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# World Customs Journal

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## *World Customs Journal*

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## Contents

<b>Editorial</b> .....	v
<b>SECTION 1 – ACADEMIC CONTRIBUTIONS</b>	
<b>Legal thoughts on how to merge trade facilitation and safety &amp; security</b>	
<i>Hans-Michael Wolfgang and Edward Kafeero</i> .....	3
<b>Review of accredited operator schemes: an Australian study</b>	
<i>David Widdowson, Bryce Blegen, Mikhail Kashubsky and Andrew Grainger</i> .....	17
<b>The role of Customs in the economic integration of East Asia: problems and proposals</b>	
<i>Feiyi Wang</i> .....	35
<b>Effects of the implementation of single window and simplified customs procedures in the Republic of Macedonia</b>	
<i>Katerina Tosevska-Trpcevska</i> .....	51
<b>The role of customs brokers in facilitating international trade</b>	
<i>Ewa Gwardzińska</i> .....	63
<b>Analysis of current customs practices in the United States and a proposed model for world class Customs</b>	
<i>Tom Coyle, Kevin Cruthirds, Sara Naranjo and Katharina Nobel</i> .....	71
<b>The impact on Customs of the implementation of the China-ASEAN FTA</b>	
<i>Li Li</i> .....	87
<b>SECTION 2 – PRACTITIONER CONTRIBUTIONS</b>	
<b>The WTO Agreement on Trade Facilitation: status of play in Southern African Customs</b>	
<i>Dhunraj Kasse</i> .....	101
<b>The facilitation of trade in Cambodia: challenges and possible solutions</b>	
<i>Sopagna Seng</i> .....	113
<b>Customs-private sector partnership: not just wishful thinking</b>	
<i>John E Mein</i> .....	129
<b>Entering the EU market in the face of anti-dumping duties: new exporter reviews</b>	
<i>Eric Pickett</i> .....	137
<b>Enabling trusted trade through secure track and trace technology</b>	
<i>Tom Doyle</i> .....	147
<b>SECTION 3 – SPECIAL REPORTS</b>	
<b>World Trade Organization Agreement on Trade Facilitation, 7 December 2013</b> .....	157
<b>World Customs Organization Dublin Resolution, 11 December 2013</b> .....	187
<b>Developing an ‘Excise Working Tariff Schedule’ for South East Asia: a resource for regional excise policy</b>	
<i>Rob Preece</i> .....	189
<b>SECTION 4 – REFERENCE MATERIAL</b>	
<b>Guidelines for Contributors</b> .....	195
<b>Editorial Board</b> .....	196



## Editorial



Since publication of the last edition of the *World Customs Journal* in which it was announced that trade facilitation would be the theme of the current edition, considerable progress has been made by the World Trade Organization in progressing the trade facilitation agenda. After years of negotiation, WTO members reached agreement on a comprehensive text for a new Agreement on Trade Facilitation at the Bali Ministerial Conference in December 2013.

The Agreement seeks to clarify and improve relevant aspects of GATT Articles V (Freedom of Transit), VIII (Fees and Formalities connected with Importation and Exportation) and X (Publication and Administration of Trade Regulations), with a view to further expediting the movement, release and clearance of goods, including goods in transit. The Agreement also contains provisions relating to technical assistance and capacity building support that may be required by developing and least-developed countries to effectively implement the range of agreed initiatives.

Article 13 of the Agreement, which covers institutional arrangements, establishes a Committee on Trade Facilitation to drive the implementation process. In doing so, it will seek advice from other relevant organisations such as the World Customs Organization. In response to the WTO Agreement, the WCO issued its Dublin Resolution which sets out its commitment to assist the WTO in this important task. Both the WTO Agreement and the Dublin Resolution have been reproduced in Section 3 of this edition of the *Journal* which includes a broad range of articles on different aspects of trade facilitation from both our academic and practitioner contributors.

The next edition of the *Journal* will include several articles that focus on collaborative border management, together with a selection of papers delivered at the Inaugural INCU Global Conference that is being held from 21 to 23 May in Baku, Republic of Azerbaijan. Continuing the theme of trade facilitation, the title of the conference is *Trade Facilitation Post-Bali: Putting Policy into Practice*. For those who are able to attend the conference, I very much look forward to meeting you in Baku!

Finally, I would like to welcome Professor Enrique Barreira who joins us on the Editorial Board. Professor Barreira is a highly respected lawyer specialising in customs, tax and trade law. He is a founding member of the International Customs Law Academy and played a key role in drafting the Argentine Customs Code. We look forward to Professor Barreira's contribution to the *Journal*.

A handwritten signature in blue ink, appearing to read 'D. Widdowson', followed by a period. The signature is fluid and cursive.

David Widdowson  
Editor-in-Chief





## *Section 1*

### *Academic Contributions*





# Legal thoughts on how to merge trade facilitation and safety & security

*Hans-Michael Wolfgang and Edward Kafeero*

## Abstract

Trade facilitation, understood as the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment, has a lot to do with security of the global trade supply chain. Different international bodies interested in trade matters have come up with various rules, regulations, guidelines and other instruments intended to enhance trade facilitation and safety and security. This multiplicity of regulations causes some duplication and redundancies which may ultimately complicate the implementation of trade facilitation and supply chain security measures. As a solution, this paper explores the possibility of merging trade facilitation and safety and security by means of a single binding agreement under the auspices of either the World Trade Organization (WTO) or the World Customs Organization (WCO).

Cognizant of the recently concluded Agreement on Trade Facilitation (WTO 2013d, WT/MIN(13)/36, WT/L/911), we further explore how the WCO can use its expertise and tools in this field to gradually enrich the Agreement in content, implementation and administration. This is in conformity with the ‘Dublin Resolution’ of the WCO Policy Commission (WCO 2013) which re-emphasised the centrality of the WCO in the implementation and administration of the Agreement on Trade Facilitation.

The preference for a single binding agreement is based on the contention that ‘hard law’ (as opposed to ‘soft law’) is more likely to be effective particularly with regard to the implementation of trade facilitation and security-related provisions. And this is because ‘hard law’ tends to increase states’ commitment to international agreements, can be self-executing or require domestic legal enactment, and foresees dispute settlement mechanisms which aid enforcement.

By comparing the various trade facilitation and safety and security instruments under the WCO, particularly the Revised Kyoto Convention and the SAFE Framework, it is evidenced that trade facilitation and supply chain security are just different sides of the same coin. In other words, the trade facilitation principles and standards contained in the Revised Kyoto Convention are the basis of the safety and security provisions. Moreover, it is shown that some provisions of the SAFE Framework are similar in content to those of the Revised Kyoto Convention. It is therefore argued that these two instruments would need to be merged as an all-encompassing agreement under the auspices of the WCO. For better implementation, however, this should concurrently go with the institution of an effective dispute settlement system within the WCO.

The WTO Agreement on Trade Facilitation is also discussed and it is observed that it falls short on adequately addressing the safety and security issues – which issues have a strong impact on trade facilitation. Thus, as a way forward, it is suggested that the WCO needs to make good use of Article 13 (especially paragraphs 1.5. and 1.6) of the Agreement on Trade Facilitation. By using its expertise and different tools for trade facilitation, the WCO can certainly influence the implementation and administration of the Agreement on Trade Facilitation. The periodical reviews of the Agreement as per Article 13, paragraph 1.6 may, for instance, be a good medium through which the idea of a substantial merging of trade facilitation and safety and security can be introduced.

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## 1. Introduction

The concept of trade facilitation is very old but it has only received considerable attention during the last two decades. The same attention has been given to the issue of safety and security of global trade following the infamous terrorist attack on the World Trade Centre on September 11, 2001. The term ‘trade facilitation’ is often used in the context of trying to improve the interface between government bodies and traders at national borders (Grainger 2008). It is the simplification, standardisation and harmonisation of procedures and associated information flows required to move goods from seller to buyer and to make payment (OECD 2001). On the other hand, safety and security refer to freedom from hurt, injury, loss, danger and fear.

Since trade facilitation and security of the international trade supply chain are key elements in the rapidly growing global trade, there are a number of international/supranational organisations involved, albeit at different levels, in regulating and implementing trade facilitation and security-related provisions. These include but are not limited to the World Trade Organization (WTO), World Customs Organization (WCO), United Nations Economic Committee for Europe through its Centre for Trade Facilitation and Electronic Business (UN/CEFACT), international Standards organisations, International Chamber of Commerce, International Maritime Organization, and many others. It goes without saying that there are further regulatory frameworks on trade facilitation and trade supply chain security at regional and national levels.

The multiplicity of regulators and actors in this field often leads to duplication and redundancies and, ultimately, complicates the implementation of trade facilitation and trade supply chain security measures – and this can be the very undoing of trade facilitation. Besides, some of these organisations act at the level of public international law, others at the private international law level, and yet others at a domestic law level.

At the level of public international trade law, one cannot overlook the role played by both the WTO and the WCO. From the 1996 WTO ministerial conference in Singapore to date, trade facilitation has remained firmly on the Doha development agenda as can be confirmed by the ‘Joint Statement by the 4th Global Review of Aid for Trade of 8 July 2013’ (WTO 2013a). The WCO is also a long-time regulator and implementer in the field of trade facilitation and trade supply chain security particularly through its Revised Kyoto Convention (2006) and the *SAFE Framework of Standards to Secure and Facilitate Global Trade* (the SAFE Framework) (2005).

In an attempt to curb duplication and therefore foster easier and effective implementation of regulations in the area of trade facilitation and trade supply chain security, this article explores the possibility of merging trade facilitation and safety and security through developing a single binding agreement under

the auspices of either the WTO or the WCO. This legal exploration is premised on the juxtaposition of ‘hard law’ and ‘soft law’ in public international law and the utility of having an effective dispute settlement mechanism within any given international treaty regime.

## 2. Some theoretical considerations

### 2.1 ‘Hard law’ versus ‘soft law’ in a bid to get the suitable form of legislation

The discourse on ‘hard’ and ‘soft’ law has continued to interest public international law jurists as they seek to find the most appropriate form of legislation. Whereas traditional sources of international law as per Article 38 of the Statute of the International Court of Justice do not take into account ‘soft law’ which is described by Snyder (1995) as rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects, such law continues to be widely used because of its various advantages. Similarly, ‘hard law’ which refers to legally binding obligations that are precise (or can be made precise through adjudication or issuance of detailed regulations) and that delegate authority for interpreting and implementing the law (Abbott & Snidal 2000) is used because it also has particular advantages.

Schaffer and Pollack (2010), based on Abbott and Snidal’s definition of ‘hard law’, rightly point out that the realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation. Take, for instance, the WCO’s SAFE Framework. It is *just a framework*, not formally binding – and therefore ‘soft’ along that dimension. There may also be an agreement which is formally binding but whose content lacks precision so that the agreement leaves almost total discretion to its parties with regard to its implementation. A good example is the Revised Kyoto Convention: while it remains a blueprint for modern and efficient customs procedures and is therefore an important trade facilitation tool, its provisions (in the form of Standards, Transitional Standards and Recommended Practices) make it rather imprecise and ultimately a soft form of legislation. Thirdly, if an agreement does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement can be ‘soft’. This third dimension ultimately relates to the absence of an (effective) dispute settlement institution. And a close study of the *Convention Establishing the Customs Co-operation Council* (1950) (now also known as the World Customs Organization) and the various agreements/conventions signed under its auspices glaringly points to this lack, rendering its legislations effectively ‘soft’ in nature.

‘Soft law’ may be in the form of treaty provisions that call only for general cooperation among states or that bind states only to reach an agreement on a matter in the future; non-treaty declarations or political pacts issued by states that set forth certain aspirations; resolutions of international organisations that are recommendatory in nature; and codes of behaviour that states or non-state actors operating transnationally are invited to adopt. It should be noted that whereas laws made under the auspices of the WCO as exemplified above tend to fall under ‘soft law’, those made under the WTO tend to fall under ‘hard law’.

We agree with what Schaffer and Pollack (2010) call a pragmatic view that actors (states and non-state actors), working *ex ante*, use agreements having different characteristics to further particular aims; and that the key difference between scholars who evaluate ‘hard’ and ‘soft’ law in terms of a binary binding/non-binding distinction and those who evaluate it based on characteristics that vary along a continuum, depends on whether they address international law primarily from an *ex post* enforcement perspective or an *ex ante* negotiating one. Notwithstanding that, and taking into consideration the WTO and WCO regimes on trade facilitation and security, we maintain that an *ex post* enforcement perspective needs to be emphasised.

Both ‘hard law’ on the one hand and ‘soft law’ on the other have advantages and disadvantages depending on the context in which they are used. That is why the two are often combined to the extent of creating a hybrid of hard and soft legislation (Trubek, Cottrell & Nance 2005). ‘Hard law’ is generally portrayed as tending to have advantages including but not limited to the following:

- It tends to increase states’ commitment to international agreements as states are apparently concerned with their reputation for compliance (Guzman 2008).
- ‘Hard law’ can be self-executing or require domestic legal enactment. And all this increases its credibility.
- ‘Hard law’ also creates an authority for interpreting and implementing the law as well as enhancing enforcement mechanisms through dispute settlement bodies (Abbott & Snidal 2000).

Yet some of the often-cited disadvantages of ‘hard law’ include the following:

- It may be perceived as a kind of ‘threat’ to national sovereignty and, as a result, states may spend years or even decades in negotiation – as exemplified by some WTO negotiation rounds.
- ‘Hard law’ agreements are also hard to adapt to changing circumstances (Abbott & Snidal 2000).

On the other hand, ‘soft law’ according to Murphy (2006) is usually credited with being easy to conclude as states are often less cautious about negotiating and concluding non legally binding norms. Besides, ‘sovereignty costs’ are lower and compromises may be more easily achieved. ‘Soft law’ instruments also tend to cope better with diversity as well as affording greater flexibility for involving non-state actors. On the negative side, apart from its non-binding nature, ‘soft law’ is criticised for its lack of clarity and precision needed to provide predictability and a reliable framework for action. It is also sometimes blamed for trying to have an effect but it bypasses normal systems of accountability (Trubek, Cottrell & Nance 2005).

## 2.2 Can customary international law work?

Article 38, 1(b) of the Statute of the International Court of Justice lists customary international law as the second main source of international law. This means that it is possible (at least in theory) to have trade facilitation or safety and security laws of a customary nature regulating international trade. But the main question here is whether this can be carried out successfully. To answer this question we need to briefly explore the characteristics or constitutive elements of customary international law and its advantages/disadvantages.

According to Murphy (2006) and Brownlie (2008), an ‘international custom’ refers to a relatively uniform and consistent state practice regarding a particular matter coupled with a belief among states that such practice is legally binding. From this description, it is obvious that international custom is not a precise source of law as there are no clear rules on what level of consistency or uniformity must exist with regard to a given practice of states. It is also not clear how long the practice must exist to be considered a custom (Murphy 2006). Besides, on account of the complex nature of trade facilitation and global trade supply chain security, it is practically impossible to rely on customary international law for solutions.

## 2.3 A case for an international agreement on trade facilitation and security

From the above discussions it is clear that ‘soft law’ and customary international law will always have a role to play in public international law. Nevertheless, they do not seem to be the most suitable and primary forms of law regulating trade facilitation and safety and security issues in international trade. Therefore, an international agreement containing significant traits of ‘hard law’ seems to be the best option to harmonise and standardise the various trade facilitation and global supply chain security provisions.

This merging can theoretically be effected under the auspices of any global intergovernmental organisation. From a practical point of view, however, this can best be completed either at WTO or WCO

levels. In the following sections we examine the various trade facilitation and security provisions under these two organisations and show how trade facilitation and security are just different sides of the same coin and how best they can be merged.

### 3. Trade facilitation, safety and security under the WCO

The ‘roots’ of trade facilitation are traceable in the preamble to the Convention Establishing a Customs Co-operation Council of December 1950 which puts emphasis on the need *to secure the highest degree of harmony and uniformity in Customs systems*. Obviously, the harmony and uniformity considered here is not for its own sake but for the sake of facilitating trade and other roles of Customs such as protection of people through customs controls.

Since its formation and to the present day, the WCO has continuously developed and upgraded a number of conventions and instruments intended to facilitate global trade and secure the supply chain. Such conventions and instruments include but are not limited to the Revised Kyoto Convention, Istanbul Conventions, SAFE Package, WCO Data Model, Time Release Study, Globally Networked Customs Concept, WCO Customs Risk Management Compendium, Immediate Release Guidelines, and the Compendium on How to Build a Single Window Environment.

It is indisputable that each of these instruments has a particular contribution to trade facilitation and safety and security. However, a close examination of the provisions of the Revised Kyoto Convention and the SAFE Framework shows that the latter’s content is much reflected in the former. This creates overlaps which in turn may create implementation/enforcement problems. Besides, whereas the Revised Kyoto Convention to some extent has the character of ‘hard law’ with binding effect (see Article 12), the SAFE Framework is completely ‘soft law’.

#### 3.1 The SAFE Framework and the Revised Kyoto Convention

Comparisons of some of the provisions of the SAFE Framework which are already catered for in the Revised Kyoto Convention are represented in Table 1.

*Table 1: Comparison of provisions of the SAFE Framework and the Revised Kyoto Convention*

<b>Revised Kyoto Convention</b>	<b>SAFE Framework of Standards</b>
<p><b>3.32. Transitional Standard</b></p> <p>For authorized persons who meet criteria specified by the Customs, including having an appropriate record of compliance with Customs requirements and a satisfactory system for managing their commercial records, the Customs shall provide for:</p> <ul style="list-style-type: none"> <li>• release of the goods on the provision of the minimum information necessary to identify the goods and permit the subsequent completion of the final Goods declaration;</li> <li>• clearance of the goods at the declarant’s premises or another place authorized by the Customs;</li> </ul>	<p><b>1.4.1. Authorized Economic Operators</b></p> <p>AEOs who meet criteria specified by the Customs (see 4.2.) should reasonably expect to participate in simplified and rapid release procedures on the provision of minimum information. The criteria include having an appropriate record of compliance with Customs requirements, a demonstrated commitment to supply chain security by being a participant in a Customs-Business partnership programme, a satisfactory system for managing their commercial records and financial viability. In order to enhance supply chain security and harmonization of Customs procedures Customs administrations should seek mutual recognition of AEO status between or among programmes.</p>

<ul style="list-style-type: none"> <li>• and, in addition, to the extent possible, other special procedures such as:</li> <li>• allowing a single Goods declaration for all imports or exports in a given period where goods are imported or exported frequently by the same person;</li> <li>• use of the authorized persons’ commercial records to self-assess their duty and tax liability and, where appropriate, to ensure compliance with other Customs requirements;</li> </ul>	
<p><b>6.3. Standard</b></p> <p>In the application of Customs control, the Customs shall use risk management.</p> <p><b>6.4. Standard</b></p> <p>The Customs shall use risk analysis to determine which persons and which goods, including means of transport, should be examined and the extent of the examination.</p> <p><b>6.5. Standard</b></p> <p>The Customs shall adopt a compliance measurement strategy to support risk management.</p> <p><b>6.6. Standard</b></p> <p>Customs control systems shall include audit-based controls.</p>	<p><b>4. Standard 4 – Risk-Management Systems</b></p> <p>The Customs administration should establish a risk-management system to identify potentially high-risk cargo and/or transport conveyances and automate that system. The system should include a mechanism for validating threat assessments and targeting decisions and implementing best practices.</p> <p><b>4.1. Automated selectivity systems</b></p> <p>Customs administrations should develop automated systems based on international best practice that use risk management to identify cargo and/or transport conveyances that pose a potential risk to security and safety based on advance information and strategic intelligence. For containerized maritime cargo shipments, that ability should be applied uniformly before vessel loading.</p> <p><b>4.2. Risk management</b></p> <p>Risk management is “the systematic application of management procedures and practices which provide Customs with the necessary information to address movements or consignments which present a risk”.</p>
<p><b>7.1. Standard</b></p> <p>The Customs shall apply information technology to support Customs operations, where it is cost-effective and efficient for the Customs and for the trade. The Customs shall specify the conditions for its application.</p> <p><b>7.2. Standard</b></p> <p>When introducing computer applications, the Customs shall use relevant internationally accepted standards.</p>	<p><b>6. Standard 6 – Advance Electronic Information</b></p> <p>The Customs administration should require advance electronic information in time for adequate risk assessment to take place.</p> <p><b>6.1. Need for computerization</b></p> <p>The advance electronic transmission of information to Customs requires the use of computerized Customs systems, including the use of electronic exchange of information at export and at import.</p>

<p><b>7.3. Standard</b></p> <p>The introduction of information technology shall be carried out in consultation with all relevant parties directly affected, to the greatest extent possible.</p> <p><b>7.4. Standard</b></p> <p>New or revised national legislation shall provide for:</p> <ul style="list-style-type: none"> <li>• electronic commerce methods as an alternative to paper-based documentary requirements;</li> <li>• electronic as well as paper-based authentication methods;</li> <li>• the right of the Customs to retain information for their own use and, as appropriate, to exchange such information with other Customs administrations and all other legally approved parties by means of electronic commerce techniques.</li> </ul>	<p><b>6.2. Revised Kyoto Convention ICT Guidelines</b></p> <p>Standards 7.1, 6.9, 3.21 and 3.18 of the General Annex to the Revised Kyoto Convention require Customs to apply Information and Communication Technologies (ICT) for Customs operations, including the use of e-commerce technologies. For this purpose, the WCO has prepared detailed Guidelines for the application of automation for Customs. These Kyoto ICT Guidelines should be referred to for the development of new, or enhancement of existing, Customs ICT systems. In addition, Customs administrations are recommended to refer to the WCO Customs Compendium on Customs Computerization.</p>
<p><b>3.3. Standard</b></p> <p>Where Customs offices are located at a common border crossing, the Customs administrations concerned shall correlate the business hours and the competence of those offices.</p> <p><b>3.4. Transitional Standard</b></p> <p>At common border crossings, the Customs administrations concerned shall, whenever possible, operate joint controls.</p> <p><b>3.5. Transitional Standard</b></p> <p>Where the Customs intend to establish a new Customs office or to convert an existing one at a common border crossing, they shall, wherever possible, co-operate with the neighbouring Customs to establish a juxtaposed Customs office to facilitate joint controls.</p> <p><b>6.7. Standard</b></p> <p>The Customs shall seek to co-operate with other Customs administrations and seek to conclude mutual administrative assistance agreements to enhance Customs control.</p>	<p><b>5. Co-ordinated Border Management</b></p> <p>Coordinated Border Management (CBM) strengthens the ability of a multitude of border based agencies to secure and facilitate global trade. Governments should develop co-operative arrangements among their agencies (such as Customs, transport ministries, national police, immigration authorities, border guard, and other entities as appropriate on a Member-to-Member basis) that are involved in international trade and security. Governments should also work with the border agencies of foreign governments in order to maximize the harmonization of border control functions. The implementation of such co-operative arrangements could address border issues such as national and international cooperation and co-ordination and the adoption of international standards.</p>

*Source: Compiled by the authors of this research for comparative purposes.*



### 3.2 Trade facilitation and security are different sides of the same coin

The two key objectives of Customs are commonly referred to as *facilitation* and *control* (Widdowson 2005), and this is evident from the Revised Kyoto Convention and SAFE Framework provisions, some of which are reproduced in Table 1. Thus, whereas the discourse on global supply chain security gained currency after September 11, 2001 (see the introduction to this article above), the concept of customs control, which includes safety and security has always been pertinent to Customs. And the key point here concerns how best to develop a legal framework that leads to an appropriate balance between trade facilitation and security-related control.

From a risk management perspective some scholars, for example Widdowson (2005), would then propose a legislative framework which provides for flexibility and tailored solutions to enable relevant risk management and administrative strategies to be implemented. In this case, the onus for achieving regulatory compliance is placed on both government and the trading community. In our view, however, we maintain that much as a legislative base that provides for '*flexibility and tailored solutions*' may have some practical advantages; it can easily erode the long-cherished *principle of legal certainty*. And this often culminates in arbitrariness – the very undoing of the rule of law.

It is therefore pertinent that trade facilitation and safety and security issues get a formidable legal framework with a binding character across the board. One way of achieving this is to reduce the fragmentation of facilitation and security provisions found in many instruments currently in place. Hence we propose to merge the Revised Kyoto Convention with the SAFE Framework into a 'strong' trade facilitation and security treaty under the auspices of the WCO. This, however, can only make sense if the WCO is also ready to institute an effective dispute settlement mechanism and upgrade its entire enforcement legal framework.

The proposal to create an effective dispute settlement system under the WCO may not sound strange because there are already some provisions in the Convention Establishing the Customs Co-operation Council (1950) on which to base this. These are: Article XX which stipulates that '(a) The Council may recommend amendments to the present Convention to the Contracting Parties'; Section 2 of the Annex to the Convention which reads: 'the Council shall possess juridical personality. It shall have the capacity: (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings'; and Section 24 of the Annex to the Convention which states that 'the Council shall make provision for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private character to which the Council is a party'.

The exposition above demonstrates how the WCO is 'naturally' engaged in trade facilitation, safety and security. It also shows that merging these into one treaty under the auspices of the WCO is not only feasible but also desirable – though it is not the only alternative. Below we explore the possibility of merging trade facilitation and trade supply chain security at the WTO level.

## 4. Trade facilitation, safety and security under the WTO

'The idea of creating a World Trade Organization emerged slowly from various needs and suggestions. Even at the beginning of the Uruguay Round, *negotiators and observers realized that significant new agreements would require better institutional mechanisms and a better system for resolving disputes*' [emphasis added] (Matsushita, Schoenbaum & Mavroidis 2006). Thus the WTO was formed to administer WTO trade agreements, provide a forum for trade negotiations, handle trade disputes, monitor national trade policies, offer technical assistance and training for developing countries, and cooperate with other international organisations.

The WTO's legal regime is based on the *Marrakesh Agreement* establishing it, plus all the specialised agreements such as GATT, GATS and TRIPS annexed to this Agreement – which are usually referred

to as the ‘covered agreements’. These are the fundamental sources of WTO law. Additionally, Article XVI.1 of the Marrakesh Agreement Establishing the WTO stipulates that the WTO shall be guided by the decisions, procedures and customary practices followed by GATT Contracting Parties. This ultimately leads WTO law to have a number of interpretative elements, namely GATT panel reports; WTO panel reports and Appellate Body reports; decisions and recommendations by various WTO organs; international agreements not reflected in the WTO agreement; Acts adopted by various international organisations; decisions by international courts; domestic law and practice; unilateral declarations by WTO Members; customary international law; general principles of law and doctrine (Matsushita, Schoenbaum & Mavroidis 2006).

Worth mentioning here is the peculiar nature of the WTO dispute settlement system characterised by both litigation and non-litigation methods. This peculiarity is also evidenced by the role of the Dispute Settlement Body (DSB) and use of decisions by consensus – where consensus refers the situation whereby ‘no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision’ (see footnote 1 to Article 2 of the Dispute Settlement Understanding [DSU]). Disputes may be settled through consultations (Articles 3(7) and 4 of the DSU); good offices, conciliation and mediation (Article 5 of the DSU); adjudication by panels and the Appellate Body (Articles 5 to 19 of the DSU); and arbitration (Article 25 of the DSU).

Starting from the GATT regime, trade facilitation has always had a place in the multilateral trading system. No wonder then that the newly concluded Agreement on Trade Facilitation is based on GATT Articles V, VIII and X. The Agreement on Trade Facilitation first deals with the issue of publication and availability of information (derived from GATT: X); then disciplines on fees and charges imposed on or in connection with importation and exportation (derived from GATT: VIII) and then freedom of transit (derived from GATT: V). Below is a summary of the salient issues addressed by the Agreement on Trade Facilitation.

#### **4.1 Section I, Article 1: Publication and availability of information**

Article 1.1 of the Agreement on Trade Facilitation provides that:

Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them:

- a. Importation, exportation and transit procedures (including port, airport, and other entry-point procedures) and required forms and documents;
- b. Applied rates of duties and taxes of any kind imposed on or in connection with importation, exportation;
- c. Fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;
- d. Rules for the classification or valuation of products for customs purposes;
- e. Laws, regulations and administrative rulings of general application relating to rules of origin;
- f. Import, export or transit restrictions or prohibitions;
- g. Penalty provisions against breaches of import, export or transit formalities;
- h. Appeal procedures;
- i. Agreements or parts thereof with any country or countries relating to importation, exportation or transit;
- j. Procedures relating to the administration of tariff quotas (WTO 2013d, p. 2).

It is important to note that modern methods of communication, particularly the use of the internet, are provided for. It is also interesting to learn that just as in the Revised Kyoto Convention this text contains

a number of provisions on the issuance of advance rulings and right of appeals. This reflects the general tendency to refer to the WTO and WCO as ‘sister organisations’ which complement each other. That is a good thing as long as it does not create unnecessary repetitions concerning trade facilitation- and security-related international law provisions.

## **4.2 Section I, Article 6: Disciplines on fees and charges imposed on or in connection with importation and exportation**

The Agreement contains general, specific and penal disciplines relating to importation and exportation. The general disciplines include the following:

- 1.1. The provisions of paragraph 6.1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with importation or exportation of goods.
- 1.2. Information on fees and charges shall be published in accordance with Article 1 of this Agreement. This information shall include the fees and charges that will be applied, reason for such fees and charges, the responsible authority and when and how payment is to be made.
- 1.3. An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force except in urgent circumstances. Such fees and charges shall not be applied until information on these has been published.
- 1.4. Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable (WTO 2013d, p. 7).

The specific disciplines deal with customs processing. They stipulate that fees and charges for customs processing:

- i. shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific importation or exportation in question; and
- ii. are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods (WTO 2013d, p. 7).

It should be emphasised that the rationale of these provisions (which are in line with GATT: VIII) is to facilitate trade by reducing non-tariff fees and charges and the application of customs procedures in a protectionist manner. The same reasons also account for the penalty disciplines contained in the Agreement.

## **4.3 Section I, Article 11: Freedom of Transit**

Some transit procedures have long been known to be a form of non-tariff barriers to trade (Kafeero 2008). Article V of GATT 1994 provides for freedom of transit, regulation of traffic in transit urging Members to avoid unnecessary delays or restrictions and to set reasonable charges and regulations on traffic in transit in a non-discriminatory manner. Article 11 of the Agreement on Trade Facilitation expands on the provisions of GATT V clearly indicating what is forbidden (paragraphs 1, 2, 3, 4, 6, 7 and 8), what must be done (paragraphs 9, 10, 11.1, 11.2, 11.3, 11.4 and 11.5); and what is recommended (paragraphs 5, 12 and 13). And all these provisions are ultimately geared towards trade facilitation.

Forbidden is, for instance, the application of ‘technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade on goods in transit’ (Article 11, 8). Among the provisions which stipulate what must be done is, for example, the rule that calls for ‘advance filing and processing of transit documentation and data prior to the arrival of goods’ (Article 11, 9). And recommendations include, for instance, Article 11, paragraph 5, which encourages Members ‘to make available ... separate infrastructure (such as lanes, berths and similar) for traffic in transit’.

#### 4.4 Other trade facilitation/supply chain security-related provisions

The Agreement on Trade Facilitation contains further provisions some of which deal with global trade supply chain security. These provisions relate, *inter alia*, to:

- pre-arrival processing
- electronic payment
- risk management
- post-clearance audit
- establishment and publication of average release times
- trade facilitation measures for authorised operators
- expedited shipments
- customs and border agency cooperation
- establishment of single window
- the use of customs brokers.

Further, the Agreement on Trade Facilitation provides for the establishment of trade facilitation institutions at international and national levels. Article 13 of the Agreement on Trade Facilitation provides for the establishment of a Committee on Trade Facilitation at the WTO level which is responsible, among others, for:

- maintaining ‘close contact with other international organizations in the field of trade facilitation, such as the World Customs Organization, with the objective of securing the best available advice for the implementation and administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided’ (Article 13, 1.5.)
- reviewing ‘the operation and implementation of this Agreement 4 years from its entry into force, and periodically thereafter’ (Article 13, 1.6.).

Article 13, 2 of the Agreement on Trade Facilitation goes further to provide for the establishment of national committees on trade facilitation to deal with domestic coordination and implementation of the Agreement. Finally, Section II of the Agreement on Trade Facilitation contains different provisions concerning special and differential treatment for developing and least developed country Members.

From our exploration of the general WTO legal framework, the various trade facilitation/safety and security provisions under WTO auspices, the newly concluded Agreement on Trade Facilitation, we can conclude that:

- The Agreement on Trade Facilitation includes some provisions on global trade supply chain security. But these supply chain security-related provisions are just elementary and therefore call for further development especially with regard to widening their scope and making them precise. Fortunately, there is room for review of such inadequacies through the Committee on Trade Facilitation as per Article 13, 1.6.
- The WTO boasts of a dispute settlement system which is, to a considerable extent, effective and thus enhances the enforcement aspects and binding character of its provisions.
- The WTO commands political respect from international actors such as states, intergovernmental organisations, multinational corporations, non-governmental organisations, and the private sector in general.

## 5. Conclusions: WCO's role in merging trade facilitation and safety and security

There is certainly a strong connection between the WCO and trade facilitation and supply chain security. This is evident and summarised in the WCO's vision statement, mission statement and first strategic goal. The Vision statement reads:

Borders divide; Customs connect; **dynamically leading modernization** and connectivity in a rapidly changing world.

The Mission statement reads:

The WCO provides leadership, guidance and support to Customs administrations **to secure and facilitate legitimate trade**, realize revenues, protect society and build capacity.

And the WCO's first strategic goal is:

... to **promote the security and facilitation of international trade**, including simplification and harmonization of Customs procedures [emphasis added].

Granted that the promotion of security and facilitation of legitimate international trade is undeniably a core *raison d'être* of the WCO, one therefore has all the reasons to give security and trade facilitation a formidable legal framework. This requires taking seriously both the *ex ante* negotiating perspective and the *ex post* enforcement one. Unfortunately, there seems to be some reluctance in addressing the enforcement aspects of the provisions of the WCO instruments. Put simply, the WCO is based on 'soft law' with all its limitations. The first step to reverse this situation for the better would be to develop an effective dispute settlement mechanism with both litigation and non-litigation aspects.

Hand in hand with empowering the WCO with an effective dispute mechanism is the need to merge trade facilitation with safety and security, for they have much in common. And the best way to do this is the 'hard law' approach of having a comprehensive treaty merging trade facilitation with security. Modernising the WCO with an effective dispute settlement system and developing a treaty that merges trade facilitation and security would therefore not be a bad option.

In line with the 'Dublin Resolution' of the WCO Policy Commission ([www.wcoomd.org](http://www.wcoomd.org)), the alternative way forward is for the WCO to make good use of Article 13 (especially paragraphs 1.5. and 1.6) of the Agreement on Trade Facilitation. Using its expertise and different tools for trade facilitation, the WCO can still have a considerable influence on the implementation and administration of the Agreement on Trade Facilitation. The periodical reviews of the Agreement as per Article 13, 1.6 may, for instance, be a good medium through which the idea of a substantial merging of trade facilitation and safety and security can be introduced.

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# Review of accredited operator schemes: an Australian study

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## Abstract

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Governments throughout the world have for many years been developing and implementing initiatives that are designed to secure international supply chains from terrorist and other threats while facilitating legitimate trade. A number of these initiatives involve the accreditation of members of the international trading community that meet security and other regulatory requirements.

This article summarises a research study that was commissioned by the Australian international trade and transport industry. The research study reviews the various types of ‘Accredited Operator’ (AO) schemes that are currently in use or being implemented and identifies options for their application in Australia. In doing so, it has sought the views of industry and has focused on ways to maximise the relevance of such schemes, minimise compliance costs and ensure against the possible erosion of Australian industry’s competitive position in the global marketplace.

The study identifies a potential disadvantage to Australian exporters of not having access to a scheme that meets the requirements of the *SAFE Framework of Standards to Secure and Facilitate Global Trade* (the SAFE Framework). It proposes the introduction of such a scheme with supply chain security as its principal focus, and an import scheme having trade compliance as its principal focus. It argues that participants in the export scheme would also need to demonstrate appropriate levels of trade compliance, and importers should similarly be required to meet minimum security requirements.

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## Background

For the past decade, government agencies throughout the world have been developing and implementing a range of initiatives that are designed to secure international supply chains from terrorist and other threats while facilitating legitimate trade. Several such initiatives focus on the concept of Accredited Operators (AO) (that is, trusted members of the international trading community that are deemed to meet security and other regulatory requirements), the two principal schemes being those relating to Customs and to air cargo security.

A contemporary method of managing compliance in these areas of regulatory responsibility is to work in collaboration or partnership with the private sector through the use of AO programs. For some border management agencies, the partnership concept is well established, and is widely acknowledged as a key foundation for trade facilitation. The effectiveness of such arrangements hinges on a working relationship between regulators and industry that reflects a mutual commitment to accountability and improving regulatory compliance.



Businesses that enter into such partnerships are generally required to demonstrate a history of providing accurate and timely information about their transactions, establish a good record of regulatory compliance, and demonstrate that their systems and procedures will ensure a continuation of their established compliance record. Generally, this requires them to open their operations to analysis by regulatory auditors and to advise the regulator of any changes to their systems or procedures that may impact on the initial assessment of their level of compliance.

On the other side of the partnership equation, regulatory authorities seek to create an environment in which companies can maximise their entitlements, and meet their obligations for trade compliance with minimal commercial impact. This necessitates providing companies with the means to achieve certainty and clarity in assessing their liabilities and entitlements and to allow them to conduct subsequent business without fear of additional regulatory burdens after the transaction is concluded and the opportunity to recover costs has passed.

Assessing the compliance levels of such entities assists regulators in determining where their resources should be directed. Put simply, such initiatives may be viewed as a way of reducing the size of the 'risk pie'. The introduction of an industry partnership concept is therefore based on the premise that companies with a good record of compliance require less regulatory scrutiny than those with a history of poor compliance. A key element of the strategy seeks to provide highly compliant companies with some form of benefit and this applies equally to those AO programs that are designed to secure international supply chains from threats of terrorism.

Provided such outcomes can be achieved for the mutual benefit of both the regulator and the regulated entity, the partnership approach is likely to succeed. However, if the anticipated benefits fail to materialise for either one of the parties, the relationship is likely to sour, particularly when would-be participants make a significant investment in the regime for no apparent return. Given that one of the parties to such a partnership is a regulatory authority, it is hardly surprising to learn that the benefits which fail to materialise are generally to the detriment of industry.<sup>2</sup>

Due to the nature of the partnership concept, the associated schemes, including Authorised Economic Operator (AEO), Known Shipper and some biosecurity-related programs, are voluntary. For those who choose not to participate, other methods of regulatory control may be applied, which inevitably involve increased levels of regulatory intervention and less scope for self-assessment. Some types of AO programs are, however, mandatory. These include certain agricultural export programs which require traders and service providers to demonstrate their compliance with regulatory standards as a prerequisite to their involvement in export activities.

## The research project

The research project involved a review of the emerging 'Accredited Operator' (AO) concept which, internationally and locally, is being espoused by a number of regulatory agencies in the form of 'Regulated Shipper', 'Regulated Agent', 'Accredited Agent', 'Authorised Economic Operator', 'Approved Exporter', 'Registered Operator' and similar programs which have emerged as a result of international initiatives relating to supply chain security and trade facilitation. The research reviewed the subject from a number of perspectives, including international initiatives and responses, Australian Government responses, and implications for regulators and the business community.

The project was conducted by the Centre for Customs and Excise Studies, Charles Sturt University. It was funded through the Australian International Trade and Transport Industry Development Fund (AITTIDF), the objectives of which are to promote, support, advance and enhance projects that facilitate Australia's international trade with its trading partners, and that encourage more efficient international supply chain solutions. Project funding has been supported by the Customs Brokers and Forwarders Council of Australia Inc. (CBFCA), the Export Council of Australia (ECA), the Australian Federation

of International Forwarders (AFIF), the Conference of Asia Pacific Express Carriers (CAPEC) and Shipping Australia Limited (SAL).

The purpose of the project was to develop an Australian international trade and transport industry position for presentation to the Australian Government on the various forms of AO schemes that are in place, under development, or being considered by Australian and overseas regulatory agencies. This includes recommendations on how such schemes should be progressed in order to guard against any possible erosion of the industry's competitive position in the global marketplace. In particular, the research seeks to identify options for maximising the relevance of such schemes, minimising compliance costs and ensuring that the Australian international trade and transport industry is able to compete on an equal footing with its overseas competitors, particularly when exporting to countries that have similar arrangements in place. In doing so, the project focused on whole-of-government solutions for a whole-of-industry outcome.

## Methodology

The project was comprised of three principal components. The first was a review of the AO landscape with a particular focus on AEO, including an examination of the broader international context and initiatives that have been or are being progressed in Australia. The second component was an examination of Australian business perspectives on the AO concept, including preferred options for Australian implementation. The third was an analysis of the first two components, with focus on current issues and future directions.

The research approach was iterative, drawing on multiple types of data. The initial step was to conduct a desk-based study of the relevant literature and supporting documents. These include primary documents such as the SAFE Framework developed by the World Customs Organization (WCO), the International Ship and Port Facility Security Code (ISPS Code) developed by the International Maritime Organization (IMO) and Annex 17 to the *Convention on International Civil Aviation 1944* (Chicago Convention), amongst others, as well as academic papers and commentaries published in academic journals or by relevant international and national organisations.

The initial desk-based review was followed by open and targeted focus groups, survey and interview-based research, the findings of which were used to further inform the initial review as well as provide the basis for the study's analysis and recommendations. Participants in the focus group sessions and interviews were provided with background material that was designed to inform them of international trends, Australian initiatives and general implications for the industry.

The general focus group sessions, which were held with interested parties from the Australian business community, were conducted in Brisbane, Sydney, Perth, Adelaide, Melbourne and Canberra. A total of 62 participated in the sessions, the majority of which represented customs brokers, freight forwarders and large to medium importers and exporters. Invitations to the focus group sessions were sent to members of CBFCA, ECA, AFIF, CAPEC and SAL by the relevant industry associations.<sup>3</sup>

In addition, targeted focus groups included members of CBFCA, who were consulted during their annual conference,<sup>4</sup> members of the Customs Trade Advisory Group (CTAG), consulted during their November 2013 consultative meeting with the Australian Customs and Border Protection Service (ACBPS),<sup>5</sup> and members of the ECA Agribusiness Working Group who were consulted at their September 2013 meeting.<sup>6</sup> Interviews were also conducted with representatives of CBFCA, AFIF, ECA and the Australian Chamber of Commerce and Industry (ACCI).

In total, consultations were held with 212 interested parties. Findings have been captured in summary documents, interview transcripts and in feedback survey responses for those who did not provide the researchers with feedback at the time of the consultations.

Also, an interview series was conducted with representatives of relevant Australian Government agencies, including ACBPS, the Office of Transport Security (OTS), the Department of Agriculture (DAg), and the Department of Foreign Affairs and Trade (DFAT). The purpose of this series was to establish the respective agencies' position with regard to AO schemes, including existing programs and plans for the future.

Two significant events impacted on the research project during the period of the study. First, the release of the ACBPS 'Blueprint for Reform 2013-2018' in June 2013 and subsequent announcements by the ACBPS executive that signalled the proposed introduction of some form of 'Trusted Trader' program in Australia. Second, a momentous Trade Facilitation Agreement, which includes specific reference to trade facilitation measures for 'Authorized Operators', was settled by the World Trade Organization (WTO) members at its Ninth Ministerial Conference in December 2013.

