the selection of such a country is not based on its infrastructure as a regional hub port, but rather the country's capacity to detect and act upon the illicit activities of the criminals concerned.

In Case Study 2, the use of Cambodia as such a transit point is discussed. In Cambodia, the level of imports (when added with local production) far outweigh the needs of the domestic market. Further, reported re-exports of tobacco products are seemingly insufficient to account for this excess of product in the local market and as such there is the obvious question of un-reported re-exports which are just as likely to enter subsequent markets as un-declared imports (Southeast Asia Tobacco Control Alliance [SEATCA] 2013, p. 10).

South East Asia is not only a destination and transit point for the illicit trade in tobacco products but also is a source in some cases. 'Illicit whites' or 'cheap whites',[5] and counterfeit cigarettes are manufactured in unlicensed or 'underground' factories without the knowledge of the relevant tax authorities. Provided the criminals can keep production undetected, the illicit products will find their way without duties and taxes into both the local market and the markets of neighbouring countries within the region.

Case Studies 3 and 4 illustrate the problems.

It appears a vast quantity of such cigarettes enter Vietnam and Cambodia by means of cargo feeders. On the other hand, some of the illicit cigarettes mentioned in Case Study 3 move between Indonesia and Malaysia (and likely other countries) via high speed motorboats which both demonstrate the organisation and the capacity of the criminals, and the difficulty of interception if suspicious movements are observed. Case Study 4 below outlines these concerns and relates to evidence given by Royal Malaysian Customs & Excise to a recent inquiry on illegal immigrants in that country. Also worth noting in that Case Study 4 is the use, once again, of free ports, in this case the Island of Labuan, in which cigarettes may be sent duty and tax free but seemingly are diverted into the domestic market as non-tax paid products.

Case Study 5 includes the use of 'mis-description' of the contents of a consignment in which criminals simply declare a product, with supporting commercial documentation which indicates a consignment of tobacco products is another good. This may include partially mis-describing a consignment, in that undeclared tobacco products are placed in the back of a shipping container, and other goods which are declared are placed in the front of the container so that any possible inspection by authorities will lead to the assumption that the consignment is in accordance with the manifest (unless the whole container is inspected).

Case Study 5 whilst focusing on the issue of mis-description, does also to serve to reinforce earlier activities in which criminals are using the South East Asian region as a transit point for the greater illicit trade.

Given the impact of the illicit trade in the region, it is now timely to assess the potential effectiveness of the new Protocol in addressing some of these problems in South East Asia, in terms of the various *modus operandi* used and the different scenarios outlined in the case studies.

Case Study 2: Excessive importing or transit country?

In 2008, cigarette trading in Cambodia was as follows:

Imports:	22.7 billion sticks
Domestic production:	4.5 billion sticks
Total available:	**27.2 billion sticks**
Domestic consumption:	7.0 billion sticks
Declared re-export:	0.5 billion sticks
Unaccounted for:	**19.7 billion sticks**

Source: SEATCA 2013.

Case Study 3: Manufacture of fake or illicit cigarettes

Regionally, there are many fake cigarettes manufacturers. Underground and/or problematic cigarette manufacturing factories produce many brands of fake cigarettes and supply the consumer markets within South East Asia and the greater Asia Pacific region. Within South East Asia, it is known that 'JET' and 'HERO' (pictured below) brands are produced by a Sumatran-based tobacco company and seemingly not produced for the local market. However, they are imported illegally into a consumer country, usually via any number of transit points within the region.

Those illicit cigarettes usually do not comply with any laws of the consumer country and they will not have local import tax stamps or health warnings. Moreover, their quality is not tested by the national authorities and is, therefore, unknown.

The illegal smuggling of 'JET' and 'HERO' cigarettes is said to have been in place for 15 years.

Source: RILO AP; photographs courtesy of Portcullis International.

Case Study 4: 'Malaysia loses RM1 billion, no thanks to cigarette smuggling in Sabah'
'… "Contraband cigarettes sold in Kota Kinabalu normally originate from Labuan while Tawau gets its supply from Sungai Nyamuk and Nunukan. The east coast of Sabah gets its supply from Indonesia and the Philippines", Mohd Fadzly said. 'The modus operandi of the smugglers was to bring the contraband cigarettes into the state on powerful speedboats equipped with three to four engines, each with a maximum capability of 250 horsepower (HP) … [which makes] 'the smuggler's speedboats extremely difficult to pursue'. '… "Mohd Fadzly said the contraband cigarettes were normally sold in Kota Kinabalu, Lahad Datu, Sandakan, Tawau, Inanam, Menggatal and Ranau by illegal immigrants. ' "Between 2007 and 2011, the majority of those arrested for involvement in smuggling and selling contraband cigarettes were from the Philippines. Although after 2011 it appeared as though more Malaysians were involved, they were actually Philippines nationals who possessed local identity cards", Mohd Fadzly said to Chin [commission member Datuk Henry Chin Poy Wu of the Royal Commission of Inquiry on illegal immigrants in Sabah]. '… The most common cigarettes smuggled from Indonesia and the Philippines were kretek or clove cigarettes, followed by white cigarettes.' *Source*: Lee Shi-Ian, *The Malaysian Insider*, 24 July 2013.

Case Study 5: Mis-description of the contents of a consignment
Other than the genuine cigarettes being diverted in and across the region, there is also a significant flow of fake cigarettes in the region. Countries of South East Asia are often used by international cigarette smuggling syndicates as trans-shipment points. In April 2013, Hong Kong Customs detected an international smuggling syndicate seizing an estimated USD3 million worth of fake cigarettes and tobacco from a container. The cargo manifest said that the container held toilet paper, whilst shipping documents indicated that the consignee was a trading firm in mainland China. It was unusual for toilet paper to be exported from Malaysia to mainland China as China is already one of the largest manufacturers of toilet paper. After a period of observation, it was determined that no party would attend for the collection of the container and it was decided that customs officers would open it for inspection. That inspection found some 955 cartons of counterfeit cigarettes including both 'DEAL' and 'REEF' brands. The counterfeit cigarettes were apparently destined for Australia as packaging included the phrase 'Made in Germany for the Australian Market'. It was believed from shipping documents that the container would have also gone to several more ports in a circuitous route before reaching Australia. Clearly, the criminals were utilising several techniques to evade detection. *Source*: WCO RILO AP.

Scope of the key elements of the *Protocol to Eliminate the Illicit Trade in Tobacco Products* (the Protocol)

During the fifth session of the Conference of Parties (COP) to the Framework Convention on Tobacco Control (FCTC), held in Seoul from 12 to 17 November 2012, the *Protocol to Eliminate Illicit Trade in Tobacco* (the Protocol) was adopted (World Health Organization [WHO] 2013).

The aim of the Protocol is to eliminate all forms of illicit trade in tobacco products by requiring signatories to take measures to more effectively ensure the integrity of the supply chain for tobacco products, and to cooperate internationally on a wide range of policy and administrative matters, as well as proposing a number of criminal offences based on supply chain controls.

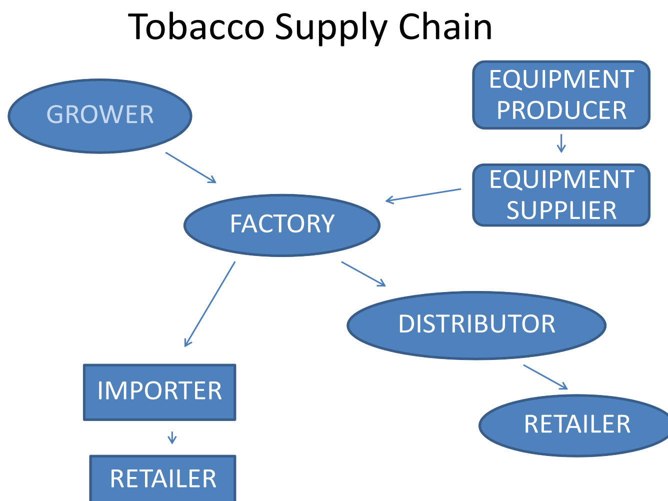
All Parties to the World Health Organization's (WHO) FCTC (currently 176 States and the European Union) are eligible to sign and ratify the Protocol. As at 31 July 2013, some 22 parties have signed the Protocol, which will remain open for signing until 9 January 2014, then countries accede to the Protocol.[6] The Protocol itself will come into force 90 days after ratification by the 40th party is notified, however, as yet no signatory has ratified.[7]

The Protocol comprises a number of Articles which are designed to enhance controls of the supply of tobacco products. By ensuring the integrity of the supply chain, the Protocol aims to reduce the opportunities of illicit activities, and where illicit activities have occurred, there would be greater prospects of detection, or successful investigation and prosecution of the relevant offences.

To examine the Protocol in the context of the tobacco supply chain, it is useful to look at what actually represents a 'typical' supply chain. Looking at Figure 1, the supply chain starts in the top left corner with the farming of tobacco leaf. Leaf is harvested, cured and then sold to cigarette producing factories, where product is manufactured and packaged for sale. Tobacco factories, depending on the distribution model, will generally sell to a distribution or wholesale company. In some cases this distributor could be a wholly owned subsidiary company, or at the very least, an independent company with exclusive distribution agreements with the manufacturer.

The supply chain ends at the bottom right-hand corner of Figure 1 with the sale from the distributor to retail outlets. However, the Protocol also correctly recognises that tobacco supply chains are now international, and cigarette manufacturers may sell their product in overseas markets which results in an export transaction from the country of production and an import transaction in the intended country of consumption.

Figure 1: Basic tobacco supply chain



Source: Preece 2013.

Significantly, the Protocol includes the manufacture and supply of cigarette making machinery as part of the tobacco supply chain. Importantly, this recognises the risk of such machinery being supplied to 'underground', non-licensed, or non-compliant cigarette making factories such as those mentioned in Case Study 3. There is also a desire in the Protocol to match production capacity with consumption in a particular market. As such, Figure 1 includes in the top right corner, the addition of cigarette production machinery manufacturers and suppliers as part of the supply chain.

The Protocol also recognises the possibility that cigarette manufacture/export and tobacco import/manufacture may occur in 'free zones' which, as shown, have been implicated in high risk illicit activities. Changing technology is also contemplated and the Protocol recognises that in some markets the internet and other technology platforms are permitted for the sale of tobacco products, and that this policy may continue. As with free zones, the Protocol seeks to have the relevant supply chain-based controls applied to these types of sales.

International supply chain integrity is not a new concept and in the context of anti-terror initiatives, the WCO has its SAFE Framework of Standards which seeks to improve the integrity of the international supply chain.[8] Whilst the WCO's SAFE Framework has a significant trade facilitation component with the capability to 'authorise economic operators' who have attained a certain level of integrity, there are some concepts which may link with the Protocol from an international trading perspective, particularly in relation to the roles of customs agencies.

The main forms of supply chain controls proposed include licensing a range of activities, record-keeping for these licensees, the conduct of 'due diligence' by licensees prior to making sales and perhaps most significantly, the ability to track and to trace tobacco products as they move through the supply chain, including internationally.

The Protocol then proposes a range of new offences to support the operation and effectiveness of the supply chain controls. These proposed offences also seek to criminalise many of the illicit activities that form part of the illicit trade in tobacco products, properly reflecting the seriousness of that trade and its consequences.

Given that the trade in tobacco products is international and transboundary, the Protocol recognises that mutual cooperation will be required to ensure the supply chain controls are effective, and that offences can be properly investigated and illicit traders brought to justice. This type of cooperation is at several levels from simple information sharing on statistical data relating to seizures and *modus operandi*, through exchanges of intelligence on risks and targets, and in the investigation of transboundary illicit activities, including extradition of suspects.

This paper focuses on what are considered to be the key Articles, or those Articles of the Protocol that comprise Part III which deals with 'supply chain controls', Part IV 'offences' and Part V which covers 'international cooperation' and an analysis of how these Articles should be implemented in the region both from a national and regional perspective. The analysis considers regional risks and links the areas of the Protocol with the case studies above.

Implementation of the key elements of the Protocol across the South East Asian Region

Having looked at the Protocol, it is now important to look at how the key Articles of Parts III, IV and V can be implemented at both a national and regional level to maximise their effectiveness. Implementation will require a number of policy decisions to be taken by each country and many of these should be taken on a consistent basis across the region or based upon a consistent standard of implementation.

This will become a critical issue as the Protocol moves towards coming into force and at this point, there is a lack of guidance on how such policy questions should be addressed. For those Articles requiring regional and global implementation, there is still some uncertainty as to who will support such national (when required), regional and global implementation.[9] It is expected that such guidelines may be developed under the Meeting of Parties (MOP) and Conference of Parties (COP) processes under the direction of the WHO Secretariat, and have been prepared for certain aspects of the larger FCTC.[10]

It remains to be seen whether this is effective, or whether the WHO Secretariat should be working with more 'enforcement' orientated agencies such as the WCO or the United Nations Office on Drugs and Crime (UNODC) where agreements are already in place, in terms of maximising the effectiveness of the Protocol and as set out in its preamble (WCO 2013, p. 12). Both agencies are 'global' with 'regional' structures, and together have significant histories and experience in managing borders and transnational crime.

When undertaking analysis of the regional implementation of the Protocol in South East Asia, support will be needed on several fronts. There will be a need for each country to:

- make a number of national-level decisions for which guidance on best practice could be sought when implementing an Article
- make a number of national-level decisions as to the extent that country will implement a particular Article
- engage in a potentially greater level of administrative, legal and enforcement-related cooperation with regional neighbours.

Being in a position to offer this support, regions will also need to reach certain decisions; in particular, agreement on 'benchmarks' or minimum standards to apply in national policymaking for Protocol implementation, and opening the channels and providing mechanisms for regional information sharing and cooperation.

It is essential that the Protocol be recognised as dealing with the international trade in tobacco and that the supply chain for this product (both licit and illicit) will often cross one or more international borders. Thus, if the Protocol as a whole or key Articles in it are not implemented without some form of regional benchmark, the integrity of the supply chain can be compromised and transboundary tobacco movements in South East Asia will become increasingly vulnerable to criminal activities.

Even with guidelines from the WHO via COP, there will still be a need for capacity and capability in terms of implementing the various aspects of the Protocol, and then with on-going operation of the Protocol's obligations on countries. Thus, whilst the WHO may eventually issue guidelines, agencies like the WCO and UNODC may still need to play significant roles in implementation, especially in a region like South East Asia which is still largely a developing part of the world.

This paper now analyses possible 'benchmarks' and other requirements for effective regional implementation, with a focus on what are considered the 'key Articles'.

Part III: Supply Chain Control

Article 6 Licence, Equivalent Approval or Control System

This Article seeks to prohibit the activities of manufacturing, importing or exporting tobacco products, as well as manufacturing, importing or exporting cigarette manufacturing equipment, unless the entity concerned has been licensed for that activity. Further, Article 6 encourages each member country to consider, where appropriate, requiring a licence or similar authority for those entities engaged in retailing tobacco products; growing tobacco leaf; transporting either 'commercial' quantities of tobacco product or manufacturing equipment; and for wholesaling, warehousing, brokering, or distributing either tobacco products or manufacturing equipment.

The act of licensing has two main advantages (Preece 2008, pp. 78-80). Firstly, it will bring all related tobacco supply activities into the knowledge of the authorities. The issue of a licence does not just put the entity 'in sight' of authorities but the process of application provides these agencies with detailed

knowledge of the entity and its operations. As will be discussed below, the application process is one of collecting relevant information from potential licensees which can be utilised to assess risk; however, the minimum level of detail required from applicants will need to be considered.

Secondly, the licence provides an opportunity to lower the inherent risk from the tobacco supply chain by ensuring only those entities of a minimum integrity level are operating in that supply chain. Based on application details which can be reviewed and tested, only those applicants reaching a 'benchmark' will be so licensed. The licence issued is a recognition that the entity operates with integrity, and the licence identification is then used for others in the supply chain to recognise a *bona fide* business operating lawfully in the tobacco supply chain.

Further, in relation to reducing inherent risk, the issuing of a licence generally provides for the ability to place restrictions and/or conditions on the licensee where a perceived threat is observed. The types of restrictions and conditions that could be utilised are not exhaustive but could, for example, include:

- a security bond relative to the size of the duty and tax liability of tobacco products to be deposited by licensees who store duty and tax suspended product
- wholesale operations not permitted to store duty paid and duty suspended tobacco products together in the same premises, or
- pre-approval required before duty suspended tobacco products are moved from one premises to another.