The former resulted in the need to revisit the line of enquiry with industry in relation to the customs-related issues, as the question of whether an AEO-type arrangement should be introduced by Customs was no longer of relevance. Consequently, the focus of the study shifted to an identification of the preferred features of such a scheme from an industry perspective.

### **9/11 and the focus on supply chain security**

The 11 September 2001 terrorist attacks in the United States (US) have had a dramatic impact on the policy governing security in international logistics and supply chain management. Following the attacks, the US Government took immediate measures to stop all inbound air traffic into the US, and instituted very strict inspection procedures for both individuals and cargo at all land and sea entry points.<sup>7</sup> These measures had the almost immediate effect of bringing commercial international trade with the US to a virtual standstill. Over time, land, sea and air traffic resumed, but only in the face of strong pressure from many quarters, most notably the US Congress, to greatly increase inbound security into the US.

The US proceeded to introduce a series of legislative amendments aimed at ensuring that the inbound supply chain, in all modes, was as secure as possible. One of the first mandatory requirements imposed on supply chain operators was the advance reporting obligation for inbound cargo in all modes, the so-called 'Advance Manifest' reporting regime, requiring carriers to pre-notify US Customs and Border Protection (USCBP) about their cargo within prescribed timeframes prior to its arrival at a US port of entry. These requirements were later supplemented for maritime traffic by the Importer Security Filing (ISF) initiative, which is required to be undertaken at least 24 hours before loading a vessel destined for a US port.

Those members of the US business community dependent on international trade moved quickly to ensure that the political pressure for tighter control did not needlessly impair their international competitiveness. They worked closely with USCBP to demonstrate that the risk of terrorist activity in the international supply chain could be controlled – and in fact was being minimised – by a variety of existing security standards already in use by major importing companies. The dialogue between the US business community and USCBP led to the creation of a new voluntary partnership program, the Customs-Trade Partnership Against Terrorism (C-TPAT).<sup>8</sup> Under C-TPAT, companies whose internal policies, systems and procedures met strict standards designed to prevent terrorist tampering in the inbound supply chain were given a provisional low-risk status, which served to minimise regulatory impediments to their international trading activities.

Similar initiatives were established in other countries, generally motivated by the need to assure the US authorities that their shippers and supply chains were secure, thereby safeguarding continued access to the US market without extensive delays at US ports, airports and border crossings.

The WCO identified the need to develop international guidelines, based on the C-TPAT initiative, to provide its members with uniform strategies to secure and facilitate global trade. The resultant SAFE Framework was first published in 2005, with revisions in 2007, 2010 and 2012.<sup>9</sup> The SAFE Framework includes recommendations for advance cargo reporting and provides the international basis for the concepts of AEO and Mutual Recognition Agreements (MRAs). This is discussed further below.

In the European Union (EU) security was added as a fast-track item to an ongoing policy program to radically overhaul the EU's customs environment – the so-called Paperless Trade and Customs Environment.<sup>10</sup> The resulting Security Amendment to the Customs Code<sup>11</sup> and its Implementing Provisions<sup>12</sup> introduced, among other things, requirements for pre-notification<sup>13</sup> and the AEO concept.<sup>14</sup> While the former requires EU carriers to pre-notify Customs – in the case of maritime cargo, 24 hours before loading – in the form of an Entry Summary Declaration, the latter seeks to accredit traders that comply with minimal security management criteria.

In a wider multilateral setting, in 2004 the ISPS Code<sup>15</sup> entered into force, which places an obligation on all signatories to the *International Convention for the Safety of Life at Sea 1974* (SOLAS Convention)<sup>16</sup> to implement minimum security measures in order to address assessed risks facing particular ships or port facilities, including the implementation of port and vessel security management systems.

Following the 2010 security incidents involving air cargo originating from Yemen, further measures were introduced to enhance the global aviation security framework, through amendments to the Chicago Convention and its annexes.<sup>17</sup> The new measures included a requirement for contracting states to establish a supply chain security process that includes the approval of 'regulated agents' and/or 'known consignors', if such entities are involved in implementing screening or other security controls of cargo and mail.<sup>18</sup>

Most recently, the WTO reached consensus, in early December 2013, on a text for a new Agreement on Trade Facilitation.<sup>19</sup> The agreement, which will need to be ratified by the WTO member states, but which may come into effect as early as mid-2014, would be binding on all WTO members. Paragraph 7 of Article 7, of the Agreement reads as follows:

#### **7 Trade Facilitation Measures for Authorized Operators**

7.1. Each Member shall provide additional trade facilitation measures related to import, export or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such facilitation measures through customs procedures generally available to all operators and not be required to establish a separate scheme.

7.2. The specified criteria shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures. The specified criteria, which shall be published, may include:

- a. an appropriate record of compliance with customs and other related laws and regulations;
- b. a system of managing records to allow for necessary internal controls;
- c. financial solvency, including, where appropriate, provision of a sufficient security/guarantee; and
- d. supply chain security.

The implication of the text of these provisions is that if a country elects to introduce an 'Authorized Operator' program, it has a level of flexibility in terms of the criteria that may be applied. Note also that the criteria identified by the WTO are consistent with those contained in the WCO SAFE Framework. In the event that a WTO member state elects to establish such a program, the Agreement would obligate the WTO member state to provide Authorized Operators with a minimum of three of the following benefits:

7.3. The trade facilitation measures provided pursuant to paragraph 7.1 shall include at least 3 of the following measures:

- a. low documentary and data requirements as appropriate;
- b. low rate of physical inspections and examinations as appropriate;
- c. rapid release time as appropriate;
- d. deferred payment of duties, taxes, fees and charges;
- e. use of comprehensive guarantees or reduced guarantees;
- f. a single customs declaration for all imports or exports in a given period; and
- g. clearance of goods at the premises of the authorized operator or another place authorized by customs.

Although Article 7 proceeds to encourage members to develop Authorized Operator programs on the basis of ‘international standards’ (without any specific mention of such standards), and to allow for mutual recognition arrangements, the provision is notable for the absence of any binding or formal adoption of related principles as set out in the SAFE Framework.

As the new Trade Facilitation Agreement establishes a Committee of Members as the relevant governance body, it appears to institute yet another parallel regime in the realm of supply-chain security and compliance-based trade partnership programs.

Figure 1 summarises the principal supply chain security activities that have been introduced since 9/11.

*Figure 1: Key government-driven supply chain security initiatives*

Year	Key Driver	Supply Chain Security Initiative
2001	USA	<b>Customs and Trade Partnership Against Terrorism (C-TPAT):</b> a voluntary partnership program open to US-based businesses and invited businesses located in Mexico and Canada which trade with the USA, focused on ensuring the security of commercial supply chains in exchange for preferential treatment at the border.
2002	IMO	<b>International Ship and Port Facility Security (ISPS) Code</b> places obligations on port and ship operators to implement minimum security measures and maintain a security management system. The ISPS Code applies to all signatories to the SOLAS Convention.
2005 (revised in 2007, 2010 and 2012)	WCO	<b>SAFE Framework of Standards (SAFE)</b> aims to establish globally applicable customs control standards to increase supply chain security while facilitating legitimate trade and promoting certainty and predictability. Apart from requirements for advance cargo reporting and measures to help collaboration between customs administrations, much of its focus is on the AEO partnership model with the private sector.
2005-06	EU	<b>Safety and Security Amendment to the Customs Code</b> (EC Regulation 648/2005) and its Implementing provisions (Regulation 1875/2006) introduced pre-arrival/pre-departure reporting requirements for shippers/transport companies to the EU; the AEO concept; and a framework for the electronic sharing of customs data between EU customs authorities.

<b>2011</b>	ICAO	<b>Annex 17 to the Chicago Convention:</b> Security ‘Safeguarding International Civil Aviation Against Acts of Unlawful Interference’ incorporates the Regulated Agent and Known Consignee concepts among its Standards and Recommended Practices for international aviation security.
<b>2013 (expected to commence in 2014)</b>	WTO	<b>Draft Ministerial Decision – Agreement on Trade Facilitation:</b> establishes a new ‘Authorized Operator’ concept for WTO members. Such schemes are required to meet certain prescribed criteria and offer trade facilitation measures selected from a menu of benefits. AO is not cross-referenced to IMO, ICAO or WCO efforts.

Source: Widdowson, Blegen, Kashubsky & Grainger 2014.

## International initiatives

The SAFE Framework which was introduced in 2005 by the WCO, identifies standards and principles for adoption by all WCO members. More than 160 countries have implemented, or have indicated their intention to implement the SAFE Framework, key elements of which are the concepts of AEO and Mutual Recognition.

An AEO is a member of the international trading community that is deemed to represent a low customs risk and for whom greater levels of facilitation should be accorded. Where two countries have an MRA in place, an entity’s AEO status is to be recognised by the customs administrations of both economies.

The International Civil Aviation Organization (ICAO) has independently developed global standards and recommended practices to ensure air cargo supply chain security. These have been enhanced in response to the ongoing threat of terrorist attacks, including the more recent air cargo security incidents originating from Yemen in 2010.

The ICAO Standards and Recommended Practices, contained in Annex 17 to the Chicago Convention, include Regulated Agent and Known Shipper/Known Consignor programs. These programs are designed to prevent unlawful interference with aviation and include measures that require air cargo to be security cleared before it can be loaded on an aircraft.

In addition, international trade in food and food products is heavily regulated in terms of quality assurance in order to protect trade and market access, and for the purposes of biosecurity. Inspection, verification and certification programs are commonplace, as is the accreditation of entities involved in the supply chain, including importers, exporters and service providers.

The AO concept is also emerging as a component of Free Trade Agreement (FTA) negotiations, with many countries seeking to establish a framework within their FTAs to facilitate the negotiation of mutual recognition arrangements.

Lastly, the recent WTO Agreement on Trade Facilitation includes specific reference to AO schemes in the context of facilitating trade for those who meet specified criteria.

## Australian initiatives

In 2005 Australia committed to implement the principles of the SAFE Framework,<sup>20</sup> but the ACBPS subsequently announced that it would not be introducing an AEO program.<sup>21</sup> In June 2013, however (and following the commencement of the current study), ACBPS announced details of a Service-wide reform program that includes a focus on MRAs with trading partners to acknowledge AEO and trusted trader schemes,<sup>22</sup> and the ACBPS executive has since signalled the proposed introduction of a Trusted Trader program.<sup>23</sup>

The OTS already has in place measures that require air cargo to be security cleared before it can be loaded on an aircraft. These measures apply to businesses that security-clear, handle or make arrangements for the transport of air cargo, and are administered through the current Regulated Air Cargo Agent (RACA) and Accredited Air Cargo Agent (AACCA) schemes. OTS was planning to introduce new export air cargo security requirements in 2014 that include the introduction of a Regulated Shipper Scheme (RSS) and Enhanced Air Cargo Examination (EACE), as well as changes to the rules governing RACAs.<sup>24</sup> These initiatives have, however, been held in abeyance pending the development of further policy options.

DAG ensures that exported food and food products meet Australian standards and overseas requirements by way of its export certification procedures, which include the registration of relevant entities in the supply chain.<sup>25</sup> These arrangements are product- or sector-specific, with the inspection, verification and certification arrangements associated with the Export Meat Program being particularly stringent.<sup>26</sup>

DFAT has also noted that concepts such as ‘approved exporter’, ‘registered exporter’ and ‘registered operator’ are impacting on discussions relating to the customs aspects of the Trans Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP).

## Emerging trends

Clear trends are emerging from the evolution of the SAFE Framework and the national initiatives which have been implemented under it. More and more countries are implementing AEO programs, with a broadening scope, and it appears that advance data filing requirements and mutual recognition arrangements are beginning to have real impact on traders. From an exporter’s perspective, having a consignment deemed low-risk at destination implies a more rapid and predictable customs clearance. At the same time, increased air cargo security requirements (for example, known consignor or regulated shipper) and destination countries which require electronic pre-departure data make it more difficult for the export to leave the country of departure without meeting international requirements.

In the world contemplated under the SAFE Framework, where a high-risk consignment is one ‘for which there is inadequate information or reason to deem it as low risk’,<sup>27</sup> the exporter is more likely to face delays and costs associated with inspections if its exports are not recognised as low risk by the destination country.

Japan, the EU and the US all have introduced mandatory electronic pre-arrival notification requirements in recent years, and they continue to expand their coverage across different transport modes, and are moving to strict enforcement. They have also introduced voluntary programs under the SAFE Framework AEO standards and have seen them widely adopted among both traders and service providers alike. Mutual recognition among the three programs has been established, and implementation of differentiated risk targeting between the consignments of qualified AEOs and non-AEOs is in its early stages.

The concept of the ‘Authorised Supply Chain’ is therefore becoming a reality – so much so that these economies are making it a part of ongoing negotiations for new trade agreements, including the TPP. China and India already have AEO programs, the North America Free Trade Agreement (NAFTA) countries are actively working on regionally integrated supply chain security concepts, and Brazil, Russia, Turkey and many others are well advanced in developing their own AEO programs under the SAFE Framework.

With regard to air freight security, a similar evolution is underway. As individual countries strengthen their security programs, exporters in other countries wishing to send cargo to them are faced with having to comply with often onerous requirements as a prerequisite to utilising the air mode of transport. In addition, under the auspices of the ICAO and the WCO, an international effort to harmonise and standardise requirements is moving forward, again led by the Europeans and the Americans, with active input from Japan, China and others. The outcome of these discussions will almost certainly be a new

global standard for accessing the international air cargo network – and any business wishing to use it is likely to have no choice but to adhere to that standard, including any associated regulated agent and known consignor certification requirements.

While Australia is well advanced in relation to air cargo security standards, without an AEO (or equivalent) program in place, Australia cannot enter into mutual recognition discussions with its trading partners in the context of the SAFE Framework. Further, apart from the initiatives being undertaken by OTS and DA<sub>g</sub>, there is no process in place for Australia’s exporters to demonstrate that they have had their security practices validated by government and certified as meeting AEO-equivalent standards.

Consequently, even if Australian exporters have operations which, in fact, meet or exceed international standards, without a national AEO-type program and certification under that program, they cannot be seen as links in an Authorised Supply Chain under the SAFE Framework. Taking international trends into account, it therefore seems ever more likely that their trading partners will deem their consignments to be high risk, and subject to the associated controls and targeting.

The way in which the commercial world is viewing the secure supply chain is also evolving. Those companies that have attained accreditation under AEO-type programs, including C-TPAT, are often reluctant to introduce new suppliers or service providers into their supply chain unless they have themselves obtained AEO status under their own national programs. The principal reason for this is their concern that introducing ‘unknown entities’ (from a regulatory perspective) into their supply chain may either jeopardise their AEO status, or impose additional costs in terms of the need to satisfy authorities that their third party operators meet the standards required under the particular scheme in which they have achieved accreditation.

## **Implications for Australia**

Feedback from industry reflects a clear expectation that some form of AEO-type scheme (referred to by ACBPS as a Trusted Trader program) will be introduced, based on statements made by ACBPS in its ‘Blueprint for Reform 2013-2018’ and in subsequent speeches by the ACBPS executive.

The feedback also indicates an assumption that various product- and sector-specific arrangements will continue to be required by DA<sub>g</sub>; and that air cargo security reforms will be progressed by OTS in consultation with industry.

In this context, the focus of industry’s attention is the likely scope, focus and detail of the Trusted Trader program, and the way it will be introduced and administered. There is also a keen interest in the likely relationship between the new program and the programs administered by OTS and DA<sub>g</sub>, and opportunities for adopting a whole-of-government approach, particularly in relation to assessments of compliance with the respective membership criteria.

Note: For the purposes of this discussion, a member of the proposed Trusted Trader program is referred to as an AO.

## **Scope and focus of a Trusted Trader program**

It is apparent that Australian exporters may be disadvantaged at some point in the future unless the Trusted Trader program includes export cargo, and is sufficiently robust to enable the establishment of MRAs with Australia’s trading partners. Indeed, the potential disadvantage to exporters of not having access to a national AEO-type scheme is seen to be a clear driver to include exports in any arrangement.

The principal criteria for mutual recognition established under the current version of the SAFE Framework are those related to security, as evidenced, for example, by the New Zealand arrangements



with the US. In fact the sole focus of New Zealand's Secure Export Scheme (SES) is the security of exported cargo. Furthermore, the New Zealand Customs assessment of supply chain security does not extend beyond outbound shipments from New Zealand. Consequently, if an Australian scheme did not extend to imports, it would most likely be sufficient to focus solely on security criteria in order to be eligible for mutual recognition.

However, members of the trade and transport industry that are involved in importing have indicated that a Trusted Trader program should also include imports, in which case there would doubtless be a need to include trade compliance as a prerequisite for accreditation. The benefit to importers is questionable if the focus is simply on ACBPS clearance procedures, as these are already considered to be quite efficient, and it was a perceived lack of benefits that caused the Accredited Client Program to fail.<sup>28</sup> Industry has, however, identified a number of possible incentives to join an import-focused scheme that look beyond the efficiency of clearance procedures. These include:<sup>29</sup>

- 1. Reduced levels of intervention**

An AO should be subject to measurably lower levels of intervention than other members of the trading community. This includes physical cargo inspections, documentary queries and post entry audits.

- 2. Simplified procedures**

AOs should have access to deferred duty payment arrangements, for example, the ability to account for duty payments in their monthly or quarterly Business Activity Statement (BAS). The option of using periodic reporting arrangements should also be made available to AOs. Simplified procedures should also be introduced for obtaining permits, claiming duty drawback and similar arrangements where such activities form a regular part of an AO's operations.

- 3. Priority treatment**

A single point of reference such as an account manager should be provided to assist AOs in their dealings with ACBPS.

In the event of a physical inspection or documentary query, AOs should be given 'head of queue' treatment. In other words, the matter should be dealt with ahead of any similar matters relating to non-AOs.

Where possible, AOs may elect to have physical cargo examinations undertaken at premises nominated by them.

AOs should receive priority processing of applications for advices and rulings, such as tariff advices, Tariff Concession Orders (TCOs) and valuation rulings.

Priority processing should be provided to AOs in the event of trade disruption and/or elevated threat levels.

- 4. Reduced fees and charges**

Differential rates should be set for import processing charges and other fees where the regulatory activities on which such fees and charges are based are less frequently applied to members of the Trusted Trader program.

- 5. Mutual recognition**

Mutual recognition arrangements should be negotiated with Australia's major trading partners to ensure that AOs receive the benefits of facilitated clearance arrangements and any other benefits that may be available under the relevant country's AEO program. In this regard, Australia should seek to secure specific outcomes for its AOs under MRAs, as is the case with New Zealand and the US.

## Membership of a Trusted Trader program

As service providers such as customs brokers, freight forwarders, express carriers and carriers all form part of the supply chain, those who see merit in a Trusted Trader program generally consider that it should be open to service providers as well as traders.

It should be noted that, in the export environment, service providers are already included in the arrangements operated by OTS (in the form of AACAs and RACAs) and by DA<sub>g</sub> (for example, export abattoirs and boning rooms), as both agencies are focused on the security of the entire domestic supply chain from exporter to carrier.

In this context, the point has been made that, whatever costs may be involved in achieving AO status, a small or indeed medium-sized trader may not consider it to be worthwhile. However, accrediting service providers may provide an opportunity to include small and medium-sized enterprises (SMEs) in the Trusted Trader program. For example, in the export context, a service provider with AO status should, where sufficient safeguards have been shown to be in place, be able to provide an SME with a conduit into a recognised secure supply chain.

As such, an SME whose standard procedure is to export via an accredited entity should in concept be eligible to attain AO status for export activity adhering to such standard procedures. This concept is clearly reflected in the OTS model whereby goods exported by an entity that is not a Regulated Shipper are able to enter a secure supply chain by way of an RACA or AACA.

## Whole-of-government approach

A key issue that has arisen during the course of the research is the degree of commonality between the DA<sub>g</sub> and OTS export arrangements in terms of the criteria for accreditation under the two schemes, both of which aim to provide assurances about the security of the supply chain. Similarly, the security-related criteria that are expected to be attached to the Trusted Trader program will most likely reflect those applied by DA<sub>g</sub> and OTS, to some extent.

Consequently, there appears to be scope for inter-agency recognition of an entity's status, at least to some degree. For example, a DA<sub>g</sub>-registered exporter of meat that is seeking OTS accreditation as a Regulated Shipper could be expected to have already satisfied a number of the OTS requirements by virtue of their DA<sub>g</sub> registration.

Similarly, ACBPS, when assessing the systems and procedures of an exporter that is seeking AO status, should take into account the exporter's existing accreditation with other agencies. In cases where the exporter holds DA<sub>g</sub> registration and/or is an OTS Regulated Shipper, the need to (re)assess the security of the exporter's supply chain should be significantly reduced.

Further, if the Trusted Trader criteria were to recognise existing authorisations, accreditations and licences in part or in full, uptake of the AO program is likely to be significantly greater. Likewise, if AO membership were to provide exemption or easier access to OTS and DA<sub>g</sub> authorisations, the Trusted Trader program would be providing a significant 'value add' for industry.

Such an approach has been pursued by other countries in the context of their AO programs. For example, in Singapore a Secure Trade Partnership (STP) member is recognised as a Known Consignor under the country's Regulated Air Cargo Agent Regime (RCAR).<sup>30</sup> Further, while cargo agents must apply for Regulated Cargo Agent status irrespective of their STP certification and vice versa, the Singaporean authorities will leverage the cargo agent's existing security certification(s) as far as possible in that the cargo agent will require minimal additional effort to meet the STP or RCAR program requirements. The authorities have future plans to harmonise and streamline both the STP and RCAR processes in that

cargo agents applying for, or who are part of, both the STP and RCAR will only need to undergo a single audit and an integrated application process.<sup>31</sup> This will eliminate the need for cargo agents to submit duplicate documents and to undergo multiple audits by different authorities.

### Implementing a Trusted Trader program

It is evident from the findings of the research that one country's solution for implementing the SAFE Framework may be inappropriate for another, due to political, economic, cultural and other variances. Each country therefore needs to identify the model that best suits its particular requirements, provided:

- the program complies with the provisions of the SAFE Framework
- the export-related elements of the program are sufficiently robust to enable the negotiation of mutual recognition arrangements.

In this regard, it would be acceptable to establish different criteria for export- and import-related elements of the program. An export program must, however, have security as its principal focus, for the purposes of achieving mutual recognition with trading partners. On the other hand, the type of benefits being sought by industry in the import environment should only be granted on the basis of demonstrating a high level of trade compliance. A logical approach may therefore be to establish:

1. an export scheme having supply chain security as its principal focus
2. an import scheme having trade compliance as its principal focus.

Both could be open to traders and service providers, and membership of both should be voluntary. The export scheme would also need to ensure that participants demonstrate appropriate levels of export compliance, including accuracy of declarations and procurement of relevant permits. Similarly, ACBPS would need to ensure that importers adhered to basic security requirements.

The development of two schemes also provides an opportunity to phase in the Trusted Trader program. The more immediate requirement is considered to be the need to mitigate the risk of erosion of Australian exporters' competitive position in the global marketplace. Consequently, it would be logical to introduce an export scheme as early as possible, and an import scheme shortly afterwards. This would also allow for further industry consultation on the detail of the import arrangements, and particularly the scope of benefits that may be provided to those members of the Trusted Trader program involved in imports.

An export scheme having supply chain security as its primary focus should be relatively easy to implement if the concepts discussed above are adopted. The work already undertaken by OTS could be used as a model for developing such a scheme, and New Zealand's SES program should also provide another useful template, and one which should redress any AEO-related market access concerns. Further, due to the advanced state of development of the OTS air cargo security arrangements, it may be prudent to firstly implement the new arrangements for air cargo, and to subsequently expand the scheme to include sea cargo.

### Summary of research findings

The number of countries that are implementing AEO programs is increasing, and mutual recognition arrangements have triggered the introduction of customs risk targeting that differentiates between consignments of AEOs and those of non-AEOs. However, apart from the initiatives being undertaken by OTS and DAG, no process is in place for Australia's exporters to demonstrate that they have had their security practices validated by government and certified as meeting AEO-equivalent standards.

Consequently, while Australia is well advanced in its application of AO schemes in the air cargo and biosecurity environments, its failure to progress such an initiative in the customs context has the potential

to disadvantage Australian exporters who are more likely to face delays and costs associated with inspections if their consignments are not recognised as low risk by the destination country. Similarly, opportunities to ease the regulatory compliance burden of trusted and compliant importers and service providers are less likely to be realised in the absence of customs-focused AO arrangements.

There is a clear expectation on the part of industry that product- and sector-specific AO arrangements will continue to be required by DAG; and that air cargo security reforms will be progressed by OTS in consultation with industry. There is also an expectation that some form of AEO scheme will be introduced, based on the statements made by ACBPS, both in its 'Blueprint for Reform 2013-2018' and in subsequent announcements.

The potential disadvantage to exporters of not having access to an AEO-type scheme is seen to be a clear driver to include exports in any customs-related AO arrangement, the focus of which should be supply chain security, which is a prerequisite to concluding any mutual recognition arrangement under the SAFE Framework. Equally, however, industry has indicated that such arrangements should extend to imports, with trade compliance being the principal criterion for accreditation. Recognising that ACBPS clearance procedures are generally efficient, the range of potential benefits identified by industry include measures designed to improve cash flow, facilitate the resolution of queries and fast-track applications for formal rulings and decisions.

Those who see merit in an AEO-type scheme generally consider that it should be open to service providers as well as traders, noting that customs brokers, freight forwarders and other service providers are already included in the arrangements operated by OTS and by DAG. It has also been suggested that an 'authorised' service provider should be able to provide SMEs with a conduit into a recognised secure supply chain.

A key issue that has arisen during the course of the research is the scope for intra-agency recognition of an entity's AO status. For example, an agency's assessment of a trader that is seeking AO status should take into account the trader's existing accreditation with other agencies.

## **Conclusions**

The research findings indicate a need for an AEO-type program in Australia, which is likely to be represented by the proposed ACBPS Trusted Trader program. The study concluded that the proposed program should be comprised of two elements – an export scheme having supply chain security as its principal focus, and an import scheme having trade compliance as its principal focus. Both could be open to traders and service providers, and membership of both should be voluntary. Participants in the export scheme would also need to demonstrate appropriate levels of trade compliance including accuracy of declarations and procurement of relevant permits, and ACBPS should similarly require importers to adhere to basic security requirements.

The development of two schemes provides an opportunity to phase in the Trusted Trader program, the more immediate requirement being the need to mitigate the risk of erosion of Australian exporters' competitive position in the global marketplace. Introducing an import scheme at a later date will also allow for further industry consultation on the detail of the import arrangements, and particularly the scope of benefits that may be provided to compliant members of the importing community.

The work already undertaken by OTS and DAG could be used as a model for developing the export scheme, and due to the advanced state of development of the air cargo security arrangements, it may be prudent to firstly implement the new arrangements for air cargo, and to subsequently expand the scheme to include sea cargo.

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## Notes

- 1 This article summarises a research study conducted by the Centre for Customs and Excise Studies, Charles Sturt University, Australia, which was funded through the Australian International Trade and Transport Industry Development Fund.
- 2 See, for example, Widdowson 2005.
- 3 Invitations were also disseminated to a wider community/audience in the form of online newsletters and announcements, in one case by way of a 'Letter to Editor' of *Australian Maritime Digest* published by the Australian Association for Maritime Affairs, and in another instance as a news item in the *Air Cargo Security e-Newsletter* published by OTS.
- 4 CBFCA National Conference, Canberra, 24 to 26 October 2013.
- 5 CTAG meeting with ACBPS, Melbourne, 29 October 2013.
- 6 ECA Agribusiness Working Group Meeting, Brisbane, 17 September 2013.
- 7 At the time much reference was made to Tom Clancy's book *The Sum of All Fears* (1991) in which terrorists managed to smuggle a nuclear device onto US soil. Hawks and vendors of security solutions at industry gatherings also started talking about the 'poor-man's guided missile' – a parcel containing an explosive or pathogenic device, delivered by express courier to the designated victim, who signs for receipt and notifies the sender via track-and-trace. Public debate in response to 9/11 was also fuelled by Flynn in Flynn 2000, highlighting the perceived vulnerabilities within the modern shipping and logistics systems, the limits to physical inspections at the border, and urging for creative thinking on the part of the private sector, states, and international bodies. See Flynn 2002.
- 8 See, for example, US Customs and Border Protection (USCBP) n.d.; Laden 2007.
- 9 See WCO 2012a.
- 10 European Commission 2003, Resolution 2003/C 305/01.
- 11 European Commission 2005, Regulation (EC) No 648/2005.
- 12 European Commission 2006, Regulation (EC) No 1875/2006.
- 13 These were phased in during 2011.
- 14 AEO arrangements have been available to EU traders since 2008.
- 15 See IMO 2003, *Amendments to the Annex to the International Convention for the Safety of Life at Sea*.
- 16 IMO 1974, *International Convention for the Safety of Life at Sea 1974*.
- 17 For a current summary, see ICAO November 2013, pp. 55-75.
- 18 ICAO 2011b, *Annex 17 to the Convention on International Civil Aviation*, Section 4.6.2.
- 19 WTO 2013a, 2013b.
- 20 As of March 2013, there were a total of 167 WCO members who have agreed to implement the SAFE Framework; see WCO 2012c.
- 21 ACBPS 2011b, Minutes of Meeting, p. 5; 2012.
- 22 ACBPS 2013b, p. 36.
- 23 See Pezzullo 2013a, 2013b, 2013c, 2013d, 2013e.
- 24 Department of Infrastructure and Transport 2013.
- 25 Department of Agriculture 2013b.
- 26 See Department of Agriculture 2008. The Export Meat Program is governed by the *Export Control Act 1982*, Export Control (Prescribed Goods-General) Order 2005, Export Control (Meat and Meat Products) Orders 2005, Export Control (Wild Game Meat and Wild Game Meat Products) Orders 2010, Export Control (Poultry Meat and Poultry Meat Products) Orders 2010, Export Control (Rabbit and Ratite Meat) Orders 1985, and other legislation relating to export fees.
- 27 WCO 2012a, Annex I, p. 1.
- 28 See Widdowson 2006; ACBPS 2011a, p. 9; Australian Customs Service 2001, 2002.
- 29 Feedback from focus group participants, survey respondents and interviewees.
- 30 See Singapore Customs 2011; Singapore Customs n.d., *Factsheet for mutual recognition*; Singapore Customs n.d., *Secure trade partnership: STP-Plus companies*; Singapore Police Force n.d.
- 31 See Singapore Customs 2011; Singapore Customs n.d., *Factsheet for mutual recognition*; Singapore Customs n.d., *Secure trade partnership: STP-Plus companies*; Singapore Police Force n.d.



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# The role of Customs in the economic integration of East Asia: problems and proposals

Feiyi Wang<sup>1</sup>

## Abstract

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The supply and consumption of regional public goods offers a new perspective from which to analyse economic integration. Further, functional cooperation should be generally acknowledged as constituting the main approach to and essential content of the deeper economic integration of East Asia. In this respect, the provision of regional public goods represents a fundamental element of functional cooperation.

This paper examines economic integration in East Asia and the role played by Customs. The study is largely theoretical but also refers to empirical data. The author argues that the various initiatives embarked on to date to promote economic integration represent only one aspect of this subject and attention should also be paid to the concept of an East Asian customs union. The foundation for establishing such a union lies in customs-related functional cooperation. Customs cooperation could provide the basis for deeper economic integration of East Asia in terms of providing regional public goods. This could then impact on other economic sectors such as the environment and finance as well as political and even institutional areas.

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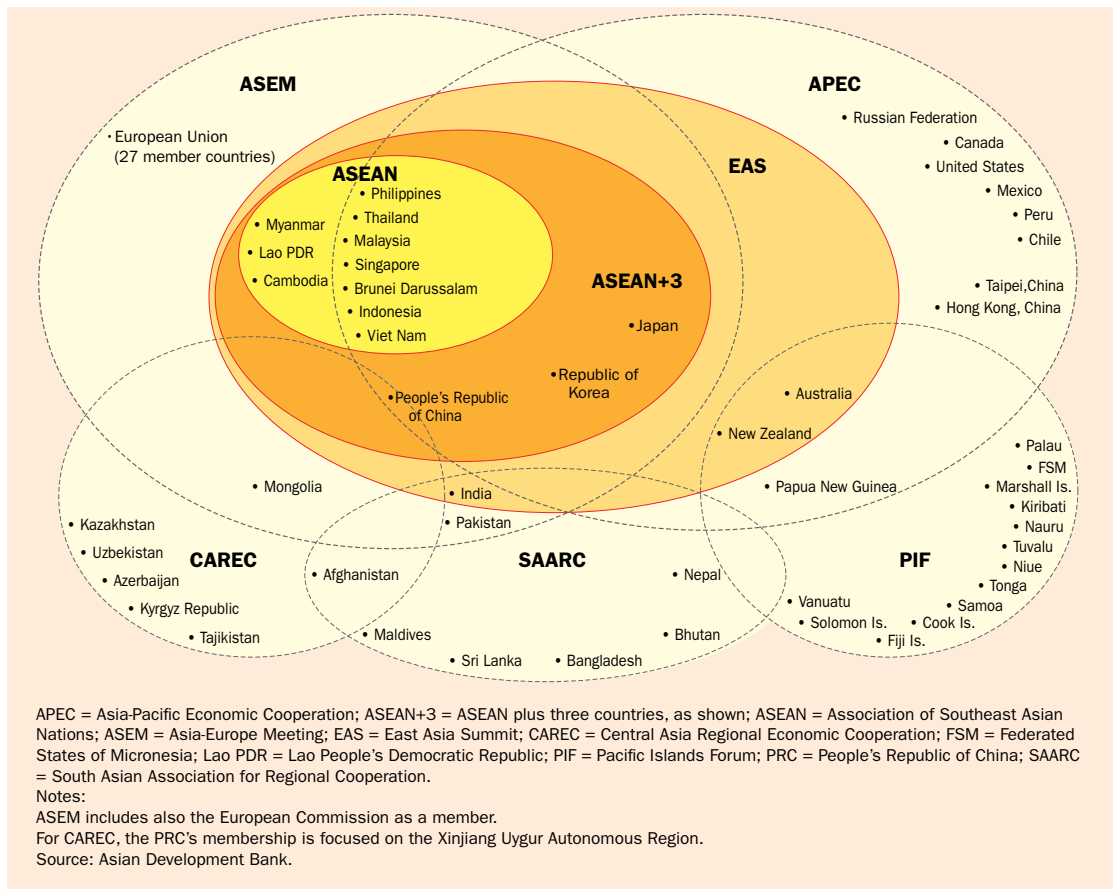
## 1. Introduction

Since the early 1990s, moves towards economic integration, particularly in the form of free trade agreements (FTAs), have progressed rapidly around the world. The process of European Union (EU) integration and the successful launch of the North American Free Trade Agreement (NAFTA) caused East Asian countries to fear that these two giant economic blocs might dominate rule-making within the global trading system while reducing the importance of East Asia in multilateral negotiations (Kawai & Wignaraja 2008, p. 6).

Whereas it is acknowledged that East Asia is not as economically powerful as its North American or European counterparts, there are nevertheless promising signs that further progress will propel the region to equally dominant status. Among the regions of the world, East Asia committed itself to economic integration after the 1997 financial crisis. According to the World Trade Organization (WTO), as of 15 January 2012, East Asian countries had entered into a total of 81 regional trade agreements (RTAs), albeit at different stages of negotiation/implementation.<sup>2</sup> The architecture of regional cooperation is broad in scope, with overlapping subjects (for example, macroeconomics, market access, security, culture) and involves a wide variety of partner countries.

Figure 1 provides an overview of regional integration in East Asia. The Association of Southeast Asian Nations (ASEAN) is involved in the core broader regional arrangements. Although FTAs and regional forums abound, none of them has yet evolved into a fully comprehensive FTA covering all goods, services and investment. Such arrangements have generally been loose, *ad hoc*, and informal. The author suggests that a basic FTA is insufficient to meet the rapidly growing needs of East Asia.

Figure 1: Economic architecture: regional and transregional forums - integration in East Asia



Source: Asian Development Bank 2008, p. 247.

Regional integration is an endeavour which can be extremely broad in scope as it affects a number of areas and involves a myriad of issues. Taking the long process of forming a European Union as an example, it is evident that the complete integration of East Asia is a highly ambitious project that is likely to take many years or decades to fully realise. The aim of this paper is to demonstrate that the supply of regional public goods by Customs will benefit regional integration and, further, that customs collaboration can effectively promote functional cooperation in East Asia. Once functional cooperation has been established in various areas, the next step in the process is likely to be the creation of a customs union (that is, as the second level of economic integration).

The paper is structured as follows. Section 2 introduces Balassa's four stages of economic integration and contrasts theory with the reality in East Asia. Section 3 presents the theoretical foundations needed for a complete understanding of the issues involved, and maintains that, in an era of globalisation and regionalisation, Customs must assume responsibilities other than revenue collection and safeguarding borders. It then describes the customs cooperation that East Asia has achieved within the process of economic integration and suggests ways forward (section 4). The study summarises the findings and provides proposals for increasing the economic and political significance of the proposed customs union (section 5).

## 2. The controversy between economic theory and reality in East Asia

The following is a candid assessment of the current state of economic integration in East Asia, from both a trade and financial/monetary perspective, and highlights the limitations of the formal regional integration initiatives in East Asia to date.

### 2.1 Different levels of economic integration

In general, international economic integration is concerned with the discriminatory removal of trade impediments between participating or member states and the establishment of some level of cooperation or coordination. The level of cooperation depends entirely upon the actual form of integration. According to Balassa (1961, p. 74), economic integration takes four forms that represent varying degrees of integration. These are:

- **Free trade area.** Member countries remove all trade barriers while retaining their own barriers with non-members (for example, NAFTA). This represents the first level of economic integration.
- **Customs union.** In addition to being a free trade area, a customs union harmonises members' trade policies with the rest of the world (for example, the then European Economic Community formed in 1957). In 2007, the Republic of Belarus, Russian Federation and Republic of Kazakhstan formed a customs union which entered into effect on 1 January 2010.
- **Common market.** This allows the free movement of labour and capital between member states (for example, the graduation of European Economic Community into European Common Market in 1993). A common market represents the third level of economic integration.
- **Economic union.** Members of a common market integrate further by unifying their monetary and fiscal policies (for example, Benelux countries, now absorbed into the EU). An economic union reflects a higher and increasingly complex level of regional cooperation. So far, only those EU countries which participate in a monetary union have attained this level (Balassa 1961; Robson 1998; Holden 2003; Salvatore 2003).

In brief, the levels of economic integration range from a free trade area, customs union, common market to an economic union. Table 1 shows an index outlining basic characteristics associated with different levels of economic integration. Note that the first two require only the removal of impediments on trade between participants or the elimination of restrictions in the process of trade liberalisation while the last two relate to the modification of existing institutions or creation of new ones to enable the markets of integrated members to function properly and promote potentially broader aims of the union.

Table 1: Levels of economic integration

Features Forms	Removal of internal quotas and tariffs	Common external tariff	Free mobility of factors of production	Harmonised monetary and fiscal policy
Free trade area	√			
Customs union	√	√		
Common market	√	√	√	
Economic union	√	√	√	√

Source: Compiled by author.

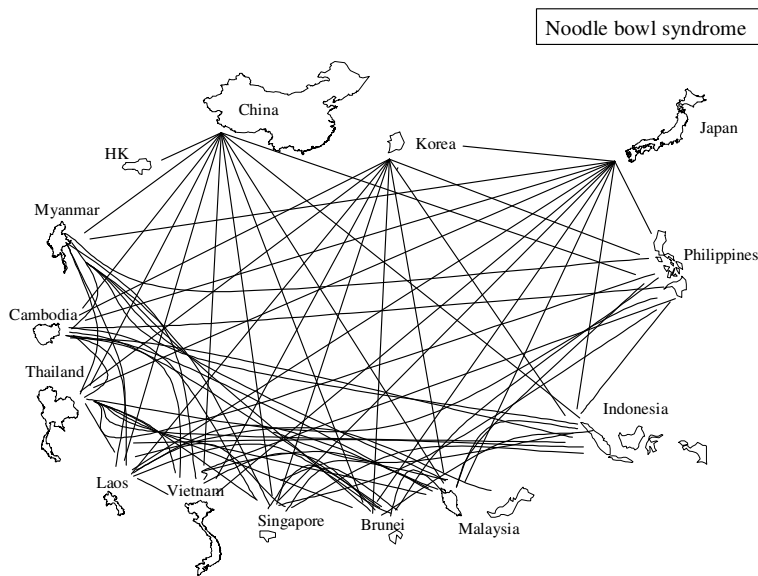
Analysing these stages within an East Asian context, the financial cooperation that is taking place in the region suggests that East Asia is attempting to move from a free trade area to an economic union without first implementing a customs union and then a common market.

## 2.2 Economic integration in East Asia: process and problems

Economic integration has spread around the world: from the EU to NAFTA, MERCOSUR (South American Common Market) and ASEAN (Frankel & Kahler 1993; Kahler 1995; Haggard 1997; Mansfield & Milner 1999; Katzenstein 2005). The EU and NAFTA are often touted by international organisations and scholars as examples of successful economic integration to emulate. Why then has economic integration been much less successful in other areas, such as East Asia?

East Asian countries have been actively pursuing FTAs for over a decade. In addition to regional initiatives, these countries have also formed partnerships with cross-regional states. This has led to a noodle bowl of overlapping rules of origin that can seriously impede trade liberalisation. Arguably, harmonising these rules represents one of the most important steps in deepening integration. As depicted in Figure 2, the trading landscape of East Asia resembles a noodle bowl of bilateral and multilateral trade agreements, coalitions, formal and informal cooperation efforts, forums, and dialogues. With each year that passes, the noodle strands multiply as countries enter into ever more agreements.

Figure 2: The noodle bowl of East Asian economic integration



Source: Baldwin 2006, p. 36.

**Economic integration in East Asia has been characterised as ‘leap development’.** It is difficult to use Balassa’s theory to explain the process of economic integration in East Asia because the region did not embark on economic integration step-by-step. Prior to the financial crisis of 1997, economic cooperation in East Asia was focused on trade and investment. The crisis led to increased calls for regional cooperation in the financial area. The Asian Development Bank has strongly argued that regional integration is important to build more resilient economies and that an Asian financing facility would provide more timely and better-tailored support (Asian Development Bank 2008, p. 33). Consequently, a number of financial arrangements and initiatives have emerged from the crisis, including the Chiang Mai Initiative (CMI), a system of bilateral currency swap agreements. In other words, the regional integration of East Asia began with monetary and financial cooperation rather than trade cooperation. This level of integration usually characterises an economic union and is considered to be an overly ambitious agenda for East Asia.

**Will integration through ‘leap development’ succeed in the future?** Or rather, will this kind of development finally succeed in East Asia? The experience of the EU may hold the answer. In the 1970s, when it appeared that the Bretton Woods Regime (which had sustained the global financial system) was going to collapse, the European Economic Community sought to leap-frog the common market phase and establish an economic union.<sup>3</sup> The European Monetary System, however, was experiencing many problems due to its lack of a fundamental common market. In 1992, the internal contradictions and limitations of the monetary system led to the outbreak of a currency crisis in Europe.

In 1985, the EU passed the Single European Act, which reinforced the goal of developing a common market as established by the Treaty of Rome. The Act set a clear timetable of establishing the European common market by 1992. The Single European Act had removed all obstacles in order to realise the free movement of goods, service, capital and labour.<sup>4</sup> We can conclude that the European Economic Community’s motivation to establish an economic union also originated from crises precipitated by the chaos caused by the collapse of the Bretton Woods System. In the event, the economic union was successfully realised after the Common Market had been established in 1993.

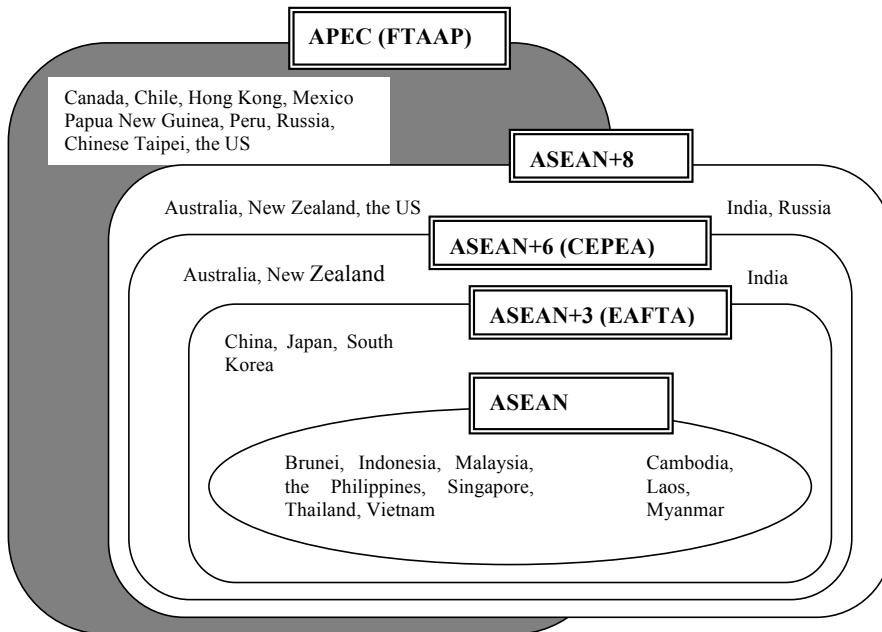
**Economic integration by ‘leap development’ can probably solve temporary crises, yet it cannot build a stable regional cooperation mechanism.** At present, East Asia has made some progress in financial cooperation but the motivation of East Asia is to deal with financial crises, avoiding the economic loss caused by a large fluctuation in member countries’ exchange rates. It is not currently realistic to create an Asian monetary union; without free trade or a common market in East Asia, there will be no demand for an exchange rate mechanism and single currency within the area. In theory, monetary and financial cooperation are based on trade cooperation. As a result, financial cooperation in East Asia cannot simply focus on avoiding financial crises but must also accelerate the process of establishing free trade areas and a customs union to promote financial cooperation. In other words, East Asia is still at the initial stage of economic integration despite the fact that it has already established a degree of financial cooperation.

As illustrated above, there is a pressing need for the deeper integration of East Asia. Despite this, **there are many challenges in the region that have the potential to impede its future development.** FTAs are proliferating in East Asia. This proliferation will become a foundation for the region’s economic integration on the one hand but will also lead to the ‘spaghetti (or noodle) bowl syndrome’, due to a mixture of different rules (for example, rules of origin), on the other. In addition, the need for many procedures and documents, as well as customs clearance at borders, will incur much time and expense, leading to high cooperation costs. Apart from the noodle bowl of overlapping rules of origin, there will be many other issues to address before further economic integration is achieved.

The first fundamental issue confronting East Asian countries is **diversity**, in terms of economic size, population, culture, religion, and language. This could represent both an advantage in that all kinds of different resources could be combined to promote deeper interdependent integration and a disadvantage in that each difference could present a potential barrier to regional economic integration. The most important element of the future integration process is to balance the various needs of the individual countries with those of the overall integration process.

Second, the **enlargement of membership** is an issue which is difficult to tackle considering the conditions pertaining in the various countries. It arises from the basic question: is East Asian economic integration ‘open’ or ‘closed’ regionalism? If it is ‘open’, the inefficiency of the Asia-Pacific Economic Cooperation (APEC) will be revealed in future. If ‘closed’, the standard for enlarging membership should be set up immediately. Establishing standards and criteria ensures that all members adhere to a common schedule, comply with their obligations and, moreover, prevents economic integration being dependent on voluntary action. Whereas Malaysia and China prefer an Asia-based arrangement based on political motivation, Japan and Australia prefer an arrangement based on United States (US) accession.

Figure 3: Enlarging the membership of East Asian economic integration



Source: Compiled by author.

Figure 3 provides a snapshot of the most significant initiatives undertaken to date. These efforts have been undertaken both contemporaneously and at other times which has led to a ‘multi-layered’ implementation of cooperative efforts (Shimizu 2009, p. 3). It also shows different versions of East Asian cooperation in terms of membership. Thus, the greater the consensus established among countries, the greater the chances of creating an East Asian arrangement.

Third, **external common security conditions** cannot become a unifier for East Asia. Rather, countries in this region have different national security concerns which depend upon their geographical position and circumstances. This contrasts with post-war western Europe which had a unifying core partnership (Germany and France), as well as external pressures (strategically, the Soviet Union, and later, economically, the US; see Keohane & Nye 1999). In East Asia, regional security networks had to be reconstructed after the Cold War era.

Finally, **the impact of the US** is a key political issue within the process of economic integration. The major question is whether to exclude US power in this region or not. The majority of East Asian leaders appear in favour of exclusion. The first East Asian Summit limited membership to countries in the East Asia region and the goal of economic integration to building an East Asia Community. The US, however, uses APEC as a platform for liberalising its preferred sectors in East Asian countries and increasing competition with China.<sup>5</sup> Whether to include or exclude US power remains the key issue among East Asian countries.

Based on the analysis above, the key point in negotiations for further economic integration is how to remove barriers between East Asian countries. No doubt, the integration process in East Asia is more difficult than in other regions around the world. Many of the obstacles hindering the development of East Asia are customs-related. Many parts of the region suffer from excessive control and inefficiencies in customs procedures combined with a monopoly of service providers at key entry points in importing countries. For example, the complexity of classification, valuation, clearance procedures and resultant

disputes are depressing monuments to the lack of trade facilitation in ASEAN countries (Chia 2010). Consequently, it must be clarified what Customs should do to remove the barriers among East Asian countries in order to promote the further economic development of East Asia.

### 3. Theoretical perspectives on Customs in the process of economic integration

This section explores the role of Customs in the economic integration of East Asia. Its aim is to (1) provide a coherent and systematic explanation of how Customs interplays with economic integration, and (2) propose a highly integrated regional arrangement that reflects the complicated diversity of East Asia.

#### 3.1 The neo-functional perspective

Neo-functionalism is a theory of regional integration, building on the works of Haas (1961, 1964) and Lindberg (1963). Neo-functionalists studied the development, evolution and experience of the EU and claimed that European integration (which aimed at integrating individual sectors in the hope of achieving spillover effects to further the process of integration), corresponded with their school of thought. The main views of neo-functionalism are:

- International cooperation should begin in the field of economics. This is because functional cooperation in the economic realm is largely characterised by a preoccupation with technical issues and absence of political disputes. As a result, cooperation is easy to achieve.
- This kind of economic cooperation has a spillover effect (Keohane & Hoffman 1991, p. 19). The ‘spillover effect’ refers to the notion that integration between states in one economic sector will promote integration in other sectors. The latter will be keen to integrate once they observe how integration has benefited the sector in which it started (Mitrany 1975, pp. 124-27).
- It follows from this core claim that European integration is self-sustaining, with the ‘spillover effect’ triggering the economic and political dynamics which drive further cooperation.

Neo-functionalism describes and explains the process of regional integration in terms of how the three causal factors interact: (a) growing economic interdependence between nations, (b) organisational capacity to resolve disputes and build international legal regimes, and (c) supranational market rules that replace national regulatory regimes (Haas 1961; Sandholtz & Sweet 1997). The process of EU integration may be regarded as the best practice of neo-functionalism.

#### 3.2 The regional public goods perspective

**Public goods** is a concept of economics which refers to the products and services provided by the government within a country (for example, public order, social security) to meet the common needs of all citizens. The realist school of international relations transfers this concept into international politics and argues that a certain number of international actors should take on the role of providing basic public goods in order to realise the stability and prosperity of the entire international community. Olsen (1971) first used the concept of **international public goods** to enquire how the incentive effect of international cooperation could be improved.

Generally, **regional public goods** refer to the international arrangement, mechanism and institutions which particularly serve local areas and whose costs are shared by the countries within the region. In general, regional public goods in the economic field include the stability of the financial system, open market, economic growth and stable development, and so on. Those forming part of the political field include regional security and political trust.



The initiative for providing regional public goods is based on the rationale that the countries of East Asia share both challenges and opportunities for development that can be acted on and realised more effectively and efficiently at a regional level through collective action and cooperation. Regional public goods, which involve several boundary authorities and regions, have a more complicated supply and management mechanism than common public goods. As the consumption of public goods is non-inclusive and non-competitive, it is possible to select areas of regional cooperation according to a comparatively objective standard. On the other hand, as regional public goods have a small area of coverage, their costs and benefits are clear to each country. To a certain extent, therefore, it is possible to decrease the phenomenon of ‘free riders’ and avoid the ubiquitous shortage of public goods.

### 3.3 A third perspective

Research on regional public goods in economics and the spillover approach of neo-functionalism has provided new analytical frameworks for the analysis of regional cooperation. The following section looks at both theories of customs cooperation in East Asia to see whether they support the idea of creating an East Asian customs union in order to promote the deeper integration of East Asia. It also suggests a third approach combining elements of both models, arguing that an East Asian customs union is a rational and realistic choice for promoting integration in East Asia.

The theory of regional public goods proves especially persuasive in relation to the issue of regional cooperation and integration. The regional public goods demanded by regional cooperation in East Asia are determined by the political, economic and cultural diversities of the member countries in this region. An internal task of East Asian countries is to overcome the development barriers by increasing the supply of regional public goods. Regional public goods and cooperation are mutually conducive: regional public goods can provide new momentum for regional cooperation. The effective supply of regional public goods is closely linked to the process of regional cooperation insofar as the constant improvement of regional cooperation increases their efficient supply. The theory of regional public goods addresses the following questions:

- What is the relationship between functional cooperation, regional public goods and economic integration? Will functional cooperation or regional public goods offer a practical approach to the question of promoting economic integration?
- Can Customs prove to be the initial driving force in the process of functional cooperation in East Asia? Does a customs union offer a possible and realistic approach to the question of overcoming obstacles to and difficulties in the economic integration of East Asia?
- Finally, how are all these discussions related and how should they be applied to the circumstances of East Asia? What policies have to be implemented in order to ensure that the role played by Customs serves to improve regional economic integration?

## 4. Proposed ways forward: the idea of an East Asia customs union

East Asia is not a stranger to the concept of economic integration; various calls in the past for broader cooperation have led to a variety of summits, economic partnerships, and initiatives. The following proposals are submitted for the future development of East Asia.

### 4.1 The role of Customs in the process of functional cooperation

East Asia can already boast a number of examples of functional cooperation in the fields of agriculture (2001), tourism (2002), environment (2002), energy (2004), telecommunications and IT (2004); however, there has been little in the way of actual agreements (Yoshimatsu 2005, p. 212).

However, within the context of this paper, the question is what should Customs do to promote functional cooperation in light of the special roles it performs at different levels? It is imperative for East Asia to create pivot points through the functional spillover, provision and consumption of regional public goods. The following explains the role of Customs in this respect at regional and national levels.

As far as the role of Customs at the regional level is concerned, FTAs provide an important example. Most FTAs contain a chapter which concerns customs procedures and trade facilitation. There is such a chapter in the FTAs concluded between ASEAN member states which includes customs procedures and supervision, risk management, use of IT, post audit, etc.

The role of Customs at the national level can be explained by the example of China Customs. This customs authority has four traditional functions: supervision, statistics, duty collection and anti-smuggling. In addition, other specific responsibilities of China Customs include the supervision and management of bond operations; audit-based control and the protection of intellectual property rights (IPR). What is more, China Customs also shoulders some non-traditional functions in the era of globalisation (for example, safeguarding social security and anti-terrorism).

Considering the multi-dimensional nature of customs' tasks, there has been a great deal of interagency cooperation between customs authorities in East Asian countries. For example, China-ASEAN customs cooperation was launched in 2003. The two sides have since established a regular consultation mechanism at ministerial level and a consultation mechanism of expert customs coordination committees. As of 2011, there had been nine consultative sessions of China-ASEAN customs directors.

China-Japan-Republic of Korea (ROK) Customs Heads Meeting (which was officially launched in 2007), has provided an important platform for the three customs authorities to strengthen their coordination and cooperation in regional affairs. The Fourth Customs Heads Meeting in November 2011 adopted the revised Action Plan of the Tripartite Customs Cooperation, which mapped out future trilateral customs cooperation. The Trilateral Customs Heads Meeting is supported by four working groups: IPR protection, customs enforcement and intelligence, authorised economic operator (AEO) and customs procedures.

In the area of **IPR protection**, the customs authorities of the three countries have adopted the IPR Action Plan (fake-zero project), and made progress in information exchange (both generally and in individual cases), sharing legislative and law enforcement practice, public awareness and cooperation with IPR holders.

Concerning **law enforcement cooperation**, the three countries have concluded the Action Plan on Intelligence Exchange and Law Enforcement Cooperation, improved the dissemination and utilisation of intelligence and information for combating commercial fraud and drug trafficking (in accordance with the provisions of the action plan), provided mutual support in case investigation and led effective joint campaigns against transnational smuggling activities.

The three countries have also taken effective steps to advance cooperation in **AEO mutual recognition**. The customs authorities of China and the ROK have signed the Action Plan for AEO Mutual Recognition, which was expected to lead to the formation of an arrangement for AEO mutual recognition between China and the ROK in 2013. The customs authorities of China and Japan have also drafted a roadmap for AEO mutual recognition and are now in the process of comparing their respective AEO regimes.

In relation to the **harmonisation of customs procedures**, the three countries have adopted the Work Plan for the Improvement of Customs Procedures and identified the priorities and goals of the customs procedures working group.

The customs authorities of the three countries have also achieved close and effective cooperation in **human resources development**. In particular, the General Administration of China Customs has signed the Memoranda of Co-operation in Human Resource Development with its counterparts in Japan and the ROK, thereby laying a solid foundation for promoting cooperation with these countries.

Overall, the customs authorities of these three countries have conducted in-depth exchange of views on regional trade security and facilitation, IPR protection, law-enforcement cooperation and human resources development at the Customs Heads Meeting. This has not only contributed to the healthy growth of their own economies (and the regional economy as a whole) but has also set a good example for customs cooperation in other parts of East Asia.

### 4.2 Customs and the supply of regional public goods in East Asia

As a result of the tremendous shock of the global financial crisis, customs cooperation among East Asian countries has made great progress and their close economic cooperation could play a role in providing regional public goods and driving regional integration. The following explains how customs cooperation can provide regional public goods in fields such as border security and transnational crime, trade liberalisation and free trade arrangements, revenue collection and cargo administration, public health and environment protection, natural disaster/response, IPR, etc.

- **Regional security.** Globalisation and terrorism are challenging the very notion of borders. Before the terrorist attack on 9/11, the overriding concern of world economists was to open up borders and facilitate trade. This terrorist attack significantly heightened awareness of the need for Customs to play a more meaningful role in protecting society from various threats (Widdowson 2007, p. 31). The border security requirements in today's international environment are emerging as a significant challenge for Customs. The need for enhancing global security in maritime and aviation transport means that Customs is likely to play a greater role in these areas than has traditionally been the case. In November 2002, China and ASEAN leaders signed the 'Joint Declaration on Co-operation in Non-traditional Security Areas to Safeguard Regional Security'.
- **Trade liberalisation and FTAs.** WTO Members are committed to the multilateral trading system and promoting the Doha Round of trade negotiations. At the same time, some are pursuing trade liberalisation through bilateral, multilateral and regional FTAs. Customs plays an important role in supporting the WTO negotiations on a Trade Facilitation Agreement, as well as developing national positions on FTA negotiations. Customs are best placed to comment on customs-related issues and prepare relevant drafts. However, the increasingly different ways of administering common issues under FTAs (for example, the application of rules of origin) may pose challenges for Customs in the future.
- **Public health and environmental protection.** The World Health Organization (WHO) believes the world is closer to an influenza pandemic than at any time since 1968. Events since January 2004 affecting both human and animal health (including avian influenza), have given the world an unprecedented warning of a potential pandemic. The WHO says it is prudent for all countries to take or intensify precautionary measures as a matter of urgency.<sup>6</sup> In many countries, Customs will be part of the 'frontline' in tackling the threats to national health.
- **Disaster relief.** The tsunami in Southeast Asia highlighted the importance of the customs clearance of relief consignments. As global warming and population growth continue, such events may occur ever more frequently. Improvements in the role Customs plays in disaster relief could be an important issue in the future.

In a word, Customs plays an important role in implementing a range of critically important government policies and contributes to achieving a number of development objectives. To that end, it must enhance its effectiveness and efficiency in monitoring compliance with trade regulations, protecting society, collecting revenue, facilitating trade and securing international trade. This would contribute to the economic and social well-being of nations and deeper economic integration in East Asia.<sup>7</sup>

### 4.3 Ways forward

**A standing body is needed to sustain economic integration.** A neo-functionalist approach emphasises the role of institutions in EU policymaking (Dysvik 1997). By making proposals, facilitating bargaining and providing organisational skills, the Commission can exercise task-orientated leadership and promote the spillover process (Lindberg & Scheingold 1970, p. 129). Consequently, a standing body must be established to guarantee the steady progress of economic cooperation in East Asia. The establishment of permanent institutions can be integrated into the main institutions of functional cooperation. Therefore, the regional Asian currency institutions, meteorological and disaster prevention agencies (as the transitional form of regional public goods), should play a more important role in East Asian regional cooperation in future.

The main focus of East Asian economic cooperation has been the advance of East Asia's financial regionalism. However, although East Asian economic integration is on track, there is still a long way to go: the current political challenges in the region are too broad and intense to contemplate much beyond the creation of a second-level form of integration. Accordingly, **the establishment of a customs union**, which abolishes internal barriers and establishes a common external tariff, is most likely to be the next step for East Asia. This does not rule out the creation of a common market for East Asia (similar to the EU) which could eventually evolve into a full-blown economic union. This view is supported by three important projects: the Chiang Mai Initiative, the Asian Bond Market Initiative (ABMI) and the Asian Currency Unit (ACU) initiative. However, these projects do not necessarily mean that East Asia has already attained the third level of economic integration and is in the process of forming an economic union.

There is no doubt that East Asia can learn from the experiences of NAFTA and the EU. As this region is unique in many ways, a customs union should be tailored to the particular needs of East Asia. From the author's point of view, the East Asian customs union is designed to increase the competitiveness of companies doing business in East Asia and abroad, reduce compliance costs and improve East Asia's regional security by providing a centralised customs service that underscores uniformity and modernisation.

**Possible functions of a future East Asian customs union.** The profile of Customs is being elevated within government circles and internationally. The World Customs Organization (WCO) has already noted that an efficient and ethical customs administration can make a major contribution to effective revenue mobilisation, assist governments facilitate trade and investment and increase confidence in the quality and integrity of government institutions. Increasingly, Customs is playing a leading role in economic integration and the focus on customs issues within international forums has increased general awareness of the importance of customs' function within government.

Given the actual process of regional cooperation in East Asia, Customs is responsible for the tasks of supplying regional public goods, ensuring customs cooperation as well as covering most fields of functional cooperation. Therefore, the establishment of a permanent committee of customs cooperation is urgently needed and this is exactly what the second phase of integration offers in the form of a customs union. Customs cooperation may be seen as a breakthrough point in East Asian regional cooperation, thereby uniting theory and practice.

There is no doubt that a properly designed and efficient customs union can make a major contribution to economic integration at a regional level. The functions of the future East Asia customs union would be designed to: (1) endorse the customs union as a vital part of protecting the external borders of East Asia; (2) facilitate trans-border operations; (3) encourage changes in the tax systems that support common objectives, competitiveness, and development; (4) effectively respond to the international challenges associated with customs and tax policies; (5) foster better collaboration among member states in tackling customs and tax offences; and (6) promote a regular and open dialogue with stakeholders on policies and programs in response to the pressure of global trade and globalisation.

## 5. Conclusions

The East Asian region has progressed rapidly over the last few decades and is now the most advanced region of developing countries in the world. The drive towards deeper integration in East Asia builds on the integrated production network ('Factory Asia') which has knitted together the East Asian region. This paper has argued that the next logical step for the East Asian region would be to enhance economic integration by consolidating the myriad of trade agreements into one comprehensive regional arrangement and establishing a customs union among East Asian countries that already have close and existing interdependencies.

Deeper economic integration in East Asia could and should start from areas of functional cooperation with the aim of providing regional public goods for East Asian countries. In the context of inadequate supplies of international public goods, it will become increasingly common for regional countries to supply, finance and manage supplementary public goods for the benefit of the region. The regional regime could solve the potential problem of 'free riders' by ensuring countries share the costs of supplying regional public goods. This strategy would also be attractive to East Asian countries.

The initiatives outlined above indicate that there is great interest in economic integration at a much more profound level. Unresolved questions relate to the form this should take and what would be the most beneficial arrangement for East Asian countries and the global community as a whole. The proposal for deeper integration in this paper anticipates the creation of a customs union. It is argued that East Asia is ready to move beyond an FTA, and must seek an alternative in order to achieve sustainable growth. By deepening trade and economic integration in a customs union, East Asia could benefit from enhanced efficiency and, at the same time, adopt a stronger negotiating position in multilateral talks.

The main findings of this paper are as follows:

- Functional cooperation should be commonly regarded as an essential approach and the main content of deeper economic integration in East Asia.
- Considering the complex political, economic and social realities of East Asia, the provision of regional public goods represents a fundamental method of functional cooperation.
- Given the special and important responsibilities of customs administrations, Customs can and should play a key role in the provision of regional public goods to promote functional cooperation with the aim of deepening economic integration.
- In East Asia, through regional customs cooperation, Customs can provide regional public goods in terms of regional security, trade liberalisation, public health and environment protection, as well as disaster relief, etc.
- The second level of economic integration, the customs union, appears the most appropriate next step for East Asia.
- A Commission or Secretariat is essential to ensure the proper functioning and development of a customs union at the supranational level. The proper design and implementation of a customs union can create trade and encourage the region's participation in multilateral liberalisation.

It is also argued that the East Asian region must make a concerted effort to work as a unified whole. The theory of regional public goods offers a new perspective in the study and interpretation of the trends towards economic integration. In areas of customs cooperation, supplying regional public goods can help eliminate barriers, reduce the costs of cooperation, promote functional cooperation and finally, pave the way for the economic integration of East Asia.

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## Notes

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- 2 World Trade Organization. In particular, negotiating RTAs, mostly the result of the formation of bilateral free trade areas, for example, a Singapore-Korea FTA, and some multilateral FTAs, for example, an ASEAN-China FTA, are very common in the region.
- 3 In January 1979, the European currency system was instituted, with the ruling that the proportion of currency of every member country be linked with the economic power of the country.
- 4 The effect of the Single European Act shows the determination of the EU to achieve the Economic Union. In June 1998, the 'Economic and Monetary Union Research Council' was established to decide the specific procedures of this union, and in April 1989 it published the Report on Economic and Monetary Union in the European Community. At the end of 1991, when the European Common Market was imminent, the establishment of a European Economic and Monetary Union was approved at a meeting in Maastricht. At the end of 1992, when Europe had achieved the aim of the Common Market, the Economic and Monetary Union came into being which established a single currency (the 'euro') on 1 January 1999.
- 5 Yongtu Long, 'China and Asian regional co-operation', in Kiichiro Fukasaku (ed.) 1995, pp. 53, 54-7.
- 6 World Health Organization, Executive Board, January 2005.
- 7 The WCO provides a broad vision for Customs in the 21st century, which is to support international development, security and peace by securing and facilitating international trade. While the core roles and responsibilities of Customs have remained essentially the same for many years, the manner in which customs administrations discharge these roles and responsibilities has changed in recent times. The WCO's 'Guidelines on the use of the Customs Capacity Diagnostic Framework' describe the drive for this change. See *WCO Customs Capacity Building Strategy 2003*.

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# Effects of the implementation of single window and simplified customs procedures in the Republic of Macedonia

*Katerina Tosevska-Trpcevska*

## Abstract

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This paper analyses the effects of implementing two important measures for trade facilitation: the single window concept and simplified customs procedures, based on research conducted in the Republic of Macedonia. Results from this research indicate that introduction of the single window has been viewed positively by companies due to savings in time and human resources. In relation to implementation of simplified customs procedures, the results indicate that all variables measured (average numbers of documents, signatures, hours, costs) show reductions in comparison with regular customs procedures, indicating that such measures can have a significant influence on the facilitation of trade. The research serves to confirm that introduction of trade facilitation measures is necessary for assisting Macedonian companies to compete more effectively in the international marketplace.

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## 1. Introduction

As proven by several empirical studies, implementing trade facilitation measures is important for every country and, without exception, leads to positive economic outcomes and increased trade. For the Republic of Macedonia, a small, open and import-dependent country, trade facilitation is a necessary condition for improving its position on the international trade scene and realising higher rates of economic growth. Conducting research that assesses the trade facilitation measures that have been put in place and demonstrates the potential benefits of implementing new measures is of great importance for the country and a challenge for researchers in the field of international trade.

The Customs Administration of the Republic of Macedonia (CARM) is the responsible institution for implementing trade facilitation measures as recommended by the World Customs Organization (WCO), and is also the principal state agency for ensuring trade security. Among the most significant measures implemented by CARM to increase security of the international supply chain and to facilitate trade are a risk management system, the electronic single window for issuing import, export and transit licences and for quota allocation, simplified customs procedures for secure trading partners, electronic submission of pre-arrival and pre-departure information, and several facilities for operators to obtain approvals electronically (CARM 2011a, pp. 8-12).

This paper analyses the effects of the implementation of two important measures for trade facilitation: the single window concept and simplified customs procedures in the Republic of Macedonia. The second part of the paper focuses on the implementation of the single window concept; in the next section, the simplified customs procedures in use in Macedonia and the criteria for their application are discussed. Details are then provided about the research questionnaire used, the data parameters, the results obtained,

and some additional issues arising from the research. The paper concludes with commentary on the feedback received from the Macedonian companies surveyed and provides some recommendations and guidelines for CARM to address measures currently in place in order to improve the facilitation of trade.

## **2. Implementation of a single window in the Republic of Macedonia**

The project to develop a single window system in the Republic of Macedonia began in 2007 and became operational and compulsory for all users of import, export and transit licences and tariff quotas in 2009.

Implementation of the system, known as EXIM, as a tool for trade facilitation has had strong political support and will, and rules for its application that focus on the needs of the business community have been clearly defined (Kutirov 2009).

Legal aspects that arose during the implementation of EXIM were the need to establish an appropriate legal framework to enable electronic submission of documents, use of digital signatures and their authentication, enabling data exchange between government agencies taking into consideration the importance of business confidentiality, security and data protection.

Key legal instruments that enabled the introduction of the single window were the Law for General Administrative Procedure, the Law on Administrative Taxes and the Law for Data in Electronic Form (Dimitrovski 2008, p. 159). In addition to the amendments to these laws and several bylaws, the functioning of the single window is regulated by a 'Direction for implementation and application of the information system for data in electronic form and electronic signature during import, export and transit'. This Direction was introduced in 2008 and revised in 2011 (*Official Gazette* 2008, No. 134, pp. 1-2; 2011, No. 13).

The single window is managed by CARM in coordination with other government agencies that use the system. These include the Ministry for Interior through the Bureau for Public Safety, Ministry for Economy through the Bureau for Meteorology, Ministry for Environment and Physical Planning, Ministry for Agriculture through the Directorate for Seeds and Seeds Material, Phyto-sanitary Directorate and State Agricultural Inspectorate, Ministry for Health through the Bureau for Medicines and the State Sanitary and Health Inspectorate, Ministry for Culture through the Directorate for Protection of Cultural Heritage, Ministry for Transport and Communication through the State Transport Inspectorate, Food and Veterinary agency and the Directorate for Radiation Security (*Official Gazette* 2011, No. 13, pp. 3-4). Under CARM's leadership, 16 government agencies of the Republic of Macedonia are interconnected from which 61 licences can be obtained for import, export and transit (CARM 2011b). EXIM enables simple electronic creation of and single window application for all documents (licences, approvals and tariff quotas) needed to perform customs procedures for import, export and transit to and from Macedonia, with complete security and transparency for users and economic operators.

From CARM's point of view, the benefits and simplification in trade that have resulted from the implementation of EXIM are: enabling services to apply for a licence 24 hours a day, seven days a week; time and cost savings through electronic applications; increased efficiency and legal security in the process of licence approval; easier exchange of information resulting from the use of standardised and harmonised data; automated management of licence usage, and transparent tariff quota allocation (Kutirov 2009).

The benefits identified by economic operators following the implementation of the single window are: simple search mechanisms; straightforward procedures for obtaining a licence; resource savings (time, costs and human resources); improved communication; and contact with and resolution of problems by CARM as the responsible agency for its functioning (Kostovski 2011).

In December 2009, the United Nations Economic Commission for Europe (UNECE) recommended EXIM as a model for development of an electronic single window system for import and export licences

in the region, and suggested that the Macedonian experience should be included in the WCO's guidelines for the development of such systems in less developed countries (CARM 2010a, p. 8; 2011a, pp. 10-11).

The use of EXIM in the Republic of Macedonia is constantly growing. The number of licences issued in 2010 in comparison with 2009 showed an increase of 82%, with 52,081 licences being issued in 2010, compared with 28,632 in 2009. In 2011, the figure was 66,818 (CARM 2012, p. 20). There are 595 registered users of the system among which there is a large number of companies that act as customs representatives for thousands of clients (CARM 2011, p. 11).

The application of single window systems has been promoted as one of the most important solutions for trade facilitation and, in the same way, for ensuring its security. Undertaking an assessment of the operation of EXIM in the Republic of Macedonia was therefore considered of great importance, and was based on research that involved individual assessment by companies which used the system. The results of the research indicated that EXIM had helped to facilitate trade by speeding up the process of obtaining licences, providing savings in terms of time, human resources and costs, and generally, in facilitating the activities of economic operators. The research also served to identify problems, bottlenecks and potential solutions with the ultimate goal of facilitating global trade.

### **3. Implementation of simplified customs procedures in the Republic of Macedonia**

The current customs law and the Direction for its implementation came into effect on 1 January 2006. Simplified customs procedures based on the revised customs law include: simplified procedures for declaring imports and exports, for local clearance of imports and exports, and for simplified transit. To be eligible for simplified customs procedures, the economic operator must be financially stable, demonstrate full compliance with customs and tax laws in the past three years, and have been engaged for at least two years in the activity for which simplification is being sought. Users of simplified customs procedures must also pledge an instrument guaranteeing customs duties (Guidelines 2010, pp. 4-8).

The simplified procedures for declaring imports and exports enable domestic traders to declare goods using a procedure that includes submitting simplified customs declarations electronically. This means that the application can be processed based on a declaration with minimum data or documentation, with additional information being provided by the declarant at the end of the accounting period (Guidelines 2010, pp. 33-37).

Users of these procedures may perform all customs formalities at their own premises or in other places approved by the customs authorities. This means that customs terminals no longer have to be used, and that there are no time/day constraints – the processes can be carried out at any time of day, on working and non-working days (Guidelines 2010, pp. 20-33). Local clearance lowers traders' costs, especially terminal costs and some forwarding costs. The ability to perform customs clearance procedures without the usual time constraints reduces the time taken for some transport operations and enables better planning of business activities.

Simplified procedures for local clearance are applied more for export than for import. This is because of the limiting factor of inspection controls applied to goods when imported into the country. Another limiting factor is that CARM is promoting the simplified procedures for those traders that at least 10 times a month register the same type of goods in a certain clearance procedure, as well as goods that can easily be classified in the nomenclature for control relief when needed (Customs/Newsletter 2009, pp. 14-15).

In 2008, CARM introduced the option of clearing goods at the time of border crossing or at any other time at the following border crossing points: Blace, Deve Bair, Delchevo, Novo Selo, Bogorodica and

Medzitlija (CARM 2012, p. 56). This simplified process is used more by exporters than importers because there is less presence of inspection agencies at border crossing points. Export clearance can be arranged 24 hours a day which reduces transport operations and avoids terminal costs (Customs/Newsletter 2009, p. 15).

In the second half of 2011, the inspection agencies for food and veterinary, for sanitary and phytosanitary control, and for agriculture introduced controls at border crossings. This saw an increase of 30% in the number of declarations submitted using the simplified procedures (CARM 2011, p. 19).

Two simplified procedures are available to perform transit operations in the Republic of Macedonia. Economic operators can apply to obtain the status of certified recipient and certified sender in relation to transit goods. The status of *certified recipient* enables the holder of the certificate to receive goods in transit in its own premises or in other designated places without the inspection of goods and the submission of a transit declaration to the customs authorities. The certified recipient must notify the customs authorities in advance for each import separately. However, for goods transiting with TIR carnet this simplified procedure cannot be applied (Guidelines 2010, pp. 16-20).

The status of *certified sender* enables the holder of the certificate to perform transit operations without the inspection of goods and the submission of a transit declaration to the customs authorities. This status can be used by entities which have been approved to use a general guarantee or have been approved for relief from the guarantee (Guidelines 2010, pp. 11-15).

Although there is increased interest, some restrictive factors and insufficient promotion of the simplified customs procedures by CARM, has meant that their application in the Republic of Macedonia has been limited. In 2010, 121 certificates for simplified procedures were approved and 29 operators had been granted approved exporter status (CARM 2011, p. 12). In the same year, the simplified procedures were used for 21% of all customs declarations – 15% of import declarations, and 33.7% of export declarations. In 2011, 27% of declarations were processed using the simplified procedures, of which 22% related to import and 36% to export. CARM suggests these data indicate that economic operators are accepting and applying simplified procedures because they expect greater efficiency through time savings and a reduction in costs for import, export and transit (CARM 2012, p. 22).

## **4. Research on the implementation of the single window concept and simplified customs procedures**

For the Republic of Macedonia, a small, open and import-dependent country, the implementation of trade facilitation measures is an important and necessary process for improving its position on the international trade scene and realising higher rates of economic growth. Conducting research that assessed simplified trade facilitation measures and the benefits that economic operators should gain from their implementation has enabled further development and has been very important for the national economy, for the business community, and for the science of economics.

### **4.1 Research methodology**

The objective of the research detailed in this paper was to assess and evaluate the efficiency of the trade facilitation measures undertaken by CARM with the implementation of the single window concept (EXIM), and with the application of simplified customs procedures. On this basis, a questionnaire was delivered to Macedonian companies that were actively involved in international trade. The research was carried out in 2011 and the data gathered were for the year 2010.

The evaluation of EXIM was carried out by ranking from one to five (1 to 5) eight characteristics of the system. The characteristics assessed were: speed of obtaining a licence, uncertainty of obtaining a licence, transparency of the procedure for obtaining a licence, obtaining information on tariff quota allocation,

speed of resolving problems and improved communication with the customs administration. A rank of 1 for a particular characteristic indicated that it was least favourable (slowest, most complicated, least safe, least certain, least transparent) and a rank of 5 meant it was most favourable (quickest, simplest, safest, most certain, most transparent).

Companies were asked to evaluate the level of facilitation they received with the application of the single window from the point of view of time, resources and finances saved. The respondents were asked to assess the following aspects: speed of the process of obtaining a licence, savings in time, human resources, and finances, and general facilitation of their work. The second part of the questionnaire referred to the simplified customs procedures. Initially, companies were asked whether they used the simplified customs procedures. If the companies did not use those procedures, they were asked to identify the reasons for not doing so and were offered seven possible reasons, for example, having no need, not knowing that they could use them, not being familiar with the procedure to obtain the approval, the length of procedures for obtaining approval, not knowing the benefits and simplification that could be derived, the possibility of being in the process of obtaining approval, or the large amount of customs guarantee needed to obtain approval to use the procedures.

Those companies that did not use simplified customs procedures were asked to provide the number of documents needed to perform a particular customs procedure, the number of signatures, the average number of hours, and the average financial costs for its realisation. The answers to these questions were used to calculate the average numbers of documents, signatures, hours taken, and the financial costs needed to perform the procedure. From these data, reasons for the costs were analysed and compared with similar data in other countries or groups of countries that had been examined in different studies and research in this field.

Those companies that had implemented the simplified customs procedures were asked the same questions about performing a particular customs procedure, and the data were similarly evaluated.

With the two sets of data, the variables needed to realise one regular and one simplified customs procedure were compared. The results from that comparison showed whether, with the application of simplified customs procedures, the number of documents, the number of signatures, the clearance time and the financial costs could be reduced.

The companies that had applied the simplified customs procedures were also asked to assess their application from a trade facilitation point of view. To do so, the companies evaluated five criteria: speed of the clearance process, savings in time, human resources, and financial costs, and general facilitation of the clearance process. Again, the criteria were ranked from one to five, as above. Evaluating the application of the simplified customs procedures provided an assessment of the level of trade facilitation that the companies had received with the application of those procedures and identified their overall level of satisfaction with them. Gathering these data was of great importance and enabled CARM to assess the effects of the trade facilitation measures promoted by the international trading community.

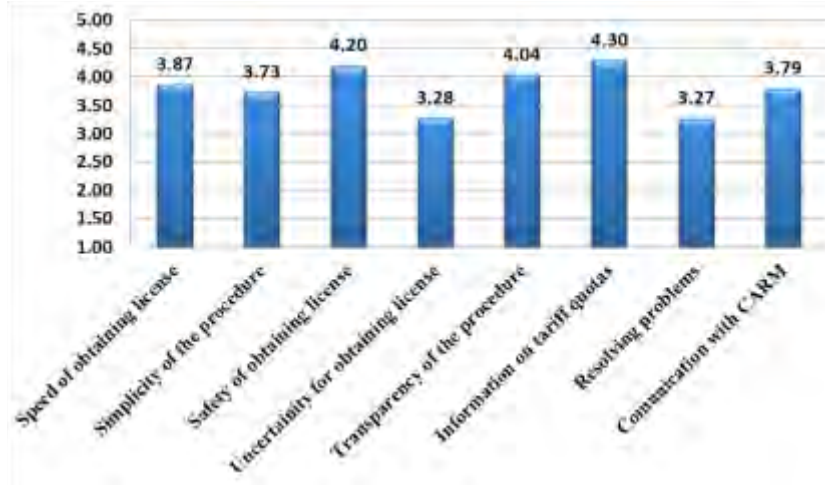
## **4.2 Data for the research**

The random sample of companies that received the questionnaire was obtained from a list of 764 companies which, in 2010, were involved in international trade (both import and export) totalling more than USD1,000,000. This data was obtained from CARM, and was used to select a random representative sample of 211 companies, which received the questionnaire in June 2010. Responses to the questionnaires were collected through to December 2011. Responses were received from 67 companies, that is, a response rate of 32%. Around 80% of answers were received by mail and the remainder by direct interviews. The answers were run through the SPSS statistical system for data analysis and frequencies and descriptive statistics of the sample were calculated.

### 4.3 Research results

Table 1 shows the average ranks assigned to the evaluation of the eight characteristics of EXIM mentioned above.

Table 1: Evaluation of the characteristics of EXIM

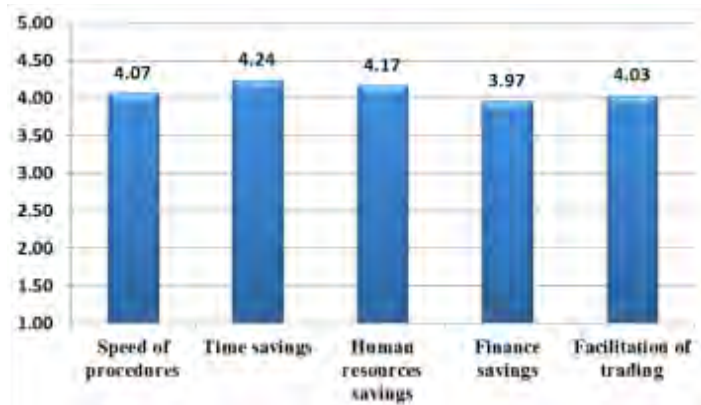


Source: Customs Administration of the Republic of Macedonia 2012.

As can be seen from Table 1, the lowest ranks received were for the criteria of uncertainty for obtaining licences and speed for resolving problems. The recommendation is that CARM should work on improving the ability to resolve problems more quickly and more efficiently, although in most cases they are technical problems such as issues with computer systems.

Table 2 shows the ranks allocated to the impact that EXIM was having on the overall facilitation of trading procedures.

Table 2: Evaluation of the impact of EXIM



Source: Customs Administration of the Republic of Macedonia 2012.

The average ranks received on the satisfaction of the Macedonian companies indicated that the users of EXIM received greatest facilitation of the trading process with savings in time and human resources. These savings have also had a flow-on effect in time saved in the process of obtaining licences for import, export and transit, and in the process of tariff quota allocation.

Similar results in time savings have been identified by many countries that have implemented single window systems. With the application of the single window in Mauritius, the clearance time has been reduced from an average of four hours to around 15 minutes. In Senegal, the users of the system can complete a particular procedure in a day which previously took two to three days (Korinek & Sourdin 2011, pp. 7-8).

*Table 3: Correlation of the rankings from the influence of EXIM on trade facilitation*

	<b>Speed of procedures</b>	<b>Time savings</b>	<b>Human resources savings</b>	<b>Finance savings</b>	<b>Trade facilitation</b>
Speed of procedures	1.00				
Time savings	0.766	1.00			
Human resources savings	0.724	0.847	1.00		
Finance savings	0.651	0.822	0.770	1.00	
Trade facilitation	0.800	0.930	0.876	0.830	1.00

*Source:* Customs Administration of the Republic of Macedonia.

A high level of correlation has been confirmed between the indicators for trade facilitation from the application of the single window system for obtaining licences and approvals for conducting import, export and transit procedures in the Republic of Macedonia.

The data on the application of simplified customs procedures indicated that 34.4% of the companies (23) had been using those procedures and 65.7% (44) had not. The analysis showed that some of the more important reasons for not applying for simplified customs procedures were: having no need (16 of 44 companies or 37.2%); being unfamiliar with the procedure for obtaining approval (6 of 44 companies or 14%); the lengthy procedure for obtaining approval (8 of 44 companies or 18.6%) and not knowing the benefits and simplification that can be obtained with their use (7 of 44 companies or 16.3%).

From the responses relating to the reasons for not applying for simplified customs procedures it was apparent that, for a significant number of companies, this was due to the lengthy application and approval process, and because they were not familiar with the benefits that could be obtained. These findings indicate that CARM should work on shortening the procedures for obtaining approval for simplified customs procedures and should more widely promote their benefits when used.

From the companies that did not apply simplified customs procedures, the following data was received: the average number of documents needed to perform one customs procedure was 5.97; the average number of signatures was 4.65; and the average financial cost was 3,300 denars.

Comparing the data received with similar data from other research studies, it could be seen that the average number of documents of 5.97 for realising one customs procedure was slightly more than the 5.3 documents needed for the OECD countries to realise one export transaction, and less than the 6.9 documents needed for the OECD countries to realise one import transaction. On a global level, the average number of documents for export was 7.4 and for import, 10.8 documents (Wilson 2006, p. 9).