The 1st policy question – Competent authority

As part of the implementation of the Protocol, Article 6 will require three important policy questions to be addressed by individual countries. The first of these questions relates to assigning a 'competent authority' to administer the licensing regime. Likely agencies could include Customs, Revenue or a similar agency, given the 'connection' between these agencies and elements of the existing supply chain components of tobacco manufacture, importation, and exportation which are generally already subject to some form of regulatory regime. This licensing is likely to be primarily linked to bonded operations, such as bonded factories and warehouses where domestic leaf is manufactured into cigarettes, or imported finished cigarettes are held with duty suspended, or tobacco leaf is imported for further manufacture. However, what is important to note is that significant tobacco supply and trade knowledge is developed within these customs and revenue agencies, which adds to their capabilities in a wider licensing regime.

Currently, customs agencies will license the warehouses holding imported leaf for manufacture and imported cigarettes, whilst a tax or revenue department will license domestic production. In some cases, a Customs & Excise Department has jurisdiction over all import, export, and domestic activities[11] and such an agency, where it exists, could be a logical starting place for a 'competent authority'.

However, the question of competent authority is not seen as 'critical' provided the chosen agency is capable of administering such licensees, and is also capable of cooperating with both relevant agencies internationally and with other revenue and enforcement agencies domestically. The overriding principles in this first policy question are that the agency has sufficient capacity to both administer a licensing regime and to coordinate with relevant local and international agencies.

The 2nd policy question – Licensing regime

The second policy question is crucial and relates to what activities will be included in the licensing regime. Article 6 dictates that the manufacture of tobacco products and manufacturing equipment, as well as importation and exportation of tobacco products and manufacturing equipment, 'shall' be included but requires countries to only 'consider' other activities in the supply chain. Of significance are the activities of farming tobacco, wholesaling, commercial transporting, and other dealings such as broking and warehousing.

The immediate question is perhaps 'why would any country want to omit any of these activities from a licensing regime'? It would seem logical that if certain aspects of a supply chain that are considered a risk or have the potential for risk are excluded from a sound control like licensing, then opportunities for diversion and other illicit activities will remain and simply 'shift' from existing areas to those unregulated areas of the tobacco supply chain.

The Article makes one interesting exception to licensing: 'traditional small scale growers, farmers and producers', although it does not define what constitutes a 'small scale' operation. It is likely listed as an exemption for licensing as the Protocol in Article 1 defines 'supply chain' as including the growing of tobacco 'except for traditional small scale growers, farmers and producers'. However, when any regulatory environment begins to allow exemptions and, in this case, an undefined exemption, the administration becomes difficult as many operators either fail to apply for a licence or seek to be excluded from licensing arrangements based on methods or scales of production.

Further, the exemption is seen as not needed and likely to create unnecessary risk as some illicit tobacco trade actually originates or is conducted by small growers and producers.[12] At the very least, this provision calls for some form of tightly drafted definition that severely limits the availability of this concession.

In terms of the other potential exemptions through 'national consideration' such as farming, wholesaling, warehousing, and transportation, the preferred position would be to license all such activities. However, minimal consideration could be given to linking the duty and tax status of the tobacco as a principle in addressing this policy.

In this context, the consideration would be that tobacco farming which produces the main raw material for tobacco products (which will be a discussion point in record-keeping policies) as well as the likelihood that a tax liability arises for the tobacco farmer once the tobacco leaf is harvested, and rightly should be accounted for to authorities. Thus tobacco farming should be licensed in all instances, except where the Protocol has specifically exempted 'traditional, small scale farms'. In these cases, again there is a need to develop a very clear working definition or guidelines as to what constitutes 'traditional, small scale'.

Warehousing, wholesaling, transporting and other dealings could easily all be licensed, however it is recognised that many entities could be involved. As a minimum, the policy could be linked to the duty and tax status and where such activities will or may involve tobacco products which are duty suspended, those activities shall require a licence. This principle applies because of the risk of diversion where tobacco products have not yet been subject to duties and taxes. Duty and tax paid tobacco products can still pose a risk in that they can be later subject to export and duty drawback, or be exported from a low tax country to a high tax country (bootlegging), however, other supply chain controls could mitigate these types of risks.

To illustrate the policy option, a tobacco factory issued with a licence under Article 6 produces finished cigarettes and contracts a company to distribute the products through the domestic market. Where the distributor has their own transport and storage facilities, and the storage facilities are bonded warehouses under relevant customs or tax legislation for the holding of duty and tax suspended goods, the requirements of Article 6 should be applied to the distribution company and its premises. Where the distribution company is unable to store duty and tax suspended products and the manufacturer forwards only duty and tax paid cigarettes to the distributor, the country can opt whether or not to apply Article 6.

In summary, Article 6 works best when all commercial activities relating to the manufacture and distribution of tobacco require licensing. However, if a minimum standard needs to be adopted then all commercial activities relating to the manufacture of tobacco products and the distribution of duty and tax suspended tobacco products should be licensed.

The 3rd policy question – Licensing administration

The third and final area of policy is administration, which would include the licensing and approval

process, levying of fees, the need to place time limits on validity, and what occurs should the licensee breach any condition or commits an offence under Article 14 of the Protocol.

In terms of the application process, Article 6 does provide a minimum level of information that should be required by applicants for a licence. However, there is no discussion of the criteria that should be met by applicants in response to information provided. As mentioned previously, the licensing regime is a critical area of the Protocol as it determines which entities can enter the tobacco supply chain and do business and which entities represent too great a risk. Once entities with significant risk are allowed to enter to deal in tobacco products the basis of Article 6 and the integrity of the supply chain are undermined.

Table 2 looks at the information proposed to be collected from applicants via Article 6 and the likely reasoning that information was sought. The third column identifies the type of criteria that need to be developed for competent agencies to use in assessing whether an applicant should be granted a licence and whether restrictions or conditions, if any, should be applied at licensing.

Continuing its focus on administration, Article 6 contemplates the right to levy licence fees. In relation to such licensing fees there are several schools of thought. The first is that there should be no fees as they would be additional costs to businesses, and those businesses usually provide significant tobacco duty and tax revenues; moreover, Article 6 is about supply chain controls and not revenue generation.

At the other end of the thinking is that large application and renewal fees work to ensure that only serious, financially viable businesses are entering the tobacco supply chain, by placing a barrier to less serious and non-viable entities. Then the mid ground would suggest moderate or minimal fees that are more reflective of the administrative costs borne by the competent authority to license and re-license entities.

There is however some benefit in all licence fees in the region having some consistency so that investment decisions are not based on this additional cost where an excessive fee is payable in one country but is free in a neighbouring country which could see a business make decisions as to where to base certain operations.

Placing a limit on the validity of the licence – generally one to three years – provides an effective way to motivate continual compliance and an opportunity for competent authorities to monitor that compliance. Provided re-licensing is not an automatic process on receipt of a fee, the renewal process will have an effect.

Whilst licence time validity and fees are not seen as critical policy decisions, the ability to be able to suspend and, if necessary, cancel a licence is. Competent authorities must have this ability as leverage over ongoing compliance and to protect future tobacco tax revenues. Having said that, guidelines can be developed which reflect elements of natural justice, transparency and the need to ensure compliance in the event of a need to sanction a licensee – for illustrative purposes only, guidelines similar to Table 3.

Table 2: Application criteria

Information required by Article 6	**Likely reason**	**Criteria which need to be met for effective licensing control**
Name of entity and relevant tax or other identification	Establish *bona fide*	Entity lawfully exists and is properly registered for all duties and taxes
Names of persons in control	Establish integrity of applicant	Persons are fit and proper in terms of not being the subject of criminal conviction or investigation Persons have relevant knowledge, experience and qualifications
Previous criminal conviction/s	Entity is fit and proper to hold a licence	Entity and/or principal/s not to have been convicted of a fraud-related offence which carries a sentence of imprisonment
Location of premises	Establish *bona fide* Location of manufacturing equipment within premises	Premises suitable for the production or storage of tobacco products or manufacturing equipment Premises physically secured Production capacity details
Details of products (or manufacturing equipment)	Identification of brands Serial numbers of equipment	Volume of production matches capacity Volume of production should match information provided re market for products
Bank account/s	Tracing future transactions	Confirmation from bank of account details
Market for products	Assess size of market to reconcile with information on volume capacity of manufacturing equipment	Separate sales by domestic and export Separated sales by tax paid and tax suspended Estimated volume of imported leaf and imported finished products TOTAL SALES of product do not exceed market size

Source: Preece & Sou 2013.

Table 3: Licence breaches and possible sanctions

Nature of breach	Possible sanction/s
Failure to keep proper records	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event – cancellation
Not make records available for audit	Licence suspended until records made available
Not conduct due diligence	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event – cancellation
Not inform change of premises, personnel or equipment	1st event – warning letter 2nd event – administrative penalty 3rd event – short licence suspension, e.g. 1 week 4th event – longer licence suspension, e.g. 1 month 5th event – 12 month suspension Subsequent event - cancellation
Non-payment of licence fees	1st event – warning letter 2nd event – administrative penalty Subsequent event – licence suspended until fee paid
Suspected of an Article 14 offence	Where the offence has a penalty of imprisonment, licence suspended for the course of the investigation and prosecution
Convicted of an Article 14 offence	Licence cancelled

Source: Preece & Sou 2013.

How can licensing immediately act to reduce the risks? In Case Study 2 we saw the excessive importation of cigarettes, well in excess of the local market needs, and clearly insufficient re-exportation to cover the over-supply. Article 6 will require the importers here to be licensed, and in that process need to demonstrate their volumes of product are commensurate with the market. Additionally, should declared volumes be reasonable, should checks of *bona fide* and of criminal records indicate the entity or its controlling principals are not 'fit and proper', this importer will not be able to import tobacco products.

Article 7 Due Diligence

The requirement under Article 7 for industry to conduct due diligence on their customers will link effectively with the licensing of entities under Article 6. It also reinforces the benefits of adopting a policy with maximum coverage of the licensing regime, as the licence identification held by a customer provides an immediate notification that the customer has undergone vetting by the competent authority and poses a lower risk. Where countries elect to limit the activities to be licensed, the due diligence process to confirm the credibility and integrity of a customer becomes more difficult.

However, in addition to confirming a licence is held by the customer, the supplier should also be looking to confirm that quantities of tobacco products or the nature of manufacturing equipment to be sold is appropriate to the market, and for the customer's position in the market. It would, for example, under this Article be inappropriate for a manufacturer of cigarettes to sell to a wholesale dealer an amount of cigarettes considered to be in 'excess' of the market's needs, or in excess of regular purchase volumes,

or reasonable purchase volumes, even if the customer is licensed. Competent authorities could ensure that licensees are verifying customers as licensees, monitoring volumes, and performing other checks of non-licensed customers as part of any licence renewal process, should there be concerns by that agency.

Due diligence checks extend to suppliers of manufacturing equipment and it would be difficult to imagine such an equipment supplier selling any relevant machinery to any entity which does not hold an Article 6 licence for manufacturing.

Where a sale to a customer is to proceed, the supplier is also required to take note of the customer's bank details and to confirm that the customer does not have a criminal record. However, where licensees feel obliged not to make a sale to a customer on the basis of a due diligence process, the licensee will be required to report this to the competent authority.

The effectiveness of due diligence is enhanced by making available 'blocked customers' or 'black lists' which should comprise the following:

- entities who have failed to secure an Article 6 licence upon application
- entities who have had their licence revoked for criminal behaviour
- customers of licensees who have had sales refused on the grounds of due diligence, or
- information supplied from another domestic agency or competent international authority, as to serious duty and tax fraud activities.

The ability to check either a customer's current licensing status, or a 'black list' for customers not needing a licence, will underpin the due diligence process.

Given that there is significant international trade, due diligence may also be required to be undertaken on foreign customers. Again, this process is largely enhanced if the foreign customers can produce a licence issued by their local competent authority rather than having to conduct an international due diligence check of the customer, and further demonstrates the need for some consistency in licensing activities and those entities conducting them.

How will due diligence assist in securing the supply chain? Returning to Case Study 3 an 'underground' or unlicensed factory is producing both cheap white and counterfeit cigarettes for distribution in the region. Article 7 will require the manufacturer of the cigarette making equipment to conduct due diligence on the customer seeking to acquire the equipment. In this case, the unlicensed factory should not be able to acquire the necessary equipment to produce cheap whites and counterfeit cigarettes as they would fail due diligence.

Article 8 Tracking and Tracing

The Protocol ambitiously proposes that a global tracking and tracing regime shall be established 'within five years of entry into force of this Protocol'. The global regime will comprise national and/or regional track-and-trace systems and 'a global information-sharing focal point' located at the WHO FCTC Convention Secretariat.

In the context of the Article, 'tracking' refers to the ability to monitor movement of product in the supply chain, whereas 'tracing' refers to the ability to recreate that movement.

The proposed system commences with a need for countries to establish a requirement that all cigarettes have affixed to each 'unit package' and each 'outside package', a unique identifying mark such as a 'code' or 'stamp'. Each of these unique identifying marks must then contain the following data:

(a) date and location of manufacture
(b) manufacturing facility
(c) machine used to manufacture tobacco products

(d) production shift or time of manufacture
(e) the name, invoice, order number and payment records of the first customer who is not affiliated with the manufacturer
(f) the intended market of retail sale
(g) product description
(h) any warehousing and shipping
(i) the identity of any known subsequent purchaser, and
(j) the intended shipment route, the shipment date, shipment destination, point of departure and consignee (United Nations [UN] 2012, pp. 12-13).

The objective of the unique markings and this level of detail is for relevant agencies to be able to determine the origin of any cigarette packet, and the point (if any) of any possible diversion into the illicit market. It may also be used to monitor movements of tobacco through the supply chain and be able to confirm the legal status of the product at any particular time. Even where a country has a relatively low tax rate of tobacco products, a track and trace system still needs implementation to the agreed standard[13] otherwise there will be a 'break' in the tracking and traceability of products leaving all other countries linked to a global system without vital information.

Article 8 is perhaps the most critical of the Protocol as it truly addresses the risks associated with the global supply chain as tobacco products move from dealer to dealer and from country to country. As seen in several of the case studies, these multiple international movements are often a significant component of diverting tobacco products into the illicit market, and tracking and tracing can provide a solution to address some of these risks, or indeed facilitate the timely investigation and prosecution where diversion has occurred.

However, the most important Article for implementation is seemingly the most difficult to implement. Without some agreed standards in relation to technology and data sets, there will be 'gaps' and 'delays' in the knowledge about suspect movements and their reconciliation.

It is therefore important for this issue to be looked at regionally (and realistically, globally). One risk to successfully implemented track and trace systems is that individual countries build their own local monitoring systems and so effective tracking and tracing of products across borders becomes difficult. Without a regional approach, incompatible monitoring systems cannot communicate the required critical data between the agencies of each trading partner. Thus, there needs to be a move towards a 'standard' within the tracking and tracing concept for coding and data management.

Implementing a regional (or global) standard of secure coding and data management systems would enable law enforcement authorities to easily retrieve, through a single access point and in a standard format, information about the product, its manufacture, distribution and legal status, including products in transit.

The emerging track and trace technology now marks products with a unique identifier as required under Article 8 of the Protocol. The serialisation is generally applied during manufacture, on the packaging line, for which all data relating to the product and its manufacture is generated and is accessible by the relevant tax authority.

Whilst Article 8 provides some standards in terms of data, it does not in terms of the enabling systems. This is perhaps the priority: the development of standards and guidelines for countries (and regions) covering the IT needs to support the management of the systems. The relevant support features required in such a system would include:

- activation of data strips at packaging
- compilation of a database upon activation of data strips

- field authentication
- international traceability
- reporting.

Article 9 Record-keeping

Article 9 requires licensed entities to keep records and make them available upon request to the competent authority. The Article effectively looks at two categories of activities for which record-keeping is required – the first is for manufacturers of either tobacco products or of manufacturing equipment, and the second category is for those who are in possession of tobacco products or manufacturing equipment which is to be exported, or is duty and tax suspended and intended to be moved. It is likely that some entities will need to keep both categories of records.