The average number of signatures of 4.65 was higher than the average number of signatures needed for the OECD countries where it was 3.2 for one export procedure and 3.3 for one import procedure, but was less than the world average which for one export transaction was 11, and for one import transaction was 16.4 (Wilson 2006, p. 9).



Table 4 shows the responses from the companies using simplified customs procedures. The average number of documents needed to realise one customs procedure was found to be 3.92, the average number of signatures was 3.86, the average time was 6.77 hours and the average financial costs were 2,832.50 denars.

Table 4: Comparable data on average number of signatures, documents, hours and financial costs

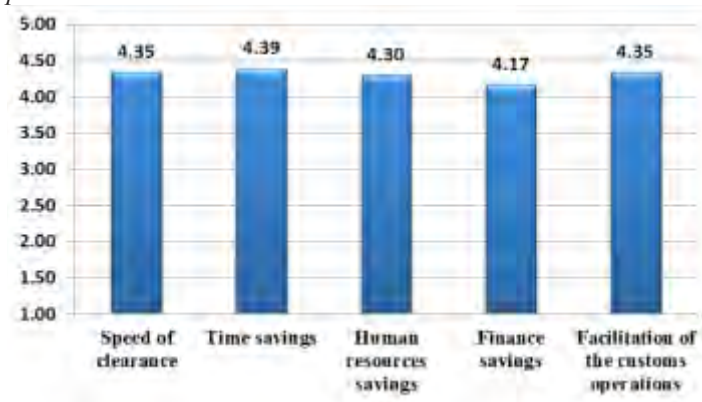
	No. of documents: import	No. of signatures: import	No. of documents: export	No. of signatures: export
OECD	6.9	3.3	5.3	3.2
World average	10.8	16.4	7.4	11.0
Macedonia	No. of documents	No. of signatures	Hours	Financial costs (in denars)
Regular customs procedure	5.97	4.65	20.00	3,300.00
Simplified customs procedure	3.92	3.86	6.77	2,832.50

Source: Wilson 2006, p. 9, and calculations by the author.

These data confirmed that with the application of simplified customs procedures, traders realised a reduction in all measured variables. The average number of documents had decreased by almost 2 documents, the average number of signatures had decreased by almost 1 signature, the average time by 13.23 hours, and the average financial costs had dropped by almost 500 denars.

The data indicated a reduction in time taken when the simplified customs procedures were used, which was promoted as their greatest benefit for users. Table 5 shows the impact of the use of those procedures and their influence on trade facilitation.

Table 5: Evaluation of the facilitation of customs operations with the application of simplified customs procedures



Source: Customs Administration of the Republic of Macedonia.

All rankings, except one, were higher than 4.30 and when compared to the maximum rank of 5, confirmed that the users of simplified customs procedures obtained significant benefits from their use. This indicates there is a high level of correlation between the savings and simplification obtained with the application of simplified customs procedures.

Table 6: Correlation of the assessments of the simplified customs procedures

	Speed of clearance	Time savings	Human resources savings	Financial costs savings	Facilitation of customs operations
Speed of clearance	1.00				
Time savings	0.898	1.00			
Human resources savings	0.778	0.851	1.00		
Financial costs savings	0.773	0.699	0.657	1.00	
Facilitation of customs operations	0.906	0.898	0.861	0.898	1.00

Source: Customs Administration of the Republic of Macedonia.

#### 4.4 Additional implications of the research results

Around 20% or 15 questionnaires were answered by personal interviews with the responsible persons in the companies. From that interview process additional insight was derived from their situations which, on the one hand, indicated the limited abilities of the questionnaire and the difficulty in covering all situations in practice, and on the other hand, provided additional knowledge about certain processes and activities that are important for trade facilitation.

Companies reported several problems with the application of the single window in the Republic of Macedonia. Those companies that evaluated the characteristics of EXIM and its influence on trade facilitation with lower ranks indicated that the process of obtaining import, export and transit licences was complicated by the need to file the complete documentation in paper format after obtaining the licence electronically. This means that at the time the companies require a certain licence for import, export or transit for the goods, they receive the licence requested through EXIM but later need to file the complete documentation in hardcopy. According to those companies, this way of working was an unnecessary burden and complicated the process.

Companies that use EXIM indicated dissatisfaction with technical problems such as ‘crashes’ in the computer system of CARM and the fact that such problems were not resolved quickly.

Some companies indicated certain problems with tariff classification of the goods and situations where, because of inappropriate tariff classification, the system may show that a licence or an authorisation is needed for a certain type of goods. Accordingly, it was suggested that CARM should put additional effort into clarifying the tariff classification of the goods in EXIM.

Those companies that were interested in implementing the simplified procedures indicated there was a problem with the large amount of customs guarantee and the significant amount of money ‘tied up’ for that purpose which limited their possibilities for business. Because of this, some companies were using the simplified customs procedures through their forwarding agents that have the necessary authorisation. This redirects the problem to the forwarding agencies and impacts on the possible competition between them to win more clients. Those forwarding agencies that can support larger amounts of customs guarantee can perform customs clearance operations for greater numbers of clients. This suggests a likely consolidation of the forwarding companies in the Republic of Macedonia for more successful use of the trade facilitation measures.

Some companies indicated that insufficient use of simplified customs procedures results from the fact that CARM has promoted these procedures to companies that trade in goods that fall to five or six tariff classifications. At these companies customs control could be performed much more easily. This should be reconsidered because there should be a way for all companies, especially those that import and export a wide assortment of trading goods, to equally be able to use the simplified customs procedures.

Companies that import medicines and medical equipment and devices indicated that because of the large number of licences needed to import the goods, the procedure for implementing simplified customs procedures was more complicated than the simplification benefits they would gain.

Companies that utilised simplified customs procedures indicated their uncertainty in interpreting the question relating to the number of signatures needed to conduct simplified customs procedures with the probability that mistakes may have been made. For example, some companies responded that only one signature was needed for simplified customs procedures but, with additional cross checking, it was confirmed that one person in the company is authorised to sign all the documents and that this person needs to provide more than one signature.

Finally, it was found that the use of simplified customs procedures does not add to financial costs. The single most important cost in this regard is the wage of the person in the company who is authorised to handle these procedures.

## 5. Conclusions

Results from the research on the implementation of trade facilitation measures in the Republic of Macedonia have shown that the companies evaluate positively the application of the single window for obtaining licences and for tariff quota allocation. The greatest benefit realised by the users of the single window has been the savings in time and human resources.

The findings relating to the application of simplified customs procedures in the Republic of Macedonia also indicate positive results. All measured variables: average number of documents, signatures, hours, and financial costs, have resulted in reductions compared to regular customs procedures.

The largest reduction as a result of using simplified customs procedures that has been realised is the average number of hours: reducing from 20 hours needed for the regular customs procedure to 6.77 hours for the simplified procedure. Recent studies indicate that a 10% saving in time in preparing to export may result in an increase in exports of 4%, and that each additional day that the goods are held pending clearance decreases trade by at least 1% (Djankov, Freud & Pham 2006, p. 17). Comparing the 13.23 hours saved in simplified customs procedures with the 20 hours needed for regular customs procedures, indicates a time reduction of 66.15% could be achieved. It was not possible to compare the data on the calculated time and time savings because, in the case of the Republic of Macedonia, a separate calculation of the time for import and for export was not made, nor was the complete time associated with preparation for export measured, as was done in research by the World Bank. Only the time for one particular customs clearance procedure was measured. Nevertheless, the potential time saved should not be underestimated. The reduction of 66.15% of the time needed for one simplified customs procedure indicates that this trade facilitation measure may have a significant influence on increasing trade and especially exports.

The time savings that result from the application of simplified customs procedures have been confirmed by the Macedonian companies' evaluation of the influence of these procedures on the trading process. Overall, the companies evaluated positively all variables, with the savings in time assessed as providing the highest level of satisfaction for traders.

The unnecessary retention of goods at border crossing points or in customs terminals was found to burden traders with additional costs and has a negative impact on trade. Promoting simplified customs procedures is one way to speed up the flow of goods which should in turn help to increase exports.

Increasing the number of users of simplified customs procedures would be a positive outcome for CARM and for traders. For CARM, it would mean increasing the number of safe trading partners and redirecting the resources to less secure and higher risk fields. For the representatives of the business community, the application of simplified customs procedures should mean simplification of the trading process and activities. Improving customs procedures and increasing the efficiency of the domestic customs administration would also serve to facilitate trade for Macedonia's trading partners.

Taking into consideration the fact that Macedonia is a landlocked country, increasing the efficiency of customs procedures gains more importance when looked at from a regional perspective. Landlocked countries are highly dependent on trade by air and road, and due to the limited use of air transport, transportation by trucks gains further importance for Macedonian importers and exporters. This suggests a necessity to undertake initiatives at a regional level to facilitate trade, which may be achieved by undertaking concrete activities and trade facilitation measures in the framework of the Central European Free Trade Agreement (CEFTA) 2006.

The responses to the questionnaire and the follow-up clarification by interview indicate that in Macedonia there is still considerable opportunity to introduce further trade facilitation measures. It is apparent that CARM should work to reduce the formalities for conducting customs procedures, make greater use of electronic documents, find a way to authorise more companies to utilise the simplified customs procedures, apply different measures for modernisation, and increase its efficiency to meet the needs of the business community. This research serves to confirm that introduction of trade facilitation measures is necessary for assisting Macedonian companies to compete more effectively in the international marketplace, noting that, by increasing trade, positive economic outcomes in other areas may be realised.

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# The role of customs brokers in facilitating international trade

*Ewa Gwardzińska*

## Abstract

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This article describes changes to the customs broker profession in the European Union (EU) and particularly in Poland as a result of proposed legal reforms. It suggests that customs brokers should have expertise not only in customs-related matters but also in facilitating international trade, supply chains, financing and financial operations, security matters and compliance. The author indicates that, by now, customs brokers should have realised the potential of the legal reforms enabling Authorised Economic Operator (AEO) status to overcome the barriers to providing customs services in other EU Member States. In this regard, the article addresses the challenges to be faced in relation to mutual recognition of qualifications needed to practise as a customs broker in the EU Member States.

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## 1. Introduction

Customs brokers continue to play a significant role in international trade, especially in small and medium-sized enterprises (SMEs). They provide a means of ensuring trade compliance, thereby helping to protect the financial interests of the European Union (EU) and its individual Member States.

Although the tasks of customs brokers have remained unchanged for years, in recent times their role has been subject to constant changes brought about by the rapidly changing regulatory environment, including challenges presented by the electronic customs environment. This article describes the changes being made to the customs broker profession in the EU and in Poland as a result of such legal reforms.

## 2. The customs brokers' profession in the EU in light of proposed changes to the Union Customs Code (UCC)

In the proposed changes to the Union Customs Code (UCC),<sup>1</sup> Art. 18 UCC provides that any person (both natural and legal persons, or an organisational entity without a legal personality) may appoint a customs representative. The form of representation and the responsibilities of customs brokers (defined by their legal liabilities) are similar to the provisions of the Community Customs Code (CCC).<sup>2</sup> It is likely that Art. 5(2) CCC which allows a Member State to determine the acceptable form of representation for its customs brokers and execute customs formalities in their respective territories in accordance with the place of establishment, will finally disappear from the UCC's legal provisions, which is considered to be a change for the better. Differences among the formal and legal requirements that customs brokers are required to meet in particular Member States will be retained and, in keeping with the principle of subsidiarity of the EU legislation, they will be subject to the national jurisdiction of Member States. The retention of this principle reflects cultural and administrative differences between Member States, where customs brokerage may or may not be regarded as a licensed profession.<sup>3</sup>

In some Member States, the profession of a customs broker is or was (for example, in Poland until recently) a state-regulated profession, with entry into a register of customs brokers (such as the one maintained by the Director of the Customs Chamber in Warsaw) being a prerequisite for practising.

Art. 80(1) of the Polish Customs Act<sup>4</sup> provides that a natural person may be registered who:

1. is resident within the Community
2. has the necessary capacity to perform legal transactions
3. enjoys full civil rights
4. holds at least a secondary school graduation certificate
5. has not been convicted of an economic or fiscal offence or one involving documents or property
6. properly performs the duties of a customs broker in accordance with the code of professional conduct
7. has passed the customs brokers' professional examination before an examination board appointed by the Ministry of Finance or whose licence to practise as a customs broker has been officially recognised (pursuant to separate regulations)
8. has applied for registration as a customs broker no later than two years from the date of passing the exam.<sup>5</sup>

In other states, such as Germany or Sweden, there are no such restrictions.<sup>6</sup> In this regard, performing the function of a customs broker within the Community is on the one hand subject to a variety of requirements, while on the other hand, attempts are being made to standardise customs services and promote appropriate levels of competence throughout the profession.

For many years, the European profession has been regulated by a uniform European Customs Brokers Code of Conduct developed by CONFIAD,<sup>7</sup> yet it has not been adopted by all customs brokers. According to earlier proposals, it was planned to be included in the Modernised Community Customs Code Implementation Regulation, but it is hard to say at this point whether this will, in fact, be the case. The Code of Conduct establishes principles, values and rules of conduct, encouraging customs brokers to adopt high ethical standards and to perform their duties to an appropriate standard, thereby protecting the rights of customers and their own livelihood, as well as the financial interests of individual Member States and the EU as a whole.<sup>8</sup> The European Customs Brokers Code of Conduct seeks to establish ethical rules governing the conduct of the service providers (customs brokers), while the Quality Charter<sup>9</sup> defines the manner in which services should be provided in order to achieve an appropriate level of quality.

Until 2012, there were two contradictory approaches towards the future development of the customs broker profession within the EU.<sup>10</sup> The first advocated regulation and was represented by CONFIAD, which contains principles regulating customs representation (including those stipulated in the European Customs Brokers Code of Conduct<sup>11</sup> and the Quality Charter), as a means of creating ethical standards and providing a high quality of customs services. The other approach was liberal in nature and was represented by CLECAT,<sup>12</sup> which stressed the need for more flexible legal frameworks that facilitate solutions in light of the close ties that have developed between customs representation and the provision of logistical services.

Since 2012, the EU market has developed a new program for unifying skills-related standards for customs brokers. This is to be achieved by means of the European Committee for Standardisation (CEN) procedures,<sup>13</sup> under the auspices of CLECAT. According to the official work schedule, the program will be finalised by 2016.<sup>14</sup> For the time being, it requires close cooperation among the Member States. In October 2013, a vote was held on the adoption of CEN standards for customs brokers.<sup>15</sup> A two-thirds majority was necessary to enable the further development and creation of a body supervising compliance with CEN standards for customs representatives.<sup>16</sup> It is uncertain at this point whether the project will obtain the required approval and be adopted. However, it should be noted that this would be a significant step towards harmonising the customs broker profession in the EU.

The focus of the EU on the professional competence of customs representatives clearly stresses the role they play in international trade. This featured for the first time in the Modernized Customs Code<sup>17</sup> and was then repeated in the UCC. The latter's provisions also introduce a unified principle allowing customs brokers to provide customs services from their headquarters without the need for their qualifications to be recognised in another Member State provided that the broker is certified as an Authorised Economic Operator (AEO) regarding customs simplifications (AEO-C) or Customs Simplifications/Security and Safety (AEO-F). Subject to this requirement, the broker may provide customs services in other EU Member States on a temporary basis only.<sup>18</sup>

Undoubtedly, the services provided by customs brokers currently form part of a broader range of logistical services. This does not mean that there is no place for a customs broker profession. The market for their services certainly exists but the evolution to an e-Customs environment means it is likely to be seriously curtailed in the future and will undergo significant metamorphosis. In 2009, revenue from customs duties in the EU reached 19 billion Euros for the first time, thereby exceeding incomes from VAT (15.3 billion Euros).<sup>19</sup> In 2012, revenue reached 19.1 billion Euros (that is, 15% of the EU budget) and in 2013 it was 18.6 billion Euros (which also accounts for 15%).<sup>20</sup> Although customs duties only apply to transactions with third countries and are collected mainly at ports and airports, they still account for a significant portion of the EU's income. Although not as significant a source of revenue as in certain countries (for example, Moldova where customs duties amount to 57% of state revenues<sup>21</sup>), customs duties are still important for the EU and its Member States. According to official figures, 75% of the income from customs duties is transferred to the EU and 25% remains in the state where they are collected.

In the near future, it is expected that the customs environment will be fully computerised, and include centralised customs clearance. This is likely to result in a significant reduction in the number of customs brokers operating in the market. Only top quality specialists will be able to compete and the rest are likely to disappear. Slowly but surely, the e-Customs broker is becoming a reality.

### **3. Changes to existing legal regulations in Poland: deregulating the customs broker profession**

In Poland, the Ministry of Finance is currently overseeing a new bill (widely known as the 'Deregulation Act') facilitating access to professions in the financial, construction and transport sectors.<sup>22</sup> This includes access to the professions of tax adviser, chartered auditor, architect, construction engineer, insurance and reinsurance broker, investment adviser and customs broker (and others), all of which have traditionally been regulated professions. The bill requires changes to the applicable legal provisions regulating these professions.

In the case of the customs broker profession, the changes mainly concern Art. 80(1) of the Polish Customs Act. Under the new provisions,<sup>23</sup> a natural person can be registered who:

1. holds Polish citizenship or citizenship of a Member State of the EU, the European Free Trade Agreement (EFTA), a party to the agreement on the European Economic Area (EEA), or the Swiss Confederation
2. has the necessary capacity to perform legal transactions
3. has qualifications or experience in providing customs services to business entities
4. has not been convicted of an offence involving documents, property or an economic or fiscal offence
5. has applied for registration as a customs broker.

As far as access to the customs broker profession is concerned, the amended regulations involve four significant changes to the following:



- extending the citizenship requirements: under existing regulations, the customs broker profession is open to persons who have a permanent place of residence in the European Community (an EU citizen). However, the planned regulations extend that to include citizens of the EFTA states, parties to the agreement on the EEA not being members of the EU (that is, Iceland, Norway and Liechtenstein) and the Swiss Confederation. The extension results directly from agreements between the EU and these states (that is, the Agreement of the European Economic Area and the agreement on the free movement of persons between Switzerland and the EU) which took effect on 1 June 2002 and on 1 April 2006 for Poland.<sup>24</sup>
- stipulating the level of professional skills and experience in providing customs services to economic entities
- waiving the requirement for the candidates to pass state exams for customs brokers before a commission appointed by the Minister of Finance
- eliminating the element of arbitrariness regarding the registration of customs brokers caused by existing requirements (that is, 'properly performs the duties of a customs broker in accordance with the code of professional conduct').

One of the most important aspects of deregulation is that it completely does away with the state examination requirement in favour of recognition of previous qualifications or professional experience. The wisdom of this is questionable since the verification of professional qualifications is a diploma awarded after completing the first or second level of higher education, or a uniform higher education in the fields of legal, administrative, economic or technological sciences that cover the knowledge and competence relating to the provision of customs services to business entities. Looking at this regulation from a practical point of view, it must be said that the majority of law schools in Poland do not teach customs law. Sometimes this subject is added either to courses in international economic law or international financial law, where (on average) one or two lectures or classes are devoted to the EU customs law (in fact, Polish customs law is not dealt with at all). A few law schools offer customs law as an optional subject to their students but this is not the case with the majority of Polish higher education establishments. A similar situation prevails in relation to the economic, administrative or technological subjects taught at higher education institutions.

The next question is whether the verification of knowledge and skills in providing customs services to economic entities will be reliable. In the author's opinion, it will not be. Will a candidate for the customs broker profession – who has never come across terms such as customs-approved use, origin of goods, customs rating, customs value, limitations of tariffs, tariff and non-tariff measures – be able to assign goods the correct customs treatment? To do so requires highly specialised (rather than basic) knowledge, without which it would be impossible to properly clear goods for customs purposes. In practice, therefore, the regulation outstrips current capabilities and is not backed up with the required training measures.

Some argue that the regulation is likely to create a profession of pseudo-customs brokers in Poland which will adversely affect certain economic participants. They point to a similar situation concerning the development of the Polish forwarder profession. However, this will depend on how quickly regulations on the electronic customs environment will be implemented. Considering that the computerisation of customs transactions is already at an advanced stage, this fear is unlikely to materialise.

It will hardly be a surprise if a completely electronic environment leads to a significant reduction in the number of customs brokers needed to perform customs transactions. Taking the planned changes to the organisation of customs services into the equation (including the liquidation of inefficient customs offices), we may confidently assume that the customs broker profession in Poland is not going to be dominated by 'pseudo-customs brokers'.

The other way of verifying customs brokers' knowledge, skills and competence by accrediting their experience (at least three years' experience in customs-related matters) is also controversial since the term 'experience in customs-related matters' covers:

- the period during which duties specified in the customs law are performed in a customs authority, or
- the period of specialist training at colleges of higher education during which aspiring customs brokers acquire the knowledge needed to perform their tasks properly, provided that the training was completed at least five years after the date on which application for entry was made.<sup>25</sup>

Thus, again we have a dual approach to verification: the period of performing duties specified in the customs law in a customs authority or the period of specialist training at a post-secondary college in relation to customs transactions. One solution would be to replace the conjunction 'or' with 'and' as it would link practical and theoretical knowledge and skills. From a practical point of view, a legal loophole has been created for persons wishing to practise as customs brokers but having only secondary education qualifications.

What remains to be discussed is the issue of decisions made by Polish national authorities on the recognition of formal qualifications to practise the profession of a customs broker that are gained in another EU Member State. Such recognition is regulated by the provisions of the Act on the recognition of professional qualifications gained in another EU Member State, but the provisions are not commonly used nor do they seem likely to gain popularity in the near future because the Polish language poses a barrier for customs brokers coming from other EU Member States.<sup>26</sup> Since 2004 and to date, that is, since Poland's entry into the EU, there has not been a single instance of a customs broker from another EU Member State who would be willing to provide his or her services in Poland, based on the Polish legal regulations on recognition of their professional qualifications. As far as the provisions of Poland's customs law are concerned, we have become used to this common pattern which is being repeated over and over again: a regulation exists but is not being applied.

Customs broker services, according to the planned regulations of the UCC<sup>27</sup> may be provided from the service provider's headquarters, only temporarily, based on:

- AEO status (AEO-C or AEO-F)
- implicitly demonstrating that the provider meets all criteria required for AEO (C or F) status, including compliance with customs and taxation requirements, a satisfactory system of managing commercial and, where appropriate, transport records, proven financial solvency and fulfilment of practical standards regarding professional competence or qualifications directly related to their business activities.<sup>28</sup>

It is clear that AEO-customs brokers must fulfil these conditions before they can provide customs services as envisaged under the new arrangements. However, there will not be a need to apply to central administrative bodies to have their qualifications verified and, where the required qualifications differ in various Member States, they will not need to undertake retraining or sit examinations. Verification is provided by AEO status, which is acknowledged in all EU Member States.

Coming back to the obligatory requirement of registration as a customs broker, the draft regulation of the Minister of Finance provides that the register for customs brokers can be maintained electronically and that registrations should contain the following information:

- the number and date of the entry
- surnames and given names
- date of birth
- place of residence
- the PESEL (Social Security) number (or the reference and date of decision acknowledging qualifications to perform the duties of a customs broker).

Practically no changes have been made to the registration itself: applications for entry in the register of customs brokers must be submitted in writing to the director of the customs authority. It should include evidence (copies) of qualifications, absence of a criminal record and three years' experience in customs matters.<sup>29</sup> Deletion from the register is also unchanged under the draft rules and is justified in the event of death or where the customs broker fails to satisfy the conditions for registration or to fulfil the duties of a customs broker.

Currently, the main challenge confronting customs brokers in Poland, and in the EU in general, is how to stay competitive in the national and EU markets for customs services.

## Conclusions

The market for customs brokers in the EU is shrinking owing to the introduction of the electronic customs environment. This suggests that only the best customs brokers will be able to stay in business. Ideally, customs brokers should have expertise not only in customs-related matters but also in facilitating international trade, supply chains, financing and financial operations, security matters and compliance. That said, the customs broker profession is unlikely to decline and disappear any time soon. Although it looks likely to shrink and transform, the profession will be sustained by micro enterprises as well as SMEs. By now, customs brokers should have realised the potential of AEO status to break down the barriers to providing customs services in other EU Member States. For now, services can only be provided on a temporary basis but this may change in the future. Therefore, CONFIAD's claim that '... customs representatives are going to get lost, as Alice in Wonderland, in a world which simply does not exist'<sup>30</sup> is somewhat wide of the mark.

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## Notes

- 1 Gwardzińska 2013, pp. 215-18.
- 2 Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, p. 1.
- 3 'Customs representation: objectives and experience', 16 November 2012.
- 4 The Act of 19 March 2004, Customs Law, *Journal of Laws*, no. 68, item 622, as amended.
- 5 Czyżowicz & Gwardzińska 2012, pp. 8-18.
- 6 Parker 2013.
- 7 European Customs Brokers Code of Conduct, CONFIAD Pan European Network. The CONFIAD Pan European Network (Confédération des Agents en Douane), International Federation of Customs Brokers and Customs Representatives, was founded in 1982 as an organisation of the European Customs Brokers, with the purpose of defending and coordinating the professional interests of its members, supporting harmonisation of the legislative, professional and customs regulations at the European level.
- 8 The problem is widely discussed by the author in the 2012 article, 'Change of customs brokers' identity in the European Union: a vision or reality?'
- 9 See note 8.
- 10 See note 3.
- 11 European Customs Brokers Code of Conduct.
- 12 CLECAT was established in 1958 in Antwerp as the 'European Liaison Committee of Common Market Forwarders' [Comité de Liaison Européen des Commissionnaires et Auxiliaires de Transport du Marché Commun (CLECAT)].
- 13 The European Committee for Standardization (CEN) [Comite Européen de Normalisation] was officially created as an international non-profit association based in Brussels on 30 October 1975. See 'Competency of customs representatives', Proposal for the creation of a CEN Project Committee, CLECAT, CONFIAD.
- 14 Planning foreseen for the adoption of the CEN Standards for customs representatives.

- 15 See note 14.  
16 See note 14.  
17 Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April.  
18 See 'Customs representation: objectives and experience', 16 November 2012.  
19 Parasie 2009.  
20 Zografos 2012.  
21 Zografos 2012.  
22 See <http://bip.ms.gov.pl/pl/projektyaktowprawnych/.../download,2225,0.html>.  
23 See note 22, Article 20.  
24 See <http://bip.ms.gov.pl/pl/projekty-aktow-prawnych/>, p. 50.  
25 Pogorzelski 2013.  
26 See *Journal of Laws of the Republic of Poland*, no. 63, item 394.  
27 More broadly, see Gwardzińska 2013.  
28 'Customs representation: objectives and experience', 16 November 2012.  
29 Pogorzelski 2013.  
30 CONFIAD The Story of a changing trans-European identity 2007.

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# Analysis of current customs practices in the United States and a proposed model for world class Customs

*Tom Coyle, Kevin Cruthirds, Sara Naranjo and Katharina Nobel*

## Abstract

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The purpose of this research is to propose a theoretically supported model for world class customs procedures and present testable propositions. A gap is noted in customs research and literature: no attempt has been made to bring together in one model the significant constructs which define world class customs operations. The model proposed in this paper is based upon literature and indicates six constructs to world class customs: infrastructure, procedures, technology, time focus, cost, and mission. The proposed model is contrasted with current practices used by US Customs and Border Protection (CBP). Also discussed are constructs for further research in this field of study. This topic is critically important in today's global environment because any disruption to the supply chain can be costly and waste significant resources of a firm or country.

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## 1. Introduction

The purpose of borders is to delineate sovereignty and legal control (Bersin 2012), essentially allowing communities of people divided into nations to function while maintaining control over their own territory. Having defined the border, the next step for countries is to determine how to control the border. This decision has historically been driven by the primary focus of the country. The control mechanism has fallen generally into four broad categories: control of physical boundaries from invading armies; control of population migration; the collection of duties on international goods entering their country; and control of goods leaving and entering the country (Widdowson 2007; Koslowski 2011).

The practice of stopping goods at a territorial border to collect duties dates back to Syria, 136 AD (Asakura 2003). However well this centuries old practice has served countries throughout the ages, this paper argues that current customs practices, outdated in the age of globalisation and information technology (Stevenson 2011), may be hampering global trade and adding cost. This broad concept is the focus of this research.

The need to update customs practices has been documented in the literature. In 2002, the World Trade Organization (WTO) investigated the impact of current customs practices and identified possible impediments to global trade (WTO 1998):

- Excessive government documentation requirements
- Lack of automation and insignificant use of information technology
- Lack of transparency; unclear and unspecified import and export requirements
- Inadequate customs procedures, particularly audit-based controls and risk-assessment techniques
- Lack of cooperation and modernisation amongst Customs and other government agencies, which impedes efforts to deal effectively with increased trade flows.

The list of problems noted by the WTO stems from the focus on customs duties. While the traditional core role of Customs has been the control of goods flowing across national borders, some countries' priorities have shifted traditional core customs responsibilities to different governmental agencies. For example, in Hong Kong, due to its free port status, the focus of classification and valuation is assigned to the Census and Statistics Department rather than the Customs and Excise Department (Widdowson 2007). The United States (US) Customs and Border Protection (CBP) service is another whose focus has changed in more recent years.

CBP has a long and successful tradition of regulating the flow of goods into and out of the US and is a part of the Treasury Department. However, after 9/11 the focus of US Customs changed from goods flow to border security (CBP 2009). This changing focus for US Customs has not been without consequences nor has it gone unnoticed. There has been a growing call for CBP to improve service and reduce crossing times (Accenture Consulting Group 2008). The reason for this is simple economics: the US is in its worst economic slowdown in over thirty years (Pethokoukis 2012). Also, the US is the world's largest economy (World Bank 2012a), and any slowdown in the US economy will have an impact upon the rest of the global economy. The necessity to improve customs' operations, both in the US and worldwide, is important because ports of entry are an integral part of the worldwide supply chain.

Much of the customs-related literature has focused on individual issues. Some research has been done on best practices but there has been no comprehensive approach to theoretically developing a model of world class customs. It is the intent of this research to fill this gap. This paper first presents a literature review intended to determine best practices in customs operations, define current practices, and provide a basis for model development. The next section proposes a theoretical model for world class customs operations and then offers propositions that can be developed into testable hypotheses. The last section summarises the findings and provides recommendations for further research.

## 2. Literature review

### 2.1 Best practices

Several authors and agencies have attempted to define modern customs organisations in terms of those using or implementing best practices. One such example is reported by Gwardzińska (2012) who notes the initiation of the Authorised Economic Operator (AEO) status program within the European Union (EU). The AEO program starts with a common database of information and is designed to ensure those economic operators have achieved a status that minimises risk with regard to importing and exporting goods. This successful program has been extended to economic operators in Sweden, Norway and Japan. Currently, negotiations are under way with China, the US and South Africa (Gwardzińska 2012). In addition to AEO status, electronic communication for numerous import and export procedures is being implemented and standardised within the EU with a target implementation date of 2015 (Gwardzińska 2012).

The International Air Cargo Association (tiaca.org) has identified best practices which are deemed critical for expedited customs treatment of air cargo shipments. As a general matter, customs authorities should have the capacity for the following:

1. Providing online information about customs practices, including regulations
2. Providing binding advance rulings
3. Providing independent, administrative reviews/appeals
4. Overall transparency
5. Overall integrity
6. Progressive modernisation

7. Automation/paperless environment
8. Evaluation of data and enforcement actions based on risk assessments
9. Formal consultations with the trading community for new rules and procedures
10. Permitting post-release reconciliation and post-entry audits
11. Penalty mitigation through a transparent, well documented process
12. Separation of physical release from fiscal release.

## 2.2 Ease of Doing Business Index

The World Bank has ranked countries for which it can collect data with regard to their abilities for private sector firms to do business, either within the country or with firms operating within the borders of the country. In the Ease of Doing Business Index, the US has traditionally been ranked in the top three countries out of the 189 reported. However, for 2013, the US dropped to the number four position and is in danger of dropping even further. The World Bank uses ten variables in order to rank a country's ease of doing business, as compared to the other countries it monitors. The ten variables used in the index are shown in Table 1.

*Table 1: Variables used in determining the Ease of Doing Business Index*

Starting a business	Protecting investors
Dealing with construction permits	Paying taxes
Getting electricity	Trading across borders
Registering property	Enforcing contracts
Getting credit	Resolving insolvency

*Source:* World Bank 'Ease of Doing Business Index' 2013.

Note that one of the variables used in the ranking is trading across borders. The data used to compile the rankings was done via surveying both the private and governmental sectors' subject matter experts. The areas of the survey that make up the trading across borders construct are shown in Table 2.

*Table 2: Variables used in determining the trading across borders construct*

Legal reforms	Inland transportation
Document filing	Customs clearing and inspection
Port and terminal handling	Costs

*Source:* World Bank 'Ease of Doing Business Index' 2013.

The review has shown that best practices and current practices have identified several issues that have an impact on customs practices and procedures. Literature supports summarising the best practice items into six constructs: infrastructure, procedures, technology, time focus, cost and mission. The next section expands on these constructs and proposes propositions for future evaluation.

## 3. Model development and propositions

### 3.1 Infrastructure

Infrastructure is a basic requirement for economic development (Fasoranti 2012; Waters 1999). This statement has not been disputed regarding overall economic development for a country. China experienced a resurgence in its economy in 2011, which resulted in a USD4.6 billion expansion and modernisation program for ports (Industry Trends 2011). While infrastructure logically impacts less developed countries, there are issues in this arena even in industrialised western countries.



International terrorism has brought a new sense of urgency to ports of entry in the security arena. Consider the two opposing issues. First, global trade functions best when the concepts of efficiency and effectiveness are applied to the movement of goods (Stevenson 2011). Simply put, global trade works best when barriers in the supply chain are minimised or eliminated. Second, the current significant impediment to global trade is international terrorism which has added a significant risk for many countries, and for some, the risk is considerable. As a result of international terrorism, the ability of ports in the US to maintain pace with global trade has been minimal at best (Accenture Consulting Group 2008). Even with the minimal ability to maintain pace with global trade, the US's ports of entry are not designed to accommodate the volume of trade with the current security measures in place (Siekman 2003).

Consider, for example, the current situation with commercial truck traffic moving among Canada, the US and Mexico. One of the anticipated benefits from trade agreements is increased trade. In the case of North America, consider that trade between the North American Free Trade Association (NAFTA) signatories tripled from USD297 billion in 1993 to USD1.6 trillion in 2009 (Burfisher, Robinson & Thierfelder 2004). This represents a 438% increase in the dollar value of trade among the NAFTA partners. Accompanying this dollar value is an increase of truck traffic along both borders. In 1995, the first year of NAFTA, 7.99 million trucks (empty and loaded) crossed the US borders from both Mexico and Canada. By 2010, this number had increased to 10.1 million (Research and Innovative Technology Administration [RITA] n.d.), a 26.4% increase in truck traffic.

The Accenture Consulting Group (Accenture) conducted a study for the US Department of Commerce and in a 2008 report noted the following:

- US-Mexico trade totals approximately USD340 billion annually
- Every day more than 13,000 trucks bring over USD550 million of product into the US
- US exports to Mexico total USD136 billion, with USD93 billion crossing via commercial trucks. This represents a 150% increase in export value since the enactment of NAFTA (Accenture Consulting Group 2008).

While the above statistics are encouraging signs showing the benefit of NAFTA, this growth points to an obvious problem: truck congestion. The increase in truck traffic at the nations' land ports represents two problems: (1) the increased number of trucks makes inspecting and detecting both illicit cargo and national security threats more difficult, and (2) the increased time for legal trucks to cross the borders is costly and has a direct effect on the cost of NAFTA firms' abilities to compete in a global environment. The Accenture study (2008) concluded the following:

- In 2008, the wait times at the five busiest bridges on the southern border averaged one hour.
- In 2008, border delays cost the USD116 million per minute and 26,000 jobs and USD6 billion in output, USD1.4 billion in wages, and USD600 million in tax revenue annually.
- By 2017, the above numbers are expected to double.
- US goods and services trade with NAFTA totalled USD1.6 trillion in 2009 (latest data available for goods and services trade combined).

The above is presented to show the magnitude of trade among the US, Canada and Mexico. As global trade increases, the pressure on the US ports of entry will only intensify.

The Accenture report (2008) also identified a number of problems which, if not solved, will have a significantly adverse impact on NAFTA economies. These border delays result in losses to output, wages, jobs, and tax revenue due to various decreases in spending.

1. Companies, suppliers, and consumers due to congestion, delays, and wait time uncertainty.
2. US and Mexican firms require increased inventory levels, additional trucks, and additional drivers.
3. US and Mexican exporters experience higher transportation costs and less export volume.

4. US consumers pay higher prices for Mexican goods and reduced consumer choice.
5. The productivity of firms is compromised, especially in time-sensitive industries (for example, automotive, agriculture).
6. The border region's ability to attract and maintain investments is hindered.

The above discussion points to the need for improvement in the ability of the US port of entry operations. This includes not only infrastructure but all aspects of import and export operations: data, forms and records, ability to resolve problems and time to cross. This leads to the first proposition which is:

***P1: The ability to adequately and quickly move goods through ports of entry is positively related to trade.***

### 3.2 Procedures

The ability for organisations to function effectively has long been linked to effective policies and procedures (Daft 2006). Administratively, procedures are designed to cover recurring situations and provide repetitive steps which minimise managerial intervention. One drawback to procedures is that they can take on a life within themselves; in other words, procedure is followed, not because it is the best thing to do, but because it is what has always been done. From an organisational behaviour perspective, this phenomenon is called structural inertia (Miller & Friesen 1980; Hannan & Freeman 1984; Jansen 2004). Essentially, structural inertia occurs when organisations build in mechanisms to provide stability. These mechanisms include hiring procedures and formalised regulations and policies which provide stability to the organisation. When change is attempted to be introduced into the organisations, these structural inertia mechanisms act to counterbalance or minimise the change.

One mechanism to improve organisational effectiveness is education. Interestingly, the US CBP has a considerable training budget for law enforcement-related training but it has not invested the resources to develop supervisors and managers to effectively plan and guide their organisation into the 21st century (Coyle 2011). The lack of managerial education and training will hinder any organisation.

Effective procedures are the strategic link between vision and operations. In terms of customs operations, a series of measures can be turned into programs, policies and results that will benefit both security and economic competitiveness (Mongelluzzo 2011). Also, the free flow of goods will be enhanced by improvements to procedures and technology, thus increasing the speed at which goods may be cleared at intra-regional borders (Preece 2012). There is also a need to review existing procedures in order to ensure compliance with international conventions (including the WCO Revised Kyoto Convention) and international best practice ('Customs in the 21st Century') (WCO 1999; 2008).

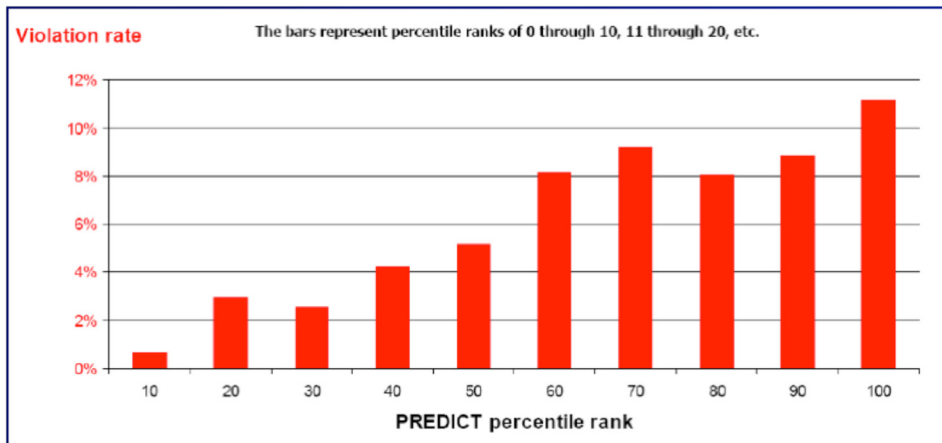
While this research has used US CBP as an example to support the need for the development of a world class customs model, this does not imply that other customs organisations do not need a model. For example, Doyle (2012) has issued a call to rethink the procurement practices of many customs organisations. Doyle's findings note that most customs organisations have very lengthy time requirements to complete a purchase which in many cases renders high-level technology as out of date by the time the equipment is installed. Also, and arguably the most serious allegation, is many customs organisations have a clear purchasing intent but no strategic intent (Doyle 2012).

One area affecting procedure in port of entry operations within US CBP is structural inertia, particularly in the examination of goods at ports of entry. The current method for CBP in the US is to examine every single vehicle that enters the US, causing tremendous delays and increased cost. These problems should prompt a change in procedure, but none has been forthcoming.

However, the Food and Drug Administration (FDA), faced with a similar situation, developed a computer-based algorithmic system called PREDICT, which is a tool used for screening imports and exports. This program was designed and is operated for the FDA in conjunction with New Mexico State

University. PREDICT (Predictive Risk-based Evaluation for Dynamic Import Compliance Targeting), was instituted as a scientific alternative to the previous method of inspecting relevant shipments. The FDA previously relied on entry document review and inspector intuition to make decisions (Silver 2011). The fundamental improvement has been to incorporate the latest technology to quickly separate potential violators or high risk shipments from non-violators or low risk shipments. This was accomplished by developing algorithmically-driven software that uses relevant variables and assigns a score to each shipment. The results have been impressive as shown in Figure 1.

Figure 1: FDA violation rate data using PREDICT



Source: Silver 2011.

The data in Figure 1 was taken from 81,480 field and label examinations for entries submitted October 2009 through November 2010. The higher the PREDICT targeting score, the more likely the violation. If an FDA reviewer selects an import with a score of 90%, the chances of a violation are about 9% (Silver 2011). The success of the PREDICT program shows that changing procedures to keep pace with trade can be effective and leads to proposition two:

***P2: Modern procedures can be successful in detecting illicit goods while minimising the impact on legal trade.***

### 3.3 Technology

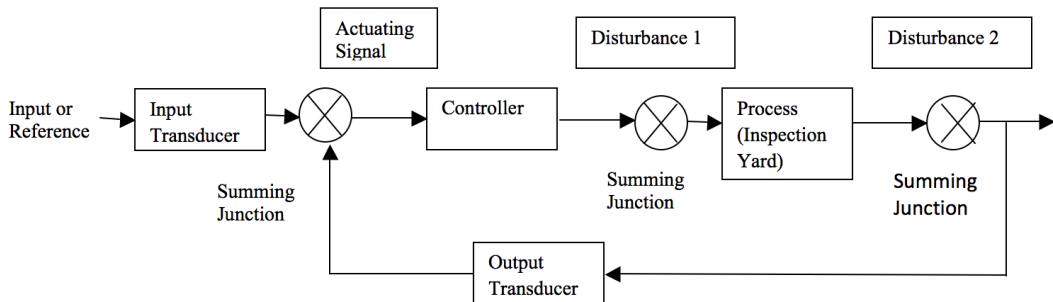
Information technology (IT) has penetrated the office and services environment since 1978 (Attaran 2003). According to the World Customs Organization (WCO), customs authorities must take advantage of new and emerging technologies to enhance, amongst others, processing, risk management, intelligence and non-intrusive detection (WCO 2008).

The technologies and methodologies for a collaborative e-commerce platform are already proven by well-established examples of logistics networks. Those allow the exchange of electronic messages between commercial and logistics operators as well as providing for the interchange, at national level, of certain messages with customs and other government authorities (Pugliatti 2011). Currently industrial best practices include the use of advanced technology to both improve performance and minimise risk (Derry 2012).

There are several additional approaches to technology which have not been discussed in the literature so it is not known if these are being implemented in any customs organisation. For example, control theory (Kuo & Golnaraghi 2003) has been effectively used in electrical engineering. The basis of control

theory is to define the system mathematically and then develop a mathematical solution which minimises oscillation around the control point. This technique is common in electrical engineering but has not been used in logistics. A generic model for control theory is shown in Figure 2.

Figure 2: Basic control schematic



Source: Kuo & Golnaraghi 2003.

The mathematics of control theory is rigorous, but the results may yield large benefits in understanding what input fluctuations do to the system. The basics for solving control problems are as follows:

- finding a solution to the nonlinear differential equations
- linearising the nonlinear differential equations at the resulting solution
- finding the Laplace Transform of the resulting linear differential equations
- solving for the outputs in terms of the inputs in the Laplace domain (Brogan 1991).

This concept is not unknown in business; economists term the construct involving multiple inputs with multiple possibilities and consequences as multiple equilibria (El-Erian 2008). The reason this type of analysis is important is that it recognises that in both physical science and economics, multiple variables may deviate from the expected, and the resulting interaction can cause significant unwanted results. This is directly related to the flow of commercial traffic at ports of entry because multiple variables can change unexpectedly (loss of inspection equipment, delayed arrivals at the inspection yard, congestion leaving the yard, computer failure, etc.). Maximising the resources available to customs officials allows for the use of advanced analytical techniques, which can better explain these interactions and their unintended consequences leading to the third proposition:

***P3: The proper use of state of the art technology to quickly move goods through ports of entry is positively related to trade.***

### 3.4 Time-focused

In trade, as in all economic activity, time has an economic cost. Hence, savings in time in transit have a clear economic benefit. The benefits of reduced cycle time have been clearly demonstrated in various industries (Stevenson 2011). Cycle time reduction has become a significant concern for those doing global business. The longer products take to get to market, the more likely they will perish, become outdated, be displaced by superior alternatives, or lose the interest of potential buyers. Previous research has shown that a 10% cut in delivery time will, other things being equal, expand exports of time-sensitive manufactures by over 4% (Holloway & Rae 2012).

If goods are slow to cross international boundaries, cost increases. Cirincione reports the estimated time to conduct a physical inspection of a container is four hours involving 15 to 20 customs officers

(Cirincione, Cosmas, Low, Peck, & Wilds 2007). This evidence shows the need to increase efficiency in the screening process of imported goods because anything that impedes the supply chain flow has a direct impact on competitiveness (Ngai 2011). From this we can postulate:

***P4: The faster goods move through the entire supply chain positively impacts global trade.***

### 3.5 Cost

Transaction cost has been important for modern economics and is especially significant for studying institution system and social structure transformation since Ronald H Coase first proposed it in 1937 (Lv, Liu & Wang 2012). The impact of cost is most obvious in the global supply chain when the bureaucracy of customs and border security, and the associated transaction costs of crossing international borders are considered (Ngai 2011). Long delays at borders and attendant costs ultimately raise the cost of the goods, making both the firms using particular ports of entry and the countries of those ports of entry noncompetitive (Raj Jain 2012). For example, consider the case of Title XVII, Maritime Cargo of Public Law 110– 53—AUG. 3, 2007, which requires 100% scanning of all containerised freight entering the US. The concern with implementation of this law is the widespread congestion that would result from this action. The action can best be described by the theory of constraints (Goldratt & Cox 1986), which is based on the concept of identifying the limiting or constraining process in an operation and eliminating the obstacle. The concept behind this theory is that increasing flow through the constraint will result in an overall improvement in throughput in the process. Implementation of the 100% Container Scanning Law is contrary to the theory of constraints. Several researchers have expressed concern about this law and its impact on the adverse effect, including costs, on the global economy due to the adverse impact on the global supply chain (Bakshi, Flynn & Gans 2010; McNeill & Zuckerman 2010; Nguyen 2012). Contrary to the current actions of the US CBP, research has continually shown that reducing such costs stimulates international trade, investment and business innovation (Holloway & Rae 2012). This research leads to the fifth proposition, which is:

***P5: Minimising cost at port of entry operations is positively related to trade.***

### 3.6 Mission

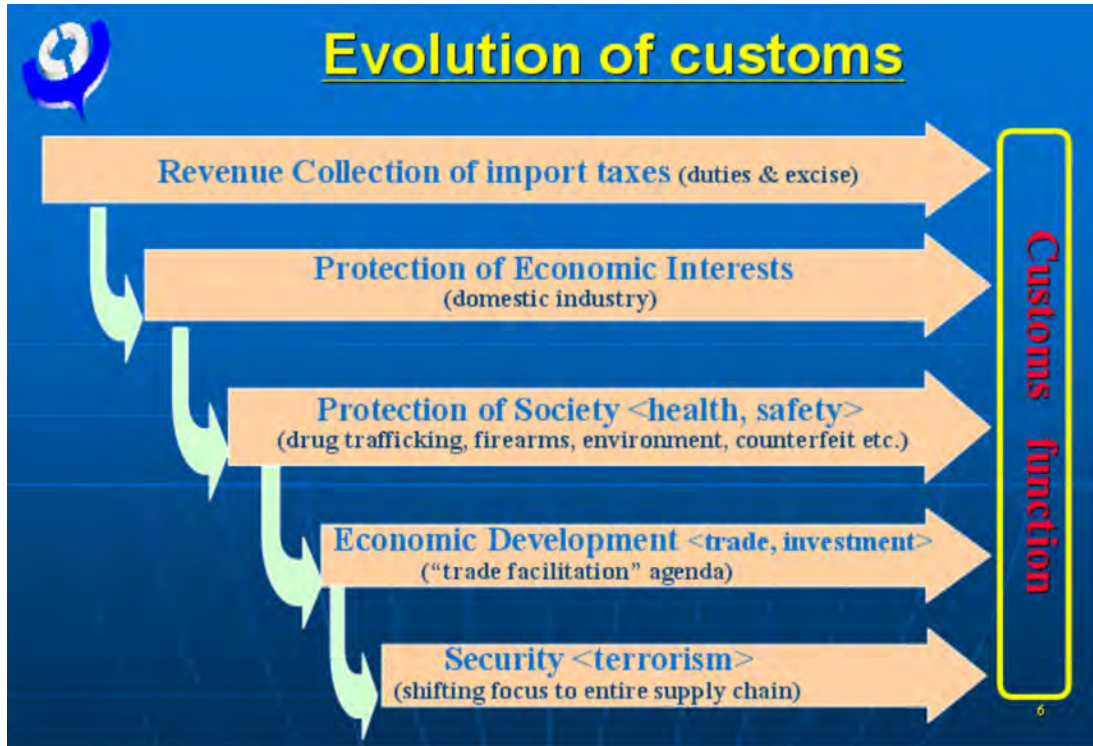
This section has been deliberately presented last because it should be the focus that drives all of the previously submitted topics. Strategy is easiest understood as “how are we going to get there?” (Gamble, Thompson & Peteraf 2013). Essentially, strategic management is the formulation of necessary resources to accomplish the organisation’s long term goals. The starting point of any successful strategic plan is the organisation’s mission statement. This is important when considering the role of customs in global trade. Consider, for example, the evolution of customs over the past thousand years. Mikuriya (2007) has done an excellent job of doing this and a summary of this evolution is shown in Figure 3.

The US has followed this progression completely. The original mission of the Customs Service, the collection of tariffs, was established by President George Washington with the signing of the Tariff Act on 4 July 1789. However, consider the current mission statement of the US CBP:

We are the guardians of our Nation’s borders. We are America’s frontline. We safeguard the American homeland at and beyond our borders. We protect the American public against terrorists and the instruments of terror. We steadfastly enforce the laws of the United States while fostering our Nation’s economic security through lawful international trade and travel. We serve the American public with vigilance, integrity and professionalism (CBP 2009).

This is a very revealing mission statement because the overwhelming majority of the mission is focused on protection and defending the US borders. There is only one short phrase regarding economic activity, and that phrase focuses on ‘economic security’. The problem with this mission statement is that for any nation to be secure it must be economically viable. The reason the customs service was initially formed

Figure 3: Evolution of Customs



Source: Mikuriya 2007.

in 1789 was to generate revenue for the US federal government to function. Mission statements are only useful if they match the current environment. The current environment of the world today is global trade.

When an imbalance occurs in an organisation's actions, the result is an imbalance in the organisation's performance. Consider the performance of the US in the world trade arena regarding crossing international boundaries. This analysis is best done by looking at the World Bank's 'Ease of Doing Business Index' (World Bank 2012b). The US is currently ranked as the number twenty country in terms of ease of doing business across borders. The rank of the countries above the US is shown in Table 3.

Of the countries ranked above the US, there are several western European nations and the nation of Israel. The data for Israel clearly shows that for a country which has an overall ranking of 34; it is ranked as the 10th easiest country in the world in terms of doing business across borders. It is obvious that Israel's ability to import and export goods is a competitive advantage for the country. Compare this to the US, which is 4th on the overall list but is 20th in terms of ease of importing and exporting. For the US, the ability to import and export goods is not a competitive advantage but a hindrance in doing business.

Table 3: Ease of Doing Business versus Trading across Borders ranking

Economy	Ease of Doing Business rank	Trading across borders
Singapore	1	1
Hong Kong SAR, China	2	2
Estonia	24	3
Korea, Republic of	8	4
United Arab Emirates	33	5
Finland	11	6
Denmark	5	7
Sweden	14	8
Norway	6	9
Israel	34	10
Panama	61	11
Germany	19	12
United Kingdom	7	13
Netherlands	31	14
Latvia	21	15
Japan	20	16
Thailand	17	17
Saudi Arabia	12	18
Cyprus	40	19
United States of America	4	20

Source: World Bank ‘Ease of Doing Business Index’ 2012b.

Figure 4 shows the individual rating factors and their correlations. The way this data is interpreted is that the higher the individual correlation scores (which can range from 0.00 to 1.00), the more important the individual variable is as compared to another variable.

As seen from the data represented in Figure 4, the correlation between trading across borders and all other variables ranges from 0.27 to 0.45. These are all significant correlations, but those above 0.40 are particularly important and, in this case, trading across borders has a 0.40 or greater correlation for five of the nine variables. This means the ability of the US to make cross border trading easier will have a significant impact on the country’s ability to compete globally.

Figure 4: Ease of Doing Business variable correlations

	Dealing with construction permits	Registering Property	Getting credit	Protecting investors	Paying taxes	Trading across borders	Enforcing contracts	Resolving insolvency	Getting electricity
Starting a business	0.39	0.32	0.45	0.59	0.37	0.45	0.42	0.45	0.28
Dealing with construction permits		0.22	0.19	0.25	0.36	0.45	0.20	0.33	0.40
Registering property			0.39	0.29	0.31	0.27	0.49	0.33	0.24
Getting credit				0.47	0.20	0.41	0.42	0.52	0.24
Protecting investors					0.37	0.39	0.29	0.37	0.20
Paying taxes						0.40	0.27	0.33	0.40
Trading across borders							0.35	0.50	0.56
Enforcing contracts								0.42	0.21
Resolving insolvency									0.32

Source: Doing Business Database 2011.

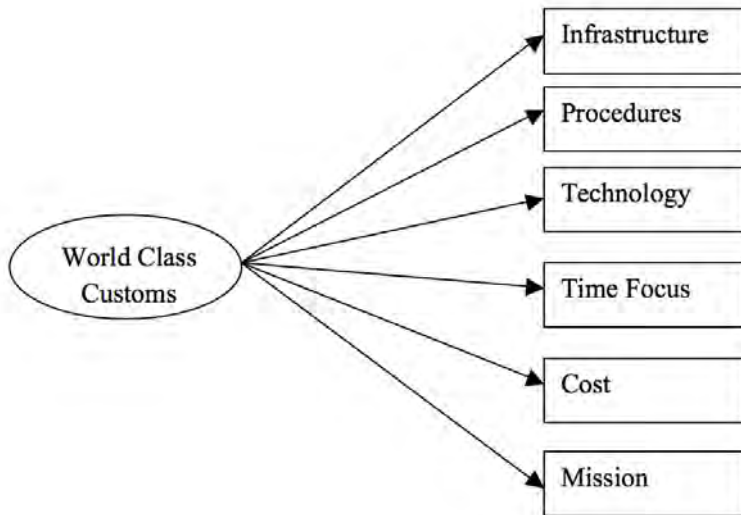
This results in proposition six, which is:

***P6: If a country's customs mission statement is properly aligned with both the country's goals and the current operating environment, international trade is increased.***

### Model

The literature presented in the previous sections allows for the construction of a theoretical model of world class customs. The use of models allows researchers to confirm the presence of causal constructs and their effects on a dependent variable in a cost effective manner. Figure 5 is the proposed model for world class customs.

*Figure 5: World class customs model*



Developed by Coyle, Cruthirds, Naranjo & Nobel 2013.

The model represented in Figure 5 can be tested using confirmatory factor analysis (CFA). This has been shown to be an effective technique for analysing complex interactions as an initial technique for developing models (Hair, Anderson, Tatham & Black 1998). The propositions for this model have been shown to be theoretically supported. The next step will be to develop the individual measures for each of the individual constructs and then test the model. Since global trade has become such a significant part of the world's economy, it will be best to develop the model using world data, not data from one country.

## 4. Concluding comments and recommendations for future research

This paper has presented a new mechanism for evaluating customs operations. Rather than considering individual functions and evaluating them in terms of "best in class", this paper has presented an argument that the idea of world class customs should be developed, and the constructs presented in this paper are a first attempt at this effort. While the model is supported by literature, there is no empirical evidence to support this, and the next step should be empirical testing of the model.

One shortcoming of this paper is the brevity of each of the subjects. It is recommended that future research be dedicated to better exploring the individual constructs. As an example, in the procedures section, a brief mention was made about education. A detailed analysis of the educational training given customs officials should be made. The cursory investigation for this paper indicates that most of the educational training given customs officials concentrates on legal, law enforcement, and compliance education and training. There is little evidence that customs officials are given management education or



management training. Management education is critical to the improvement of any organisation because this topic deals with effective leadership, problem solving, and team building and provides students with broader exposure to the world of business. As anecdotal evidence, one of the authors of this paper has spent considerable time with multiple senior level CBP managers, and all complain of their lack of knowledge of the world economy and state of the art control processes.

Another area not given much attention in this paper is the actual mechanism for implementing world class customs ideas. This falls under the construct of strategic management and one reasonable idea for consideration would be to develop an improvement strategy as follows:

1. **Select a pilot location.** For the purpose of this project, the pilot location needs to be accessible to the researchers. This will minimise cost and speed analysis of ideas.
2. **Analyse existing data.** The data analysis will include both a flow analysis which is based upon two known scientific principles: queuing theory (Stevenson 2011) and theory of constraints (Goldratt & Cox 1976).
3. **Develop a data driven strategy.** This strategy will be based upon site-specific capabilities and best technology/industry practices and supported by facts.
4. **Conduct a pilot program.** Make changes and recommendations based on results supported by the data.
5. **Develop new research initiatives.** There are several promising technologies, some of which have been discussed in this paper. Research supports the use of control theory as an operational tool and the use of computer algorithms as excellent tools which could be tested in a customs environment.
6. **Educational improvements.** Previous discussions with both CBP representatives and members of the private sector have indicated a general lack of knowledge in both business management in CBP and a lack of knowledge regarding customs procedures within the private sector.

Academics, customs officials, and practitioners working together should be able to identify the necessary elements of world class customs which will better facilitate the flow of legal goods while, at the same time, increasing the ability to interdict illegal goods.

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# The impact on Customs of the implementation of the ASEAN-China FTA

*Li Li*

## Abstract

This paper examines the impact of the ASEAN-China Free Trade Area (ACFTA) on regional trade facilitation. An overview of the development of ACFTA is followed by a discussion on the need for ongoing consideration of new policies and measures to further enhance economic complementarity and industry cooperation with the goal of strengthening zero tariff FTA policies. Research indicates that although utilisation of preferential concessions is increasing, it is less than the original expectations of China's Central Government. Policies are therefore being considered and other measures designed to enhance the utilisation rate. The challenges presented by these initiatives and their impact on Customs' already limited resources are outlined. The paper concludes by identifying opportunities for Customs to effectively address the growth in regional trade and contribute to the negotiation, formulation and enforcement of rules of origin.

## 1. History and development of ACFTA

A Free Trade Agreement (FTA) is a legally binding agreement between two or more countries to reduce or eliminate trade barriers in terms of both tariff and non-tariff, and to facilitate the cross-border movement of goods and services between the territories of the Parties.

The ASEAN-China Free Trade Area (ACFTA) is a free trade area between ten member states of the Association of Southeast Asian Nations (ASEAN) and the People's Republic of China. In November 2001, ASEAN and China launched negotiations for an ASEAN-China FTA and signed the Framework Agreement on Comprehensive Economic Cooperation (FACEC) in the following year (Sheng Lijun 2003). The Agreement on Trade in Goods was signed in 2004 and implemented on 1 July 2005 by the ASEAN countries and on 20 July 2005 by China.<sup>1</sup> In January 2007, the Agreement on Trade in Services was signed and entered into force in July 2007. The Agreement on Investment was signed in August 2009 and implemented on 15 February 2010.<sup>2</sup>

When ACFTA came into effect on 1 January 2010 it became the largest free trade area in terms of population, the third largest in terms of nominal GDP, and the third largest in trade volume after the European Economic Area and the North American Free Trade Area.<sup>3</sup> Under the ACFTA agreement, 90% of all goods, or around 7,881 items traded between China and the six original ASEAN countries have been given zero tariff treatment,<sup>4</sup> and the average tariff rate on goods originating in ASEAN and sold in China has decreased from 9.8% to 0.1%. As at 1 January 2010, the average tariff rate on Chinese goods sold in ASEAN countries decreased from 12.8% to 0.6% pending implementation by the four remaining ASEAN members.<sup>5</sup> Since 1 January 2012, all goods except for 400 subheadings of sensitive goods between China and the six original ASEAN countries have been given zero tariff treatment.<sup>6</sup>

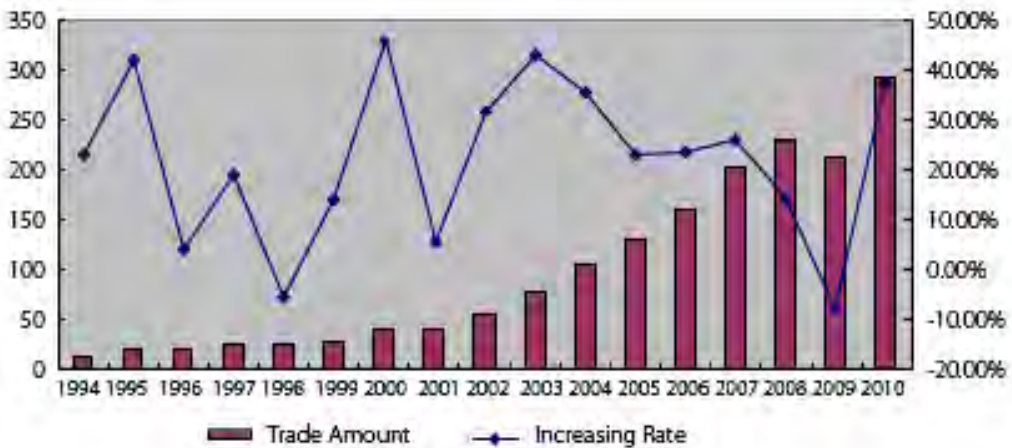
## 2. The impact of ACFTA on regional trade in goods

### 2.1 Trade expansion

Since the signing of the FACEC in 2002, regional trade has expanded rapidly (Wei Min 2002), with trade volume increasing from USD54.78 billion in 2002 to USD292.86 billion in 2010, that is, up to 37.49% on a year-by-year basis (see Chart 1). In 2010, the year ACFTA entered into full implementation, China's imports from ASEAN countries increased by 44.8% to USD154.56 billion and, for the first time, China surpassed Japan and the European Union (EU) to become ASEAN's largest trading partner. In the same year, ASEAN became China's fourth largest trading partner, after the EU, the United States (US) and Japan.

However, in 2009 China-ASEAN trade decreased 7.92% from the previous year to USD213.01 billion due to the global financial crisis that originated in US and EU markets, reflecting the fact that China and ASEAN rely significantly on those markets. The trade relationship between China and ASEAN is more competitive than complementary. The main products traded among ACFTA members still focus on labour-intensive goods, such as machinery and electronic products, and raw minerals which have low value add (see Chapters 84, 85 and 27 respectively of the HS Code) (Table 1). Statistically, only the trade between China and Singapore has a better complementary relationship compared with other ASEAN member countries. As a developed country, Singapore imports considerably more parts and components under HS8517, HS8541, HS8504, and HS8534, and exports integrated circuitry (HS8542) and refrigeration equipment (HS8418) with higher technology to China.

Chart 1: Trade volume and annual growth rate of ACFTA 1994-2010 (USD billions)



Source: China Statistical Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).

Table 1: Top 3 Products imported into China from main ACFTA members<sup>7</sup> 2005-2012 (HS Chapters)

Country	2005	2006	2007	2008	2009	2010	2011	2012
Thailand	84	84	84	84	84	84	84	84
	85	85	85	85	85	85	85	85
	39	40	40	40	40	40	40	40
Philippines	85	85	85	85	85	85	85	85
	84	84	84	84	84	84	84	84
	90	71	26	72	39	26	26	26
Malaysia	85	85	85	85	85	85	85	85
	84	84	15	84	84	84	84	84
	15	15	84	15	15	27	27	27
Singapore	85	85	85	85	85	85	85	85
	84	84	84	84	84	84	84	84
	27	27	27	27	89	27	27	27
Indonesia	27	27	27	84	27	27	27	27
	84	84	26	85	84	84	84	84
	29	15	15	27	85	85	26	85
Vietnam	27	27	27	84	27	85	84	85
	40	40	40	27	85	84	85	84
	26	26	44	85	84	27	27	27

Source: China Statistical Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).

## 2.2 Trade deficit and individual performance

China's trade deficit with ASEAN (Table 2) rose from -7.61% in 2002 to -16.4% in 2003 and between 2004 and 2007, fluctuated between -14% and -20%.<sup>8</sup> The bilateral trade imbalance improved in 2009 because market demand from western countries decreased sharply which directly impacted China's exports. As the 'world factory', China generally assembles and packages goods in production lines, with ASEAN being the chief source of materials, parts and spares. As a result, importations from ASEAN into China decreased (Wang Feng, Liang Chuyun & Sheng Shaoqin 2012).

Table 2: Trade amount and trade deficit of ACFTA 2002-2010<sup>9</sup> (USD billions)

Year	Trade amount	Export	Import	Annual increase	Trade deficit
2002	54.78	23.58	31.20	31.64%	-7.61
2003	78.25	30.92	47.33	42.85%	-16.4
2004	105.87	42.90	62.97	35.29%	-20.07
2005	130.36	55.36	75.00	23.14%	-19.63
2006	160.84	71.31	89.53	23.38%	-18.22
2007	202.53	94.15	108.39	25.92%	-14.24
2008	231.32	114.32	117.00	14.21%	-2.69
2009	213.01	106.26	106.75	-7.92%	-0.49
2010	292.86	138.16	154.70	37.49%	-16.54

Source: China Statistical Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).



Among the ten ASEAN member countries, trade performance with China has differed. Prior to 2008, Singapore was China’s most significant ACFTA trading partner, (USD47 billion), followed by Malaysia and Thailand. Since 2008, Malaysia has overtaken Singapore as China’s largest FTA trading partner, followed by Singapore and Thailand (Table 3).

Compared to other original members, Malaysia and Thailand exported more goods to China and their exporters thus benefited more from preferential concessions (Table 4). Generally, the four new members imported more goods from China than they exported, representing an adverse trade balance.

*Table 3: The top four trading partners with China 2004-2010 (USD billions)*

Year	First	Second	Third	Fourth
2004	Singapore (26.68)	Malaysia (26.26)	Thailand (17.34)	Indonesia (13.47)
2005	Singapore (33.15)	Malaysia (30.70)	Thailand (28.11)	Philippines (17.56)
2006	Singapore (40.86)	Malaysia (37.11)	Thailand (27.73)	Philippines (23.41)
2007	Singapore (47.14)	Malaysia (46.39)	Thailand (34.64)	Philippines (30.62)
2008	Malaysia (53.56)	Singapore (52.48)	Thailand (41.30)	Indonesia (31.52)
2009	Malaysia (51.97)	Singapore (47.86)	Thailand (38.20)	Indonesia (28.39)
2010	Malaysia (74.22)	Singapore (57.06)	Thailand (52.95)	Indonesia (43.75)

Source: China Statistical Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).

*Table 4: The six original members’ performance in trade deficit 2002-2010 (USD billions)*

Year	Malaysia	Thailand	Philippines	Brunei	Indonesia	Singapore
2002	-4.32209	-2.64225	-1.17492	-0.22079	-1.08190	-0.06234
2003	-7.84552	-4.99893	-3.21414	-0.27848	-1.26508	-1.62108
2004	-10.08868	-5.73893	-4.79072	-0.20317	-0.95925	-1.30687
2005	-9.48686	-6.17259	-8.18206	-0.15459	-0.08659	0.11766
2006	-10.03536	-8.19836	-11.93642	-0.11568	-0.15603	5.51267
2007	-11.01691	-10.69006	-15.61563	-0.12943	0.21390	1.211923
2008	-10.71891	-10.04209	-10.42380	0.04069	2.86184	1.216481
2009	-12.70414	-11.61980	-3.35782	-0.14155	1.05230	12.24800
2010	-26.64476	-13.45487	-4.68171	-0.29672	1.15685	7.61848

Source: China Statistical Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).

### **3. Utilisation of FTA preferential concessions**

In general, the utilisation rate of FTA preferential concessions has increased steadily year by year since the Agreement on Trade in Goods came into force. However, this is still below China Central Government’s anticipated utilisation (Chen Siyuan 2011).

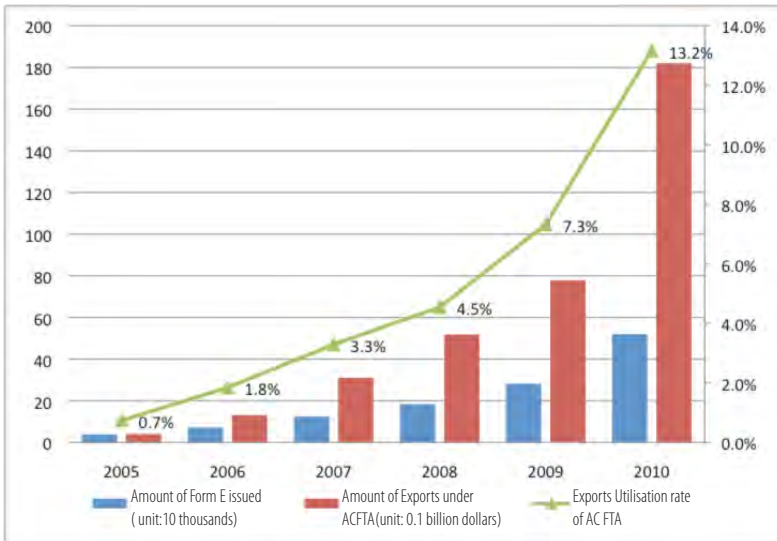
In regard to China’s exports, the number of Origin Certificates (Form E) issued increased from 38,000 in 2005 to 52,000 in 2010 and in the same period, the volume of trade under ACFTA rose from USD0.4 billion to USD18.2 billion, with export utilisation rate also increasing, from 0.7% to 13.2% (Chart 2).

Compared to the utilisation rate in the US, ACFTA still has some way to go. In 2010, around 41% of US goods were exported to FTA member countries,<sup>10</sup> which is more than three times the utilisation rate of ACFTA. In the US, FTAs have proved to be one of the most effective ways to open up foreign markets

to its exporters. The establishment of a more stable trading environment with fewer barriers makes it easier and cheaper for US firms to export their products to FTA regional markets. As a result, from 2009 to 2010, US exports to FTA countries grew faster than to the rest of the world: 23% versus 20%, about twice the rate of increase in ACFTA in the same period.<sup>11</sup>

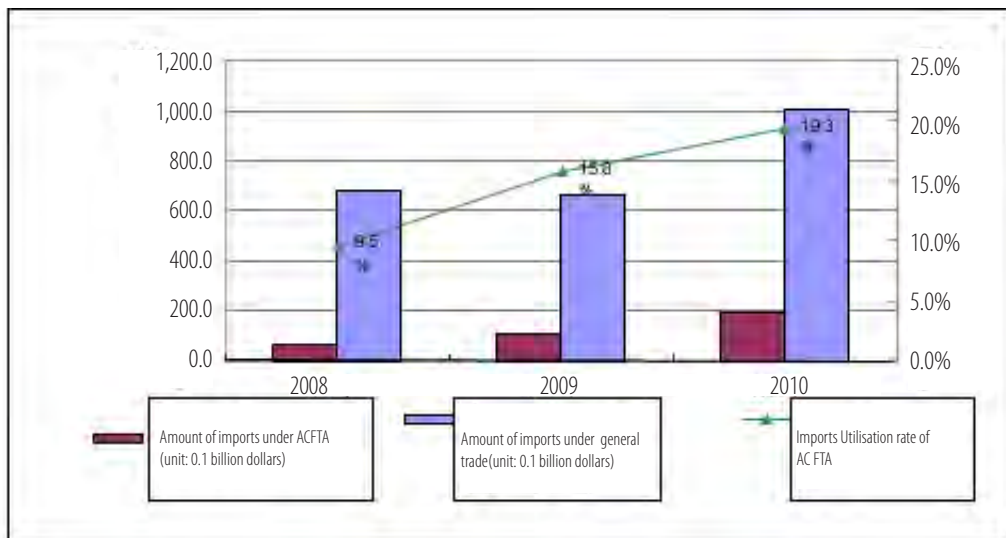
In terms of import utilisation of ACFTA, performance was more positive. Goods under a preferential tariff rate increased from 9.5% in 2008 to 19.3% (USD19.31 billion) in 2010 (Chart 3).

Chart 2: Export utilisation of ACFTA 2005 to 2010 (USD billions)



Source: General Administration China Customs and General Administration of Quality Supervision, Inspection and Quarantine.

Chart 3: Import utilisation of ACFTA 2008 to 2010 (USD billions)



Source: General Administration China Customs Statistics.

Among all ASEAN countries, Thailand’s utilisation rate was the highest. In 2010, Thailand’s export trade under FTA preferential treatment accounted for almost one-third of total exports to China. Vietnam also showed a good utilisation rate. Their main exports to China are raw minerals (HS Chapter 27) (Table 5). Malaysia, as China’s largest ACFTA trading partner, nevertheless presented a comparatively low utilisation rate. Laos had the lowest utilisation rate overall, and Myanmar’s and Cambodia’s decreased.

From a research questionnaire and sample visits,<sup>12</sup> it was concluded that there were two reasons for low utilisation. On the one hand, the complexity of the rules of origin (Baldwin 2006; Carrere & de Melo 2006), together with low predictability of preferential treatment in the import country reduced traders’ intention to spend money and time to apply for Form E. On the other hand, certain products are not covered in the ACFTA tariff concession list, such as the smoked sheets from Laos and technically specified natural rubber from Cambodia which are not included in China’s tariff reduction list. Also, as mentioned above, hundreds of cargo subheadings under sensitive goods have not been given tariff concessions.

*Table 5: Different performance of the import utilisation rate of ASEAN countries*

<b>Import utilisation rate</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>
<b>ASEAN</b>	<b>9.5%</b>	<b>15.8%</b>	<b>19.3%</b>
<b>Countries</b>			
Thailand	11.7 %	25.8 %	33.2 %
Vietnam	12.0 %	26.5 %	27.7 %
Indonesia	10.4 %	15.8 %	23.7 %
Myanmar	28.5 %	20.7 %	21.9 %
Singapore	11.7 %	15.9 %	18.9 %
Malaysia	8.7 %	10.2 %	11.2 %
Cambodia	0.4 %	13.9 %	9.2 %
Philippines	2.5 %	4.3 %	8.3 %
Brunei	0.00008%	0.4 %	6.1 %
Laos	---	---	0.4 %

*Source:* General Administration China Customs Statistics.

## **4. Challenges for Customs**

Interest in establishing Regional Trade Agreements (RTAs) and FTAs has increased worldwide (Estevadeordal & Suominen 2006) and by 31 July 2013, the Secretary of the World Trade Organization (WTO) had been notified of 575 RTAs (including goods, services and accessions), 379 of which were in force.<sup>13</sup> As a result of this trend, China’s Central Government promoted ‘FTA Implementation’ as the National Strategy in 2007 and accelerated steps to enforce their implementation in the following years.<sup>14</sup> This increase in the number of FTAs and RTAs has added to Customs’ administrative and capacity building costs. Even so, it is essential that Customs supports the negotiation and promotion of FTAs, and facilitates the inclusion of goods that meet compliance requirements. At the same time, as proposed by Widdowson and Holloway (2011), Customs should establish an effective risk analysis system in order to identify goods that originate in a third country and fraudulently claim FTA tariff rates.

### **4.1 Rules of Origin negotiations**

Rules of Origin are at the core of FTA negotiations on goods and also represent an area in which capacity building is urgently required (Li 2012) due to their complexity and potential applicability to a multitude

of products across various industries and sectors. In theory, the rules of origin should not be too strict or too loose (Inama 2009). Further, consideration of the North American Free Trade Agreement (NAFTA) and EU models (Estevadeordal 2008; Jones & Martin 2012) often results in confusion about which model would be more appropriate for China or ACFTA, and which origin criteria are more applicable and feasible in relation to developing countries, and to fully understand the likely impact of negotiated rules of origin, Customs must clearly understand industries' production and development requirements.

In this context, a change in the formulation of origin criteria, by combining the '40% Regional Value Content (RVC)' criteria of the EU Model with the 'Change of Tariff Classification + 40% RVC' mixed criteria for certain products of the NAFTA model may serve to reduce the restrictiveness of some related goods and offer more flexibility in complying with the rules of origin.

## 4.2 Rules of origin formulation

In addition to selecting a 'rules of origin' model, certain existing origin rules require amendment.

**Minimal operations and processes.** The current Minimal Operations and Processes provision applies only to 'Wholly obtained' goods due to the interim rules of origin for the Early Harvest Program (EHP). This provision is not well expressed compared to other FTAs<sup>15</sup> and is therefore not easy to interpret or implement.

**De minimis.** Currently there is no *de minimis* provision in ACFTA rules. This continues to restrict the change of tariff classification (CTC) criteria and impede the ability of certain industries to comply with the requirements and to utilise the ACFTA preferential arrangements. Some ACFTA members have suggested adding a *de minimis* provision with an 8% to 10% threshold. For the textile industry, a *de minimis* provision pertaining to weight has been suggested and discussion about this is ongoing.

Also, to implement the 'Accumulation' provision more efficiently and accurately, it has been recommended that consideration be given to including an 'Indirect Materials' provision in the ACFTA rules of origin.

## 4.3 Issuing certificates of origin

In some ACFTA member countries Customs is not responsible for issuing certificates of origin and the agency with that responsibility has insufficient knowledge and expertise in the fields of the HS code, customs valuation or the rules of origin. This leads to errors in issuing Form E, through incorrect HS classification, applying incorrect formulae to calculate Regional Value Content, or not following the 'Operational Certification Procedures for the Rules of Origin' correctly. Moreover, some issuing authorities may issue Form E in respect of goods for which preferential tariff treatment should not be given in accordance with the tariff reduction schedule, and consequently there is a clear need for officials with responsibility for issuing certificates to be better trained to ensure that goods identified on Form E are entitled to the relevant preferential tariff treatment under ACFTA.

Self-certificate issue is not permitted under current ACFTA rules. However, with the implementation of the WCO SAFE Framework and Authorised Economic Operator (AEO) regimes, an amendment to enhance facilitation for approved operators may soon be considered by ACFTA.<sup>16</sup>

## 4.4 Verifying rules of origin

**Unintentional irregularity.** Actual cases of irregularity can be classified into two main categories:

*Misuse in good faith.* Sometimes traders may present Customs with a Form E certificate that does not comply with the requirements of the rules of origin, but not with the intention of evading trade control. For example, a certificate may be submitted in the wrong format or in an out-of-date format, or for which incorrect origin criteria have been used for the declared goods, or by entering HS codes and units of weight in the wrong column by mistake.

*Counterfeiting and fraudulence.* Illegal traders may submit fraudulent certificates with the intention of evading most favoured nation (MFN) tariff rates and anti-dumping taxes. Examples of this type of fraud include counterfeiting Form E for goods that originated in a third party country, modifying HS codes of products from the codes of non-preferential policies applied to the codes covered by FTA concessions, adding illegal goods that do not satisfy the origin criteria, or increasing the authentic import weight of the goods approved by the issuing bodies.

**Difficulty in verifying origin.** Verifying origin through physical examination is a challenge for customs administrations in the country of import. For example, identifying whether the origin of a coat is Member Country A or Third Party B can prove to be quite difficult. While ‘Origin Marks’ may assist physical verification, such marks are not compulsory for all imported goods. Furthermore, the legal basis for origin marks lies in the non-preferential rules of origin based on the WTO Agreement on Rules of Origin, but not the ACFTA preferential origin rules. Consequently, even if certain goods are entitled to be marked ‘Made in Member Country A’, it does not mean the goods satisfy the ACFTA preferential rules of origin and are therefore eligible to enjoy tariff concessions. As an electronic verification system has not been established among ACFTA members, certificate verification relies mainly on manual checking which, as we know, is time consuming, often ineffective and inefficient.

**Administrative cooperation.** Of the four methods proposed by the WCO to verify the origin of goods (importer investigation, exporter direct investigation, administrative cooperation, and field inspection), administrative cooperation has emerged as the most popular way of checking the authenticity of the origin of goods. However, the deposit that is required to be paid by importers and the waiting time for a response from the issuing agency, impact negatively on the value of obtaining a concession and inconvenience importers. For example, a deposit must first be paid and only on a positive response from the export issuing agency can an importer request that the deposit be refunded. Sometimes the issuing agency in the export country does not provide feedback within the required time limit<sup>17</sup> which can lead to considerable inconvenience to importers, as preferential treatment will be denied by the import customs administration and importers have to pay the tariff at the MFN rate. Moreover, there is the likelihood of possible criminal or administrative penalties, including anti-smuggling litigation. The increasing trade risk and cost may also impede traders taking the initiative to seek the benefits of FTA policies.

**Export control.** Generally, customs authorities in ACFTA member countries rarely exercise controls on exported goods. To date, no fraud cases have been detected in the export phase. This is, in part, because customs officials are not sure whether or not the purchaser of the goods will seek FTA benefits in the country of import, and in part due to the export encouragement policies that exist in all the member countries. Weaknesses in export control also result in inaccuracies in member countries’ FTA utilisation statistics because customs authorities are unable to confirm the amount of exported goods that enjoy preferential concessions in the importing countries. Export/import statistics and utilisation rates will therefore be inaccurate.<sup>18</sup>

## 5. Challenges and opportunities

To effectively implement ACFTA, several issues need to be considered. Not only are less duties and taxes collected under the FTA zero-tariff policies but at the same time, customs authorities require additional resources to ensure an effective and ongoing capacity to administer the policies. This includes, for example, additional costs of training customs officials, especially those field-based officials who are responsible for origin certificate verification and physical inspection. Appropriate infrastructure, particularly the introduction of a risk analysis and management system, is also required in order to select high-risk goods in terms of origin irregularity and to ensure that trade is facilitated under the FTA. An independent branch comprising experts in the fields of FTAs and origin rules may need to be established and funded in order to ensure competent FTA negotiation and implementation.

These additional costs to customs administrations will be amplified by the concurrent loss in revenue under FTAs. Nevertheless, there is a need for Customs to be more involved in national strategy formulation, industry policy amendment, and protection of community interests. In the short term, as the utilisation rate is relatively low (on average no more than 20% of ASEAN-China's total trade, with 80% of ASEAN-China trade remaining under MFN tariff rates), revenue collections are likely to be maintained in view of the anticipated dramatic growth in regional trade. In the long term, Customs will need to adjust its attitude to regional and national FTA strategies, recognising that FTA policies are designed to encourage trade facilitation and greater freedom of trade among contracting members, and are not focused on tariff collection. This means that Customs, particularly the administrations of developing countries, should accept their new role and recognise the opportunities that flow from the development of FTAs.

Customs should also become more involved in developing national trade policies by taking part in aspects of FTA negotiations such as rules of origin and simplified customs procedures. Traditionally this has not been the case, with Customs' role being restricted to that of the trade policy enforcement agency, acting as the 'gatekeeper'<sup>19</sup> and having little input to national policymaking. The rules of origin provide opportunities for Customs to contribute to the national interest through community protection and domestic industry support. Loosely formed origin rules result in greater external competition whereas rules that are capable of effective administration can provide greater industry assistance. Research into key industries' development and use of processing technology would, for example, provide guidance in adjusting origin rules, enhance domestic inter-agency relationships and facilitate trade by lowering MFN tariff rates.

## **6. Findings and conclusions**

Regional trade under ACFTA is expanding rapidly. China has surpassed Japan and the EU to be ASEAN's largest trading partner. However, China-ASEAN trade still relies heavily on US and European markets and the trade relationship between China and ASEAN is currently more competitive than complementary.

An increasing number of traders is making use of ACFTA preferential concessions, even though the utilisation rate is still low compared to other mature and developed FTAs (EU and NAFTA). This is partially because of the complexity, restrictiveness and unpredictability of the origin rules and weaknesses in government service mechanisms. Industrial cooperation between China and ASEAN is still developing and is an important factor in common economic growth via duty-free policies, and ACFTA governments should take steps to enhance regional industry supply chains and complementarity among bilateral traders.

In addition to challenges on implementation and administration, FTAs also provide opportunities for Customs to contribute more to the national interest and industrial assistance by negotiating effective origin rules under FTAs. A key issue is the restrictiveness of certain goods' origin rules. Therefore, to better contribute to national trade policymaking, Customs should invest more effort on researching industry needs and requirements and establishing more efficient inter-agency cooperation.

Customs should adjust the relevant rules and procedures in order to promote trade facilitation and the FTA utilisation rate (Li 2011). In addition to establishing more appropriate and transparent rules criteria though FTA negotiation and formulation, Customs should seek to establish clearer and more predictable guidelines under which traders may claim FTA treatment for their imports. Advance rulings for FTAs origin decisions, an AEO regime, and e-Verification systems between import and export countries should also be considered and implemented.

Capacity building is urgently needed to ensure customs officials are proficient in regard to origin implementation and administration. Sufficient resources are required to guarantee the effective negotiation and implementation of FTA origin rules, and to develop a risk analysis and management infrastructure that properly addresses the administrative functions required to determine origin.

Training is also necessary for international traders and issuing bodies, in order to reduce instances of incorrectly issued certificates of origin through misunderstanding and misapplication of the origin criteria.

Finally, the WCO Guidelines on Preferential Origin Verification are designed to assist Member customs administrations by providing practical examples of effective implementation and administration. These Guidelines should form the basis of developing an effective risk-managed system of preferential origin and Customs' role in the verification process.