In terms of outlining these record-keeping requirements, a summary of each category can be found in Table 4.

Table 4: Record-keeping – a possible licence condition

Manufacturers of tobacco products and tobacco manufacturing equipment	**In possession of tobacco products or tobacco manufacturing equipment for export or non duty and tax paid tobacco products or tobacco manufacturing equipment**
Commercial records which reconcile inputs to production	Date of shipment from the last point of physical control of the product/s
General information on market: • volumes • trends • forecasts • other relevant information	Details concerning the product/s shipped (including brand, amount, warehouse)
Quantities of tobacco products and manufacturing equipment in the licensee's possession, custody or control kept in: • stock • in tax and customs warehouses under the regime of transit or transhipment or duty suspension	Intended shipping routes and destination
	Identity of the natural or legal person/s to whom the product/s is/are being shipped
	Mode of transportation, including the identity of the transporter
	Expected date of arrival of the shipment at the intended shipping destination
	Intended market of retail sale or use

Source: Preece & Sou 2013.

Manufacturers' records need to demonstrate that inputs to production can be reconciled or matched with outputs from production. This is a critical aspect of the Article and is required so that there can be confidence that all duty and tax liabilities created through manufacture are recorded (and can be tracked until brought to account). To insist on keeping records from the point where 'finished goods' are moved into inventory will not assist competent authorities to confirm, through audit, that all production

has been captured in the records (Preece 2008, p. 82). To this end, manufacturers should be requested to specifically keep commercial records as they relate to acquisition of raw materials; production specifications by brand; production (batch) runs; losses or gains; and quantity of finished product. Such a requirement could be a condition of a 'manufacturing licence'.

Tobacco manufacturers also need to have records which account for the current and forecast markets for their products, the nature and type of manufacturing equipment they have in place, as well as the inventory (including tax status) they hold. This will assist in 'flagging' possible manufacturing operations that may be 'over producing' products which can be a risk indicator for potential illicit trade.

Finally, the Article wants tobacco licensees to hold such records for a period of at least four years.

Of note in this Article is the suggestion that all retailers and tobacco growers except 'traditional, small scale growers' keep records in relation to their operations without being specific. This will be a difficult requirement if the country has placed these activities outside the licensing regime. However, if it can be achieved, the priority would be to request records from tobacco growers that indicate volumes of leaf sold to licensed factories so that this can be reconciled with declared inputs to production at those factories, and acquisitions of finished cigarettes from suppliers by retailers to reconcile with declared sales by factories or other licensed entities.

How can record-keeping help? Record-keeping is not a preventative control such as licensing and due diligence, but rather a detective control. In Case Study 5 there was an importation of tobacco product which had been mis-described in the customs import declaration process as toilet paper. If a licensee actively mis-describes such consignments, competent authorities are unable to reconcile deliveries into a market by the licensee with products in possession, and duty and tax suspended products in possession. In other words, the competent authority will realise that the licensee does not have sufficient licit product to supply their market. Further, record-keeping provides 'audit trails' and at some point, and in another country, records will exist for any export or transit which eventually may confirm the agency's concerns.

Article 10 Security and Preventive Measures

There are two main components in Article 10. The first requires those entities licensed under Article 6 to report to the relevant agencies in relation to cross border cash transactions that exceed an amount that is normally reportable under local cash transaction laws, and similarly, report any 'suspicious' transactions.

The second component places a responsibility for those same licensed entities to only supply either tobacco products or manufacturing equipment in amounts which are 'commensurate with the intended market'. Thus, with 'due diligence' requirements, the Protocol is moving a number of obligations to eliminate the illicit trade onto the industry itself.

Article 11 Sale by Internet, Telecommunications or any other Evolving Technology

Article 11 recognises the increasing role of technology in the economy, particularly in relation to retail level sales of all types of goods. In relation to tobacco products however, the Article seeks to have countries consider 'banning' the sale through the internet or other technologies. Where a country continues to allow such sales, Article 11 requires those countries to apply the Protocol to those sales.

Article 12 Free Zones and International Transit

Trade investment policies run by many governments have attempted to attract manufacturing businesses to their economies by providing 'free zones', 'export processing zones', and similar regions in which foreign investors can operate free of many of the local taxes and regulations. This investment policy creates a policy issue in terms of who manages a 'free zone' and the rules that apply – is it a 'Board of Investment' under an industry portfolio, or is it a customs agency owing to the nature of the import and

export operations which occur, and does this set up a potential 'gap' in control of illicit goods? (Allen 2011, p. 19). In terms of the South East Asian region, whilst there are economic benefits from this type of policy, it has become a clear risk area in terms of the illicit trade in tobacco as seen in both Case Studies 1 and 4.

In recognition of these risks, Article 12 requires countries, within three years of the Protocol coming into force, to apply its manufacturing and transaction controls to any tobacco or tobacco product activities that are to occur in a free trade zone or free port. This implies, and the policy should be supported regionally, as meaning:

- **Licensing.** That manufacturers or dealers intending to operate in a free trade zone to manufacture tobacco products or manufacturing equipment, or to store or otherwise deal in tobacco products or manufacturing equipment, must first obtain a licence under Article 6 to do so from the competent authority. It may also be prudent to have the operators of free ports who may have occasion to unload, repack and reload tobacco products or manufacturing equipment also to have an Article 6 licence.
- **Due diligence.** That those conducting business within a free trade zone, or through an operator of a free port, apply the requirements of Article 7 in the relevant business transaction.
- **Record-keeping.** That licensed manufacturers and dealers keep records in relation to that manufacture, and in relation to any movement of duty and tax suspended goods, as well as free port operators in relation to any unloading, repacking and reloading activities.
- **Track and trace.** That manufacturers of tobacco products in a free trade zone still be required to affix the unique identifier as per Article 8.

Further measures include prohibiting 'intermingling' or the packing of tobacco products with non-tobacco products in the same shipping container when the container is removed from the free zone, as well as fuller 'verification of international transit and transhipment' of tobacco products through the free zone.

Article 13 Duty Free Sales

This Article seeks to have duty free sales subject to the relevant measures of the Protocol within a period of five years of the Protocol coming into force. However, the Article also suggests that the risk from the duty free market is not well known and therefore, has called for further research to be conducted through the 'Meeting of Parties' process.

Part IV: Offences

Part IV will support the implementation and enforcement of the supply chain controls outlined in Part III and will provide for a range of potential new offences that will be available for agencies to prosecute entities that fail to apply the appropriate supply chain controls. The following Articles are worthy of further analysis.

Article 14 Unlawful Conduct including Criminal Offences

Article 14 seeks to have countries adopt in national laws, offences which 'follow' the key components of the supply chain and general illicit activities. The main point to be made is the 'criminalisation' of the illicit trade in tobacco, providing incentive for the legitimate trade to ensure controls are working, and greater disincentive for those entities looking to undertake illicit activities. In summary, the key new offences sought to support the Protocol include:

- manufacturing, or any dealing in tobacco products or manufacturing equipment 'contrary to the provisions of this Protocol'

- manufacturing, or any dealing in tobacco products or manufacturing equipment 'without the payment of duties, taxes and other levies' or any other acts of smuggling tobacco products or manufacturing equipment
- any form of illicit manufacture of tobacco, tobacco products or manufacturing equipment, or tobacco packaging bearing false unique identification markings
- dealing in illicit tobacco or products bearing a false unique identification mark
- dealing in illicit manufacturing equipment
- 'mixing of tobacco products with non-tobacco products during progression through the supply chain, for the purpose of concealing or disguising tobacco products'
- intermingling tobacco products with non-tobacco products in free zones
- 'using Internet-, telecommunication- or any other evolving technology-based modes of sale of tobacco products in contravention of this Protocol'
- 'obtaining, by a person licensed in accordance with Article 6, tobacco, tobacco products or manufacturing equipment from a person who should be, but is not, licensed in accordance with Article 6'
- obstructing any public officer or an authorized officer in the performance of duties relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment'
- 'making any material statement that is false, misleading or incomplete, … to any public officer or an authorized officer … relating to the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment'
- 'misdeclaring on official forms the description, quantity or value of tobacco, tobacco products or manufacturing equipment'; evading 'the payment of applicable duties, taxes and other levies, or [prejudicing] any control measures for the prevention, deterrence, detection, investigation or elimination of illicit trade in tobacco, tobacco products or manufacturing equipment'
- 'failing to create or maintain records covered by this Protocol or maintaining false records'
- 'laundering of proceeds of unlawful conduct established [above] as a criminal offence' (UN 2012, pp. 18-20).

It should further be noted that Article 26 then discusses the jurisdiction for where an offence has been committed given the nature of the supply chain. Article 26 does recommend the confirmation of jurisdiction by national laws, and this will become important as it is probable that the region will see an increase in the likelihood that offenders located in one jurisdiction will be committing offences against another jurisdiction. The offender, by their location, should not be able to escape subsequent investigation and prosecution.

Article 17 Seizure Payments

This Article requests countries to consider national laws which provide for the ability to demand unpaid duties and taxes in the event illicit tobacco is seized. It is still a little unclear what is trying to be achieved, as it could be assumed that most customs, excise or tax laws would provide this ability if an entity is detected with 'smuggled' product.

The Article may be trying to emulate the system which operates by agreement in the European Union with the major tobacco companies in which seizures of a tobacco company's product in the illicit market can attract appropriate payments from that company.[14] However, given the Article applies to either the 'producer, manufacturer, distributor, importer or exporter of seized tobacco, tobacco products and/or manufacturing equipment', the Article may be attempting to provide a recourse to the last entity who may have failed in their supply chain control obligations and facilitated the diversion into the illicit market.

Whichever approach is being contemplated, the issue will be to seek consistency in the nature and assessment of seizure payments across the region. As with other aspects of the Protocol, once a particular country implements a policy which is not consistent with other countries' policies, it will influence illicit activities. In this type of policy, any country providing a concession on seizure payment arrangements could result in criminals focusing certain activities in those countries to mitigate the costs should those activities be detected.

Article 19 Special Investigative Techniques

In line with the move to try and criminalise many aspects of the illicit trade in tobacco, Article 19 encourages countries, where domestic laws permit, to apply special investigative techniques when investigating the range of new proposed offences in Article 14. The types of special investigative techniques discussed include methods such as 'electronic or other forms of surveillance and undercover operations' (UN 2012, p. 22).

The Article also seeks a greater level of bilateral or multilateral cooperation in investigating the illicit trade in tobacco, either at a formal agreement level or, at least, on a 'case-by-case', in recognition that there are often many legal and jurisdictional impediments to officials of one country operating in another, or sharing information about their nationals with foreign officials.

Part V: International Cooperation

International cooperation will be an important aspect in ensuring the successful implementation of both the proposed supply chain controls and prosecution of offences. The WCO could play an important role in Part V of the Protocol having established a range of international cooperation and information sharing arrangements under both its SAFE Framework Customs-to-Customs pillar, (WCO 2012b, p. 7) and in certain current regional reporting and dissemination arrangements run through the RILO office.

In terms of the Protocol, the key Articles of Part V are seen as:

Article 20 General Information Sharing and Article 21 Enforcement Information Sharing

Articles 20 and 21 relate to the sharing of general information such as seizures, methods of concealment and relevant import/export trade data, as well as more specific enforcement data such as licensing records, targeting of consignments, investigation outcomes, and detailed information on individual seizures. However, any handover of information to foreign officials will be subject to the 'confidentiality' provisions of Article 22, which defers to domestic laws and mutual agreements in the matter of what information is required to be kept confidential and not to be shared.

What is seen as required regionally for these levels of information exchange to occur is an appropriate 'platform'. Article 22 could indeed see many national laws restrict what type of information can be exchanged and to what type of organisation it can be released, therefore, there may be a need to look at current regional information exchange arrangements. In terms of customs activities, the WCO through its RILO AP is perhaps the appropriate 'platform' at this present time, with one of its main roles described as being 'a regional centre for collecting and analysing data as well as for disseminating information on trends, *modus operandi*, routes and significant cases of fraud'.[15] This role of the global RILO network already includes illicit tobacco.

The WCO SAFE Framework will eventually be an option, with the Customs-to-Customs pillar setting standards to enhance electronic data interchange between customs agencies.[16] Work is being done on areas such as agreeing common data model sets, and risk selection criteria – meaning perhaps one day certain information and target selection may be fully automated (WCO 2012b, p. 7).

The Association of Southeast Asian Nations (ASEAN) has also considered transnational crime in the region, and has had in place a number of regional agreements since 1997. These include the 'ASEAN Declaration on Transnational Crime' (1997), the 'Manila Declaration on the Prevention and Control of Transnational Crime' (1998), and an Action Plan known as the 'The ASEAN Plan of Action to Combat Transnational Crime' (1999) (ASEAN 2012, pp. 9-23). Currently, ASEAN still meets bi-annually at the Ministerial level on transnational crime,[17] and it would be beneficial to have this level of meeting drive regional cooperation initiatives.

There is little information on the output of these initiatives although each calls for levels of information sharing and cooperation. The planned establishment of an ASEAN Centre for Transnational Crime which would have assisted in this regard does not appear to be in operation. However, there is also the ASEAN Chiefs of National Police group which does meet regularly but this group appears more strategic than operational. It would seem that the WCO's RILO AP may need to take a leadership role in this information sharing proposal, and has been exploring this issue since May 2013.

Article 23 Assistance and Cooperation: Training, Technical Assistance and Cooperation in Scientific, Technical and Technological Matters

Article 23 relates to the provision of training and higher level technical assistance by one country to another. The Article reflects the developmental differences in the economies and encourages those countries with the capability to assist those countries without. The benefits of the Article include the increased capabilities of the less developed countries so as not to leave 'capacity gaps' in the international tobacco supply chain.

The training and technical assistance would be related directly to the building and operating of the supply chain controls of Part III of the Protocol and could extend to the investigation and prosecution of offences under Part IV.

The provision of training and technical assistance could be from country to country, or through appropriate regional organisations, such as the WCO which in addition to the RILO AP, has a regional Capacity Building office, the Asia Pacific Regional Office for Capacity Building (ROCB A/P). It is encouraging that ROCB A/P will be studying this issue soon. Other organisations could well play roles, such as UNODC which has expertise and regional resources to assist the lesser developed countries, and Interpol which runs specific capacity building programs to combat the illicit trade.[18]

Article 24 Assistance and Cooperation: Investigation and Prosecution of Offences and Article 27 Law Enforcement Cooperation

Article 24 is more specific in terms of international assistance. In this case, the Article requires assistance and cooperation in relation to investigation and prosecution of offences. The assistance and cooperation are subject to domestic laws, and is further confirmed by Article 25 which protects the sovereignty of each country and certainly prevents, for example, one country conducting activities under the Protocol in another country without appropriate agreement between the countries.

Cooperation is also sought under Article 27, in this case between law enforcement agencies, domestically and internationally. Using agreements, within domestic laws, countries are asked to undertake the following enforcement activities:

- enhance communication for secure and rapid exchange on information on criminal offences under Article 14

- ensure effective cooperation between customs, police, relevant agencies and other law enforcement bodies to identify the:
  - whereabouts of suspects
  - movement of proceeds of crime from Article 14 offences
  - movement of property and equipment used, or to be used in the commission of these offences
- provide samples of product for analysis
- exchange technical personnel and other experts where appropriate and subject to formal agreements where required
- exchange specific information on the *modus operandi* where Article 14 offences have been committed (UN 2012, pp. 27-8).

Article 27 also asks countries with the proper bilateral and multilateral agreements to exploit these fully and, where available, to use 'modern technology' when combating transnational crimes.

The same issues arise in Articles 24 and 27 as they do for information sharing across the region under Articles 20 and 21. There are no clear or obvious regional law enforcement platforms in operation for cross border investigation and process, however regionally based organisations, such as Interpol, have assisted in 'field operations' in which two of more South East Asian countries have been involved in the interception of illicit goods,[19] and this model of the use of international organisational expertise may be what is required until the relevant Ministerial level agreements can be made by ASEAN.