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## Notes

- 1 The Agreement on Trade in Goods was implemented in July 2005 for the two parties. ASEAN implemented the agreement 19 days before China.
- 2 See information supplied in the China FTA Network, <http://fta.mofcom.gov.cn/topic/chinaasean.shtml>.
- 3 This information is available from the website of Chinaviews. Additional information is available at [http://news.xinhuanet.com/english/2010-01/01/content\\_12740470.htm](http://news.xinhuanet.com/english/2010-01/01/content_12740470.htm).
- 4 According to the agreement, the remaining ASEAN members including Cambodia, Lao PDR, Myanmar and Vietnam have until 2015 to do so.
- 5 See the Free Trade Agreement between China and ASEAN.
- 6 The remaining ASEAN members including Cambodia, Lao PDR, Myanmar and Vietnam have until 2018 to do so.
- 7 Chapter 15: Animal or vegetable fats and oils and their cleavage products; prepared edible fats; animal or vegetables waxes; Chapter 26: Ores, Slag and Ash; Chapter 27: Mineral fuels, mineral oils and products of their distillation; Bituminous substances; Mineral waxes; Chapter 39: Plastics and articles thereof; Chapter 40: Rubber and articles thereof; Chapter 84: Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof; Chapter 71: Natural or cultured pearls, precious or semi-precious stones, precious metals, metals clad with precious metal, and articles thereof; imitation jewellery; coin; Chapter 72: Iron and steel; Chapter 85: Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
- 8 Because China imported more cargo from ASEAN than it exported since the establishment of ACFTA, the trade deficit column shows a negative figure for the previous years.
- 9 Data from China Statistics Yearbook, [www.stats.gov.cn/tjsj/ndsj/](http://www.stats.gov.cn/tjsj/ndsj/).
- 10 Data from the US Department of Commerce, International Trade Administration, and the Census Bureau.
- 11 See <http://trade.gov/fta/>.
- 12 Some aspects of the research results on low FTA utilisation were presented and discussed at the WCO Regional Workshop on Rules of Origin (ROO) for the Asia-Pacific Region, 11-15 June 2012, RTC Shanghai, China.
- 13 See [www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm). A database of those RTAs is also available online.
- 14 See [www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm).
- 15 This information is from the WCO Regional Workshop on Rules of Origin (ROO) for the Asia-Pacific Region, 11-15 June 2012, RTC Shanghai, China.
- 16 In the FTA between China and Switzerland, Swiss-approved exporters are allowed to self-certificate.
- 17 In ACFTA, the time limit for a response is 180 days.
- 18 In the author's opinion, for a certain member country, the import utilisation rate of CAFTA is more reliable than that of export. To increase the accuracy of the statistics, customs cooperation and data exchange are necessary.
- 19 See Widdowson 2005.



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## *Section 2*

### *Practitioner Contributions*



# The WTO Agreement on Trade Facilitation: status of play in Southern African Customs

*Dhunraj Kasseel*<sup>1</sup>

## Abstract

The September 11, 2001 attack on the World Trade Centre in New York brought a paradigm shift to the focus of Customs. Following that event and the global terrorist threat, a number of customs control initiatives and instruments were developed and implemented. Included amongst those are the World Customs Organization's (WCO) SAFE Framework of Standards, the Authorised Economic Operator (AEO) concept, the advance cargo information requirement, the 24-hour Advance Manifest rule, use of non-intrusive inspection equipment and the United States Container Security Initiative (CSI). Some of these security measures, such as the AEO concept, were developed and implemented to maintain the balance between customs control and trade facilitation of legitimate goods. When it comes to trade facilitation, Customs always needs to consider its obligations under the World Trade Organization (WTO). This paper gives an overview of the WTO Agreement on Trade Facilitation signed in Bali in December 2013 and the current state of play in Southern African Customs.

## 1. Introduction

The 'Bali Package' is a subset of the Doha Development Agenda (the Doha round) which began in 2001 and results from the Ninth Ministerial Conference of the World Trade Organization (WTO) held in Bali, Indonesia from 3 to 7 December 2013. As part of the wider 'Bali Package', and following some nine years of negotiations, WTO Members reached consensus on an Agreement on Trade Facilitation. GATT Article V on freedom of transit, Article VII on valuation for customs purposes, Article VIII on fees and formalities, and Article X on publication had already laid a solid base for trade facilitation. This latest Doha round of trade negotiations among WTO Members had the primary objective of enhancing the trading prospects of developing and least developed states. 'The Bali Package consists of decisions and declarations in two parts: Part I regarding the regular work under the General Council, and Part II regarding work under the Doha Development Agenda. The most significant part of the Bali Package is the Ministerial Decision on trade facilitation as a multilateral commitment to simplify customs procedures by reducing costs and improving speed and efficiency' (Trade Law Centre [TRALAC] 2013).

A Preparatory Committee has been established at the WTO level to ensure the expeditious entry into force of the agreement including the necessary ratification processes and to prepare for its efficient operation. One essential question at this stage is how the Agreement on Trade Facilitation will be incorporated into the existing WTO Agreement after the necessary 'legal review for rectifications of a purely formal character' has been carried out. It is also worth noting that two-thirds of WTO Members will need to ratify the new trade facilitation agreement for it to take effect. Those who do not ratify it, meanwhile, will not be bound by it. Some trade officials have suggested that this process could take at least two years (International Centre for Trade and Sustainable Development [ICTSD] 2013).

## 2. Costs of trade transactions

According to the OECD (2013a), ‘reducing global trade costs by 1% would increase worldwide income by more than USD40 billion, most of which would accrue in developing countries’. A recent study by the OECD revealed that the areas ‘that contribute the most to lowering trade costs in the [Sub-Saharan African] region are formalities: automation (with an estimated potential reduction of 2.9% in trade costs), the simplification and harmonisation of documents (2.7% estimated potential reduction) and information availability (1.9% estimated potential reduction)’ (OECD 2013b). The same study indicates that ‘in some African countries revenue losses from inefficient border procedures are estimated to exceed 5% of GDP’ (OECD 2013b).

## 3. Overview of the main Bali Package measures and current state of play in Southern African Customs

### Article 1: Publication and availability of information

Article 1 provides that Members should publish and make use of trade-related information in order to enable governments, traders and other interested parties to become acquainted with it. This information would include import, export and transit procedures, rules for classification and valuation of goods, rate of duties, taxes, fees and related charges. In the Southern African region, in line with the Revised Kyoto Convention and the Southern African Development Community (SADC) Customs Information Communication Technology Strategy 2013,<sup>2</sup> most of the Revenue/Customs administrations have published trade-related information on their websites.

*Southern African Development Community Member States*



*Source: SADC Regional Indicative Strategic Development Plan (n.d.).*

**Box 1: Trade Portal in Mauritius and Namibia**

Some Member States such as the Republic of Mauritius (2013a; 2013b) have developed trade portals. The government of Mauritius refers to its trade portal as a web-based state-of-the-art system whose prime objective is to facilitate import and export. The trade portal is expected, initially, to store information relating to existing trade regulations and procedures, including but not limited to laws, administrative procedures, guidance notes, applicable fees, forms, licences, permits and penalties applicable in the case of breaches. In addition, the portal catalogues international, regional and bilateral trade agreements to which Mauritius is a party, including the applicable rules and requirements as well as the benefits devolving therefrom.

According to the Southern Africa Trade Hub (SATH), the government of Namibia expected to have its Trade Information Portal up and running by early 2014. The development of the portal is supported by the USAID Southern Africa Trade Hub, under its Partnership for Trade Facilitation facility. The Trade Information Portal will provide a single platform where all trade-related information for Namibia is collected in one system and readily available for searching and viewing, which will save time and expense for the trading community (Southern Africa Trade Hub [SATH] 2013).

**Article 4: Appeal or review procedures**

Basically, this Article makes provision for any person to whom Customs or another relevant border agency issues an administrative decision to have the right, within its territory, to administrative appeal or review by an administrative authority higher than or independent of the official or office that issued the decision. This mechanism goes further, to judicial appeal or review of the decision. According to a customs audit carried out in 2011, all revenue/customs administrations already have established appeal or review procedure mechanisms (AECOM International Development 2011).

**Box 2: Appeal procedures in Mauritius**

In Mauritius, for instance, the Revenue Authority Act 2006 makes provision for aggrieved parties under the Customs Act to lodge written representations to the Revenue and Valuation Appeal Tribunal (formerly known as Assessment Review Committee). Any party dissatisfied with the decision of the latter may also make appeal to the Supreme Court and subsequently to the Judicial Committee of the Privy Council which is the highest structure of the Mauritius judicial system. This judicial process also applies to any similar issues other than those under the Customs Act such as the Customs Tariff Act, the Excise Act and the Value Added Tax Act.

**Article 7: Release and clearance of goods**

Article 7 proposes various concrete and practical trade facilitation initiatives such as:

- Pre-arrival Processing
- Electronic Payment
- Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges
- Risk Management
- Post-clearance Audit
- Trade Facilitation Measures for Authorized Operators (WTO 2013, pp. 8-10).

According to the SADC Customs Audit 2011, ‘virtually all Member States are implementing Post Clearance Audits and Pre-Clearance with the exception of Lesotho and Swaziland respectively’ (AECOM International Development 2011, p. 18). The majority of Member States have risk management procedures in place except for Botswana, Lesotho and Swaziland. With regard to the Authorised Economic Operator (AEO) concept, in addition to Mauritius, Zambia and Tanzania, Southern African Customs Union (SACU) countries including Botswana, Lesotho, Namibia, Swaziland, and South Africa are implementing the Preferred Traders Program (Poverello 2013). This Article offers tangible benefits to traders as it has a direct impact on the clearance and release of merchandise. Several reasons have

been given for the lack of implementation of some of these measures in certain countries such as lack of automation, the need to review legislation, varied levels of infrastructure and development, and capacity constraints. The successful implementation of the AEO program will also rest on the zealous participation of the private sector. However, to the credit of the region, some notable progress should not be ignored. Mauritius and South Africa have gone 'paperless' and several countries are in the process of or planning to migrate to ASYCUDA World which has several standard and non-standard features such as electronic payment.

### **Article 8: Border agency cooperation**

This Article calls for members to ensure that their authorities and agencies responsible for border controls and procedures dealing with the importation, exportation and transit of goods cooperate with one another and coordinate their activities with a view to facilitating trade. Such cooperation may include:

- (i) alignment of working days and hours
- (ii) alignment of procedures and formalities
- (iii) development and sharing of common facilities
- (iv) joint controls
- (v) establishment of one stop border post (OSBP) control (WTO 2013, p. 12).

Coordinated border management guidelines have been developed by SADC to assist Member States to enhance border management modernisation (SADC 2011). According to the guidelines, the transition from a Free Trade Area to a Customs Union and on to a Common Market requires effective controls of the internal borders and, eventually, of the external borders of the Common Market. A Common Market, furthermore, requires a common approach to security, movement of people, goods and means of transport, and to sanitary and phytosanitary measures (SADC 2011).

State interests at the border include protection of national security, enforcement of immigration requirements, enforcement of import and export restrictions and prohibitions, collection of revenue, recording cross-border statistics, and enforcement of sanitary and phytosanitary measures and technical standards. According to SADC (2012), there are complaints that the region has different border operating times and this inhibits intra-regional trade. This is also amplified by cumbersome and bureaucratic delays encountered in the processing of documentation and clearing of goods at the border posts.

Furthermore, the SADC 2012 report states that in June 2012, the Sub-Committee on Customs Cooperation (SCCC) (Heads of SADC customs administrations) resolved that customs administrations should consult with each other and relevant stakeholders to review the hours of operation of the border posts, with the objective of meeting the requirements by traders, and also noted that the extension of border operating hours will require the support of additional resources and structures. The Heads of Customs also noted the need to correlate the business hours and the competence of border posts in SADC which is in line with the provisions of the Revised Kyoto Convention.

In August 2012, the SADC Summit (Heads of State) approved the Regional Infrastructure Development Master Plan (RIDMP), a strategic framework to guide the development of a seamless, cost-effective trans-boundary infrastructure in a coordinated and integrated manner. The objective of RIDMP is to address regional infrastructure development (OSBP) and planning in a coordinated and integrated manner over a 15-year period (SADC 2012a).

**Box 3: Chirundu One Stop Border Post**

The implementation of the One Stop Border Post (OSBP) concept at Chirundu (between Zambia and Zimbabwe) was launched in December 2009, and significant progress has been made to date. Chirundu is the first operational OSBP in Sub-Saharan Africa. According to information available, before the OSBP was operational, clearing times were between three and five days. Now clearance is effected on the same day. An average of 480 trucks cross at Chirundu every day so a total of 960 to 1,920 travel days per day are being saved. This translates, at a conservative estimate, to between USD288,000 and USD576,000 in savings every day. There is no doubt that the Chirundu OSBP project will serve as a model for other OSBPs in the region and other parts of Africa (TradeMark Southern Africa 2011).

**Article 10: Formalities connected with importation and exportation and transit**

Article 10 calls for members to review their existing formalities and documentation requirements '[w]ith a view to minimizing the incidence and complexity of import, export, and transit formalities and of decreasing and simplifying import, export and transit documentation requirements' (WTO 2013, p. 12). Two essential measures under this article are the use of international standards and the implementation of the single window concept. Some examples of international standards are the Revised Kyoto Convention, Istanbul Convention, HS Convention, the WCO Data Model and the UN layout key for trade documents.

Significant progress has been noted in this area considering that eleven out of the 15 SADC Member States have already acceded to the Revised Kyoto Convention: Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. Additionally, a gap analysis undertaken recently as part of preparations for the Seychelles to accede to the Revised Kyoto Convention, shows that customs and related laws were 96% compliant with regard to the Convention's standards (Seychelles Revenue Commission 2013). A new Customs Management Act and regulations are being developed which reflect current international best practice as prescribed by the Revised Kyoto Convention (Seychelles Revenue Commission 2013). In the Democratic Republic of the Congo (DRC), a new Customs Code, inspired by the Revised Kyoto Convention, came into effect in February 2011. This Customs Code takes into account issues and initiatives such as deferred payment, integrity management, IPR, AEO, electronic payment, and ICT. The accession formalities beyond Customs seem to be the main challenge for the remaining countries to accede to the Revised Kyoto Convention. However, there is also a strong need for a mechanism to gauge implementation of the relevant provisions (Direction Générale des Douanes et Accises [Directorate General of Customs and Excise Duty] [DGDA] 2014).

**Box 4: Malawi becomes the 91st Contracting Party to the Revised Kyoto Convention**

On 6 September 2013, the Ambassador of the Republic of Malawi, Her Excellency Dr Brave Ndisale, visited WCO Headquarters to deposit her country's instrument of accession to the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention - RKC). Malawi has thus become the 91st Contracting Party to the RKC.

The Ambassador conveyed a message from the President of Malawi, Dr Joyce Banda, expressing appreciation for the WCO's assistance, as well as the hope that accession to the RKC will contribute to improving Malawi's business environment. Secretary General Mikuriya had met the President in Blantyre on the occasion of the Meeting of Heads of Customs for the East and Southern Africa Region in May 2013, when he had encouraged accession to the RKC.

The Secretary General pledged his ongoing support for Malawi where the WCO had recently conducted a national trade policy dialogue involving Customs, business and other government agencies.

Source: [www.wcoomd.org](http://www.wcoomd.org).



Regarding the single window concept, a number of countries in the Southern African region have already embarked on or are planning to implement a national single window, which is also part of the SADC Customs ICT Strategy 2013 and the Coordinated Border Management Guidelines. In addition to numerous guidelines and compendiums from the WCO and the United Nations Economic Commission for Europe (UNECE), the African Alliance for e-Commerce (AAEC) (2013) has developed guidelines to assist countries, more specifically in the African region, to implement a national single window. Within the region, countries such as Mozambique, Madagascar and Ghana have chosen the Public-Private Partnership (PPP) model to implement a national single window whereas some are utilising or planning to utilise the existing or planned ASYCUDA World.

### Box 5: Mozambique National Single Window

One of the best examples of a national single window in the Southern African region is the case of Mozambique. 'Mozambique's Diagnostic Trade Integration Study conducted in 2004 noted the high transaction costs to traders resulting from delays, administrative burdens and corruption as the major constraint to Mozambican cross-border trade. ... Mozambique's Single Window was launched in 2011, providing a centralized platform to streamline and simplify the operation of customs and other government agencies involved in border control. ... The system was set up to handle approximately 400,000 customs declarations per year with up to 1,500 per day. ... Mozambique is a transit country to Swaziland, South Africa, Zimbabwe, Zambia and Malawi. Single Window has therefore been designed to enhance revenue collection by closing revenue leakage due to transit.'

Source: [tfig.unece.org/cases/Mozambique.pdf](http://tfig.unece.org/cases/Mozambique.pdf).

## Article 11: Freedom of transit

The importance of transit as an element of trade facilitation is critical particularly from the perspective of landlocked developing countries. They are, by definition, more dependent on transit for market access. SADC as a Regional Economic Community (REC) has the highest number of landlocked countries in Africa.

### Box 6: SADC Regional Transit Management System

Recognising the importance of transit for the Southern African region, the SADC Transit Management System was developed in order to facilitate trade. The legal basis is derived from the Protocol on Trade and consists of:

- Annex IV of the Protocol on Trade concerning Transit Trade and Transit Facilities
- Appendix VI of the Annex IV concerning to the Regional Customs Transit Bond Guarantee (RCTBG)
- Transit Regulations, and Transit Manual.

Source: *SADC Protocol on Trade* 1996, as amended.

However, according to the SADC Customs Audit carried out in 2011, only one Member State is currently using the SADC Regional Transit Management System. Various challenges account for non-implementation of the SADC Transit Management System. The Customs Audit speaks about the domestication of the instrument by Member States into national law, and identifies recognition of the bond guarantee by relevant authorities throughout a certain corridor and multiple memberships as a contributing factor.

For a transit management system to be effective, an agreed regional bond must be recognised in all Member States. Without agreement and acceptance of a regional bond, it would be a challenge to implement a regional transit management system. Regardless, the SADC Regional Transit Bond Guarantee, which was approved by Ministers, is not operational despite the fact that implementation could yield significant improvements in trade facilitation in the region. This is in part due to the fact that some main countries along a corridor such as the DRC, Zimbabwe, Zambia, Malawi and Tanzania belong to more than one regional economic grouping, namely the Common Market for Eastern and Southern Africa (COMESA)

and the East Africa Community (EAC) that have already adopted other transit instruments. Interestingly, it appears that traders prefer to utilise national transit instruments of each country within that specific corridor which naturally adds to the costs of doing business in the region.

## Article 12: Customs cooperation

This Article can be looked at from the perspective of the Customs-to-Customs and Customs-to-Business pillars of the WCO SAFE Framework of Standards. Members are encouraged to share information on best practices in managing customs compliance, to cooperate in technical guidance or assistance in building capacity for the purposes of administering compliance measures and enhancing their effectiveness, and to ensure that traders are aware of their compliance obligations. Other WCO instruments relevant to this article are the Nairobi Convention and the Customs Mutual Administrative Assistance Agreement.

Customs-to-Customs cooperation is enshrined in the SADC Protocol on Trade which, as noted above, makes provision for the establishment of a Sub-Committee on Customs Cooperation (SCCC). According to the Protocol, the Sub-Committee is responsible for all activities relating to customs cooperation among the Member States with the objective of simplifying and harmonising customs laws and procedures.

Furthermore, in May 2013, the SCCC approved a strategy to enhance Private Sector Involvement in Customs matters (SADC 2013b). The strategy was developed in collaboration with key private sector stakeholders and has three key recommendations:

- Strengthen Customs-to-Business dialogue mechanisms at the Member States level
- Enhance the quality of Customs Administration to Business dialogue through improving information flows
- Strengthen Private Sector involvement on customs issues at the regional level.

### Box 7: Private Sector involvement in customs matters

Almost all SADC countries have formal or informal platforms that serve to enhance consultation with the private sector. Recently, a number of countries such as Malawi, Zambia, Namibia and the Seychelles, launched National Customs Business Forums. It is worth noting that the strategy proposes that Customs-to-Business partnership be reflected in customs modernisation programs and national legislative framework to support its sustainability.

The strategy recommends the establishment of Regional Customs Business Forums to address customs compliance and trade facilitation issues at a regional level. It is to be noted that the Southern African Customs Union (SACU) launched a SACU Regional Customs to Trade Forum in November 2013.

## Article 13: Institutional arrangements

According to this Article, a Committee on Trade Facilitation needs to be established to facilitate both domestic coordination and implementation of provisions of the WTO Agreement on Trade Facilitation. Several countries in the Sub-Saharan region already have national structures or mechanisms on trade facilitation issues.

At a regional level, the SADC Protocol on Trade makes provision for the establishment of the SCCC and a Sub-Committee on Trade Facilitation (SCTF). As mentioned above, the SCCC comprises SADC Heads of Customs and its main objective is to cooperate in simplifying and harmonising customs procedures and to combat illicit trade and fraud. The SCTF comprises Senior Officials from Trade, Customs and Transport and its main objective is to take the necessary measures to facilitate the simplification and harmonisation of trade documentation and trade procedures (SADC 1996).

**Box 8: National Working Group on Trade Facilitation in Zambia**

In Zambia, a National Working Group on Trade Facilitation was established in 2007.

The scope of responsibility of this National Working Group includes:

- Doha Development Round of WTO negotiations
- Development corridors
- One Stop Border Posts (OSBP)
- Trade facilitation initiatives of the Regional Economic Communities
- Non-tariff barriers.

The responsibilities of the National Working Group will include, but not be limited to:

1. Building upon the report and matrix of Zambia's self-assessment on trade facilitation needs
2. Identifying gaps in Zambia's trade facilitation and analysing the types of capacity building required, both donor-assisted capacity building and possible Zambian-led initiatives
3. Monitoring and providing input to the resolution of Non-Tariff Barriers (NTBs)
4. Providing Geneva-based Zambian officials involved in the WTO negotiations with Zambia's position
5. Monitoring trade facilitation initiatives under the Regional Economic Communities (RECs)
6. Monitoring corridor developments
7. Monitoring the development of the OSBPs.

## **4. Implications and challenges**

The WTO Agreement on Trade Facilitation came as a Christmas blessing for the border agencies in terms of its potential impact on compliance with related laws and regulations, for the private sector (traders) in terms of reducing the cost of doing business, and also for the government in terms of bolstering economic development through increased market access. However, implementation of the agreement in its totality has several implications and challenges including:

### **4.1 Need for political will**

The WTO Agreement on Trade Facilitation was approved by the ministers responsible for trade while the majority of the measures impact the revenue/customs authorities that in most cases fall under Ministries of Finance. It is therefore essential to develop synergies between the two to avoid reluctance and slow progress. Note also that some measures need political commitment due to their level of importance and scope, such as the establishment of a national structure on trade facilitation.

### **4.2 Shift from revenue collection to trade facilitation**

It's an indisputable fact that in many countries revenue collected from Customs constitutes a large share of the total revenue collected and this is why the focus is still on revenue collection. Implementation of this agreement will require a paradigm shift from revenue collection to trade facilitation.

### **4.3 Varied level of development**

Within Southern Africa, different customs administrations are at different levels of modernisation and automation. This can pose a challenge in terms of harmonisation of initiatives.

### **4.4 Resource constraints**

Introduction of the trade facilitation measures will entail massive investment in various components including but not limited to infrastructure, equipment, new regulations, training, institutional changes, business process reengineering, and ICT. Some measures might not be expensive to put in place but create challenges in terms of sustainability.

#### **4.5 Need for capacity building**

Successful execution of the agreement will require intensive capacity building of the relevant actors in the supply chain. The agreement has provisions for technical assistance and capacity building. Donor Members have agreed to facilitate the provision of assistance and support for capacity building to developing country and least developed country Members, on mutually agreed terms and either bilaterally or through the appropriate international organisations.

#### **4.6 Review of legislative framework**

Several measures will require an overhaul of the existing legislative framework related to international trade, particularly the Customs Act or Code.

#### **4.7 Change and integrity management**

Difficulty in changing entrenched behaviours and values and the desire to preserve rents will warrant a change of mindset and a robust ethical culture across the border agencies and relevant stakeholders.

#### **4.8 Private sector involvement**

Private sector consultation and participation will be essential in executing various projects such as the AEO concept, single window, post clearance audit, and establishment of a national structure on trade facilitation.

### **5. Conclusions**

Southern African Customs have already established a solid base to implement or are already implementing the WTO Agreement on Trade Facilitation. While trade facilitation is key to economic development and growth, it is an undeniable fact that Customs remains the main thrust in this endeavour. In spite of the implications and challenges stated above, Southern African Customs are already doing well. Mikuriya, in an interview on the signing of a Memorandum of Understanding between the WCO and the African Development Bank (AfDB), rightly said, 'There is a strong commitment to customs modernization in Africa' (ADBG 2012). The objective may be an ambitious one and the road towards total implementation of the agreement may seem to be long. However, it can be concluded that Southern African Customs have already started the journey. Quoting the famous phrase by Nelson Mandela as referred to by Mr Gita Wirjawan, Indonesia's Trade Minister, at the WTO Ministerial Conference in December 2013: 'It always seems impossible, until it's done'.

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## Notes

- 1 The views and opinions presented in this paper are those of the author and do not necessarily reflect the views or policies of the Southern African Development Community (SADC) or its Members States.
- 2 Southern African Development Community (SADC) 2013a, p. 28.

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# The facilitation of trade in Cambodia: challenges and possible solutions

*Sopagna Seng*

## Abstract

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In an effort to facilitate trade, the Cambodian government has sought various opportunities to integrate itself into the world economy. Several trade facilitation measures have been implemented while attempting to comply with international best practice, such as following the provisions of the Revised Kyoto Convention. However, some areas have not been efficiently achieved due to the complexity of trade procedures that permit unrelated control agencies to operate jointly at the border. In this regard, the application of trade facilitation principles faces challenges. These challenges include the role of customs, import and export procedures, legal concerns and limitations of institutional coordination. A more appropriate approach is suggested that would ensure control and underpin the success of trade facilitation. This approach would see Customs acting as the sole border enforcement agency with responsibility and obligation to undertake a risk management approach at the border from both control and facilitation perspectives.

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## 1. Introduction

In the last decade, changes in the global trading environment have resulted in a greater emphasis on security and government intervention in customs administration. The World Bank's *Global Economic Prospects 2004* (World Bank 2003) revealed that, for developing country exports, tariff barriers are seen to be much less of a hindrance than the cost of international transportation. However, complicated customs clearance procedures and the limited use of automation are often seen as common problems among the non-tariff barriers that add to the cost of trade. This has led to a significant emphasis on reforms in border and trade policies.

It is considered that customs reform and modernisation programs can add certainty and stability to the global economy and facilitate trade. However, it is imperative to balance customs control and facilitation. Achieving a balance between trade facilitation and regulatory control has become one of the most common topics in customs modernisation in several developing nations. In this regard, the Cambodian government has embarked on several major reform programs on the national level, known as the Rectangular Strategies<sup>1</sup> (Phases I & II). The main pillars include Public Service Reform, Military and Police Reform, Justice and Judiciary Reform, and Economic Reform. The Rectangular Strategy Phase III was launched in October 2013.

This paper discusses legislative concerns relating to the role of modern Customs, and considers approaches that may lead to improvement in the pursuit of operational changes to import and export trade procedures. It is hypothesised that customs control and facilitation may work collaboratively and effectively to facilitate trade and that Customs should be regarded as the sole border enforcement agency



with the responsibility and obligation to undertake risk management approaches at the border from both control and facilitation angles. The paper also examines some current challenges and potential solutions that have been regarded as international best practice in relation to the Revised Kyoto Convention<sup>2</sup> (2006).

## 2. Background

Under the framework of its membership of the World Trade Organization (WTO), Association of Southeast Asian Nations (ASEAN), Greater Mekong Subregion (GMS) and the World Customs Organization (WCO), the General Department of Customs and Excise of Cambodia (GDCE) has been contributing significantly to facilitating and simplifying trade procedures in Cambodia (GDCE 2009). In addition to its initiatives in customs reform in 2000 and with recommendations and support from development partners, GDCE launched its 'Work Program for Customs Reform 2003-2008'. Following the implementation of this major reform, GDCE developed a further five-year work program, the 'Strategy and Work Programs on Reform and Modernisation 2009-2013' (SWPRM), which is regarded as the fundamental strategic framework for Cambodian customs administration. Among its strategic objectives, trade facilitation has been incorporated in SWPRM 2009-2013.

It is noteworthy that, since 1999, the customs reform policy has aimed to shift from a control focus to a facilitative direction that focuses on customs procedures, reform and modernisation programs. These programs aim to expedite customs clearance and reduce costs (UNECE 2002, p. 65). However, even after the completion of SWPRM 2009-2013 and the implementation of the Cambodia Trade Facilitation and Competitiveness Project,<sup>3</sup> a number of border control agencies still remain as obstacles to expediting the movement of legitimate goods, in addition to adding extra cost to international trade.

Reform in legislation is an essential step towards achieving trade facilitation. In this regard, as part of their reform programs, many developing nations took the step of adopting the principles of the Revised Kyoto Convention and successfully instituting a new, revised Customs Act (eds De Wulf & Sokol 2005), while others went further and deposited an instrument of accession to the Revised Kyoto Convention with the WCO, while awaiting ratification (WCO 2010).

*Global Economic Prospects 2004* emphasised that 'the procedural and administrative burdens on traders are often aggravated by overlapping and duplicative informational requirements from several ministries, departments, or agencies' (World Bank 2004, p. 197). There is, however, a significant challenge for governments to implement effective and efficient trade facilitation measures for which the fundamental controls are administered by a single agency. Making this work demands coordination among many government bodies, and includes the reform of domestic regulatory procedures and institutional structures (World Bank 2004). This suggests that the role of border management agencies in the 21st century should focus more on enhancing economic growth and development through trade facilitation and border security. Widdowson (2006, p. 1) suggests that 'the success of the trade facilitation agenda is heavily reliant on the ability of customs administrations to achieve an appropriate balance between facilitation and regulatory control'.

The elements of trade facilitation that have been incorporated in the SWPRM have produced two significant outcomes to date: the Law on Customs 2007 (see Appendix 1), which is fundamentally based on the Revised Kyoto Convention, even though Cambodia is not a party to the Convention (WCO 2010), and an Automated System for Customs Data (ASYCUDA World).

Before the customs legislation of 2007 was adopted, there were at least eleven Cambodian government bodies and five major agencies that participated in the clearance of international consignments, the latter being Customs, Health, Agriculture, Industry and Camcontrol.<sup>4</sup> Samnang<sup>5</sup> (2008, p. 19) expressed his concerns that 'Cambodia's customs legislation permits many government agencies to be represented at the border checkpoints, with at least five present at all times. Overlapping controls on customs operations

performed by government agencies unrelated to Customs, especially Camcontrol, results in duplication, inefficient use of resources, [and] ineffective anti-smuggling efforts'. In fact, other agencies were operating at the border prior to the adoption of the Law on Customs.

The proposed role of Cambodian Customs in relation to facilitation of trade and customs procedures is discussed below, including a consideration of primary policy concerns and a discussion of what has been done and should be done in order to comply with the Revised Kyoto Convention's provisions that would allow Customs to apply and implement effective and efficient trade facilitation measures.

### 3. Concepts of trade facilitation

#### 3.1 What is trade facilitation?

Interestingly, there is no consensus on the definition of trade facilitation. Grainger (2007) suggests that trade facilitation mainly reflects the simplification, harmonisation, standardisation and modernisation of trade practices with the aim of lowering transaction costs in international trade. Keen (2003) suggests that the concept of trade facilitation is about assisting individual governments, especially governments in developing nations that are susceptible to corruption and low compliance levels, to establish an effective customs administration.

*Global Economic Prospects 2004* identifies other sources for definitions of trade facilitation:

OECD: 'Simplification and standardization of procedures and associated information flows required to move goods internationally from seller to buyer and to *pass payments* in the other direction.'

UNECE: A '*comprehensive and integrated approach* to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, *transparent, and predictable manner*, based on internationally accepted norms, standards, and best practices.'

APEC: 'Trade facilitation generally refers to the simplification, harmonization, *use of new technologies*, and other measures to address procedural and administrative impediments to trade' [emphases added] (World Bank 2003, p. 181).

Many countries are witnesses to the sluggish development in trade facilitation in which they are vulnerable to high costs and administrative difficulties at the border (World Bank 2011, p. 1). However, it seems no study has been done to estimate the cost of fully applying international trade facilitation measures. Nevertheless, trade facilitation has been regarded as the most widely used strategy that assists governments to reduce the costs of doing business and encourage trade for economic growth. To achieve sustainable economic growth while remaining competitive, several countries have reduced tariffs, initiated numerous regimes to attract foreign investment, and sought opportunities for greater regional integration as part of their trade facilitation programs.

#### 3.2 Role of modern Customs

The Revised Kyoto Convention, known as 'the international blueprint for the management of Customs procedures', was primarily established by the WCO's Council to provide a balanced approach to trade facilitation and control. The Convention has been developed to minimise the level of customs intervention in cargo movements and to maximise the level of trade facilitation. In other words, it enables the contracting parties to attain a modern customs administration and to greatly support the facilitation of international trade and travel.

Not long ago, most developed countries successfully adopted the Revised Kyoto Convention or similar standards of international best practice to facilitate international trade and travel. As the Convention's provisions aim to provide greater certainty and uniformity in the way in which customs administrations

around the world carry out their work (Yasui 2010), numerous customs administrations that seek to reform and modernise have been aspiring to accede to the Convention.

The Convention plays a crucial function in that it enables governments to widen their market access and trade opportunities. It is regarded as a significant legal framework for customs operations to implement customs-related principles developed by the WTO, such as Articles V, VIII, and X of the GATT of 1994 (Mikuriya 2005, p. 54). In addition, the Convention's provisions encourage Member contracting parties to achieve a maximum level of facilitative international trade and travel while maintaining appropriate levels of regulatory control.

According to the WCO (1999), having successfully acceded to the Convention, customs administrations will most likely be able to:

- Remove inconsistency in customs procedures and practices that may contradict international trade and other international exchanges.
- Act in concert with both international trade and customs administrations' objectives in order to facilitate, simplify and harmonise customs procedures and practices.
- Deliver appropriate standards of customs control.
- Cope with major changes that may occur in the trading environment and in administrative approaches and techniques.
- Attain the core principles for simplification and harmonisation.
- Maintain efficient procedures by appropriate and effective application of control mechanisms.

According to Widdowson (2006b, p. 1), 'The Doha Ministerial Declaration and subsequent decisions of the General Council of the World Trade Organization (WTO) have sought to intensify international commitment to further expedite the movement, release and clearance of internationally traded goods'. Pointing to the fact that 'customs administrations around the world are responsible for implementing a broad range of government policies in areas as diverse as revenue collection, trade compliance and facilitation, community protection, cultural heritage, intellectual property, collection of statistics, and environmental protection' (Widdowson 2006a, p. 2), Widdowson proposed a modern compliance management style which contrasts how such roles have been traditionally performed (see Table 1). Risk management application underpins success and is regarded as an indispensable means of concurrently ensuring enforcement, security and trade facilitation. In this regard, risk management strategies should be developed based on the provisions of the Revised Kyoto Convention in order to achieve high levels of both control and facilitation.

Table 1: Compliance management styles

	Traditional Gatekeeper Style	↔	Risk Management Style
Legislative Framework	Legislative base provides for a “one size fits all” approach to compliance management	↔	Legislative base provides for flexibility and tailored solutions to enable relevant risk management and administrative strategies to be implemented
	Onus for achieving regulatory compliance is placed solely on the trading community	↔	Legislative base recognizes responsibilities for both government and the trading community in achieving regulatory compliance
	Sanctions for noncompliers	↔	Sanctions for noncompliers
Administrative Framework	“One size fits all” compliance strategy	↔	Strategy dependent on level of risk
	Control focus	↔	Balance between regulatory control and trade facilitation
	Enforcement focus	↔	Dual enforcement–client service focus
	Unilateral approach	↔	Consultative, cooperative approach
	Focus on assessing the veracity of transactions	↔	Focus on assessing the integrity of trader systems and procedures
	Inflexible procedures	↔	Administrative discretion
	Focus on real-time intervention and compliance assessment	↔	Increased focus on post-transaction compliance assessment
	Lack of or ineffective appeal mechanisms	↔	Effective appeal mechanisms
Risk Management Framework	Indiscriminate intervention or 100 percent check	↔	Focus on high-risk areas, with minimal intervention in low-risk areas
	Physical control focus	↔	Information management focus
	Focus on identifying noncompliance	↔	Focus on identifying both compliance and noncompliance
	Post-arrival import clearance	↔	Pre-arrival import clearance
	Physical control maintained pending revenue payment	↔	Breaks nexus between physical control and revenue liability
	No special benefits for recognized compliers	↔	Rewards for recognized compliers
<b>Risk Management Enablers</b>			
IT Framework	Legislative provisions provide the trading community with electronic as well as paper-based reporting, storage, and authentication options. Such provisions should enable regulators to rely on commercially generated data to the greatest extent possible. Appropriate communications and information technology infrastructure to provide for automated processing and clearance arrangements. Regulators should seek to achieve maximum integration with commercial systems. Consultative business process reengineering prior to automation.		

Source: Widdowson 2005, p. 95.

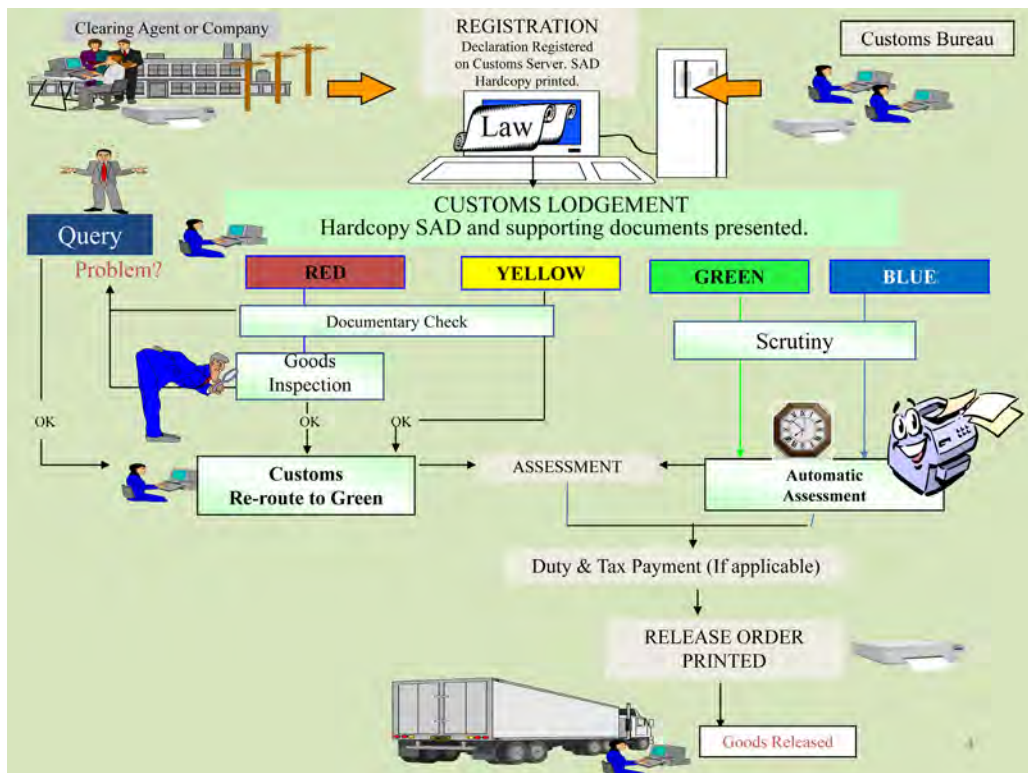
## 4. Trade facilitation in Cambodia

### 4.1 What has been done to improve import and export clearance?

Membership of the WTO has provided the impetus for the Cambodian government to implement a set of legal and regulatory reforms including the Customs Law, and to implement several trade facilitation measures (WTO 2011a). Since the Customs Reform of 2000, trade facilitation has been one of the strategic objectives developed by the GDCE in which it aims to provide prompt, reliable and professional service to legitimate business (GDCE 2011a).

With financial support from the World Bank, GDCE was able to introduce ASYCUDA World under a Trade Facilitation and Competitiveness Project (World Bank 2006). The pilot implementation was launched a year after the new Customs law was enacted in 2007. Currently, there are at least 22 customs checkpoints equipped with the ASYCUDA World system. As a result, some significant programs have been progressed including the implementation of a single administrative document (SAD) for electronic customs clearance within the ASYCUDA World system, a risk management strategy, and the streamlining and automation of customs procedures. Importantly, physical inspections are based on the level of risk (see Figure 1).

Figure 1: Process diagram of ASYCUDA risk-based procedures



Source: General Department of Customs and Excise of Cambodia 2011.

In 2004, the government established a Special Inter-Ministerial Task Force on Trade Facilitation and Investment Climate. As a result, a 12-point action plan was proposed to address the most urgent impediments to trade and to improve the investment climate and promote trade facilitation. This has resulted in a substantial change in legal and institutional mechanisms. In this regard, Dr Kun Nhem,

Deputy Director of GDCE, stressed the significance of establishing a Sub-Steering Committee, the Trade Facilitation Working Group (Kun Nhem n.d.). This has led to a number of legal documents being endorsed at the national level to enable Customs to fully exercise its responsibilities of better facilitating trade, streamlining trade procedures, and especially, reducing unnecessary intervention by other agencies. To support the reform process, the Project Steering Committee (PSC) on Customs Automation was established in 2006 and the Steering Committee on National Single Window was formed in 2008 to guide its development and implementation.

Significantly, among the various legal reforms, Sub-Decree No. 21 relates to trade facilitation through risk management while joint Ministerial Regulations, known as Service Level Arrangements, authorise coordination and cooperation between Customs and the Ministry of Commerce (Camcontrol), Agriculture, Forestry and Fishery (Quarantine), the Ministry of Industry, Mine and Energy (MIME), and the Ministry of Health (MoH). This provides an essential legal base that enables GDCE to lead and coordinate different government agencies to ensure a more efficient and effective enforcement of laws relating to trade and its facilitation. As an adjunct, Sub-Decree No. 209 focuses on the Management and Control of Prohibited and Restricted Goods among the various border agencies. Such reform was necessary due to the existence of ‘a duplication’ of control authorities at national borders, which is in contravention of the principles of the Revised Kyoto Convention.

Within the SWPRM 2009-2013,<sup>6</sup> under trade facilitation measures, four core components have been emphasised: risk management; automation (Single Window); Customs-Private Sector Partnership Mechanism (CPPM); and the implementation of the transaction value method in line with WTO commitments.

However, with support from donor agencies and international assistance, only the 2007 revised customs legislation and automation (ASYCUDA) through risk management appear to be well advanced in terms of their implementation. Less significant progress has been made in single window and transaction value implementation. Also, following concerns raised in the WTO Trade Policy Review about ‘Cambodia’s failure to fully implement transaction values and its continued use of minimum customs values on certain imports’ (WTO 2011a, p. 29), the Ministry of Economy and Finance released a new regulation, No. 6616, on the implementation of transaction value based on WTO rules, which GDCE has since been implementing.

In a further effort to improve import and export mechanisms, the pre-shipment inspection mechanism was eliminated in 2011, and has resulted in a respectable reduction in the time and number of documents required for importing and exporting. Table 2 shows that nine different documents are required to export a standard container of goods, which takes 22 days and costs USD732, while importing the same container of goods requires 10 documents, takes 26 days and costs USD872. Clearly, however, more needs to be achieved, and in this context, a Time Release Study has been conducted with the support of the Asian Development Bank (ADB) and WCO to address the improvement of import and export cargo release.

To further facilitate economic development, and to attract more direct foreign investment as well as to promote export activities, 22 Special Economic Zones (SEZ) were established in 2011. This was in response to Cambodia’s commitments in its Protocol of Accession to the WTO Agreement. The SEZ mechanism provides that ‘goods produced in any such zones or areas under tax and tariff provisions that exempt imports and imported inputs from tariffs and certain taxes, would be subject to normal customs formalities when entering the rest of Cambodia, including the application of tariffs and taxes’ (WTO 2011a, p. 46).

In addition to the efforts of the WTO, the Cambodian government has extended its effort in intra-Customs cooperation with some ASEAN member countries. Since the 1997 economic recession, the governments of Cambodia, Laos, Myanmar and Vietnam (CLMV) have been actively seeking to contribute to trade facilitation in the region, as well as conforming to the terms of the Common Effective Preferential Tariff

(CEPT) scheme (Lao-Araya 2002). This scheme allows CLMV governments to enjoy a preferential tariff that has been lowered by the ASEAN member countries.

Within the requirements of the ASEAN Free Trade Area CEPT scheme, green lanes have been established at eight major customs checkpoints. In addition, importers and exporters are no longer required to obtain approvals from customs headquarters, as the goods clearance process has been decentralised. Similarly, valuation decisions may also be made at the customs provincial branch level. Risk management principles are also being applied to facilitate trade for those traders with high trade regulation compliance records. To further facilitate communication between the public and private sectors, a Public Relations Unit has been created and, importantly, the new customs legislation also provides appeal procedures and dispute settlement mechanisms (UNECE 2002, p. 65).

**4.3 What obstacles remain?**

A report released by the World Bank (2012) identifies Cambodia’s procedural requirements, and the associated time and costs of exporting and importing a standard shipment of goods. The report suggests that a ‘comparison of the economy’s indicators today with those in the previous year may show where substantial bottlenecks persist – and where they are diminishing’ (World Bank 2012, p. 10), and these can be identified in Table 3. Obviously, bottlenecks impede the movement, customs clearance and release of legitimate cargo. However, the results of the Time Release Study that was conducted with the support of the ADB and WCO, and which sought to address such bottlenecks, are not publicly available.

*Table 2: Summary of procedures and documents for trading across borders in Cambodia*

<b>Indicator</b>	<b>Cambodia</b>	<b>East Asia &amp; Pacific</b>	<b>OECD high income</b>
Documents to export (number)	9	6	4
Time to export (days)	22	22	10
Cost to export (USD per container)	732	906	1,032
Documents to import (number)	10	7	5
Time to import (days)	26	23	11
Cost to import (USD per container)	872	954	1,085

<b>Procedures to export</b>	<b>Time (days)</b>	<b>Cost (USD)</b>
Documents preparation	14	220
Customs clearance and technical control	3	262
Ports and terminal handling	3	100
Inland transportation and handling	2	150
<b>Totals</b>	<b>22</b>	<b>732</b>

<b>Procedures to import</b>	<b>Time (days)</b>	<b>Cost (USD)</b>
Documents preparation	15	210
Customs clearance and technical control	3	265
Ports and terminal handling	5	217
Inland transportation and handling	3	180
<b>Totals</b>	<b>26</b>	<b>872</b>

Documents to export	Documents to import
1. Bill of lading	1. Bill of lading
2. Certificate of origin	2. Cargo release order
3. Commercial invoice	3. Certificate of origin
4. Customs export declaration	4. Commercial invoice
5. Export permit	5. Customs import declaration
6. Insurance certificate	6. Insurance certificate
7. Packing list	7. Import permit
8. Terminal handling receipts	8. Packing list
9. Inspection report (from Camcontrol)	9. Tax certificate
	10. Terminal handling receipts

Source: World Bank 2012.

Table 3: The ease of trading across borders in Cambodia over time

Indicator	DB 2006	DB 2007	DB 2008	DB 2009	DB 2010	DB 2011	DB 2012
Rank	..	..	..	124	127	120	120
Document to export (number)	7	10	10	10	10	9	9
Time to export (days)	43	37	37	22	22	22	22
Cost to export (USD per container)	736	722	722	732	732	732	732
Documents to import (number)	12	11	11	11	11	10	10
Time to import (days)	54	45	45	29	29	26	26
Cost to import (USD per container)	816	852	852	872	872	872	872

Source: World Bank 2012, p. 81.

As previously noted, laws and regulations concerning trade facilitation have been introduced in Cambodia to allow the government to implement a wide range of measures. Nevertheless, these trade facilitation measures have not been fully effective due to the ongoing operation of existing laws and regulations that allow a degree of duplication of agency activities at the border. Under Sub-Decree No. 59 (2008), for example, it is the duty and responsibility of Camcontrol to inspect imports and exports jointly with Customs (WTO 2011a, p. 55).

In this regard, customs control is a key component in facilitating the movement of legitimate trade and travel. According to the Revised Kyoto Convention, customs control depends upon the implementation of provisions from chapters 3, 7, 8 and 9 while chapter 6 deals exclusively with customs control. The content of chapter 6 covers the implementation of customs clearance, regulatory compliance, risk management and the use of risk analysis, application of information technology (IT), and Customs' relationship and cooperation with other agencies. In this respect, several measures have been implemented with strong cooperation among other border agencies on the national level in compliance with those provisions. However, the provisions of chapter 6 have yet to be completely complied with as other trade-related laws and regulations permit another control agency joint customs inspection at the border.

As mentioned above, Samnang (2008) expressed his concerns regarding Cambodia's customs legislation that allows overlapping controls on agency operations at the border, and which fails to achieve a coordinated approach to border management and accountability.

Widdowson (2012, p. 28) describes border clearance activities in Cambodia as being characterised by 'ineffective controls; overlap and duplication; routine checks; independent agency procedures with no



inter-agency coordination; and no evidence of a risk-based approach to compliance management’, adding that ‘The resultant costs, delays and regulatory complexity severely impeded trade and investment’. Even though inter-agency Service Level Agreements have been endorsed to enable a single agency to undertake certain activities on behalf of another agency, with Customs to be the leading border agency, the old trends seem to continue with the presence of Camcontrol at the border even after the adoption of the 2007 Law on Customs.

The presence of the overlapping border agency is still regarded as burdensome for traders as it complicates trade procedures and impedes Customs’ authority to fully exercise its legitimate role and obligations. The Chairperson made a noteworthy recommendation about customs reform in his closing remarks during the Trade Policy Review in November 2011. He expressed the concerns made by WTO Members that with the recognition of Cambodia’s efforts in the area of customs reform including enactment of the 2007 Customs law, it is fundamental that Camcontrol import requirements have to be more transparent (WTO 2011b).

Interestingly, in an effort to facilitate sanitary and phytosanitary control clearance, van der Meer and Ignacio (2011, p. 267) pointed out that:

Many SPS agencies perform their role in sequence with customs. In some countries – such as the People’s Republic of China – customs decides which goods need SPS clearance. After a customs declaration is filed, the applicant may be directed to the SPS agencies for further clearance before returning to customs. In contrast, in Cambodia a general inspection agency – Camcontrol – has, among its other duties, that of checking at the border for product identity and food safety in all incoming shipments. That results in more duplication of data and paperwork than is found in the People’s Republic of China.

To achieve an appropriate balance between facilitation and regulatory control, it is contended that customs administrations need to have the ability to exercise full border control authority. This may frequently demand coordination among many government bodies and include a readjustment of domestic regulatory procedures and institutional structures.

## 5. Suggested solutions

As previously noted, several measures have been undertaken to improve the movement of legitimate trade and travel in Cambodia. These measures include customs reform and modernisation, which resulted in substantial changes in the legal framework, cooperation among control agencies, a consultative approach and the use of automation through risk management. However, some areas remain obstacles and impede Customs’ ability to effectively facilitate trade.

To address such a significant challenge, it is suggested that the government should require border controls to be administered by a single agency (GDCE), which may involve merging GDCE with those agencies which currently have overlapping responsibilities. This would enable Customs, as the single border agency, to achieve the required balance between facilitation and regulatory control, and would require a greater degree of coordination between Customs and a number of government bodies.

To further ease trading across borders in response to the increase in trade volume in today’s globalised world, and in response to the key milestones of ASEAN Economic Community 2015 (free flow of goods, labour and capital), it is important for GDCE to continue its implementation of reform and modernisation programs and to conduct an evaluation of previous reforms. This should include a review of customs laws, regulations, administrative guidelines, and procedures, harmonised and simplified to reduce unnecessary duplication and red tape.<sup>7</sup> The review should place emphasis on the need for risk-based inspections and the implementation of post clearance audit, additional automation and other initiatives aimed at improving the trading environment and increasing the international competitiveness

of business. For instance, GDCE could re-examine its participation in, and evaluation of, the Columbus Program and other capacity building programs provided by the WCO.

In doing so, McLinden's (2005, p. 78) advice should be followed, which suggests a review to improve performance in 10 core customs areas: (1) leadership and strategic planning; (2) organisational and institutional framework; (3) resources (human, financial, and physical); (4) external cooperation and partnership; (5) good governance; (6) customs systems and procedures; (7) the legal framework; (8) change management and continuous improvement; (9) information technology; (10) management information and statistics. This also recognises that human resources are one of the key contributors in a continuing reform and modernisation program.

It is also worthwhile noting that while Cambodia claims to have based its customs law on the Revised Kyoto Convention, it is yet to become a contracting party. This should be progressed. Several studies have shown the benefits of the Convention's provisions (Yasui 2010), and indicate, among other things, that customs revenue increases significantly following customs reform and modernisation programs based on the principles of the Convention. Having fully complied with the Convention's provisions, there is no doubt that Customs would have the capacity to become the sole border enforcement agency.

The effective use of risk management must also be intensified in order to respond to the increase in trade volume in today's globalised world. The risk management approach underpins the success of regulatory compliance management and contributes significantly to speedy clearance by focusing resources on high-risk consignments. Further, it reduces procedural delays and unnecessary controls and, importantly, opportunities for corrupt activity.

There is also a need to strengthen international cooperation. It is noteworthy that during the ASEAN-Japan Director General/Commissioners Meeting on Trade Facilitation held in Phnom Penh in April 2011, some key priorities for GDCE were identified. These included further modernisation based on the Revised Kyoto Convention, further use of risk management supported by the WCO and the European Committee for Standardization [Comité Européen de Normalisation] (CEN), establishment of an Authorised Economic Operator (AEO) program with a network of mutual recognition agreements; establishment of a national single window and ASEAN single window with international interoperability; and lastly, a time release study based on the revised WCO Time Release Study Guide (WCO 2011).

## **6. Concluding remarks**

Trade facilitation in Cambodia has not been fully addressed, as some elements of its legislation serve to impede the implementation of international best practice. An obvious key concern is the presence of multiple agencies at the border, which introduces legal complexities, as well as costs and delays to traders, thereby preventing trade facilitation initiatives from being fully achieved.

It is important for policymakers to acknowledge that excessive border clearance procedures that are enforced by both Customs and other border agencies represent a significant hindrance to the international trading community. It is contended that Customs should act as the sole border enforcement agency with the responsibility and obligation of undertaking a risk management approach from both a control and facilitation perspective. A single agency approach, together with reduced documentary and other requirements will enable traders to achieve timely customs clearance, reduce costs and minimise disruption to their supply chain.

Although discussion on a capacity building program was not included in this paper, it is imperative to recognise its practicality in contributing to customs reform and modernisation. As noted by the WCO, customs reform and modernisation is synonymous with capacity building.

## Appendix 1: The 2007 Law on Customs and Regulations

### Law on Customs and Regulations

#### 1. Law on Customs

#### 2. Supporting Regulations:

(a) **Sub-Decree:** Anukret on Prohibited and Restricted Goods List

(b) **Ministerial Prakas:**

Prakas on Provision and Procedure of Customs Declaration

Prakas on Establishment and Functioning of Customs Brokers

Prakas on Customs Valuation of Imported Goods

Prakas on Customs Bonded Warehouse

Prakas on Customs Temporary Storage

Prakas on Refund of Customs Duties and Taxes

Prakas on Security

Prakas on Reporting, Movement, Storage & Transport of Exported Goods

Prakas on Importation of Goods under Temporary Admission

Prakas on Management of Documents, Books, Records, & other Information

Prakas on Determination of Exempt Goods

Prakas on Exempt Goods Control Procedures

Prakas on Management of Unclaimed Goods

Prakas on Temporary Export of Goods

Prakas on Customs Formalities outside Customs Offices

Prakas on Extension of Customs Zone

Prakas on Post Clearance Audit by Customs and Excise Department

Prakas on Customs Transit

Prakas on Special Customs Procedure in Special Economic Zone

Prakas on Procedures for the Management of Special Designed Goods

Prakas on Transportation Distribution and Possession of Imported Goods in  
the Customs Territory

Prakas on use of Information Obtained by Customs Officers

Prakas on Settlement of Customs Offences

Prakas on Customs Tariff and Tariff Classification of Goods

Prakas on Reward Distribution

Prakas on Procedures on Payment of Duty and Taxes and other levies on  
Imported and Exported Goods

Prakas on Reporting of Imported Goods

(c) **Guidelines:** Instruction No. 583, 30 June 2008, on the implementation of Initial Post Clearance Audit Manual in the Customs and Excise Department Instruction No. 790, 28 August 2008, and Procedures for Customs Transit

Source: WTO 2011a, p. 30.

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## Notes

- 1 'Rectangular Strategy' is regarded as the master plan for economic development milestones proposed by the government of Cambodia in response to priority areas for development such as integrating Cambodia into the region and the world. See the latest illustration of Rectangular Strategy Diagram published by CDRI, – *Annual Development Review 2010-11*, p. 15.
- 2 The *International Convention on the Simplification and Harmonization of Customs procedures* (the Kyoto Convention) entered into force in 1974 and was revised and updated to ensure that it meets the current demands of governments and international trade. As a result, the Revised Kyoto Convention entered into force on 3 February 2006.
- 3 Cambodia Trade Facilitation and Competitiveness Project is a World Bank-funded project largely contributed to the Automated System for Customs Data (ASYCUDA) system.
- 4 Camcontrol (Cambodia Import Export Inspection and Fraud Repression Department in the Ministry of Commerce).
- 5 Mr Chea Samnang, at the time of publication, was a researcher at the Supreme National Economic Council (SNEC), Social Study and Analysis Division, Phnom Penh, Cambodia.
- 6 The document is entitled 'Strategy and Work Plan on Reform and Modernization of the General Department of Customs and Excise Department Strategic Objectives: 2009-2013'.
- 7 See McLinden 2005, pp. 67-89.

### Sopagna Seng



Sopagna Seng joined Cambodian Customs in 2006. After receiving a Master of International Customs Law and Administration (MICLA) from the University of Canberra, he was promoted Deputy Chief of Customs Inspection Office. Sopagna has been involved in a variety of trade facilitation issues and other customs-related areas such as Border Security Programs, Anti-Money Laundering (AML) and Advance Rulings for Tariff Classification (AR-TC).



# Customs-private sector partnership: not just wishful thinking

*John E Mein<sup>1</sup>*

## Abstract

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This paper identifies the importance of effective cooperation and regular, systematic consultation between customs authorities and the private sector to ensure that trust is built and maintained in those relationships. The challenges presented to achieve the opportunities that would result, and how they have been addressed in Brazil, are outlined and include step-by-step guidance that has resulted in Brazil's increased participation in world trade by accepting that cross-border logistics can be made more efficient. That experience suggests that the Brazilian model, and similar initiatives, could become instrumental in building a new paradigm of partnership that engages all stakeholders to develop the international supply chain.

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## Introduction

'It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change.'

*Author unknown; sometimes erroneously attributed to Charles Darwin*

In this article we will seek to show that there is a growing awareness of the importance for government authorities – Customs – to work with the private sector through regular and systematic consultation at both the strategic and technical levels. We will also look at why such cooperation seems to present a major challenge, even though making it work enables trust to be built in the Customs-private sector relationship, and this can lead to productive changes. Finally, we will describe an ongoing practical example of such an exercise in Brazil.

It is our conviction that substantial advantages can accrue to countries that seek to have all the stakeholders involved in international trade working together to make their trade and logistics processes more efficient and competitive.

Recommendations that customs authorities work with traders, or the private sector, have existed since the Revised Kyoto Convention of 1999 determined that signatory countries should set up formal consultative relationships with the private sector. At that time the major emphasis was on compliance, and there were examples of countries like Sweden that established an interactive working relationship with the private sector to develop a program – called Stairway – to make the country more competitive. The goal was to increase compliance by engaging with companies rather than merely controlling cargo.

This was perhaps one of the first examples of a customs authority that perceived its role in increasing the country's competitiveness, and knew that to fulfil this role it needed to work in close partnership with the foreign trade community.



Following the September 11, 2001 attacks on New York's World Trade Centre, some customs authorities in the developing world increased their concern and responsibilities in the area of security. This was instrumental in encouraging the World Customs Organization (WCO) to create a program to help its members address the issue of security in a structured manner.

This gave rise to the WCO's SAFE Framework of Standards (2012), in which one of the two pillars is that Customs should work with the private sector to implement the framework. Within this proposed relationship the emphasis is on security, as opposed to merely strict compliance, and the Framework implies that implementation will be selective and based on a trade-off: you (business) help us (government) provide security and we will facilitate your trade. However, this approach does not maximise a convergence of objectives between the private sector and the government.

## The WTO Agreement on Trade Facilitation

More recently, on 7 December 2013, an internationally binding Agreement on Trade Facilitation was approved and signed at the World Trade Organization (WTO) Ministerial Conference in Bali. This agreement requires that member countries engage with traders and the private sector in three ways:

- ... provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release and clearance of goods, including goods in transit (WTO 2013, p. 3).
- ... provide for regular consultations between border agencies and traders or other stakeholders within its territory (WTO 2013, p. 4).
- ... establish and/or maintain a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of provisions of this agreement (WTO 2013, p. 20).

## Working together to implement the WTO trade facilitation agreement

As indicated by the various items mentioned above, the matter of Customs and the private sector working together is a recurring one and represents a growing consensus within the international community. Yet it seems difficult to implement in practice. Why should this be so?

In this relationship, it is usual for both sides to focus on their immediate respective tasks – traders on moving goods, and governmental authorities on generating revenue and implementing security and controls (health, environment, industrial policy, statistics, etc.). The two sides do not create a working relationship to develop a higher common agenda, for example, how to make the country more competitive. Trade facilitation is seen as something that benefits traders and for which Customs would have to give up something, while controls are seen as a demand (usually judged as unjustified) rather than as a safeguard mechanism with benefits for society.

It does not help that the two sides – government authorities and the private sector – are so different, and frequently have very different views of what is best for the country that they both live and work in.

Government agencies are charged by the societies that they serve with providing processes that ensure revenue, security and protection from illicit activities, together with defence of health, the environment and the nation's historic and cultural assets. One of the main areas where this is necessary is the flow of goods, services and people across the nation's borders.

Private sector companies have the challenge of moving goods and services across borders to satisfy their clients' needs in a manner that makes them competitive with companies producing the same goods and services in other countries. Thus the overall competitiveness of companies is indicative of the

competitiveness of a country's economy. However, this capability can no longer be exclusively the concern of the private sector.

Reducing the cost of international trade transactions has become a priority for governments intent on facilitating the effective integration of firms in regional and global production networks. Along with improving availability and access to trade-related infrastructure, cutting red tape and streamlining trade processes have become essential both to maintain competitiveness and enable smaller players to also benefit (UNESCAP 2013).

The challenge is how to maximise competitiveness while complying with the mandate of society for effective control. And the opportunity to do this is directly proportional to the ability of all stakeholders to work together on the challenge.

As the principal player in border control, Customs can play a major role in bringing stakeholders together to jointly find mechanisms that maximise their desired outcomes.

Government action in the area of trade facilitation comprises various elements such as simplification of the regulatory framework, procedures and formalities; modern operations and information and communication technologies (ICT); human resource training; agency cooperation; cross-border cooperation; and private-public dialogue. A key element of successful trade facilitation reforms is public-private dialogue. Trade facilitation involves many different organizations which are interconnected and linked by formal or informal relationships. Consequently, solving the problems related to trade facilitation requires collective action. A trade facilitation strategy would, therefore, ideally build on a framework that allows for participation and communication between the different organizations (UNCTAD 2010).

Government is not a monolithic organisation and neither is the private sector. A government is composed of various ministries, departments and agencies that are charged with different mandates and are led or managed by individuals with different world views, ideologies and priorities. And specifically with regard to trade, the private sector comprises companies that produce and consume products as well as companies that provide different services along the supply chain, all with their own (mostly legitimate) agenda. There are also associations that seek to promote their sector or to further the agenda of a specific industry. These private sector agendas are not necessarily convergent, given that the interests of service providers and users may differ significantly.

Historically, the private sector has sought to influence public policy by listing its grievances and writing papers to justify its positions, then delivering these to their interlocutor in the public sector. This mechanism is ineffective because it does not provide a platform for creating one of the essential factors for change: trust among the parties.

The challenge therefore lies in getting the various stakeholders with their different demands, requirements, mandates, interests and world views (public interest commitment versus private interest gain) to work together on a common solution capable of generating improvements that benefit the country as a whole, making it more competitive while increasing the efficiency of the control process.

How can this be achieved? Before describing one example of how it is being done in Brazil, it is important to emphasise that the common effort must be systemic in approach. The best instrument to help with this approach is value chain analysis, where one of the major tools is business process mapping:

Value chain analysis plays a key role in understanding the need and scope for systemic competitiveness. The analysis and identification of core competences will lead the firm to outsource those functions where it has no distinctive competences. Mapping the flow of inputs – goods and services – in the production chain allows each firm to determine who else's behaviour plays an important role in its success. Then, in those cases where the firm does not internalise much or most of the value chain in its own operations, its own efforts to upgrade and achieve efficiency will be to little effect. The

same challenge is true for national or regional economic management – upgrading the performance of individual firms in a region may have little impact if they are imbedded in a sea of inefficiency (Kaplinsky & Morris 2002, pp. 11-12).

## Brazil: practical experience in partnership

In Brazil, the initiative that is the subject of this paper began in the private sector. It grew out of an awareness of the impact of time on the competitiveness of Brazil's manufacturing companies. A 1999 study by the Competitiveness Committee of the American Chamber of Commerce in São Paulo identified lead time as a major competitive disadvantage for Brazil, and concluded that there were enormous opportunities to increase Brazil's participation in world trade if cross-border logistics could be made more efficient.

The study pointed out that the greatest opportunities for improving the lead time for Brazilian production lay in border-related processes, and served as the inspiration for creating a private sector initiative to work with government on modernising Brazil's customs processes. In May 2004 the Alliance to Modernize Brazil's Foreign Trade, better known as Procomex, was officially inaugurated as an informal movement bringing together more than 50 business associations that endorsed the vision, with the presence of senior officials from Customs and the Ministry of Development, Industry and Trade. By providing a mechanism for the private sector to listen to Customs and for Customs to carry on a dialogue with the private sector, often using specific themed events, Procomex started the two sides down a lengthy road of confidence building.

It soon became clear that this would be a long-term process and that a more formal institutional structure was needed to ensure that the work would enjoy continuity. To this end the Procomex Institute was set up in 2005 as the operational arm of the alliance. Companies were asked to join to provide business-specific knowledge and financial support. Governance of the institute was split equally between representatives of participating companies and associations.

Looking back, in August 2006, Mr Michael Canon, who was president of DHL Brazil and a major sponsor of the Alliance, recalled:

‘In 1999 when I was on the Global Competitiveness Committee of the American Chamber of Commerce in São Paulo we had as our focus the impact of lead time on Brazil's global competitiveness. The question we investigated was the following: “Does the absolute length of time to accomplish each step in the supply chain and the variability in those times impact Brazil's global competitiveness and its possible use as a base for global supply chain production?”

‘We found that the impact on Brazil's competitiveness was enormous. At that time the total negative impact was over US\$30 billion a year in a country that had US\$51 billion a year in exports.

‘That study led to our work in Customs reform. Why? **Because of the 99 problem areas identified, nine of the top 10 involved Customs clearance.** It took so long to move forward because we did not have multinational corporate interest, we did not have the resources, and we did not have an ally at the top of Customs like we do today.’

In 2006 a survey of the participating associations and their corporate membership was conducted to identify major problems and opportunities for improvement, and to draw up recommendations for modernising export/import procedures. A process to review and prioritise suggestions was organised at the end of 2006, working together with senior customs officials. This led to a formal memorandum of understanding being signed with the Brazilian Internal Revenue Service, to which Customs reports. Based on the priorities so identified, five different working groups comprising the private sector and customs officials were set up. These reported monthly on their progress to a meeting between Customs and members of the alliance.

This process suffered a setback in mid-2007, following a major change in the leadership of both Internal Revenue Service and Customs. The new leadership was against dialogue or working with the private sector. It was only at the end of 2010 when a new secretary took over the Internal Revenue Service that the Procomex Institute was once again able to work with Customs. In the intervening years the institute pressed ahead as and where possible, working with other government agencies and the National Confederation of Industry (CNI).

## Progress to date

Beginning in 2011, with Customs now being run by new leadership, the Procomex Institute was once again able to work in partnership with the government and organised an effort to map business processes. The goal was to draw up an easy-to-visualise iconic description of existing problems in import and export procedures, and to identify opportunities for improvement. This involves a multi-step process:

- First, meetings are held with all the private sector stakeholders in the logistic chain. All their input is brought together simultaneously to design a process map of how current procedures work.
- Second, these same stakeholders are encouraged to think outside the box and design an innovative map of how the procedures would ideally work.
- Third, these two maps – “as is” and “to be” – are presented to Customs and other government authorities.
- Fourth, government designates a team of high level and knowledgeable customs specialists.
- Fifth, this team works together with the private sector to design a new “to be” map.
- Sixth, the customs team works with private sector representatives to define an implementation plan – how to move from the processes described in the “as is” map to the ones described in the jointly designed “to be” map. This plan outlines the necessary changes to systems, norms, legislation and procedures that will be detailed in the operational manual.
- Seventh, joint meetings are held every three months to monitor implementation efforts.
- Eighth, once the implementation process begins the consultative process continues, aiming to clarify language and address issues that may arise as the norms are written and the procedures described.

At the time of writing, in January 2014, all the steps described above have been implemented for temporary admissions (TA). Estimates are that TA approval procedures will fall from an average 38 days to less than 10 days. Steps one through six have been finalised for land, air and sea export procedures, and step seven began in November 2013. Steps one and two have been accomplished for land, air and sea imports and, in November 2013, the results were presented to Customs and five other governmental agencies (step three).

The above process was developed in 114 day-long meetings held between April 2011 and December 2013. A total of 502 professionals from 180 different companies and 36 business associations took part, as did representatives from seven government agencies. Groups averaged 25 participants per meeting. The output was 49 detailed business process maps, distributed as follows:

- Three maps for temporary admissions: “as is”, “to be” and joint “to be”.
- Fifteen maps for exports, including maritime (regular cargo, roll-on roll-off, commodities), land and air cargo (Customs).
- Nine maps for agricultural products (animal origin, grains, and containerised foods) – these were prepared jointly with senior officials from the Agricultural Sanitation Agency.
- Two maps for exports for the army.
- Twelve maps for imports – maritime (regular cargo and commodities), air and land.
- Six detailed business process maps for customs transit for air, maritime and land cargo.

- Two maps for drawback.
- A table listing all forms, documents and systems and the required data for maritime, air and land exports.

There have also been three major implementation reports, dealing with:

- Temporary admissions
- Export processes
- Import processes (in production).

One great advantage for Customs is that they have gained a much clearer description of processes as they take place in day-to-day operations, described graphically by leading professionals involved at each step of the logistics chain. Customs leadership has stated that customs controls will become more efficient as they move closer to the reality of the business processes and the way that companies control their business operations. This partnership gives Customs the knowledge of how the private sector manages its business processes.

In addition to identifying the best and easiest opportunities for change – and there has been significant “low-hanging fruit” – the business process maps are serving as a major input for development of Brazil’s new Single Window. Process times will be significantly decreased and Brazilian products will become more competitive.

For the private sector this alliance provides a structured manner to positively influence public policies that will affect their business.

Individuals participating and working in the process mapping meetings say they benefit from a very intense learning experience. While all are very knowledgeable and competent in some parts of the process, no one knows the whole process in detail. The lively discussion of the sequencing and interdependence of activities provides new insights even for very seasoned and knowledgeable professionals.

The bottom line is a win-win partnership for both the public and private sectors.

### **Some of the lessons learned**

The Brazilian experience is still very new in terms of institutional development. We face a long learning curve but some lessons have been learned:

- The mission needs to be clearly seen as the platform for the relationship: in the Brazilian case, the mission is making the country more competitive through the modernisation of customs processes.
- The model requires the involvement of:
  - government officials with strong political leadership and willingness to lead change and engage with the private sector
  - a broad representation of associations (these provide political representation and legitimacy)
  - companies that represent all elements in the value chain: producers, purchasers and all agents that provide services to make goods flow along the supply chain.
- There needs to be a small permanent structure to provide logistics support and give continuity to the effort.
- Governance must be totally transparent.
- A methodology is essential. Procomex used Kaisen, furnished by professionals from Embraer, the airplane manufacturer.
- The alliance must not defend any sector or corporate interest or try to solve any company-specific issues or problems.
- Trust is built slowly as individuals learn to respect the value of the relationships so it takes time and effort. This does not come automatically; it must be built through actions and not just with words.

- Many companies are reluctant to commit financial resources for projects that do not bring an immediate return, and fewer still are willing to stick it out through difficult times, for example, when those opposed to change appear to have the upper hand.
- There is always going to be resistance to change. This needs to be managed skilfully by leadership in both the government organisations and the private sector.

## Conclusions

The Brazilian partnership between the government/Customs and the private sector is essential and is generating excellent results in a huge, emerging economy. However, it must be improved to meet the new challenges of the fast-changing international trade environment. Cooperation must go deeper, becoming more frequent, better structured and systematic.

Brazil's experience represents one way of developing effective cooperation; something similar could probably be employed in other countries. Our experience suggests that this model and similar initiatives could become instrumental in helping build a new paradigm of partnership that engages all stakeholders to develop the international supply chain. The question for each country is: how to make this happen?

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## Note

- 1 The pioneering work described in this article would not have been possible without the commitment and dedication over the years of well over a hundred public officials and private-sector executives. In particular, the Procomex Alliance would like to thank and recognise the leadership, from the public sector, of Carlos Alberto Freitas Barreto and Jorge Antônio Deher Rachid, current and former secretaries of the Internal Revenue Service; Clecy Maria Busato Lionço, former assistant secretary of the Internal Revenue Service; Ernani Argolo Checcucci Filho, undersecretary for Customs and International Relations; José Carlos de Araújo, general coordinator of Customs Administration; Ronaldo Lázaro Medina and Dario da Silva Brayner Filho, former general coordinators of Customs Administration; and Marco Aurélio Mucci Mattos, general supervisor of the Customs Manuals Project (AFRFB Coana/Suari/RFB). Key leaders from the private sector have included Michael Canon, former president of DHL Express Brazil; the late Eduardo Cruz, former president of the Brazilian Dry-Ports Association; Paulo Protásio, former vice-president of the Brazilian Exporters Association; Gerson Foratto, director of Deicmar; Carlos Eduardo Abijaodi, director for industrial development at the National Confederation of Industry; and Claudenir Pelegrina, Alessandra Monteiro and Julio Cunha, all from Embraer.

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# Entering the EU market in the face of anti-dumping duties: new exporter reviews

*Eric Pickett*

## Abstract

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This paper identifies the conditions under which new exporters may initiate a new exporter review (NER) under the Basic Anti-Dumping Regulation and thereby avoid the otherwise applicable residual duty, thus making access to the European Union (EU) market more realistic. The paper serves as a guide to new exporters, briefly describing the NER mechanism and the conditions under which the application will be successful in light of the European Commission's practice, also describing the impact of recent developments. Strategies are described for effectively exercising the applicant's rights and the available judicial remedies in the event of an unfavourable outcome.

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## Introduction

Although the European Union (EU) is a comparatively moderate user of anti-dumping (AD) measures, once in place they seem to have a greater longevity than Methuselah. Given the typical level of residual AD duties, new exporters of the product concerned may find entering the EU market commercially prohibitive or even impossible. The new exporter review (NER) offers newcomers a mechanism by which they can avoid the residual AD duties and obtain an individual AD rate based on their individual dumping margin.

AD proceedings in the EU are governed by Regulation 1225/2009, as amended (the Regulation). Under the Regulation a product is considered to be dumped if its export price to the European Community<sup>1</sup> is less than a comparable price for the like product as established for the exporting country. If the European Commission (the Commission) determines that dumping has occurred and that the dumping has caused injury to the EU industry, it will propose the adoption of specific AD measures, unless the EU's institutions conclude that such measures would not be in the European Community's interest. Definitive AD measures automatically expire no later than five years from the date of their imposition. Each time the measures are due to lapse the Commission may conduct an expiry review and extend the period of application by up to five more years. The outcome of the expiry review, which is generally taken on the initiative of a substantiated request by the EU producers, is binary: either the measures are repealed or extended for up to five more years without amendment. AD measures can thus be maintained for an indefinite period of time.

Prior to the introduction of the rules governing NERs, exporting producers which did not export to the EU during the investigation period (IP) of the original investigation were normally subject to residual AD duties until they were able to request an interim review.<sup>2</sup> However, since interim reviews could not be requested until one year had elapsed since their imposition, their situation was difficult at best. The NER mechanism, now codified in Art. 11(4) of the Regulation, addresses this situation: such reviews can be initiated even during the first year of the imposition of the AD measure in question. At the other end of the spectrum, the new exporter can lodge its request even after several years have passed since the original AD measure was imposed. After the one-year time limit has expired newcomers may therefore lodge a request for either an NER review or an interim review.



The quasi-judicial NER is conducted by the Commission and can essentially be conceived as a sequential two-step analysis: the determination of whether the applicant qualifies for new exporter status and the determination of the AD duties, if any, to be levied.

It should be noted at the outset that the Regulation expressly prohibits the initiation of an NER where the initial investigation used sampling as the basis for the determination. Such exclusion could result in a detriment to the newcomer, since it could not obtain a better margin than the residual AD duties; this result could be considered discriminatory and thus in violation of primary EU law.<sup>3</sup> Therefore, the regulation imposing definitive AD measures will, typically, specifically provide that the weighted average duties incurred by the cooperating companies not included in the sample in the original investigation are also to be applied to unrelated new exporters.<sup>4</sup> This approach, called New Exporting Producer Treatment (NEPT), ensures equal treatment between new exporting producers and the cooperating, non-included companies.

Where price undertakings have been accepted but newcomers are expected, the regulation imposing definitive AD duties typically also foresees a provision authorising the Commission to accept such undertakings from newcomers.<sup>5</sup> Price undertakings are a voluntary agreement formulated by the exporter whereby it agrees to increase the export price of its product concerned to the EU to non-dumped or non-injurious levels.

### Initiating an NER

The newcomer is entitled to an NER if it substantiates in its application that it:

- has not exported the product concerned to the EU during the IP on which the measures are based
- is not related to any of the exporters or producers in the exporting country which are subject to the AD measures
- has actually exported to the EU following the IP, or has entered into an irrevocable contractual obligation to export a significant quantity to the EU.

Where the applicant is located in a non-market economy (NME) it must additionally demonstrate either that it operates under market economy conditions (MET) or that it qualifies for individual treatment (IT).<sup>6</sup> If the Commission is satisfied that the applicant has substantiated its claim to newcomer status then it will initiate an NER to verify the claim and determine the applicant's dumping margin.

In respect of the first criterion, even established companies that had exported the product concerned to the EU satisfy the criterion, providing that no exports of the product concerned were made to the EU in the original IP.<sup>7</sup> If an exporting producer does not export any relevant products to the EU in the original IP and makes itself known during the investigation, the Commission may decide to already include the new exporter within the scope of the definitive measure rather than wait and possibly have to conduct a separate NER, provided the applicant meets all the conditions for newcomer status.<sup>8</sup> In *Sacks and bags* (India, Indonesia and Thailand) the definitive measure foresaw the application of the weighted average dumping margin of cooperating exporters to the newcomers who had made themselves known.<sup>9</sup> Since such a 'pre-emptive inclusion' in the definitive measure is clearly advantageous to both the exporters concerned and the Commission it is recommended that companies satisfying these criteria make themselves known at the appropriate time.

In respect of the second criterion, the applicant must substantiate its claim that it does not have any links, direct or indirect, with any of the exporting producers subject to the AD measures with regard to the product concerned. If the applicant is related to a company subject to the AD duties but that company has ceased to exist, the Commission will nonetheless consider the second criterion to have been respected.<sup>10</sup> Consistent with the Commission's practice of considering all related companies as a single entity subject to the same duty, where the applicant is related to a company subject to the weighted average duty rate,

it will be also be subject to that rate if the two producers, taken together, would not have been included in the sample.<sup>11</sup>

To satisfy the third condition the applicant must demonstrate that it is a genuine exporter or producer of the product concerned.<sup>12</sup> Even a single consignment over a two-year period will entitle the applicant to an NER.<sup>13</sup> The goods must be exported directly to the EU as the final destination<sup>14</sup> for release into free circulation.<sup>15</sup> While small quantities of exports will not affect the determination of the applicant's newcomer status, it may impact the determination of its dumping margin.

The newcomer's exports to the EU must fall within the review investigation period (RIP) or the NER will be terminated. In *Stainless Steel Wire* (India) the applicant had made one sale to the EU prior to the RIP and the single contract it had entered into during the RIP had not materialised, whereupon the Commission terminated the NER.<sup>16</sup>

The product the applicant has exported must be the product concerned. In *Certain electronic weighing scales* (China) the applicant had exported products to the EU during the RIP. However, these exports were unfinished products, had different physical characteristics than the product concerned, and were not in a condition to be sold to end-users.<sup>17</sup> The Commission found that the imported products could not be classified as the product concerned<sup>18</sup> and terminated the investigation.<sup>19</sup>

The consistency of the third criterion with Art. 9.5 of the World Trade Organization (WTO) Anti-Dumping Agreement (ADA) is questionable. In its *Mexico – Beef and Rice* ruling the WTO Appellate Body held that Art. 9.5 of the ADA *requires* that an investigating authority carry out an NER for an exporter that (i) did not export the product concerned during the IP, and (ii) demonstrated that it was not related to a foreign producer or exporter already subject to the AD measure.<sup>20</sup> Additional conditions for the initiation of NERs not provided for in the ADA may not be imposed.<sup>21</sup> However, even if the third criterion is inconsistent with Art. 9.5 of the ADA, this would not necessarily render the provision invalid under EU law. The applicant should therefore submit evidence that it has respected the third criterion with its application.

Although the determination of newcomer status should not be affected where the applicant's exports cannot be considered to be representative within the meaning of Art. 6(1) of the Regulation, in *Leather handbags* (China) the Council rejected the application as inadmissible, based *inter alia* on the fact that the applicant's exports were sporadic.<sup>22</sup> This justification is inconsistent with the Appellate Body's ruling in *Mexico – Beef and Rice* and should be considered obsolete.

## Dumping determination

If the investigation concludes that each of the criteria for granting newcomer status is satisfied then the individual dumping margin must be calculated where sampling was not used in the original investigation. Ideally, the new exporter will be found not to be dumping and will therefore be exempted from the AD duties. Similarly, if the newcomer's dumping margin is determined to be below the *de minimis* threshold of 2%, no duty will be imposed and the regulation will be amended accordingly.<sup>23</sup> Under the Commission's proposed draft revision of the Regulation, exporters will no longer be subject to subsequent review investigations where their dumping margins have been found to be less than the *de minimis* thresholds.<sup>24</sup>

Where the exports to the EU are infrequent and the export price is significantly higher than exports to non-EU countries, newcomer status may be granted, but the dumping margin will be detrimentally affected.<sup>25</sup> In *Polyethylene terephthalate* (Thailand), the Council imposed the residual AD duty established in the original investigation.<sup>26</sup> Consequently, where the applicant believes that its dumping margin is lower than would be determined in accordance with the above described practice, it should ensure that it is able to establish a representative basis for the dumping determination.

In the case of an application on the basis of an irrevocable contractual obligation, the arrangement must be for the release of a significant quantity of the goods concerned into free circulation in the EU.

If the investigation reveals that the applicant's individual dumping margin is greater than the applicable residual AD duty, the higher rate will be imposed, subject to the lesser duty rule.<sup>27</sup> The new exporter should therefore carefully consider its individual dumping margin before lodging the application. If, in the course of the investigation, it becomes apparent that the applicant's individual rate will exceed the residual AD rate in force, it may withdraw its application and cease cooperating, which will generally result in the proceedings being terminated.

### Procedure

Pursuant to Art. 11(5) of the Regulation the relevant provisions of that Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, also apply to NERs. There are, however, certain differences.

After consultation with the Advisory Committee and after the EU producers concerned have been given the opportunity to comment, the Commission will initiate the NER by publication of the relevant regulation, rather than by notice as in other reviews.

The regulation initiating an NER repeals the duty in force with regard to the applicant by amending the regulation imposing the AD duty. Pursuant to Art. 11(4) of the Regulation the Commission also directs the Member States' customs authorities to register the applicant's imports in accordance with Art. 14(5) of the Regulation.<sup>28</sup> Registration ensures that AD duties can be levied retroactively to the date of the initiation of the NER should it result in a determination of dumping. In 'normal' investigations, the Commission generally only directs the registration of imports upon a request by the EU industry.

NERs are carried out on an accelerated basis and must be concluded within nine months of the date of the initiation. This is a significantly less amount of time than that set for interim reviews, which should normally be concluded within twelve months of the date of the initiation but may be extended by three months, meaning that it may not be concluded until 15 months after the date of initiation.

After publication of the initiation of the NER the Commission will send the applicant a questionnaire and verify the information at the applicant's premises. The investigation is limited to the applicant's status as a new exporter, dumping margin during the RIP and any claims for MET or IT. Information which has not been verified during the visit will generally not be considered.<sup>29</sup> The applicant should therefore ensure that it has appropriately prepared for the on-site inspection and bring any issues which may require examination to the Commission's attention prior to the verification visit.<sup>30</sup> This includes ensuring that the relevant staff are available to answer any questions, preparing all documents and computer records, which served as the basis for the questionnaire response and providing the inspectors with a photocopier.

The NER concludes with the notification of the maintenance or amendment of the measures by publication of a regulation in the Official Journal (OJ). With the regulation's entry into force the duties, if any, will be collected retroactively and the Member States' customs authorities will be directed to cease registration of the applicant's imports. It should be noted that the period of validity of the measures reviewed is not affected by the NER.

Finally, if the investigation is not completed within the nine-month timeframe the measures will be maintained.

### The applicant's rights in the proceedings

The Regulation bestows important rights on the parties in AD proceedings. These rights include rights of disclosure, the right to make submissions and be heard, confidentiality and intervention by the hearing

officer. The ECJ considers the parties' procedural rights to be crucial in anti-dumping proceedings<sup>31</sup> and a violation of these rights of defence may lead to the annulment of the contested regulation. According to settled case law, parties must be placed in a position during the administrative procedure in which they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission.<sup>32</sup>

Throughout the investigation the applicant may lodge any submission or supplementary comments with the Commission, which the Commission is obligated to take into account when establishing its findings. This obligation is to be evaluated in light of the duty to state reasons. The statement of reasons for a regulation imposing AD duties must be assessed by taking account, *inter alia*, of the information which has been communicated by the institutions to the interested parties and the submissions made by those parties during the investigation procedure.<sup>33</sup> The institutions are not, however, required to give specific reasons for a decision not to take account of the various arguments raised by the interested parties.<sup>34</sup>

The Regulation also grants the applicant rights of disclosure of the details underlying the essential facts and considerations which form the basis for the proposed duties as well as the dumping margin calculation. Pursuant to written requests and their acceptance, the applicant is entitled to inspect the non-confidential files. At both stages the applicant has the right to comment on the documents, facts and considerations and have these comments considered by the Commission. The applicant's confidential information must be treated as such where that information has been properly identified or is obviously confidential. The right to confidentiality extends to the verification phase.