Article 28 Mutual Administrative Assistance and Article 29 Mutual Legal Assistance

In addition to law enforcement cooperation, Article 28 looks at 'administrative cooperation' at the international level. Administrative cooperation includes, in this case, the sharing of general information which will enhance the effectiveness of controls of relevant agencies such as details of 'new customs and other enforcement techniques' and 'new trends', as well as about known offenders and the products they deal in.

Article 29 states that 'Parties shall afford one another the widest measure of mutual legal assistance' and cooperation when any investigation and/or prosecution of offences is being undertaken. The Article recognises that the illicit trade in tobacco is an international issue and that whilst offences will likely have occurred in one jurisdiction, evidence or offenders may be located in another. The Article requires countries to assist one another in this process of investigation and prosecution where permissible under domestic law or formal agreement, in:

(a) taking evidence or statements from persons
(b) effecting service of judicial documents
(c) executing searches and seizures, and freezing
(d) examining objects and sites
(e) providing information, evidentiary items and expert evaluations
(f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records
(g) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes
(h) facilitating the voluntary appearance of persons in the requesting Party, and
(i) any other type of assistance that is not contrary to the domestic law of the requested Party (UN 2012, pp. 29-30).

Articles 30 and 31 expand this mutual legal assistance somewhat by providing for extradition of suspected offenders, provided the offence is serious and would be subject to serious penalties in the country that holds the suspect.

These Articles will require a minimum level of capability in the country asked to undertake the relevant administrative and legal activities needed to support other countries which are investigating and prosecuting offences under the Protocol. Again, there needs to be capacity building delivered to those countries that require it, and again, we see organisations like the WCO, UNODC and Interpol with their presence in the region and their expertise being in a position to assist.

How can the region analyse these policy issues and implement the Protocol effectively?

It is clear from the analysis that the implementation of the Protocol across South East Asia will require:

- a number of policy issues to be determined at a national level, particularly those relating to the key Articles of supply chain control such as licensing, due diligence, record-keeping, and track and trace
- some form of regional benchmarks or standards to assist countries with these policy issues so that there is some consistency in decisions taken on the key Articles
- capacity building to individual countries in need as they implement aspects of the Protocol
- establishment of regional cooperation programs in the areas of information exchange, investigation of offences, and prosecution of offences
- support in establishing and operating these types of regional cooperation programs from regionally based organisations with relevant resources and experience.

It is likely that the region will have to wait for guidelines on these relevant Articles to be issued by the WHO Secretariat after due process and consultation through COP. The COP process will involve country-level negotiation from South East Asia rather than from a regional level, however, it is hoped that the sort of analysis and findings from this paper are similar to what is fed by countries into the COP process. In that way, through the guidelines, there will be a minimum standard or benchmark on which countries can base national policy decisions.

Implementation of the Protocol with its reliance on regional (and international) cooperation, and of one country on another to properly administer the key Articles, will need the support of international agencies with relevant resources and expertise.

This paper has acknowledged the WCO for both its capacity building and regional intelligence roles in the Asia Pacific region, and believes there is a strong case for the WCO to support the region, particularly in relation to the operations of the various customs and excise authorities.

Given the nature of the illicit trade in tobacco, these customs agencies will have a key role in the import, export, transit, warehousing and, in some cases, domestic production of tobacco products, and of tobacco manufacturing equipment. Thus customs authorities may well find that they become the competent authority for licensing and other aspects of the Protocol. And the WCO may need to develop programs to assist those countries in need of this new capacity.

The WCO is also integral to the collection and sharing of information and intelligence related to the movement of illicit goods, including illicit tobacco products. It is well placed to enhance or strengthen this existing role as is sought under the Protocol.

However, certain legal aspects including amendment to national laws, investigation and prosecution of offences and enforcement cooperation in investigation and prosecution are highly specialised skills. Thus, other organisations are seen to be important to regional implementation.

As discussed, organisations like the UNODC and Interpol could be engaged to advise on and set up procedures relating to cross border criminal investigations and prosecutions, as well as in the position of national laws to support this and possible amendments that may be required. These agencies are also capable, when resources permit, of looking at capacity building of these same areas.

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Notes

1 Lo (2013) suggests tobacco can be manufactured in mainland China for export at USD6.40 per kilogram, then resold in some markets at wholesale prices as high as USD330.00 per kilogram – or a 5,000% mark up.

2 Euromonitor 20123, pp. 31-32 (40%); Maybank Industry Research 2012 (36%); Havoscope Black Market Research [n.d.] (36.6%)

3 Various sources including World Bank, SEATCA, FPO Indonesia, Thai Excise Department. Note: for Myanmar, data as at 2001 due to lack of credible sources. Rounding to nearest USD1,000 in each market.

4 Total collections = tobacco excise paid, and represents 91% to 93% of the total market; 7% to 9% calculation based on total market size.

5 'illicit white' or 'cheap white' cigarettes are unbranded and manufactured for the illicit market.

6 www.who.int/fctc/protocol/ratification/en/, viewed 31 July 2013.

7 See Note 6.

8 www.wcoomd.org/en/topics/facilitation/instrument-and-tools/tools/safe_package.aspx, viewed 26 August 2013.

9 Lieberman 2012 www.asil.org/insights121214.cfm, viewed 7 August 2013.

10 Guidelines have been developed for eight Articles of the FCTC, www.who.int/fctc/guidelines/en/.

11 Brunei Darussalam, Cambodia, Indonesia, Malaysia, and Singapore each have customs and excise administered by the one agency.

12 Transcrime 2012 http://transcrime.cs.unitn.it/tc/1047.php, p. 18, viewed 9 August 2013.

13 Transcrime 2012, http://transcrime.cs.unitn.it/tc/1047.php, p. 14, viewed 29 July 2013.

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15 www.wcoomd.org/en/topics/enforcement-and-compliance/instruments-and-tools/~/media/WCO/Public/Global/PDF/Topics/Enforcement%20and%20Compliance/Tools%20and%20Instruments/RILO/RILO_09EN.ashx.

16 Several articles in *World Customs Journal*, vol. 5, no. 2 (2011) refer to the importance of the SAFE Framework's Customs-to-Customs pillar.

17 See www.asean.org/communities/asean-political-security-community/category/overview-8.

18 United Nations Office on Drugs and Crime (UNODC) runs programs like Partnership Against Transnational Crime through Regionally Organised Law Enforcement (PATROL) in South East Asia, see www.unodc.org/southeastasiaandpacific/en/patrol.html. Interpol runs capacity building programs internationally and regionally which are specifically aimed at illicit goods, see www.interpol.int/en/Crime-areas/Trafficking-in-illicit-goods-and-counterfeiting/Capacity-building-and-training.

19 See, for example, where, on 30 July 2013, Interpol worked with Thai and Malaysian law enforcement officials to seize precursor chemicals in a van on the Thai-Malaysian border, www.interpol.int/en/News-and-media/News-media-releases/2013/PR089**.**

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The Eurasian Customs Union in transition

Hans-Michael Wolffgang, Gennadiy Brovka and Igor Belozerov

Abstract

In 2010, the Republic of Belarus, Republic of Kazakhstan and the Russian Federation formed the Eurasian Customs Union (ECU). Although the states have achieved an impressive degree of integration, both the aim and initial results of the union are controversial. This paper starts with a brief historical overview and describes the current state of the ECU. The authors then explain what effects the union is having on internal and external trade and identify emerging problems. They also consider a development strategy, paying particular attention to the way the ECU attempts to resolve tensions between the World Trade Organization's (WTO) regime and its own legal order. The paper concludes with a brief outlook.

1. Historical background

Today, the world has far more free trade zones than customs unions. According to the World Trade Organization (WTO), less than ten per cent of all preferential trading agreements take the form of a customs union (WTO 2011, p. 62).

The reasons are that free trade zones are more politically acceptable than customs unions (that is, no loss of autonomy), are independent of geographical factors (cross-continental FTAs) and offer greater flexibility in establishing bilateral trade relationships with the rest of the world (Facchini, Silva & Willmann 2012, p. 25; Andriamananjara 2011, p. 111). Despite all these advantages, Russia, Belarus and Kazakhstan have all decided in favour of a customs union. This integration project is explained in the three countries' recent history.

1.1 1993 to 1999

Between 1993 and 1994, the former Soviet Republics (and now independent states) attempted to form an economic union. For this purpose, the state leaders signed the treaty 'on economic union' on 24 September 1993. The further development of this union gave rise to a number of further treaties including the establishment of a free trade zone on 14 April 1994, the creation of a payment union on 21 October 1994 and a customs union on 20 January 1995. A comprehensive economic union enabled the states to maintain the economic ties inherited from the Soviet Union. However, the attempt to involve all new post-Soviet states in an integration project failed owing to various political and economic reasons. Between 1995 and 1999 it was not possible to achieve any significant progress.

1.2 2000 to 2006

Since 1999-2000, the post-Soviet states have started to develop their relations with the rest of the world. In 2000, Russia, Belarus, Kyrgyzstan, and Tajikistan founded the Eurasian Economic Community (EurAsEC). This new international organisation is strongly institutionalised. It has replaced the requirement of unanimity with a qualified majority and abolished the principle of 'one state = one vote'. This represents a departure from the usual voting procedures that characterise international arrangements. For three of the five states, Russia, Belarus and Kazakhstan, the EurAsEC provided the springboard for creating the Eurasian Customs Union (ECU).

1.3 2007 to today

The next important steps towards integration were completed in less than five years. The state leaders of Russia, Belarus and Kazakhstan signed the Treaty Establishing the Customs Union on 6 October 2007. Shortly afterwards, further legal agreements were concluded (despite the tedious political disagreements that repeatedly arose between the member states). In July 2011, the Customs Code of the Eurasian Customs Union (ECU-CC) took effect. This signalled the completion of the customs union and represented a high water mark in the integration process. Since the beginning of 2012, the official description of 'the Customs Union and the Uniform Economic Area of the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation' was officially adopted and signified an advanced degree of integration. The members plan to achieve the next step (that is, the establishment of the Eurasian Economic Union) by 2015.

2. Between a customs and economic union

The new integration project aims to promote social progress and improve the living standards of the people. The founding states plan to achieve these aims by exploiting existing relationships in production and the economy.[1] The mutual dependency of post-Soviet political economies is often taken for granted and cited as an explanation for the broadly conceived integration projects between these countries. The process of integration is also facilitated by geographical proximity and cultural similarities. To date, however, the political will for integration has been lacking. By creating the ECU, Russia, Belarus and Kazakhstan have attempted to reinvigorate their once comprehensive economic relations, despite the fact that they have been clearly weakened in the 20 years since the collapse of the Soviet Union. By elevating the ECU to a common market, members hope to increase the profitability of Eurasian countries and make them more attractive to investors. On the other hand, establishing a common legal framework by means of supranational legislation will expand the economic freedom that can be claimed by economic operators. The next section deals with the extent to which the partner states have actually succeeded in these endeavours.

2.1 Completion of the Customs Union

2.1.1 Abolition of internal customs borders

The abolition of customs borders between the three countries marked the first stage in realising the ECU. After a delay of several months, border controls were lifted on 1 July 2011. Restrictions to free trade are also in the process of being abolished: a declaration is only necessary when exporting oil products from Russia to other member states. These measures clearly contributed to facilitating trade between the partner countries – especially during the financial and economic crisis.

In mutual trading relationships, energy resources are by far the most important export product. They account for almost 50 per cent of the total exports, with machines, vehicles, chemical and metallurgical products being the most important. Russian exports currently account for almost two-thirds of mutual trade and are rising. However, whilst Russia trades intensively with Belarus and Kazakhstan, trade between the two smaller states appears low and in 2012 amounted to scarcely USD1 billion. The generally positive tendencies are often cited to justify the tripartite Customs Union. Accordingly, the Russian Academy of Sciences has estimated that the total effect of integration will amount to USD400 billion or 15 per cent of shared GDP by 2015 (Kosov 2012, pp. 162-3). The Eurasian Development Bank has also provided an extremely optimistic prognosis concerning economic development within the ECU.[2]

Table 1: Trade statistics in the Eurasian Customs Union for 2010, 2011, 2012 (January to October)

Year	Total turnover of ECU in USD (millions)	Total turnover of ECU as % of previous year	Export								
			Russia			Belarus			Kazakhstan		
			USD (millions)	as % of previous year	% in the ECU	USD (millions)	% of the previous year	% in the ECU	USD (millions)	% of the previous year	% in the ECU
2010	47134.6	129.1	30717.0	118.7	65.2	10418.4	148.2	22.1	5999.2	166.6	12.7
2011	63461.8	134.6	40814.7	132.9	64.3	15182.9	145.7	23.9	7464.2	124.2	11.8
2012	56820.6	109.3	37065.5	112.1	65.3	14049.2	111.2	24.7	5705.9	90.7	10.0

Source: Information of the Economic Commission, www.tsouz.ru.

Regardless of whether this promising prognosis materialises, one has to agree that the aforementioned export statistics are not explained by the abolition of customs barriers alone. In fact, the dynamics of export are the simplest indicator of a regional union's degree of integration; in other words, the degree of welfare depends on the amount of 'intra-trade' that an economic union generates (Do & Watson 2007, p. 12). However, the increased trade figures in the ECU are not due to a reduction in customs duties since duty-free trade in goods between the three countries had already been achieved on the basis of free trade agreements. Rather, the reduction in bureaucracy (more efficient border crossing, simplified payment transactions, less risk of corruption) seems to have had the most telling effect. The introduction of the common customs tariff has also made an important contribution to increasing exports within the ECU.

2.1.2 Common tariff

The Common Customs Tariff (CCT) forms the basis of the customs union. According to the legal definition, the CCT consolidates the rates of import duty for goods imported into the common customs area.[3] The customs tariff of 16 July 2012 is based on the Harmonized System for the Nomenclature of Goods of 1 January. This is already the ECU's second CCT (the first applied from 1 January 2010 to 23 August 2012). It largely consists of *ad valorem* (9,473 headings), specific (235 headings) and mixed duties (1,563 headings), which are calculated partly in euros and partly in US dollars. Although a further transition from mixed duties to *ad valorem* or specific duties is planned in future, there are complaints at WTO level that the current proportion of mixed duties is motivated by protectionism in that they permit a greater degree of tariff protection.[4]

The *de facto* adoption of Russian import duties in the first CCT in 2010 entailed a considerable increase in customs duties for Kazakhstan and Belarus (Jandosov & Sabyrova 2011, p. 13) which was offset by increased trade between the partner states. According to the European Bank for Reconstruction and Development (EBRD), this process served to promote trade throughout the region. That said, there is also a risk that less competitive exports from Russia are preventing the importation of cheaper goods from Europe and China.[5] Since the increase of exports within a customs union is usually achieved by a common tariff, the World Bank believes that living standards are negatively affected thereby (owing to trade diversion), despite the positive developments of intra-regional trade (World Bank 2012, pp. 15ff).

2.1.3 Reduction of customs duties

When the CCT entered into force, the level of customs protection in the ECU declined. Russia's accession to the WTO in August 2012 played a decisive role in this respect (Weerth 2012, pp. 176ff). As early as July 2012, the Eurasian Economic Commission (the ECU's standing regulatory body [the Economic Commission]) proposed a new Eurasian customs tariff in accordance with Russia's WTO obligations. As a result, the average rate of customs duty in the CCT had fallen from 9.6% to between 7.8% and 7.5 %.[6] Russia's WTO obligations are adopted within the CCT on the basis of the Agreement between

Russia, Belarus and Kazakhstan on the Functioning of the Customs Union in the Multilateral Trading System (FCUA); accordingly, the member states' WTO obligations form part of ECU law. The CCT has to be amended every 12 months to reflect Russia's concessions. Accordingly, its rates will continue to gradually fall, as provided in Russia's Protocol of Accession. However, the fall in customs rates is accompanied by a corresponding increase in non-tariff measures.

2.1.4 Non-tariff barriers to trade

Before the Customs Union was established, indirect protectionist measures represented an important instrument of foreign trade for ECU members. Some years ago, Russian import prohibitions on meat from the United States of America (USA) and wine from Georgia and Moldavia attracted a lot of attention. Such measures were partly motivated by political concerns – the milk war between Russia and Belarus being a good example. Russia's accession to the WTO and the incorporation of WTO standards into the ECU's legal order aim to restrict the member states' freedom to act. However, the European Union (EU) announced as early as November 2012 that the charge for scrapping foreign cars or quotas on wood exports were disproportionate and did not rule out the possibility of making a complaint against Russia at the WTO. The USA also regards the Russian prohibition on imports of beef treated with hormones (introduced at the end of 2012), as infringing WTO law. Russia rejects the criticism and refers to its right to introduce measures to protect health and the environment. Further protective measures are planned should the global economic crisis flare up again, including a number of customs quotas from 2013 to 2015.[7]

The founding of a customs union has made it more difficult for individual ECU members to introduce unilateral non-tariff measures since some of the powers needed to do so have been transferred to its organisations. The responsibility for such measures now rests with the Economic Commission and member states. The former has powers to issue prohibitions and restrictions in relation to imports and exports, safety and security (that is, technical barriers to trade and sanitary and phytosanitary measures), trade protection[8] and, more recently, export controls.[9] Furthermore, there is a framework regulation for export and import licences although the decision on applications still remains with the national authorities.[10] The Economic Commission is not only responsible for introducing protective measures in relation to imports but also for supervising trade restrictions that other countries impose on exports from the customs union.[11]

The role played by technical provisions, sanitary and phytosanitary measures as well as protective, compensatory and anti-dumping duties in ECU trade policy is only likely to increase as a result of the deepening and multilateral development of the customs union. Ultimately, it reflects a global trend. Parallel to this, the Economic Commission will gradually assume a more assertive role in this area and replace the national authorities as the competent contact point for questions relating to non-tariff trade regulation across the whole customs union. It is hoped that, by transferring powers to the Economic Commission, protective measures will be introduced in a way that ensures greater certainty and predictability within the ECU. This, in turn, promises a more effective protection of economic operators' legitimate interests in practice.

2.1.5 The economic test: pass or fail?

Economic analysts agree that the ECU's common tariff policy has triggered a shift in foreign trade. Arguably, new non-tariff trade provisions amount to a *de facto* discrimination against foreign imports. However, the question as to whether the ECU has led to an increase or reduction in living standards or has had discriminatory or liberalising effects cannot be answered by an economic test alone. In any case, the increase in trading activities and a clear reduction in trade barriers *between* the three countries is of far greater significance. Arguably, greater liberalisation and economic integration will promote trading relationships *with non-member states*.

3. Customs treatment and trade facilitation

Traditionally, customs unions have been created by abolishing internal customs barriers and harmonising trade policy and customs formalities in relation to third party states (Lux 2008, p. 163). Russia, Belarus and Kazakhstan have gone a step further in realising their aim of integration and have harmonised their customs rules in the ECU-CC. The ECU-CC, consisting of almost 400 articles, represents an international treaty that takes priority over member states' national law and takes direct effect. In Eurasian countries, therefore, customs law was the first legal area of supranational regulation (Kozyrin 2011, p. 3).

Customs law must keep up with the changing environment of international trade (Wolffgang & Natzel 2008, p. 39). For this reason, the next section asks whether there are any legal deficiencies in the customs union and what steps members are taking to develop customs law.

3.1 Problem areas

A number of representative studies into the underlying conditions of business permit of a comparative analysis. In its *Doing Business* series, the World Bank investigates the extent to which the business policies in individual states serve to promote trade.[12] It analyses progress made in ten categories, including international trade. As Table 2 shows, since they abolished internal customs duties, none of the three ECU members has been able to make significant progress in facilitating trade beyond establishing common customs borders. In almost all areas, Russia, Belarus and Kazakhstan score below average in the region.

Table 2: The ECU countries in 'Ranking on trading across borders in 2011/2012/2013'

Indicators	Average in Eastern Europe and Central Asia	Belarus	Kazakhstan	Russia
Aggregate ranking	-/105/107	-/152/151	-/176/182	-/160/162
Documents to export (number)	6.4/7/7	8/9/9	10/10/9	8/8/8
Time to export (days)	26.7/27/26	15/15/15	81/76/81	36/36/21
Cost to export (USD per container)	1651.7/1774/2134	1772/2210/1510	3005/3130/4685	1850/1850/2820
Documents to import (number)	7.6/8/8	8/10/10	12/12/12	13/10/11
Time to import (days)	28.1/29/29	20/30/30	67/62/69	36/36/36
Cost to import (USD per container)	1845.4/1990/2349	1770/2615/2315	3055/3290/4665	1850/1800/2920

Source: www.doingbusiness.org.

Whereas the *Doing Business* reports are generally based on an analysis of legislation, the *Business Environment and Enterprise Performance Survey* (BEEPS) Project examines the quality of the business environment in practice.[13] It found that the business climate gradually improved between 2009 and 2012. Nevertheless, there are still clear deficiencies in relation to taxation, anti-corruption strategies and qualified workers which negatively affect international trade. Finally, the *Logistics Performance Index* must be mentioned: the current rankings (2012) place Kazakhstan, Belarus and Russia 86th, 91st and 95th – between the Dominican Republic and Lebanon.[14]

Therefore, the creation of the customs union has not significantly improved the situation. This is confirmed by recent questionnaires completed by economic operators. Only a third of Russian companies questioned by the *WZIOM* market research centre in November 2012 reported that border crossing times had decreased;[15] 64% of exporters still spend more than three hours waiting at the border customs office; 49% report that the procedure sometimes lasts more than 24 hours. Imports (including 100% of food imports) are separately controlled by customs, veterinary and consumer protection authorities;

border authorities do not use computerised systems. One must also take into account several layers of customs legislation, hundreds of requirements in the ECU-CC and differing rules in the three member states which frustrate the intended simplification of trade (Bakaeva 2011, p. 121). The costs incurred by customs procedures are still too high. This is reflected in the rhetoric of the political decision makers regarding the deficiencies in the national customs administrations.

3.2 Reform plans

In view of the existing problems, the Economic Commission plans a series of comprehensive measures for reforming the ECU's customs law in preparation for a general revision of the ECU-CC in 2015.[16] These measures plan to grant simplifications to particularly reliable economic operators in order to promote the transparency of business transactions and increase the efficiency of the customs authorities in performing risk analysis and customs controls. The measures include, for example, reforming the identification of participants as well as guaranteeing compatibility with the European Economic Operators' Registration and Identification (EORI) number.[17]

Although some elements of this ambitious plan have already been completed, there is still work to do. Accordingly, ECU members have gradually implemented initiatives of the World Customs Organization (WCO) (the Kyoto Convention, SAFE Framework). Since 17 July 2012, all economic operators in the customs union using road transport have been required to submit advance electronic declarations and this requirement will soon be extended to cover other means of transportation. The legal status of Authorized Economic Operators (AEO) is slowly making progress: in 2012 more than 120 applications for AEO status were submitted to the Federal Customs Services in Russia alone. Currently, 70 companies have had their applications accepted, 20 applications have been rejected and the remainder have yet to be checked.[18] In the partner state of Kazakhstan, two regions started a pilot project for the electronic customs declaration of exports; the project will be extended to other customs procedures at the end of 2013.[19] A new bill on customs regulation in Belarus promises to simplify customs clearance considerably.[20] At the end of 2012, the Economic Commission also issued rules ensuring the uniform application of customs valuation methods.[21]

3.3 Legal deficiencies

Despite this, the Russian-Belarusan-Kazakh customs union has a long way to go and one should not expect a dramatic improvement in the *Doing Business* rankings any time soon. The legislative and institutional demands are widely recognised by both member states and organisations of the customs union. However, legal practice appears to be deficient in a number of respects. In Russia, public authorities complain of partisanship, corruption and the lack of qualified personnel. The situation in the two partner states is not much better: legal failings are increasingly being discovered in all areas (World Economic Forum 2013, p. 9). It is therefore unsurprising that economic operators have little faith in the domestic legal system and prefer to base their legal transactions on foreign law. In Russia, for example, only 10% of commercially important contracts are subject to Russian law; the majority of Russian contracts for import and export are drafted according to English law.[22] This tendency is apparent in relation to the judicial venue as well, with a striking number of disputes involving Eurasian states being heard in foreign states. For example, almost 16% of all cases heard by the London Court of International Arbitration (LCIA) involve CIS states; by comparison, disputes relating to other European states account for only 10%.[23] This is all the more impressive considering the extent of economic relations between the EU Member States. This problem is also attracting attention within the customs union. Although the shift in economic activities from Russia to Kazakhstan has usually been attributed to the lower rate of VAT, it is now becoming clear this may also be due to the high costs of customs clearance at the Russian border. The shift in trading activities may appear disadvantageous from an economic point of view but allows legal risks to be avoided. Russian Customs may lose the vast majority of appeals against the *ex*

post collection of import duties,[24] but small and medium-sized companies are unable to bear the costs of proceedings. Such examples make clear that the greatest obstacle to the development of the internal market and foreign trade is legal uncertainty rather than economic risk. This problem will not be solved by the planned creation of an International Arbitration Tribunal of the Customs Union.

If the ECU is to become an economic area attractive for investors in the *long term*, the rule of law and system of justice must be firmly established. Economic operators will only do business in ECU member states if they trust the decisions of public authorities and have effective appeal procedures.

4. Current developments

This integration project of Russia, Belarus and Kazakhstan is extremely ambitious considering that its ultimate aim is the establishment of a full-blown economic union in less than ten years. The subjects of cooperation between the three partner states are enunciated in the *Declaration on the Eurasian Economic Integration* (Declaration of Integration) of 18 November 2011. Directly after the preamble, the state leaders affirm that the Eurasian economic area is to be based on generally recognised principles of international law. The second paragraph stresses the importance of each of the three states acceding to the WTO as well as the adoption of practical standards and rules facilitating cooperation in the Eurasian economic area. This represents an important political statement.

4.1 The WTO problem

4.1.1 WTO accession

The Declaration of Integration also resolves the debate concerning the WTO membership of the customs union which has been going on since 2009, insofar as it refers to a separate WTO accession ‘of each of the three states’. As a rule, WTO law does permit customs unions to exist subject to Art. XXIV GATT but only as between its member states (that is, once the state in question has joined) (Herrmann 2011, pp. 45, 121). To date, this has not been the case. It may well be that Russia’s accession to the WTO will accelerate the accession of the other two states because now Russia’s WTO obligations will be implemented in the legal order of the customs union. However, even if Kazakhstan were to join the world trading club as early as 2013, negotiations with Belarus remain on hold for the foreseeable future.

4.1.2 The danger of legal fragmentation

If ECU members accede to the WTO individually, there will be a risk of legal fragmentation within the customs union. This would occur if the concessions required of Kazakhstan or Belarus were different to those of Russia and thereby gave rise to different legal obligations. According to Art. 1(3) of the FCUA, the WTO obligations of ECU members that join the WTO also form part of the customs union’s legal order. To solve this problem, Art. (5) of the same agreement obliges member states to comply with international law and the obligations of the state which first acceded to the WTO whenever the negotiation of accession touches on matters regulated by the ECU or its organisations.

4.1.3 The application of WTO law in the Eurasian Customs Union

As far as the ECU is concerned, the FCUA agreement already regulates the relationship between WTO law and the legal system of the customs union – despite the fact that two of the three member states have yet to join the WTO. First of all, the member states undertake to ensure the ECU’s legal system complies with the Treaty Establishing the WTO, as well as with the WTO obligations of each of the acceding member states. Until then, WTO law takes priority over agreements within the ECU and the decisions of its organisations. In addition, the rights and duties of each ECU member arising under the WTO agreements are exempt from review by the ECU (including the Eurasian Court) and are not open to amendment by international agreement entered into by the members. In other words, the ECU members

undertake to comply with WTO law when entering into international agreements affecting the customs union and when passing and applying legal acts issued by its organisations.

4.1.4 Another obstacle?

The obligation contained in the FCUA that its members must comply with WTO law, has turned the ECU into an instrument for the multilateral liberalisation of Belarus and Kazakhstan. The ECU offers an interesting practical example of the 'stepping stones/stumbling blocks' debate concerning the conflict between the proliferation of regional trade agreements and the multilateral system of trade. At the same time, it is unclear what status WTO law has in the customs union. Hitherto, Russian WTO obligations have always been implemented by the customs legislation of the customs union. Whether the Eurasian Court in Minsk dares to give its opinion on this question within the context of a legal interpretation (as did its European equivalent in Luxembourg) remains to be seen. Clearly, it is of great significance that national courts can refer to provisions of WTO law when interpreting national law. Some point to Russia's protocol of accession in support of the proposition that WTO law takes direct effect.[25]

4.2 Between Europe and Asia

Besides integration into the world trade order, ECU members aim to reinforce *intra-regional trade relations*. The geopolitical situation of the three states means that cooperation with other economic blocs is a priority. For this reason, the Declaration of Integration ends with a passage which underlines 'the pragmatism of coordinated cooperation to harmonise and approximate the process of integration in the Euro-Atlantic region and Eurasia'.

4.2.1 Europe

4.2.1.1 The EU as a model for integration

The Declaration on Integration particularly emphasises partnership with the EU. This is further confirmation of the fact that the EU represents an attractive model of integration for other regional trade relations despite the crisis. There are many indications of this in the ECU's legal and institutional structures.

4.2.1.2 The EU as an economic partner

The EU is the most important economic partner of all three ECU countries. However, there are considerable differences in both the legal framework for bilateral relationships and the intensity of trade between the EU and individual ECU member states. Although trade between the EU and Russia has reached record levels and the country remains the EU's third largest trading partner (after the USA and China), this cooperation lacks a legal basis appropriate to the current situation. As of 2012, all there was to show for the negotiations on a new Partnership and Cooperation Agreement between the EU and Russia (started in 2008) was 'progress in areas of disagreement'.[26] The bilateral relations between the EU and Belarus are still regulated by the Trade and Cooperation Agreement concluded with the Soviet Union in 1989 whilst the new Partnership Agreement of 1995 has never been ratified by the EU in response to Belarus's intransigence on democratic reform and civil and political rights. Only Kazakhstan has achieved an effective legal framework with the EU: in addition to the Agreement on Partnership and Cooperation of 1995 (which entered into force in 1999)[27] and the EU strategy for Central Asia,[28] negotiations on a Partnership and Cooperation Agreement started in 2011. Kazakhstan has also been holding a constructive dialogue with individual EU states. Accordingly, Germany concluded the Agreement on Partnership in the Field of Raw Materials, Industry and Technology with Kazakhstan in 2012 which gave it access to rare earths.[29] Now, Eurasian states would like to open *en bloc* negotiations with the EU concerning a free trade zone. The EU is not unfamiliar with the idea of closer intra-regional cooperation: partnership agreements with regional groupings form an important component of European

trade policy. However, it is questionable whether a free trade zone between the EU and ECU is capable of bringing the parties greater political, economic and legal advantages than separate bilateral agreements.

4.2.2 Asia

Russia would also like to appear as a troika in relation to the Pacific region. Although this is not so apparent in the ECU's trade policy, it is nevertheless growing in importance. In September 2012, the ECU appeared as a trade bloc for the first time at the summit of the Asia-Pacific Economic Cooperation (APEC) hosted by the Russian city of Vladivostok. The ECU's importance looks set to grow in this region considering that the EU and Asian-Pacific region are aiming to increase trade passing through Eurasian countries five-fold by 2020. This will considerably increase the profile of the ECU as a transit region (Putin 2012) and, in this context, a number of free trade agreements are being negotiated between the ECU and individual APEC states. Negotiations between the Economic Commission, Vietnam and New Zealand may even lead to a free trade agreement in 2013.

5. Outlook

The customs union of Russia, Belarus and Kazakhstan has embarked on a process of integration necessitated by cultural and geographical proximity. Despite initial trade diversion, the parties are hopeful that net welfare will increase. This is supported by trade growth within the union. The integration project of the three states is not limited to the Eurasian region. Rather, the creation of a customs union in accordance with WTO law will serve to propel Belarus and Kazakhstan into the multilateral trading system. However, further liberalisation is necessary before this can be achieved. It is uncertain whether the customs union will serve to increase the negotiating power of Eurasian countries in relation to other trade blocs because it does not provide for a joint policy towards other countries. This may change in light of increasing integration and the further unification of foreign trade policies brought about by economic union. However, the greatest challenge for the three countries lies in the creation of a *legal* rather than economic union. Ultimately, it is unclear exactly where the process of integration is heading.

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10 Art. 3 of the Agreement on rules governing the issue of licences in foreign trade of 9 June 2009.

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Section 2

Practitioner Contributions

Integrity: an age-old problem for Customs that demands a new approach

Gareth Lewis

Abstract

The role of the World Customs Organization (WCO) in providing a mechanism for its 179 Member administrations to discuss matters of common interest and to seek solutions is outlined, including an overview of the WCO's Integrity Program. Reference to the 1993 Arusha Declaration, and its later revised version, provides background to the WCO's continuing efforts to combat corruption. Australian Customs and Border Protection Service's (ACBPS) efforts to improve its corporate image through a concerted series of initiatives aimed at staff ethics, anti-corruption and other related factors are discussed. Examples are provided of the efforts being made at the international level by the WCO and at a national level by the ACBPS to divine a new and more effective approach. It is concluded that the price to be paid if integrity is to be maintained is eternal vigilance and the quest for new, more effective practices. Without integrity there can be no proper border management, no effective revenue collection and no public trust in customs agencies. The task is not simple but it remains essential for all agencies to adopt the kinds of measures outlined in this article if they are to maintain public trust.

Introduction

The great 18th century English critic and author Samuel Johnson once said that 'integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful'. Today, we live in an era of unprecedented access to information and knowledge and this applies as much to Customs as it does elsewhere. On that basis, the first part of Johnson's quote bears little relevance to today's world. However, the second part remains a powerful statement that resonates throughout the world, not least amongst the approximately one million individuals employed globally in customs administrations.

The historical connection between Customs, revenue and valuable cargo has proved to be a rich source for the temptation and opportunity for corrupt practices. This remains the case even today given the unparalleled amounts of illegal money flowing around the world associated with such trades as narcotics, arms, endangered species, counterfeit goods and the illegal movement of people. No country is exempt from this scourge and a successful remedy must be fully inclusive, determined and properly thought through.

The World Customs Organization (WCO) is the international voice of Customs through its convention established more than sixty years ago that provides a mechanism for today's 179 Member administrations to discuss matters of common interest and to seek solutions. Integrity has been a high profile topic since the 1980s, culminating in the well-known Arusha Declaration that was tabled in 1993 and set the benchmark for a consolidated position by global customs leaders against corruption at all levels within their agencies. The WCO has continued its efforts to combat corruption in the twenty years since Arusha and this article is partially devoted to a description of that work.

The writer worked for Australian Customs for many years before working for the WCO, hence the other main focus of this article being the recent efforts by Australian Customs and Border Protection Service (ACBPS) to improve its corporate image through a concerted series of initiatives aimed at staff ethics, anti-corruption and other related factors. This has been done in Australia partly in response to a high profile infiltration of ACBPS by criminal gangs that threatened to severely damage the image of one of Australia's oldest and best known government agencies.

The WCO's Integrity Program

The Arusha Declaration was a dramatic symbol of the international determination to acknowledge the importance of integrity to Customs. Without integrity and ethics, all the standards, best practices and other initiatives put in place by national administrations will achieve little. Readers can look up the Arusha Declaration easily enough and they will discover that it is a deceptively simple single page of text; nonetheless, that single page contains several critically important issues that have dominated efforts to counter corruption and foster ethical behaviour amongst customs officers everywhere.

The document begins with an acknowledgment that 'Customs is an essential instrument for the effective management of an economy and that it performs simultaneously the vital roles of combating smuggling and facilitating the flow of legitimate trade' which is the apparent dichotomy facing all those working in or alongside Customs, but its repetition in the declaration underlines the importance of a properly run administration to any economy. The document goes on to further acknowledge that 'corruption can destroy the efficient functioning of any society and diminish the ability of the Customs to accomplish its mission', adding that a corrupt agency will not properly collect revenue, fight criminal activity nor assist in national economic development. Given its great importance therefore, the declaration states that the only way to combat corrupt practices is through a concerted national effort to promote high levels of integrity throughout the civil service, taking account of some key factors, namely:

1. Customs legislation should be clear and precise. Import tariffs should be moderated where possible. The number of rates should be limited. Administrative regulation of trade should be reduced to the absolute minimum. There should be as few exemptions to the standard rules as possible.
2. Customs procedures should be simple, consistent, and easily accessible, and should include a procedure for appealing against decisions of the Customs, with the possibility of recourse to independent adjudication in the final instance. They could be based on the Kyoto Convention and should be so framed as to reduce to a minimum the inappropriate exercise of discretion.
3. Automation (including EDI) is a powerful tool against corruption, and its utilisation should have priority.
4. In order to reduce the opportunities for malpractice, Customs managers should employ such measures as strategic segregation of functions, rotation of assignments and random allocation of examinations among Customs officers and, in certain circumstances, regular relocation of staff.
5. Line managers should have prime responsibility for identifying weaknesses in working methods and in the integrity of their staff, and for taking steps to rectify such weaknesses.
6. Internal and external auditing are essential, effective internal auditing being a particularly useful means of ensuring that Customs procedures are appropriate and are being implemented correctly. The internal auditing arrangements should be complemented by an internal affairs unit that has the specific task of investigating all cases of suspected malpractice.
7. The management should instil in its officers loyalty and pride in their service, an "esprit de corps" and a desire to co-operate in measures to reduce their exposure to the possibility of corruption.

8. The processes for the recruitment and advancement of Customs officers should be objective and immune from interference. They should include a means of identifying applicants who have, and are likely to maintain, a high standard of personal ethics.
9. Customs officers should be issued with a Code of Conduct, the implications of which should be fully explained to them. There should be effective disciplinary measures, which should include the possibility of dismissal.
10. Customs officers should receive adequate professional training throughout their careers, which should include coverage of ethics and integrity issues.
11. The remuneration received by Customs officers should be sufficient to afford them a decent standard of living, and may in certain circumstances include social benefits such as health care and housing facilities, and/or incentive payments (bonuses, rewards, etc.).
12. Customs administrations should foster an open and transparent relationship with Customs brokers and with the relevant sectors of the business community. Liaison committees are useful in this respect (Declaration of the Customs Co-operation Council, 7 July 1993).

It is more than twenty years since these words were written, however few would argue that the message contained in this short document remains highly relevant and arguably, its concision adds to the power of its delivery. The world moves on of course and, in 2002, in Maputo, Mozambique, another communiqué was issued under the auspices of the WCO, building upon the principles espoused in Arusha. This so-called Maputo Declaration was limited in application to Africa, although the concepts are universal. There was a clear affirmation of all aspects of the Arusha Declaration but, in addition, the authors highlighted the need for strong input from the private sector, reflecting the growing partnership approach that is evident in the framing of the *WCO SAFE Framework of Standards to Secure and Facilitate Global Trade*, for example. Another clear message from Maputo was the need in Africa for technical assistance and capacity building, with particular emphasis on technology and overall modernisation.

The following year, at the 2003 WCO Council sessions, the gathered leaders of global customs administrations issued a revised Arusha Declaration that reflected the various new ideas and progress that had materialised in the ten years since the original declaration was made. This document remains the pre-eminent source of guidance for customs administrations to install anti-corruption systems. It went further into enumerating the various adverse effects of corruption, listing the following:

- a reduction in national security and community protection;
- revenue leakage and fraud;
- a reduction in foreign investment;
- increased costs which are ultimately borne by the community;
- the maintenance of barriers to international trade and economic growth;
- a reduction in public trust and confidence in government institutions;
- a reduction in the level of trust and co-operation between Customs administrations and other government agencies;
- a reduction in the level of voluntary compliance with Customs laws and regulations; and
- low staff morale and "esprit de corps" (Declaration of the Customs Co-operation Council, June 2003).

Having outlined the negative potential impact, this revised declaration went on to describe the various issues that a customs integrity program should take into account, inter alia:

1. **Leadership and Commitment:** As is the case with any major organisational issue, the prime responsibility for corruption prevention and the implementation of integrity measures resides with the Customs head and his/her executive. Beyond that, all managers and supervisors must accept an

appropriate level of responsibility and accountability and set an example to staff consistent with the agency's stated integrity program.

2. **Regulatory Framework:** 'Customs laws, regulations, administrative guidelines and procedures should be harmonized and simplified to the greatest extent possible so that Customs formalities can proceed without undue burden. This process involves the adoption of internationally agreed conventions, other instruments and accepted standards. Customs practices should be reviewed and redeveloped to eliminate red tape and reduce unnecessary duplication. Duty rates should be moderated where possible and exemptions to standard rules be minimized. Systems and procedures should be in accordance with the revised International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention)'.
3. **Transparency:** All parties involved with Customs should experience optimal predictability in their business interactions. Statutory law, procedures and administrative guidelines should be in the public domain, applied uniformly and consistently. The right to exercise discretion by officers must be clearly understood and simple appeal or administrative review mechanisms should be established. All of this ought to be set out in client service charters or similar mechanisms.
4. **Automation:** The adoption of modern IT systems to automate customs functions will improve efficiency and effectiveness while increasing accountability. IT systems provide audit trails that empower Customs to review discretionary decision-making by individuals at all levels.
5. **Reform and Modernisation:** Obsolete and cumbersome practices provide an ideal environment for incentives to circumvent official channels through bribes and other 'unofficial fees'. Reform must focus on all aspects of customs operations and performance, that is, it cannot be simply outsourced to the application of modern IT.
6. **Audit and Investigation:** Monitoring and control mechanisms such as internal check, internal and external auditing and rigorous investigation/prosecution regimes will encourage an environment hostile to corrupt practices therefore fostering higher levels of corporate integrity.
7. **Code of Conduct:** This mechanism is now an established component of most national integrity programs. Successful examples must be very practical and unambiguous, explaining the behaviour expected of all customs officers.
8. **Human Resource Management:** The implementation of sound human resource management (and human resource development) including merit-based selection, adequate remuneration, staff rotation and appraisal systems are examples of the kinds of practice that should characterise a modern customs administration, thereby minimising the potential for corruption.
9. **Morale and Organisational Culture:** Experience has shown that corruption proliferates when staff morale is low and where there is little or no pride in work practices or organisational image. The obvious corollary is that customs administrations must work towards improvements in all of these elements by creating fair and rewarding workplaces.
10. **Relationship with the Private Sector:** It is important to have open and transparent dealings with the private sector at all levels of Customs. Industry players must also play their respective roles in this and be aware that bribing officials or other corrupt practices will attract severe penalties for those industry parties as well as for the customs staff involved.

By 2003, the WCO had already documented a wide range of measures that its worldwide membership committed to adopt and the revised Arusha Declaration set the benchmark for all customs administrations worldwide as they developed their respective anti-corruption measures. The transformational events of September 11, 2001 caused a tremendous reaction within the customs community culminating in the creation of the SAFE Framework that was finally mandated in 2005. That framework implies a number

of strategic approaches to manage the security and facilitation of the international trade supply chain which are documented as a series of standards. Of these, Standard 10 reads:

> The Customs administration and other competent authorities should establish programmes to prevent lapses in employee integrity and to identify and combat breaches in integrity to the extent possible (*WCO Safe Framework of Standards* 2012, p. 9).

As is the case with all strategic responses by Customs, if integrity is not intrinsic to the process, then there is little chance that it shall succeed. This applies most significantly to the WCO's Columbus Program, the ongoing capacity building initiative aimed at enabling the global implementation of the SAFE Framework. This is an excellent example of the extent to which integrity is interwoven with the fabric of the WCO's instruments, tools and priorities. However, the SAFE Framework is by no means the sole example of that relationship. For example, the revised Arusha Declaration makes specific mention of the revised Kyoto Convention as the basis for customs procedural modernisation, and integrity itself is one of the ten pillars of the 2008 'Customs in the 21st Century' strategic blueprint for the WCO that remains valid to the present day.

At about the same time that the SAFE Framework was grasping the imagination of customs leaders globally, the WCO released its Integrity Development Guide (Self-assessment for Revenue Authorities) tool in 2007 that was based on three phases for each administration – self assessment, the development of an action plan and finally, an evaluation. Other instruments and declarations were developed and promulgated around this time (for example, the Nairobi Resolution, the Almaty Resolution and the WCO Compendium of Integrity Best Practices, all published in 2007) and the reader is invited to peruse these and other sources at the WCO website. The site also has an integrity e-Learning module.

In December 2012, the WCO released an upgraded Integrity Development Guide. The process is based on organisational self-assessment, action planning and review. The foundation stones for that process remain the ten key issues that form the basis of the revised Arusha Declaration that are listed above. The guide acknowledges the range of international organisations that have published useful literature devoted to the fight against corruption, including the United Nations, Organisation for Economic Co-operation and Development, European Union, Organization of American States, and the World Bank. However, it also reaffirms that the conceptual basis of the guide remains the revised Arusha Declaration and it goes on to add that it 'goes a step further by providing guidance to assist in the implementation of a range of practical strategies specifically designed to be used by administrations' (WCO Integrity Development Guide 2012, p. 4).

The guide makes the important new qualification that integrity is often seen today as more than just combatting corrupt practices and encompassing adherence to service delivery targets as espoused in service charters and the like. The WCO defines integrity as: 'a positive set of attitudes which foster honest and ethical behaviour and work practices' (WCO 2010; 2013). In the guide, the WCO expands on that definition, adding that '… integrity is more than simply the absence of corruption. Rather, it involves developing and maintaining a positive set of attitudes and values which give effect to the organization's aims, objectives, and the spirit of its integrity strategy' (WCO Integrity Development Guide 2012, p. 5). In other words, as has been the overriding theme of this paper, integrity issues go to the heart of organisations – to corporate plans, recruitment and other staffing strategies and the public image they project. It is more than anti-corruption.

The WCO formulated an Organizational Development Package (ODP) in 2003 that is regularly updated and is a comprehensive package in all important aspects of customs modernisation. Integrity is one of the cornerstones of the ODP implying, once again, that it is fundamental for effective administration.

The WCO is extremely active in the fight to improve integrity amongst its 179 Members. Despite that, the WCO is an international organisation, not an agency operating within a sovereign government with all the implications that such status implies. That is why the reader is invited to move from the international

to a domestic perspective. The underlying philosophy will be similar, but the means of getting the job done are quite different.

Australian Customs and Border Protection Service (ACBPS)

ACBPS is one of the few national agencies to have survived, more or less as originally set up, since the formation of the Commonwealth of Australia in 1901. There have been name changes, administrative connections to many other federal agencies (from 1901 until 1956 it was 'Trade and Customs', for example) and it has operated as a standalone agency, enjoying its Minister being part of the Cabinet until 1972. As is the case with most developed nations, revenue collection has diminished in importance in the post-war years while border security has become arguably the prime focus, particularly since September 2001.

In the last year or so, certain revelations of corrupt practices within the organisation have shed an unwelcome light on its integrity programs. As a result, the recently departed head and the new Chief Executive Officer (CEO) have been extremely active in putting in place a range of new measures aimed at enhancing the administration's credentials as one of high ethical standards and commitment to its service obligations. This flurry of activity makes the recent ACBPS experience worthy of examination.

Recently, the agency has created an Integrity and Professional Standards Branch, headed by a senior executive who reports directly to the CEO, that has offices in the national capital, Canberra, as well as in the two largest cities, Melbourne and Sydney. The ACBPS public website describes some features of this branch but, in general, it is responsible for the strategic awareness and penetration of integrity standards throughout Customs, for investigation of breaches, security clearances and liaison with the various Australian Government agencies with legal and policy coverage for integrity and anti-corruption matters. Of particular importance is its close relationship with both the Australian Commission for Law Enforcement Integrity (ACLEI) and ACBPS's main partner law enforcement agencies, including the Australian Federal Police.

ACBPS has, as a major aspect of its published governance policy, a 'Practice Statement Framework' that outlines the way in which all its administrative policies and procedures must be managed. This framework is consistent with the Australian Government's overall 'Building Better Governance' policy. It contains rules and policies for all customs officers and further states that '… public sector governance covers "the set of responsibilities and practices, policies and procedures, exercised by an agency's executive, to provide strategic direction, ensure objectives are achieved, manage risks and use resources responsibly and with accountability' (Australian Public Service Commission 2007, p. 1). The framework is made up of a series of so-called Practice Statements, Chief Executive Instructions, Instructions and Guidelines and Associated Documents.

Practice statements set out the legal framework under which all officers are bound as well as other obligations, rights and service standards that are expected. The Chief Executive Instructions outline the financial and asset management policies that apply to all ACBPS staff and finally, the Instructions and Guidelines outline the general principles and procedures to assist in the implementation of the Practice Statements. They can include (in the words of the official ACBPS framework itself) standard operating procedures and processes, boundaries and parameters, operating manuals, guidelines, assessments and plans. In total, this framework incorporates everything that applies to staff acting in their official capacity in ACBPS, including integrity and anti-corruption obligations.

In 2012, ACBPS published an internal 'Ethics and Integrity Handbook' incorporated within the very broad framework just described. It is written in a manner entirely consistent with the very broad Australian Public Service Code of Conduct that sets out principles for ethical behaviour amongst all Australian public servants even when they are away from their usual place of work and outside official working hours. This informative document provides great depth of coverage in all aspects of integrity

and ethics: there are the expected topics such as a discussion of ethical behaviour, the code of conduct and values framework, asset management, other financial rules, fraud, leave, whistleblowing, gifts, use of official vehicles and other Australian Government property, and so on. Some issues have attracted significant internal debate such as mandatory drug and alcohol testing, a subject that is explored a little more later on.

Ethics is defined as 'doing the right thing' and made to apply to all aspects of employee behaviour, above and beyond simple adherence to official rules and guidelines. Fraud is defined as 'dishonestly obtaining a benefit, or causing a loss, by deception or other means' to the Australian Government. It is an important element of integrity and this document views fraud in its widest possible sense, involving not simply money, but any form of entitlement such as educational and other allowances, misuse of attendance records, misuse of vehicles, IT and any other Australian Government property. The agency has a Fraud Control and Prevention Plan which is updated every two years in order to help manage the risk of fraud and, ideally, to ensure that anti-fraud measures are part of organisational culture.

Having had a general discussion of ethics, the Handbook contains a more targeted section devoted to the personal implications of an ethical framework to individual staff. This includes, inter alia, the handling and disclosing of official information, standards of dress, drugs and alcohol, and conflicts of interest. As is typical of this very practical guide, actual examples of conflicts of interest are provided, for example:

> **Situation:** You engage a family member as an employee of the agency or as a contractor to the agency.
>
> **Risk:** Colleagues, potential employees and suppliers may argue that the decision was not made on merit or on the basis of the agency receiving value for money.
>
> **Situation:** You are making a decision on a tariff concession order (a type of duty exemption) lodged by a family member or friend.
>
> **Risk:** Others may view any decision you make as biased or influenced by your association with the applicant.
>
> **Situation:** You are making a decision on whether to inspect importations from a community organisation of which you are a member.
>
> **Risk:** Others may view any decision you make as biased or influenced by your association with the community organisation.

These typical real-world examples have applicability far beyond Australia's borders. They portray the simple and seemingly innocent situations where ethics can be tested, where fraud can occur and where personal and organisational integrity can be severely questioned. In each of the above examples, the approach to be taken will vary according to myriad personal circumstances but, in all cases, the framework ethics and integrity put in place by ACBPS will provide the context within which individual staff can assess the risk and work out for themselves the appropriate and ethical course of action.

Importantly, the guide includes a public service-wide definition of corruption which is quoted from legislation known as the *Law Enforcement Integrity Commissioner Act 2006*. It defines corruption as conduct that involves:

> **Abuse of office**
>
> • using powers and discretions inappropriately
>
> • using position to support or assist criminal activity
>
> **Perverting the course of justice**
>
> • sabotaging the detection, investigation or prosecution of crimes

Corruption of any other kind

- placing the agency's reputation at risk
- being an accessory to corruption.

There is further explanation of ACBPS's partnership with the ACLEI which is an independent government body able to 'investigate corrupt conduct relating to all Customs and Border Protection functions'.

The ACBPS's Professional Integrity and Standards Branch (mentioned above) works closely with the ACLEI and has a corporate mission 'to shape our environment to be resistant to criminal infiltration and corruption, consistently support and reduce border risks with the assurance that our staff, information, security and operations are not compromised'. Note that the generic wording about corruption is augmented in this mission statement by specific references to risk management at the border, thus providing staff with a logical connection to their day-to-day functions. There follows a comprehensive guide to conduct and criminal activities that are of the kind the branch has the responsibility to investigate. This list allows ACBPS staff to have a completely unambiguous understanding of what types of behaviour can lead to a breach of the rules, or much more serious breaches of the law.

An example of a conduct issue is:

> 'Inadequate service – includes repeated and/or wilful instances of failure to provide a service or facility in an adequate, professional or appropriate manner.'

An example of a more serious misconduct and criminal matter is:

> 'Excessive force (on property) – includes the use of force against property that was not authorised by a warrant or the law.'

All such matters reflect upon the integrity of individual officers and, as such, upon ACBPS as a whole.

Following the high profile criminal breaches in 2012, the ACBPS implemented new and more stringent anti-corruption, anti-fraud and other measures aimed at further addressing integrity issues within the agency. In 2013, the new CEO released the 'Fraud Control and Anti-Corruption Plan' which is yet another comprehensive description of the many factors an agency must address in this complex subject. The plan best describes the environment that led to its creation in its Executive Summary:

> The Service is continually refining its operating model to respond to changes in the environment as new challenges emerge at the border. It is important to consider anti-corruption as well as fraud control to best meet threats to our Service's integrity. Program Integrity Risk Assessments (PIRAs) conducted at the branch and divisional level throughout 2011 and 2012 identified risk exposure, current mitigations and additional treatment options for each Service program. PIRAs are intended to form the basis of Integrity Risk Management Plans.

The reader will appreciate the speed at which ACBPS has reacted to its changing external environment and the enormous effort that has gone into the production of plans and other literature aimed at minimising corruption and improving integrity throughout the organisation within the structure of a risk management framework. Given the urgency of the situation at the time in Australia where integrity breaches had been on the front page of national newspapers, there was a need to introduce new measures. These include integrity testing and drug and alcohol testing. The ACBPS's literature defines integrity testing as:

> operations designed to test whether a public official will respond to a simulated or controlled situation in a manner that is illegal or would contravene an agency's standard of integrity. For example, a test may involve the insertion of false information into a database to test whether an official, acting corruptly, may seek to unlawfully disclose that information to organised crime figures.

This testing does not apply only to Customs, but to other comparable law enforcement officials such as the Australian Federal Police. The fact sheet from which this quote is taken also describes the mandatory

drug and alcohol testing and other innovative practices that ACBPS is now undertaking as part of its anti-corruption policies and procedures.

Finally, the Fraud Control and Anti-Corruption Plan provides a slight linguistic variation on the definition of corruption, although it is from the same source as that quoted above:[14]

> …conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

ACBPS has embarked on a 'Blueprint for Reform' over the next five years and, as would be expected, integrity is intrinsic to the strategic direction that is envisaged. Within the integrity track of that blueprint, ACBPS specifically sees itself focusing on:

- building a professional culture
- growing leaders at all levels
- appointing a Special Integrity Adviser
- strengthening Professional Standards capability
- enhanced integrity measures
- enhancing organisational suitability assessments
- secondary employment review
- continued enhancements to the integrity framework.

In June 2013, one of ACBPS's deputies addressed the WCO Policy Commission (executive advisory body to the Council) about the recent corrupt practices within Sydney Airport and the agency's range of responses. This important address is available for all to read and is included in the references below. Those interested in the ways a modern customs administration has reacted to a major corruption incident are strongly advised to read this address.

ACBPS has been extremely active in the field of anti-corruption and integrity. As can be seen from what they have already done as well as the determination to improve on all aspects, the task is daunting, yet there is no obvious finish line.

Summary and conclusion

The by-line to this short article reads 'an age-old problem for Customs that demands a new approach'. The examples provided at the international level by the WCO and at a national level by the ACBPS show that tremendous efforts are being made within the world of Customs to divine a new and more effective approach. The only conclusion that can be made is that the price to be paid if integrity is to be maintained is eternal vigilance and the quest for new, more effective practices. There is no other possible course for modern customs administrations to follow. Without integrity there can be no proper border management, no effective revenue collection and no public trust in the agency. The task is not simple but it remains essential for all agencies to adopt the kinds of measures outlined in this article if they are to maintain that trust.

This article began with a quote from Samuel Johnson, an Englishman of the 18th century, and it ends with President John F Kennedy, an American of the 20th.

> There are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction.

All customs administrations will be well aware of the wisdom of Kennedy's words. None can ignore the threats implicit in the ever-present risk of corruption.

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World Customs Organization (WCO) 2012, *WCO SAFE Framework of Standards to secure and facilitate global trade*, June, WCO, Brussels.

World Customs Organization (WCO) 2013, 'Integrity: no reform without integrity' [pamphlet], WCO, Brussels.

Author's note: The first link below is to the section of the WCO public website devoted to integrity matters. Readers can peruse this site and they will discover the various instruments and documents mentioned in this article and more. The second link is to WCO's Organizational Development Package. All ACBPS links are to information that is in the public domain from the agency's website. Similarly, the final link to the USAID document is public and added here for comparison and contrast.

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Australian Customs and Border Protection Service (ACBPS) 2013, 'DCEO Border Management Speech to the World Customs Organisation Policy Commission', 24 June, www.customs.gov.au/site/update-on-ACBPS-integrity-and-reform-measures.asp.

Commonwealth of Australia, Customs (Drug and Alcohol Testing) Amendment Regulation 2013 (No. 1), www.austlii.edu.au/au/legis/cth/num_reg_es/caatar20131n180o2013613.html.

USAID

Booz Allen Hamilton 2005, *Customs Modernization Handbook*, 'Establishing and implementing a customs integrity program', a publication produced for review by the United States Agency for International Development (USAID) by Robert L Holler, http://aysps.gsu.edu/isp/files/Customs_Integrity_Handbook_(USAID).pdf.

Author's note: This last reference clearly comes from another perspective, that is, from other than WCO or ACBPS that have been the basis of this article. Even a cursory glance at this USAID publication will tell the reader that the principles are much the same as those adopted in the various guidance materials quoted in this reference section. It adds to the perception that the principles are generic, able to be applied to any administration in any part of the world.

Notes

1 The Customs Cooperation Council, 1952.

2 See References at the end of this article for a link to the Arusha Declaration.

3 See References for a link to the WCO's Integrity program.

4 The global Customs response to the events of September 11, 2001. See the WCO website www.wcoomd.org for more information.

5 The WCO's peak committee; the 179 global heads of customs administrations that make up the organisation.

6 See References for a link to the WCO's Integrity program.

7 See the WCO website (www.wcoomd.org) for more information on this international convention.

8 See References for a link to the WCO's Integrity program.

9 See References for a link to the WCO's Integrity program.

10 See References for a link to the ODP.

11 See a variation of this definition in the section on the Fraud Control and Anti-Corruption Plan.

12 ACBPS Fact Sheet 'Law Enforcement Integrity Measures' based on the *Law Enforcement Integrity Legislation Amendment Act 2012*.

13 There are two references to this matter in the References section above.

14 The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act).

Gareth Lewis

Gareth Lewis began work in Customs in Port Adelaide and moved around the South Australian region 'learning the ropes' of customs operations in all the main areas. Later, he worked in Canberra and Melbourne in project orientated and customs core business management roles. In early 2006, he joined the World Customs Organization (WCO) in the Compliance and Facilitation Division where he worked on a range of strategic issues closely aligned with the WCO's trade facilitation and supply chain management agenda, becoming a Senior Technical Officer in 2011. In mid-2013, Gareth returned to Adelaide and is now a customs and trade consultant.

Importing software: IBM's global approach to customs valuation issues and new technologies

Éloïse Brouillard and Lisa Terwilliger

Abstract

This article discusses current policy requirements for valuation for customs purposes with a focus on software imports and includes challenges from the practitioner's point of view. These challenges include applying valuation principles to the various types of solutions that include software, such as software on media and preinstalled software on hardware. As technology evolves, new offerings or products in this space are not clearly defined in the existing policy requirements. To maintain compliance, the importer may have to negotiate with various countries' customs authorities, which may result in added complexity and additional risk for the importer.

Introduction

In the current global economy, governments are looking to increase revenues through increased customs inspections and audits to ultimately drive more duties and taxes. The financial impact to an importer for failing to comply can result in fines, penalties, and disruption to its supply chain. Maintaining compliance in a global trade environment is a unique challenge. For multinational companies that operate in a large number of countries, the complexity can be significant. Cross-border transactions are governed by trade regulations which may be at a country, regional, or global level. In addition, a country's political interests, level of protectionism, established trade barriers and local customs procedures can increase the number of compliance requirements.

An accurate and complete customs declaration is a significant step in preventing supply chain disruption at country borders. A customs declaration is a statement of the tangible goods to be imported and also the basis for which duties will be determined. Customs valuation, which may be computed in several ways, is the primary source for determining duties and taxes. The primary valuation method is the transaction value and is defined as the 'price paid' for the good by the buyer to the seller. But the transaction value cannot always be used for all types of transactions related to imports of goods. Trade is much more complex than a simple price paid per physical item. Even when using the transaction value method, additional elements can come into play, such as software licences and royalties, subject to the condition of sale requirements. Complex contracts may drive additional payments subject to customs valuation and economic value incurred by the importer (that is, assists) to be declared as additions to transaction value. In light of the complex customs requirements and customs valuation rules, these additional elements and intangibles may be required for an accurate valuation. The diligence in gathering all of the material information required to calculate the transaction value for customs can be significant.

For large multinational companies, related party transactions can represent the vast majority of the goods to be declared and related party transaction restrictions can be a challenge in many countries. When transaction value cannot be used, there are several other approved methods for determining valuation. The other approved methods can bring additional complexity and administrative aspects with various countries' customs authorities. All parties involved would benefit by avoiding these complexities by establishing 'arm's length' principles for all related party transactions.

Finally, the global economic environment is broadening opportunities for multinational companies to grow and to enter new countries. This expansion along with complex acquisitions and joint ventures is leading to new types of business models and agreements, with implications for customs valuation as described above. With governments looking to make up for shortfalls in revenues, there is additional scrutiny of related party transactions and contract terms by customs and tax authorities.

Challenges with software valuation

One area of significant challenge is that of software valuation for customs purposes. Countries can vary in their methodology for valuing software imports. The non-standard application of the World Trade Organization (WTO) decision for valuing software on media leads to country-unique requirements and divergent processes for the importer. Understanding the various requirements is the first step but then having unique process steps, perhaps manually executed, increases compliance risk for importers. Also, the technologies are evolving faster than the regulations, creating potential gaps between the two. The new technologies, media types, and software types challenge the technical assumptions made when the regulations were first written. Knowing how to declare these new technologies ahead of time before the first import is a constant challenge for the importer.

Valuation of software on physical media, like CD/DVDs or tape cartridges is the simplest case, as opposed to software installed on other devices, such as a personal computer, a server, a new operating device or a smart phone. These devices are not considered carrier medium by definition. While the medium is the tangible good crossing the border, the content, the software, is the true purpose of the media shipment. Current valuation rules are established under the WTO valuation agreement but, prior to the WTO's creation in 1995, the multilateral General Agreement on Tariffs and Trade (GATT) regulated international trade. In 1984, the Technical Committee on Customs Valuation (TCCV) established under GATT published Decision 4.1, 'Decision on the valuation of carrier media bearing software for data processing equipment'. This decision reflected an alternative for countries to transaction value in the specific cases of carrier media bearing software for data processing equipment. It stated:

> In determining the customs value of imported carrier media bearing data or instructions, only the cost or value of the carrier medium itself shall be taken into account. The customs value shall not, therefore, include the cost or value of the data or instructions, provided that this is distinguished from the cost or the value of the carrier medium (WTO 1995, G/VAL/1, p. 3).

This decision is an approved deviation to the transaction value method in the specific cases of media. This is helpful to importers but only when the country's implementation of the decision is known and clear. Because GATT gave recommendations, as opposed to requirements, customs authorities still have latitude in what valuation method they use to impose taxes and duties for software on media. These country-unique requirements continue to be challenging to importers.

In addition, some countries assess different duties for software products depending on the consumers of the product. Packaged software is considered to be 'shrink wrap' software intended to meet the needs of a variety of users. Customised software, however, is developed for a specific customer. There can be variances between customs authorities as to what software is considered to be packaged versus customised. Because the application of the carrier media exception can vary from country to country, this can have quite different implications for the importer. Ultimately, this can result in different treatment by different customs authorities. These country-unique requirements necessitate additional controls and steps for importers to manage customs compliance.

Another challenge is with respect to the following statement in Decision 4.1:

> For the purpose of this Decision, the expression "carrier medium" shall not be taken to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or

devices; the expression "data or instructions" shall not be taken to include sound, cinematic or video recordings (WTO 1995, G/VAL/1, p. 3).

With the evolution of technology and the development of new 'media' devices that may include integrated circuits, some new types of media would not be covered under the carrier media exception as currently written. As the intent or the spirit of Decision 4.1 has seemingly not changed, there is a need to have the Decision updated to reflect current technologies and help to avoid inconsistent treatment upon import between countries and products. As technology evolves, carrier media for software continues to evolve, such as USB flash drives and portable hard drives. These types of new media create a new challenge for customs authorities. These devices were traditionally viewed as hardware devices rather than carrier media for software.

That being said, the spirit of Decision 4.1 was intended to cover only cases where the carrier media did not include a true computing machine, with integrated circuits, semiconductors and similar devices. Thus, pure hardware, such as personal computers, traditional servers, smart phones, tablets and similar products, are not technically covered by the scope of the carrier media exception. Since the carrier medium description does not include these types of products, the value of the software licence is required to be included as part of the declared value (no deduction from the transaction value) when pre-loaded on the goods being imported. This creates a complex assessment of the value of the data or instructions installed on all of the various devices or hardware being imported. There have been publicised cases where the importer tried to separate the software content value from the hardware transaction value and declare it as a separate line to benefit from duty exemption but they were unsuccessful.

Finally, an additional complexity for valuing software is when royalty or licence agreements exist between related and non-related parties. Under a licence agreement, there may be a one-time charge and sometimes an ongoing fee for use, like a monthly licence payment. It's a 'right to use' agreement for an agreed period of time. In this scenario, there is no sale of the software at the time of import. The transaction value method requires the price paid for the good, therefore this valuation method does not work as there is no sale. No transfer of ownership of the software has occurred. As a result, the importer may be required to negotiate an agreement with various countries' customs authorities on what method can be used to determine the software value for customs purposes. In light of the growing complexity with respect to royalty and licence agreements, and the customs valuation implications, the TCCV of the World Customs Organization (WCO) issued a large set of advisory opinions on the application of royalties in the context of customs valuation showing how complex and diverse the models can be. Managing these unique agreements ultimately increases compliance risk for importers.

Finally, there is an additional complexity concerning customised software. Since customised software is developed for a specific customer, the licence value can vary depending on the specific terms of use. The software vendor may use the same unique identifier, such as a part number, for customised software. Therefore, the same part number can appear on different invoices and have different licence fees. This can appear as a discrepancy to Customs as they would expect the same part number to have the same value.

Additional challenges

The major growth of software products, services, and offerings is increasingly electronically based. As a result, there is no cross border movement of any physical goods, so the transaction is outside of customs review. Despite the growth in electronic offerings, traditional software products and the ability to deliver software on physical media will still remain. For example, for enterprise level or customised software, customers may continue to want physical media for a variety of reasons. Downloading large software products is time-consuming and can be prone to failure of transmission depending on where the client is located versus where the download server is located. Even when the customer is willing to download

their purchased software, they may still want a backup copy of the software on their premises. As well, some banking and government organisations do not subscribe to electronic transmission of software to be compliant with their security policies.

While there is a continued desire from companies for electronic fulfilment for various reasons, it is not always an option. Unique challenges for the software vendor can exist related to the size of the software product itself. Media capacity limitations can dictate which type of media can be used for some software packages. Also, a customer's existing hardware peripherals can determine which media can be used by the software vendor. These varying requirements result in companies still having to maintain an inventory of physical media and media production equipment to fulfil unique customer requirements. In addition, some countries restrict or prohibit import of certain types of media. These country-unique requirements will continue to be a challenge. To accommodate the different requirements, multiple fulfilment processes and manual intervention may be required, resulting in increased compliance risk.

An additional area of growth is software appliances and computer appliances. Software appliances can be virtualised and offered as an alternative to Software as a Service (SaaS) cloud computing offerings. However, computer appliances are hardware with the software preinstalled. These appliances are integrated hardware and software solutions designed to perform specific tasks, often considered a software solution with just enough operating system and/or hardware to make the software run. The way that customs authorities determine carrier media exception applicability can vary, resulting in different software valuation method requirements for different countries.

Conclusions

Valuation of software for customs purposes continues to be a significant area of challenge for importers. Valuation is already complex and can be very challenging for large multinational companies that must adhere to related party transaction rules. Software offerings, in many cases, are evolving in a way that challenges the applicability of pure transaction values used for customs valuation purposes. Companies must closely scrutinise these scenarios as the complexities of globalisation and related party agreements continue to expand.

Given various countries' regulatory requirements and customs requirements, the complexity of delivering and importing software is still a risk and a challenge to the importer. As technology products continue to evolve, there are implications in the way countries interpret the carrier media exception. Until a clarification of Decision 4.1 can be issued, software shipments will continue to be a challenge for the importer.

References

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WORLD CUSTOMS ORGANIZATION

Section 3

Integrity Case Study

Integrity Case Study: Australian Customs and Border Protection Service

Marion Grant

Introduction

In recent times the Australian Customs and Border Protection Service (ACBPS) has been faced with significant issues regarding corruption that have resulted in the arrest of six officers involved in importing border controlled substances.

ACBPS takes very seriously the threat of corruption and criminal infiltration.

We are committed to putting in place reforms to strengthen our integrity framework and to harden our Service against the potential for corruption and criminal infiltration. The objective of this paper is to share lessons learned as this is a challenge and a risk that all customs administrations face.

Impact of corruption on the ACBPS

On Saturday 22 June 2013 the Australian Commission for Law Enforcement Integrity released its first report into alleged corrupt conduct among some of our officers at Sydney International Airport.

This report followed a joint investigation between the Australian Commission for Law Enforcement Integrity, the Australian Federal Police, and ACBPS.

The investigation found that a culture had been allowed to develop in Sydney International Airport that accepted poor standards and allowed the flouting of rules and regulations as the norm.

The corrupt conduct occurred as a result of long term collusion between a small number of customs officers at Sydney International Airport using their inside knowledge to defeat surveillance and interdiction systems, including information about law enforcement techniques and systemic vulnerabilities. They had privileged access to databases and to the secure border environment. By working together, they exploited weaknesses in the supervision system and manipulated rosters and job placements. They used their official positions and made use of friendships and other connections that they had developed in the workplace to gather information, and to cover their tracks.

We had introduced a ‘whole of airport’ operating model to address peak workloads but this resulted in exposing more staff to sensitive information. This created an increase in opportunity for corrupt conduct.

Some individuals became compromised because of their use of illicit drugs and links to criminal networks, including outlawed motorcycle gangs.

Evidence also suggests there was a risk that any supervisor who took action about misconduct would be open to reprisal from certain staff.

Identification of corruption was a wake-up call to our organisation. It highlighted our vulnerabilities and our challenge now is to address these vulnerabilities. The World Customs Organization (WCO) Integrity Development Guide provides sound advice to organisations such as ours on how to fight corruption. For us, we need to focus particularly on the elements of human resource management and morale, and organisation culture.

For example, we must ensure that decisions on the deployment, rotation and relocation of staff take account of the need to remove opportunities for officials to hold vulnerable positions for long periods.

We must provide adequate training and professional development to customs personnel upon recruitment and throughout their career to continually promote and reinforce the importance of maintaining high levels of ethical and professional standards.

We must maintain appropriate performance appraisal and management systems, which will reinforce sound practices and foster high levels of personal and professional integrity.

We need to provide reasonable opportunity for career development and progression.

Integrity measures

We have strong support from the government and our Minister at the time to progress a reform agenda for ACBPS. We have focused initially on specific integrity measures to maintain public confidence in our role at the border and to align ACBPS with the same levels of assurance as other Australian law enforcement agencies.

The Australian Parliament in 2012 passed legislation to provide our Service with stronger powers to fight corruption. These additional powers include:

- the ability to conduct integrity testing of Customs and Border Protection officers
- the power for the CEO to make a declaration that an officer's employment has been terminated as a result of serious misconduct
- mandatory reporting requirements under which officers will be required to report misconduct, corrupt or criminal activity
- drug and alcohol testing for all Customs and Border Protection officers.

In relation to the mandatory reporting requirements, our CEO issued an Order making it a legal requirement for all employees of ACBPS to report serious misconduct, corrupt conduct and/or criminal behaviour to our Integrity and Professional Standards Branch – even if they themselves were involved in the activity.

Supporting our officers in their integrity obligations is an important element of our program of integrity reform.

To support our officers in their obligations related to mandatory reporting, an Integrity Support and Referral Network has been established to provide a trusted network of officers available to their colleagues to provide support and advice on options regarding reporting obligations, or as another avenue to report concerns regarding serious misconduct, corruption and/or criminal behaviour.

The members of our Service have embraced the need to improve our integrity framework.

This was clearly evident when the call went out across ACBPS for volunteers to be an Integrity Support Officer within the Integrity Support and Referral Network. This was met with an overwhelming response from all levels within the Service and resulted in more officers volunteering than positions available. The 30 selected officers underwent integrity screening and received training for the role of Integrity Support Officer.

To ensure we are creating the culture that is resistant to corruption, the CEO has outlined to the senior leadership of ACBPS his expectations of them as the leaders – making it clear that in setting the new direction and culture the senior leadership have a responsibility to make sure their staff understand and act upon their integrity obligations.

We are also focusing on enhancing our organisation's suitability checking processes – this is to be better able to detect and deal with officers with criminal associations.

We will do this at the recruitment stage and, as an employee of ACBPS, there will also be continual monitoring that will check for links between our staff and criminal groups. Added to this, we will be putting in place early identification and intervention systems and better integration between our integrity and Human Resources processes.

We have also instituted our drug and alcohol testing program to further strengthen our integrity framework. A pilot program commenced in March 2013 and a full program was rolled out in July this year.

Like other customs administrations around the world, we are aware that criminal organisations will seek to avoid the systems and processes we put in place. Consequently, those systems and processes need to be continually reviewed and, where necessary, improved.

In order to strengthen our systems and processes, we have recently created a new division – the Integrity, Security and Assurance Division, which includes the management of all disciplinary processes. This will give us a more integrated approach to managing professional conduct in our workplaces, fighting corruption and criminal infiltration, and dealing with misconduct.

We have also implemented an online course that will join the mandatory e-learning courses for all staff as part of our Performance Assessment and Feedback system.

This suite of integrity reforms is part of the larger Reform Program currently under way in our Service.

Reform Program – general comment

ACBPS is facing significant challenges, including the growth in volume of cargo and numbers of travellers, increasingly complex trade and travel patterns and increasingly sophisticated organised crime.

To ensure we are in the best position possible to face these future challenges we have embarked on a Reform Program covering three specific tracks:

- workforce and operating model
- modernisation of our business processes and systems
- integrity.

We will be working closely with our partners in the business and trading community, in Australia, the Asia Pacific region and through the WCO business engagement forums, as we design our future business model and supporting systems. The four pillars in the WCO Strategic Plan provide an excellent source of information and direction. Particularly relevant is the Organizational Development Package that includes the Integrity Development Guide, and the Economic Competitiveness Package that includes Globally Networked Customs and trade partnership arrangements that are of particular interest to us.

The Reform Program being undertaken will create a modern, highly effective, collaborative and adaptable agency with a unified end-to-end operating model and a high performance culture to match.

Marion Grant

Marion Grant is Deputy Chief Executive Officer Border Management and Chief Operating Officer, Australian Customs and Border Protection Service (ACBPS). She has over 38 years' experience in public administration and has spent the last 29 in the ACBPS.

Marion is accountable for delivering integrated border management and enterprise-wide support and governance functions essential to the Service's ability to deliver on its mission of facilitating legitimate travel and trade and preventing prohibited, harmful or illegal goods crossing Australia's border. ACBPS's national program is delivered through the Passengers, Cargo and Trade, Support and Integrity, Security and Assurance Divisions and the Anti-Dumping Commission and a specialised Reform Taskforce on customers and channels.

Prior to this appointment, Marion led the Border Enforcement Program where she implemented government decisions relating to maritime security and border protection. She has held senior executive positions within ACBPS since 1994, developing wide experience across the business, from areas as diverse as delivery of industry assistance to Australian manufacturers to leading work on arming Customs and Border Protection officers.

Before joining ACBPS, Marion worked in the Department of Finance and Department of Health in Brisbane, and The Treasury and the Australian Taxation Office in Canberra. She holds a Bachelor of Economics from the Australian National University.

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Section 4

Reference Material

Guidelines for contributors

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

Research and theory

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

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

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

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

Practical applications, including case studies, issues and solutions

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

Reviews of books, publications, systems and practices

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

Papers published elsewhere

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

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

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

Letters to the Editor

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

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

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

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

Professor Hans-Michael Wolffgang

University of Münster, Germany

Professor Dr Hans-Michael Wolffgang is Professor of International Trade and Tax Law and Head of the Department of Customs and Excise which forms part of the Institute of Tax Law at the University of Münster, Germany. He is director of the Münster Masters studies in Customs Administration, Law and Policy and has written extensively on international trade law, customs law and export controls in Europe.

Dr Andrew Grainger

The University of Nottingham, UK

Dr Andrew Grainger is an experienced trade facilitation practitioner and academic. He is currently based at Nottingham University Business School and is regularly consulted by governments, companies and international organisations. In previous roles, Andrew worked as Deputy Director at SITPRO, the former UK trade facilitation agency, and Secretary for EUROPRO, the umbrella body for European trade facilitation organisations. His PhD thesis on Supply Chain Management and Trade Facilitation was awarded the Palgrave Macmillan Prize in Maritime Economics and Logistics 2005-2008 for best PhD thesis.

Professor Aydin Aliyev

State Customs Committee, Republic of Azerbaijan

Professor Aydin Aliyev is Chairman of the State Customs Committee of the Republic of Azerbaijan. He is a graduate in Law from Azerbaijan State University, and author of educational and scientific articles and books on customs matters which have been published in several countries. His contributions to the development of customs administrations and for strengthening customs cooperation have been recognised by the World Customs Organization, the State Customs Committee of the Russian Federation, and by the Republic of Hungary. In 2010, he was awarded the title of 'Honoured Lawyer of the Republic of Azerbaijan' by Presidential Decree.

Dr Juha Hintsa

Cross-border Research Association and Hautes Etudes Commerciales (HEC), University of Lausanne, Switzerland

Dr Juha Hintsa is a Senior Researcher in global supply chain security management. He is one of the founding partners of the Global Customs Research Network, and the founder of the Cross-border Research Association (CBRA) in Lausanne, where he undertakes research into various aspects of supply chain security management in close collaboration with several multinational corporations. Juha's PhD thesis was on 'Post-2001 supply chain security: impacts on the private sector'.

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Elaine Eccleston, BA, MA, is Editor at the Centre for Customs & Excise Studies (CCES), Charles Sturt University. She is a professional member of the Canberra Society of Editors. For many years, as a university lecturer, Elaine designed, coordinated and delivered undergraduate and postgraduate courses and training programs in office management, records and archives, information and knowledge management. She was Manager, Information & Knowledge Management at the Australian Trade Commission, and has worked in these fields at the Australian Taxation Office, the Department of Foreign Affairs & Trade, and as Manager, Information & Records Management BP Oil UK.

Dr Christopher Dallimore

Dr Christopher Dallimore studied Law and German at the University of Wales, Cardiff and obtained a Magister Legum at Trier University, Germany. His doctoral thesis was on the legal implications of supply chain security. For a number of years, Chris was Course Co-ordinator of the Master of Customs Administration postgraduate program at the University of Münster, Germany, and currently works for the Trusted Trade Alliance Europe GmbH. He is a lecturer at the University of Münster and translator of a number of legal texts.