If, in the course of the review, the applicant has any grievances relating to procedural issues or the exercise of its rights of defence it may request a hearing. Hearings may be oral – where the applicant meets with the Commission's staff – or adversarial – where the interested parties directly concerned exchange views on specific contentious issues.<sup>35</sup> The Commission cannot, however, compel a party to attend an adversarial meeting.

These rights place the applicant in a position where it can effectively affect the outcome of the review. The Commission has, in fact, changed its position in light of the parties' submission on several occasions.

The applicant may also request the intervention of a hearing officer. The hearing officer, whose role includes ensuring the full exercise of the parties' rights of defence, acts as a facilitator and mediator between the interested parties and the Commission, in an advisory role and formulates non-binding recommendations.<sup>36</sup> The intervention of the hearing officer may be requested as soon as the investigation has been initiated or at any time thereafter, but it is advisable to involve him/her at an early stage and to contact him/her formally. The hearing officer's involvement has proven effective, leading to the recent codification of the terms of reference.<sup>37</sup>

## **Non-cooperation and withdrawal of request**

Where the Commission is unable to verify that the applicant qualifies for new exporter status it will reject the application as inadmissible, resulting in the applicant incurring the residual AD duties,<sup>38</sup> which will then be levied retroactively to the date of the initiation of the NER. Applicants located in an NME must additionally meet the criteria for MET or IT. In *Castings* (China), however, three Chinese exporters who had been denied both MET and IT were nonetheless granted the weighted average duty rate for sampled companies granted IT.<sup>39</sup>

In cases of non-cooperation the Commission will reject the request and inform the applicant that its request will not be considered.<sup>40</sup> Non-cooperation occurs where the applicant fails to complete and return the questionnaire within the time limits set, does not provide or refuses access to necessary information, for example, by failing to permit on-the-spot verification, or otherwise significantly impedes the investigation. Where the applicant is unable to meet the deadlines it is therefore advisable that they immediately notify the Commission and request an extension.

The Commission's consistent practice of determining MET and IT for a group of related companies as a whole<sup>41</sup> creates special problems for affiliated applicants located in NMEs. Where their related producer and/or exporter fails to cooperate in the investigation, the application will be rejected because the applicant's status as a new exporter status will not be able to be verified,<sup>42</sup> resulting in the imposition of the residual AD duty.<sup>43</sup>

If the applicant has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available. In *Chamois leather* (China) the applicant provided false and misleading information and ceased cooperation altogether during the verification visit, thereby preventing completion of the verification. The applicant proceeded to formally withdraw its application.<sup>44</sup> Despite the withdrawal of the application<sup>45</sup> and non-cooperation, the Commission considered it appropriate to continue the investigation *ex officio* and base its findings on the facts available, ultimately imposing the residual AD duties.<sup>46</sup>

Non-cooperation must be distinguished from other instances where the Commission uses the facts available to determine the dumping margin. Where the applicant cooperates but the Commission is unable to establish the applicant's individual dumping margin, for example, because of lack of representativity or because it was unable to verify the information during the on-site visit, it may resort to the facts available. As seen above, the outcome will depend on the specifics of the case.

The applicant may withdraw its request without providing a justification therefor,<sup>47</sup> which will result in the termination of the review, providing termination would not affect the measures in force and is not against the Community's interest.<sup>48</sup> In the latter case the Commission will continue the review *ex officio* and use the facts available.

## Recent developments affecting applicants in NMEs

The conditions for obtaining IT status were recently litigated before the WTO and found to be inconsistent with Art. 6.10 and 9.2 of the ADA.<sup>49</sup> The Council has amended Art. 9(5)<sup>50</sup> in light of the ruling, clarifying the criteria under which enterprises that are legally distinct from the State may nonetheless be considered a single entity for the purpose of specifying the duty. The Appellate Body's ruling reverses the presumption of Art. 9(5) of the Regulation that exporting producers operating in an NME are related to the State and bear the burden of proof that they are entitled to IT. This is of significant practical importance since the EU must now demonstrate that the undertaking does not qualify for IT.<sup>51</sup>

The EU has already also modified its MET and IT questionnaires in light of the recent WTO rulings. However, it is questionable whether the new questionnaires have brought EU practice into line with the ADA.<sup>52</sup> The new 'IT-Annex' to the questionnaires, for example, not only contains many of the same questions as before but also continues to request information which is irrelevant to the assessment of whether the applicant is eligible for IT status under the criteria set forth by the Appellate Body.<sup>53</sup> The criteria are, however, relevant to the historical approach taken by the EU for the assessment of IT status eligibility. Under these circumstances, even if the EU does shift the burden of proof so that it is in line with the Appellate Body's ruling, the type of information taken into account by the EU authorities may be inconsistent with the ADA. Nonetheless, under the current practice, companies located in NMEs as such may have a better chance of obtaining MET or IT status. The Commission recently completed an investigation launched to bring the definitive AD measures into conformity with WTO law and found that one exporting producer was entitled to IT.<sup>54</sup>

In *Brosmann Footwear (HK)* the ECJ held that the Commission must determine whether an exporting producer qualifies for MET within three months of the initiation of the investigation where the applicant has submitted substantiated evidence to that effect, irrespective of whether the applicant was included in the sample of exporting producers.<sup>55</sup> In response to this judgment the EU institutions amended the

Regulation.<sup>56</sup> Disappointingly, the amendment brings the Regulation into line with the Commission's practice rather than *vice versa*.<sup>57</sup>

## Judicial remedies

The applicant can bring three types of direct action before the General Court (GC): an action for annulment, an action for failure to act, and an action for non-contractual damages.

The action for annulment is governed by Art. 263(4) of the Treaty on the Functioning of the European Union (TFEU). There are four grounds for challenging an AD measure under this provision: lack of competence; infringement of an essential procedural right; infringement of the Treaty or any rule of law relating to its application, and misuse of power. Actions based on allegations of the infringement of essential procedural rights, such as rights of defence, tend to be more successful than actions based on a manifest error of the assessment of facts.

The action must be instituted within two months of the publication of the measure, or of its notification to the applicant. It should be noted that actions brought before the GC do not have suspensory effect by operation of law. If the action is successful the GC will declare the contested regulation void insofar as it affects the applicant.

The applicant can also bring an action for compensatory damages against the EU institutions under Art. 268 of the TFEU as an indirect way to challenge the measure. However, such actions are very seldom successful.

If the EU institutions fail to act, for example, the Commission simply does not react to the application, the new exporter may bring an action under Art. 265 of the TFEU.

## Conclusions

New exporters of products subject to AD duties will find it difficult if not commercially impossible to enter and develop the European market. To avoid these duties the newcomer may request the initiation of an interim review or an NER. The NER mechanism offers an expedited procedure for newcomers to avoid having their products subject to the residual AD duties and is therefore advantageous in comparison to the interim review. Although the newcomer must present a *prima facie* case that it is, indeed, a new exporter, this is the only significant extra hurdle the NER establishes. The investigation is limited to the applicant's dumping margin, meaning that no new injury review is conducted. It also means that the applicant will be fully investigated in respect thereof, for example, it will need to complete the questionnaire, be prepared for the on-site verification visit, etc. Companies located in non-market economies will also be subject to investigations to evaluate their MET/IT claims. The recent WTO rulings on these issues have led to an amendment of the Regulation and to a change in the Commission's practices. The ECJ's *Brosmann Footwear (HK)* judgment also led to the Regulation being amended but, disappointingly, only to bring it into conformity with the Commission's practice.

The NER allows newcomers to have an individual dumping margin determined for them, which is generally lower than the residual AD duty in force. In cases where the original investigation used sampling, the applicant cannot be granted an individual AD duty but it may be entitled to NEPT, which is generally a significant improvement over the residual AD duty. In some cases the applicant may also be entitled to offer an undertaking.

The applicant enjoys important rights under the NER procedure, including rights of defence, rights of disclosure and access, confidentiality, and the right to intervention by the hearing officer. These rights not only offer a relatively high level of protection but also enable the applicant to materially influence the outcome of the investigation. Finally, the applicant can apply for judicial relief, directly challenging the final measure.

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### **Notes**

- 1 The Regulation was adopted prior to the Treaty on the Functioning of the European Union and therefore still refers to 'European Community' rather than to the European Union. The difference in wording has no legal effect.
- 2 Van Bael & Bellis 2011, p. 572.
- 3 Council Regulation (EC) 393/2009, at recital 145 and Council Regulation (EC) 91/2009, at recital 236.
- 4 See the sources in note 2; Van Bael & Bellis 2011, p. 574; McGovern 2010, §5714.
- 5 See Van Bael & Bellis 2011, p. 575.
- 6 Council Regulation (EC) 727/2008, at recital 3.
- 7 Council Implementing Regulation (EU) 806/2010.
- 8 Council Regulation (EC) 1950/97, at recital 30.
- 9 Council Regulation (EC) 1950/97, at recital 30 and Art. 1(2)(a).
- 10 Council Regulation (EC) 2143/2004, at recital 13.
- 11 Council Regulation (EC) 2143/2004, at recital 13.
- 12 Commission Decision of 11 October 2001, at recital 13; Council Regulation (EC) 1941/2004, at recital 11; McGovern 2010, §5714.
- 13 Council Regulation (EC) 2744/2000, at recitals 12, 14.
- 14 Council Regulation (EC) 727/2008, at recitals 12, 15.
- 15 Council Regulation (EC) 727/2008, at recital 13.
- 16 Council Regulation (EC) 1294/2004, at recital 13.
- 17 Council Regulation (EC) 1941/2004, at recital 11.
- 18 Council Regulation (EC) 1941/2004, at recital 11.
- 19 Council Regulation (EC) 1941/2004, at recitals 12, 13.
- 20 WTO Appellate Body Report, WT/DS295/AB/R, at para. 321.



- 21 WTO Appellate Body Report, WT/DS295/AB/R, at para. 323.
- 22 Council Regulation (EC) 175/2000, at recitals 15, 16.
- 23 Council Implementing Regulation (EU) 295/2013, at recital 27.
- 24 European Commission 2013, at recital 13 and Art. 1(4)(a).
- 25 Council Regulation (EC) 823/2004, at recitals 13 and following.
- 26 Council Regulation (EC) 823/2004, at recital 22. See also Council Regulation (EC) 1950/97, at recital 14.
- 27 Commission Regulation (EC) 693/2005.
- 28 This is not affected by the Commission's proposed revision of the provision, see note 24.
- 29 See, for example, Council Implementing Regulation (EU) 295/2013, at recitals 15, 16.
- 30 General Court, judgment of 10 March 2009, para. 54.
- 31 ECJ, judgment of 16 February 2012, not yet published, para. 77.
- 32 ECJ, judgment of 16 February 2012, not yet published, para. 76.
- 33 General Court, judgment of 13 September 2010, para. 115.
- 34 General Court, judgment of 13 September 2010, para. 115.
- 35 Van Beal & Bellis 2011, p. 503.
- 36 European Commission 2011.
- 37 Decision of the President of the Commission of 29 February 2012.
- 38 Council Regulation (EC) 727/2008, at recital 17; Council Regulation (EC) 1941/2004, at recital 13.
- 39 Council Regulation (EC) 426/2008, at recital 20.
- 40 Council Regulation (EC) 426/2008, at recital 10.
- 41 Council Regulation (EC) 906/2008, at recitals 16 and 42.
- 42 Council Regulation (EC) 906/2008, at recital 52; Council Regulation (EC) 1652/2006, at recital 40.
- 43 Council Regulation (EC) 906/2008, at recital 52; Council Regulation (EC) 1652/2006, at recital 41.
- 44 Council Implementing Regulation 1252/2009, at recital 8.
- 45 Council Implementing Regulation 1252/2009, at recital 10.
- 46 Council Implementing Regulation 1252/2009, at recital 11.
- 47 Council Regulation (EC) 681/2009, at recital 9.
- 48 Council Regulation (EC) 258/2009, at recital 12.
- 49 WTO Appellate Body Report, WT/DS397/AB/R; WTO Panel Report, WT/DS405/R.
- 50 European Parliament and Council Regulation (EU) 765/2012.
- 51 Council Regulation (EC) 91/2009, paras 364, 365, 369.
- 52 Adamantopoulos & Graafsma 2011.
- 53 For a detailed examination of the questions, see Adamantopoulos & Graafsma 2011.
- 54 Council Implementing Regulation (EU) 924/2013, at recital 138.
- 55 ECJ, judgment of 2 February 2012, not yet published, at para. 30 and following.
- 56 European Parliament and Council Regulation (EU) 1168/2012.
- 57 See De Baere 2012.

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# Enabling trusted trade through secure track and trace technology

*Tom Doyle*

## Abstract

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There is wide consensus on the need to address illicit trade and, in the face of ever-increasing threats to government and society at large, comprehensive, collaborative and technically advanced track and trace solutions have an important role to play in strengthening and unifying regulatory control, fiscal sustainability and ensuring secure supply chains. This technology can also be a critically important trade facilitation tool to enable trusted traders to work collaboratively with regulatory agencies to establish a level playing field of competitiveness for industry, as well as improving governments' ability to fight the scourge of illicit trade and those who profit from this activity. However, we lack a clear global vision for enabling trusted trade through secure track and trace technology. Currently, systems are being developed and deployed in a far too organic way, limiting potential gains. If governments worldwide are to fully leverage the potential benefits to be had from a secure track and trace framework and solution, they need to act now.

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## Context

Government regulatory agencies have a vital role to play in terms of promoting industry competitiveness, fiscal sustainability and public health protection. The recent World Trade Organization (WTO) Bali Ministerial Conference concluded with an agreement on a package of issues designed to streamline trade, allow developing countries more options for providing food security, boost least developed countries' trade and help development more generally.<sup>1</sup> This agreement heralds a new momentum in the trade facilitation arena and increases global awareness of the important contribution that improved regulatory procedures can make to economic development and poverty reduction. The purpose of this paper is to highlight the value and principles of secure track and trace technology and examine how governments can take advantage of this technology to better enable trust-based trade facilitation. 'Tracking' in the context of trade means monitoring the movement of finished goods through the supply chain which is also a means to ensure that all regulatory requirements are met such as the payment of taxes. 'Tracing' which looks backward down the supply chain is a powerful aid to determining the point at which any out-of-normal event occurred, for example, to establish where a product was diverted out of the legitimate supply chain. Secure track and trace on the other hand covers the authentication and traceability of products through a secure supply chain so that governments, industry and manufacturers, and the population at large can be confident that the product they are using is genuine and has had the correct tax collected and legitimate industry can be more competitive.

## The emergence of track and trace

The emergence of the latest track and trace technology has been the result of a range of factors, some of which are coming from the public sector via regulation whilst others emanate from the private sector for market-driven reasons:

***International commitments with respect to legislation and standards, which impose compliance obligations on manufacturers, and which require a global track and trace system.*** These include the Protocol of the World Trade Organization (WTO) Framework Convention on Tobacco Control<sup>2</sup> (FCTC) to Eliminate Illicit Trade in Tobacco Products as well as the revision of the European Union Tobacco Product Directive<sup>3</sup> (EUTPD).

***Increased pressure on governments to ensure compliance,*** at a time when the increased complexity of supply chains means the task is ever more difficult and the opportunities for non-compliance are growing. The increased involvement of organised crime groups in illicit trade only adds to the challenge.

***Industry itself sees the potential value to be had from track and trace.*** Companies are increasingly concerned about not only their financial losses but also the potentially existential damage to their reputations which would result from harm to unsuspecting consumers. Estimates for the market value of counterfeit drugs in circulation range from between 1% of sales in developed countries to over 10% in developing countries.<sup>4</sup> The food industry faces similar threats from contamination and supplier quality control.

***The general public is increasingly demanding accessible assurance about the quality*** of the goods they consume. To illustrate the point, an estimated 100,000 people die every year from ingesting fake medicines. The ability to track and trace genuine products and assure authenticity is very much a public interest, consumer safety and brand protection issue.<sup>5</sup>

Track and trace solutions are emerging in different industries, geographies and for seemingly different reasons but most have similar core objectives:

- ***capturing the undeclared market,*** (including through under-declaration and diversion) leading to an immediate proportional increase in tax collection. Illegal, untaxed products on the market represent unfair competition for legitimate producers – reducing this type of tax fraud levels the playing field for honest manufacturers and is also a means to combat organised crime
- ***cleaning up the supply chain*** by contributing to identifying and removing illegitimate actors and their products from the supply chain
- ***preventing the introduction of counterfeit, sub-potent, adulterated, misbranded or expired goods into a market,*** protecting the interests of legitimate manufacturers as well as those of the public at large who are the victims of dangerous or ineffective goods
- ***ensuring accountability for the movement of goods*** by supply chain participants, offering recourse to both brand holders and government
- ***improving the efficiency and effectiveness of product recalls,*** offering protection to brand holders as well as the public.

## The potential value of secure track and trace for trade facilitation

‘Track and trace’ could provide significant benefits to consumers, business and the economy at large. The use of ‘track and trace’ technology is an innovation for the international customs environment. A paradigm shift from control to trust-based regulation and shared responsibility will be required and may be applicable to all import streams.<sup>6</sup>

Secure track and trace technology has a crucial role to play in strengthening and unifying regulatory control, fiscal sustainability and ensuring secure supply chains. Not only can it play a critical role in

safeguarding revenues (in particular excise revenues) but it also levels the playing field for compliant, legitimate manufacturers by enabling the identification and removal of illegal operators. This technology can also be a critically important trade facilitation tool to enable trusted traders to work collaboratively with regulatory agencies so as to establish a level playing field of competitiveness for industry, as well as improving governments' ability to fight the scourge of illicit trade and those who profit from this activity.

It is critical for governments to better understand the benefits to be gained by securing supply chains through implementation of track and trace solutions. Perhaps more importantly there is an imperative to agree the foundation for globally-aligned solutions that can benefit multiple stakeholders. There is wide consensus on the need to address illicit trade and in the face of ever-increasing threats to government and society at large, comprehensive, collaborative and technically advanced track and trace solutions have an important role to play. The bottom line is that the technology must keep ahead of the game and adapt constantly to the evolving and dynamic threat environment. All trading partners and participants in the supply chain who have any interaction with government agencies need to understand the benefits to them from the implementation of secure supply chains enabled by track and trace technology. These benefits include improved and more accurate predictability of the supply chain as well as reduced costs of compliance.

One can hardly do anything these days without being asked or indeed required to provide, additional data. Cloud computing, communication and e-commerce applications routinely require the supply of additional data to 'enhance' one's experience or complete transactions. Big data, social media behaviour and harvesting of consumer data are being touted as 'the next big thing'. Why should regulatory controls related to secure supply chains be immune from this trend?

The more reliable data provided by 'track and trace' systems and the intelligent manipulation of it, ideally in real-time, can bring many benefits including new actionable leads to enforcers and otherwise unavailable evidence which can be used in prosecutions. And it reveals the 'in-between zones' through which illicit traders' profit. Perpetrators of illicit trade count on remaining invisible. Creation of secure supply chains via track and trace allows government to have the data which enables it to 'reveal the invisible'. It gains a clear view of the licit trade that flows within secure supply chains by a process of elimination throwing the spotlight on the 'grey' areas. One might say it provides government with the data required to 'shrink the haystack'.

The potential benefits of secure supply chains via track and trace can be summarised thus:

***Increased tax revenues and improved tax policy*** by reducing under-reporting of production by domestic manufacturers and the potential for re-routing goods intended for export, as well as helping make illegally imported or counterfeit goods more easily identifiable.

***Improved consumer protection*** for government departments responsible for product safety standards, by providing a range of benefits: it ensures that manufacturers meet new product standards in a timely fashion, or provides a mechanism for accountability if they do not. It thus reduces the threat of non-compliance with product and safety standards.

***Improved competitiveness and trade facilitation*** by reducing the compliance burden on trusted traders which is known to have a positive impact on attitudes and behaviours related to compliance. Compliant, legitimate manufacturers benefit from the more ready identification and removal of illegitimate actors from the supply chain. This is, in turn, important as part of a strategy to enable trusted traders.

***Enhanced intelligence, risk and enforcement management capability*** by substantially improving the quantity and quality of data to which governments have access, making it easier to analyse and assess trends and anomalies. Data mining capabilities can be deployed with better results. Detecting patterns and trends is fundamental to understanding and addressing the root causes of non-compliance and is the key to continual improvements.

*Enhanced compliance management capability* by being able to identify the point(s) in the distribution chain at which a product or consignment became adulterated or was diverted, facilitating investigative controls and interventions and making it easier to establish accountability for supply chain ‘leaks’ and ‘losses’. It provides the ability to monitor the effectiveness of regulatory actions and makes it easier to adjust interventions to counter unanticipated problems, and provides the basis for enhancing tax structure policy.

## Current trends and developments in track and trace

Most of the current developments around track and trace technology are happening organically; in other words, in the absence of a blueprint of an ideal collaborative future state. There is little discussion about the advantages and potential synergies of an integrated and standard approach to global traceability solutions. The current disparate set of developments results in a lack of alignment between the different solutions and, perhaps more importantly, to a lost opportunity to use track and trace technology as a tool to enable global trusted trade. The industries affected have to put substantial effort into harmonising and aligning the various available marking solutions – they are increasingly seeing the value to be had from shifting towards globally recognised standards.

There are a number of different market participants offering track and trace solutions:

- **Industry.** There are industry-specific solutions designed and developed and without government security solution requirements in mind. They tend to be relatively low-cost, low-function, tailor-made solutions which by not being designed with government security requirements in mind are often less secure and are susceptible to being replicated. Additionally, they typically fall short of providing interoperability functions and benefits for government regulators and are not sufficiently independent (for example, they may have been designed by those who could potentially benefit directly from mis-declaration<sup>7</sup>).
- **Independent solution providers.** Specialist organisations that offer commercial single platform secure track and trace solutions. Focusing almost exclusively on secure track and trace and related brand protection/product authentication, these independent providers may offer commercial solutions for industry, and in specific cases, platforms provided to government to support the track and trace requirement for high-risk and/or sensitive goods. In the latter case, independence from the industry being regulated removes possible conflicts of interest – proprietary components where offered provide additional security. However, they may face additional resistance from industry, particularly where the industry objects to the absorption of the necessary operating costs or where the industry needs to be persuaded that the solution will not have an impact on their business continuity.
- **Standards organisations.** Providers such as GS1 with EPC Global that offer certain components of a track and trace solution. They may have advantage over industry-derived solutions because of the lower likelihood of conflicts of interest but these typically non-profit organisations traditionally promote guidelines and methods only, and have limited implementation capability or experience in real industrial environments.
- **Consulting firms and system integrators.** Providers that have not necessarily developed a track and trace solution of their own but offer implementation services. These services come with strong implementation capacity and solution adaptability, but the problem domain is seldom an area of specialisation for these companies. Credible understanding of the specialist domain of secure track and trace is limited, with the degree of company experience and expertise often being oversold.

## Future customer requirements informing the blueprint of secure track and trace

Agreement on an internationally recognised secure track and trace framework would provide a ‘win-win’ situation for governments, their citizens and industry at large. Agreed standards are a prerequisite for collaboration along the supply chain. They would improve security and communication and help to reduce transaction costs, reduce errors, and dramatically reduce the risk of systems incompatibility. Track and trace systems are likely to continue to grow in popularity with both regulators and the private sector. However, the absence of agreed standards and a global blueprint to guide research and investment will result in the organic development of track and trace systems, which are neither aligned nor interoperable, and which do not capture the value to be had from an integrated, aligned global tracking system.

If we take a longer term more strategic view, the requirements to be addressed through a track and trace solution that enables ‘trusted trade’ include the following:

***The marking of all legitimate production***, through secure marking with multiple levels of security features (visible, semi-covert, covert and forensic), direct marking by printing a unique code on each product with visible and/or invisible inks, and/or RFID technology. Scale and scope are likely to increase the variety and types of goods marked, traced and tracked resulting as it does from the need to reinforce consumer and brand protection, and better manage logistics, and from government control requirements.

***Material-based security*** will remain core to product authentication and in addition to information-based security is fundamental to any secure track and trace solution. Without this, illicit operators are able to manipulate product markings to feign legitimacy and infiltrate supply chains with their illicit products, often with a very low risk of detection. Both material- and information-based security give some assurance against manipulation in the supply chain by manufacturers, distributors or retailers – not just to government but, ultimately, also to the citizens trusting and using the products.

***Moving away from agency-specific track and trace solutions to a standard global track and trace platform supporting multiple stakeholders and uses***. Key would be the establishment of compatible data and process standards to enable system participants to be able to share data through an integrated system, worldwide. To be compatible with a global international track and trace regime, existing track and trace systems would need to move from local proprietary coding systems to a global harmonised standard.

***Data exchange enabled at three discrete levels***. Firstly, manufacturers, downstream supply-chain partners and their trading partners need a corporate query capability; secondly, national authorities require data at different points along the supply chain, either in a national database or query engine; and thirdly, there is international data exchange, probably through a query engine.

***Real-time auditing and authentication tools*** that need to reliably, quickly and decisively meet the needs of multiple stakeholders: Customs acting at the border may need to verify and detect the legitimacy of the product within its alleged supply chain; distributors and retailers need a mechanism to authenticate an item – a quick ‘good versus fake’ assessment; and the general public needs to easily, intuitively and simply check the authenticity of the product before consumption.

***Integration with other regulatory investments and systems***. For a secure track and trace solution to provide optimal return on investment it needs to be integrated with other regulatory agency systems. This also provides a rich data source to improve the targeting and detection of illicit activity. Therefore, secure track and trace solutions should support the consolidation of trade data to provide meaningful business intelligence, risk profiling and powerful reporting tools.

Many of the technology components to enable this future blueprint are already available today:

- **Interoperability and standardisation** have made substantial strides, with data exchange formats such as XML enabling systems in the track and trace supply chain and data network to communicate.
- **Agreed standards (serialisation, data recording and exchange)**. Organisations such as GS1 and EPC Global have made substantial progress reaching cross-industry agreement on generation, application of unique identification numbers to items and the exchange of data as an item moves through the supply chain. Recently, the World Health Organization (WHO) achieved an incredible feat in establishing track and trace requirements and defining minimum prescribed data requirements for the control of tobacco products, in the first protocol emanating from its FCTC.<sup>8</sup>
- **Advances in technology architectures and data exchange mechanisms**. Technology solutions in terms of application architecture, data exchange and storage have overcome many of the obstacles that in previous decades constrained what was technically feasible. This has opened up a realm of new possibilities in terms of scale and nature of items that can now be individually tracked.

## Conclusions

Modern track and trace systems have a great deal to offer, including as a means of securing supply chains, enhancing compliance, levelling the competitive playing field, increasing fiscal revenues and facilitating global trade. There are multiple benefits for all stakeholders. Secure track and trace systems are crucial to enabling a trust-based environment which is good for legitimate manufacturers and traders. But, currently, systems are being developed and deployed in a far too organic way, limiting potential gains. We lack a clear global vision for enabling trusted trade through secure track and trace technology.

A vision needs to be developed jointly with all stakeholders so that there is a sense of ownership and collaboration by all. It needs to be simple and easily understood but contain sufficient detail to provide clear direction. When it comes to implementing a track and trace program, leadership commitment to the vision by all stakeholder groups is required to deliver the agreed business outcomes. Critically, a government mandate is essential to ensure a coherent framework and to drive the required change in a collaborative way<sup>9</sup> across the various stakeholder groups (from both the public and private sectors). Last, but by no means least, success requires a true partnership of shared risk and reward between governments and the technology providers.

Only a well-designed combination of technologies and related business processes will make the entire track and trace solution robust and secure enough to deliver expected results. Essential components include a system of unique secure serial coding, allied with material-based security features which are the only true, proven and secure basis for product marking. Supply chain event data for tracing and mobile enforcement tools for authorities are required to enable interventions at various points in the supply chain.

Business intelligence and analytic tools are key for solution efficiency and to keep pace with the ever-changing *modus operandi* of the perpetrators of frauds. A single standard government track and trace platform with interoperable features and which can be applied in a modular way across a range of products and requirements will ensure coherence and value-for-money.

Many of the solution components for an integrated track and trace solution are already available today. However, the absence of a longer-term blueprint for an integrated system is resulting in a lack of alignment between the various stand-alone applications now being developed.

If governments worldwide are to fully leverage the potential benefits to be had from a secure track and trace framework and solution, they need to act now. Step one is to adopt a longer term strategy and vision. This has to include an agreement to develop a blueprint and standards but is also an opportunity to work on best practice for innovative procurement<sup>10</sup> and implementation. With a common vision which

goes across borders and continents we can define in detail the capabilities required, the essential building blocks to defeat the scourge of illicit trade. The potential upside is too important to ignore – at the same time protecting the welfare of our nations’ citizens and improving governments’ compliance management capability, we can without any need for ‘trade off’ stimulate the growth of legitimate industries. If we are up to the challenge this really can be a win-win.

## Notes

- 1 [www.wto.org/english/news\\_e/news13\\_e/mc9sum\\_07dec13\\_e.htm](http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm).
- 2 [www.who.int/fctc/en/](http://www.who.int/fctc/en/).
- 3 [ec.europa.eu/health/tobacco/products/revision/](http://ec.europa.eu/health/tobacco/products/revision/).
- 4 World Health Organization (WHO) 2006, ‘Counterfeit medicines’, Fact Sheet No. 275, revised February, WHO, Geneva.
- 5 US Food and Drug Administration (FDA) 2013, ‘Citizen petition to FDA – Track and trace system to monitor tobacco products’, US FDA, Maryland US, viewed 15 January 2014, <http://publichealthlawcenter.org/sites/default/files/resources/telc-citizen-petition-track&trace-2013.pdf>.
- 6 Mike Pezzullo, CEO, Australian Customs and Border Protection Service, ‘Border management and its role in supporting national economic competitiveness’, speech to the Lowy Institute for International Policy, Sydney, NSW, 16 October 2013.
- 7 L Joossens & AB Gilmore 2013, ‘The transnational tobacco companies’ strategy to promote Codentify, their inadequate tracking and tracing standard’, BMJ Group, 12 March, viewed 15 January 2014, <http://tobaccocontrol.bmj.com/content/early/2013/03/11/tobaccocontrol-2012-050796.full>.
- 8 World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) 2010, ‘Analysis of the available technology for unique markings in view of the global track-and-trace regime proposed in the negotiating text for a protocol to eliminate illicit trade in tobacco products’, FCTC/COP/INB-IT/4/INF.DOC./1, 22 February, WHO, Geneva.
- 9 T Doyle 2010, ‘Collaborative border management’, *World Customs Journal*, vol. 4, no. 1, pp. 15-21.
- 10 T Doyle 2012, ‘Rethinking Customs’ procurement practices to deliver improved business outcomes’, *World Customs Journal*, vol. 6, no. 2, pp. 95-9.

### Tom Doyle



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## *Section 3*

## *Special Reports*





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11 December 2013

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Page: 1/29

**Ministerial Conference**  
**Ninth Session**  
**Bali, 3-6 December 2013**

### **AGREEMENT ON TRADE FACILITATION**

#### **MINISTERIAL DECISION OF 7 DECEMBER 2013**

The Ministerial Conference,

*Having regard to* paragraph 1 of Article IX of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement");

*Decides* as follows:

1. We hereby conclude the negotiation of an Agreement on Trade Facilitation (the "Agreement"), which is annexed hereto, subject to legal review for rectifications of a purely formal character that do not affect the substance of the Agreement.
2. We hereby establish a Preparatory Committee on Trade Facilitation (the "Preparatory Committee") under the General Council, open to all Members, to perform such functions as may be necessary to ensure the expeditious entry into force of the Agreement and to prepare for the efficient operation of the Agreement upon its entry into force. In particular, the Preparatory Committee shall conduct the legal review of the Agreement referred to in paragraph 1 above, receive notifications of Category A commitments, and draw up a Protocol of Amendment (the "Protocol") to insert the Agreement into Annex 1A of the WTO Agreement.
3. The General Council shall meet no later than 31 July 2014 to annex to the Agreement notifications of Category A commitments, to adopt the Protocol drawn up by the Preparatory Committee, and to open the Protocol for acceptance until 31 July 2015. The Protocol shall enter into force in accordance with Article X:3 of the WTO Agreement.

**ANNEX**

**AGREEMENT ON TRADE FACILITATION**

**Preamble**

*Members,*

*Having regard to* the Doha Round of Multilateral Trade Negotiations;

*Recalling and reaffirming* the mandate and principles contained in paragraph 27 of the Doha Ministerial Declaration and Annex D of the Decision of the Doha Work Programme adopted by the General Council on 1 August 2004, as well as paragraph 33 and Annex E of the Hong Kong Ministerial Declaration;

*Desiring to* clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit;

*Recognizing* the particular needs of developing and especially least-developed country Members and desiring to enhance assistance and support for capacity building in this area;

*Recognizing* the need for effective cooperation among Members on trade facilitation and customs compliance issues:

Hereby *agree* as follows:

**SECTION I**

**ARTICLE 1: PUBLICATION AND AVAILABILITY OF INFORMATION**

**1 Publication**

1.1. Each Member shall promptly publish the following information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them:

- a. Importation, exportation and transit procedures (including port, airport, and other entry-point procedures) and required forms and documents;
- b. Applied rates of duties and taxes of any kind imposed on or in connection with importation or exportation;
- c. Fees and charges imposed by or for governmental agencies on or in connection with importation, exportation or transit;
- d. Rules for the classification or valuation of products for customs purposes;
- e. Laws, regulations and administrative rulings of general application relating to rules of origin;
- f. Import, export or transit restrictions or prohibitions;
- g. Penalty provisions against breaches of import, export or transit formalities;
- h. Appeal procedures;
- i. Agreements or parts thereof with any country or countries relating to importation, exportation or transit;
- j. Procedures relating to the administration of tariff quotas.

1.2. Nothing in these provisions shall be construed as requiring the publication or provision of information other than in the language of the Member except as stated in paragraph 2.2.

## 2 Information Available Through Internet

2.1. Each Member shall make available, and update to the extent possible and as appropriate, the following through the internet:

- a. A description<sup>1</sup> of its importation, exportation and transit procedures, including appeal procedures, that informs governments, traders and other interested parties of the practical steps needed to import and export, and for transit;
- b. The forms and documents required for importation into, exportation from, or transit through the territory of that Member;
- c. Contact information on enquiry points.

2.2. Whenever practicable, the description referred to in subparagraph 2.1 a. shall also be made available in one of the official languages of the WTO.

2.3. Members are encouraged to make available further trade related information through the internet, including relevant trade-related legislation and other items referred to in paragraph 1.1.

## 3 Enquiry Points

3.1. Each Member shall, within its available resources, establish or maintain one or more enquiry points to answer reasonable enquiries of governments, traders and other interested parties on matters covered by paragraph 1.1 as well as to provide the required forms and documents referred to in subparagraph 1.1 a.

3.2. Members of a customs union or involved in regional integration may establish or maintain common enquiry points at the regional level to satisfy the requirement of paragraph 3.1 for common procedures.

3.3. Members are encouraged not to require the payment of a fee for answering enquiries and providing required forms and documents. If any, Members shall limit the amount of its fees and charges to the approximate cost of services rendered.

3.4. The enquiry points shall answer enquiries and provide the forms and documents within a reasonable time period set by each Member, which may vary depending on the nature or complexity of the request.

## 4 Notification

4.1. Each Member shall notify the Committee of:

- a. The official place(s) where the items in subparagraphs 1.1 a. to j. have been published; and
- b. The URLs of website(s) referred to in paragraph 2.1, as well as the contact information of the enquiry points referred to in paragraph 3.1.

## ARTICLE 2: OPPORTUNITY TO COMMENT, INFORMATION BEFORE ENTRY INTO FORCE AND CONSULTATION

### 1 Opportunity to Comment and Information before Entry into Force

1.1. Each Member shall, to the extent practicable and in a manner consistent with its domestic law and legal system, provide opportunities and an appropriate time period to traders and other interested parties to comment on the proposed introduction or amendment of laws and regulations of general application related to the movement, release and clearance of goods, including goods in transit.

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<sup>1</sup> Each Member has the discretion to state on its website the legal limitations of this description.

1.2. Each Member shall, to the extent practicable, and in a manner consistent with its domestic law and legal system, ensure that new or amended laws and regulations of general application related to the movement, release and clearance of goods, including goods in transit are published, or information on them made otherwise publicly available, as early as possible before their entry into force, in order to enable traders and other interested parties to become acquainted with them.

1.3. Changes to duty rates or tariff rates, as well as measures that have a relieving effect or whose effectiveness would be undermined by prior publication, measures applied in urgent circumstances, or minor changes to domestic law and legal system are excluded from paragraphs 1.1 and 1.2 above.

## 2 Consultations

Each Member shall, as appropriate, provide for regular consultations between border agencies and traders or other stakeholders within its territory.

### ARTICLE 3: ADVANCE RULINGS

1. Each Member shall issue an advance ruling in a reasonable, time bound manner to an applicant that has submitted a written request containing all necessary information. If a Member declines to issue an advance ruling it shall promptly notify the applicant in writing, setting out the relevant facts and the basis for its decision.

2. A Member may decline to issue an advance ruling to an applicant where the question raised in the application:

- a. is already pending in the applicant's case before any governmental agency, appellate tribunal or court; or
- b. has already been decided by any appellate tribunal or court.

3. The advance ruling shall be valid for a reasonable period of time after its issuance unless the law, facts or circumstances supporting the original advance ruling have changed.

4. Where the Member revokes, modifies or invalidates the advance ruling, it shall provide written notice to the applicant setting out the relevant facts and the basis for its decision. Where a Member revokes, modifies or invalidates advance rulings with retroactive effect, it may only do so where the ruling was based on incomplete, incorrect, false or misleading information.

5. An advance ruling issued by a Member shall be binding on that Member in respect of the applicant that sought it. The Member may provide that the advance ruling be binding on the applicant.

6. Each Member shall publish, at a minimum:

- a. the requirements for the application for an advance ruling, including the information to be provided and the format;
- b. the time period by which it will issue an advance ruling; and
- c. the length of time for which the advance ruling is valid.

7. Each Member shall provide, upon written request of an applicant, a review of the advance ruling or the decision to revoke, modify or invalidate the advance ruling.<sup>2</sup>

8. Each Member shall endeavour to make publicly available any information on advance rulings which it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information.

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<sup>2</sup> Under this paragraph: a) a review may, before or after the ruling has been acted upon, be provided by the official, office or authority that issued the ruling, a higher or independent administrative authority, or a judicial authority; and b) a Member is not required to provide the applicant with recourse to Article 4.1.1 of this Agreement.

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## 9. Definitions and scope:

- a. An advance ruling is a written decision provided by a Member to an applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to:
  - i. the good's tariff classification, and
  - ii. the origin of the good;<sup>3</sup>
- b. In addition to the advance rulings defined in subparagraph 3.9 a., Members are encouraged to provide advance rulings on:
  - i. the appropriate method or criteria, and the application thereof, to be used for determining the customs value under a particular set of facts;
  - ii. the applicability of the Member's requirements for relief or exemption from customs duties;
  - iii. the application of the Member's requirements for quotas, including tariff quotas; and
  - iv. any additional matters for which a Member considers it appropriate to issue an advance ruling.
- c. An applicant is an exporter, importer or any person with a justifiable cause or a representative thereof.
- d. A Member may require that an applicant have legal representation or registration in its territory. To the extent possible, such requirements shall not restrict the categories of persons eligible to apply for advance rulings, with particular consideration for the specific needs of small and medium sized enterprises. These requirements shall be clear and transparent and not constitute a means of arbitrary or unjustifiable discrimination.

## ARTICLE 4: APPEAL OR REVIEW PROCEDURES

### 1 Right to Appeal or Review

1.1. Each Member shall provide that any person to whom customs issues an administrative decision<sup>4</sup> has the right, within its territory to:

- a. administrative appeal to or review by an administrative authority higher than or independent of the official or office that issued the decision;  
and/or
- b. judicial appeal or review of the decision.

1.2. The legislation of each Member may require administrative appeal or review to be initiated prior to judicial appeal or review.

1.3. Members shall ensure that their appeal or review procedures are carried out in a non-discriminatory manner.

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<sup>3</sup> It is understood that an advance ruling on the origin of a good may be an assessment of origin for the purposes of the Agreement on Rules of Origin where the ruling meets the requirements of this Agreement and the Agreement on the Rules of Origin. Likewise, an assessment of origin under the Agreement on Rules of Origin may be an advance ruling on the origin of a good for the purposes of this Agreement where the ruling meets the requirements of both agreements. Members are not required to establish separate arrangements under this provision in addition to those established pursuant to the Rules of Origin Agreement in relation to the assessment of origin provided that the requirements of this Article are fulfilled.

<sup>4</sup> An administrative decision in this Article means a decision with a legal effect that affects rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an administrative decision in place of the right to appeal or review under subparagraph 1.1 a.



1.4. Each Member shall ensure that, in a case where the decision on appeal or review under subparagraph 1.1 a. is not given either i. within set periods as specified in its laws or regulations or ii. without undue delay, the petitioner has the right to either further appeal to or further review by the administrative authority or the judicial authority or any other recourse to the judicial authority.<sup>5</sup>

1.5. Each Member shall ensure that the person referred to in paragraph 1.1 is provided with the reasons for the administrative decision so as to enable such a person to have recourse to appeal or review procedures where necessary.

1.6. Each Member is encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than customs.

## **ARTICLE 5: OTHER MEASURES TO ENHANCE IMPARTIALITY, NON-DISCRIMINATION AND TRANSPARENCY**

### **1 Notifications for enhanced controls or inspections**

Where a Member adopts or maintains a system of issuing notifications or guidance to its concerned authorities for enhancing the level of controls or inspections at the border in respect of foods, beverages or feedstuffs covered under the notification or guidance for protecting human, animal, or plant life or health within its territory, the following disciplines shall apply to the manner of their issuance, termination or suspension:

- a. each Member may, as appropriate, issue the notification or guidance based on risk.
- b. each Member may issue the notification or guidance so that it applies uniformly only to those points of entry where the sanitary and phytosanitary conditions on which the notification or guidance are based apply.
- c. each Member shall promptly terminate or suspend the notification or guidance when circumstances giving rise to it no longer exist, or if changed circumstances can be addressed in a less trade restrictive manner.
- d. when a Member decides to terminate or suspend the notification or guidance, it shall, as appropriate, promptly publish the announcement of its termination or suspension in a non-discriminatory and easily accessible manner, or inform the exporting Member or the importer.

### **2 Detention**

A Member shall inform the carrier or importer promptly in case of detention of goods declared for importation, for inspection by Customs or any other competent authority.

### **3 Test Procedures**

3.1. A Member may, upon request, grant an opportunity for a second test in case the first test result of a sample taken upon arrival of goods declared for importation shows an adverse finding.

3.2. A Member shall either publish, in a non-discriminatory and easily accessible manner, the name and address of any laboratory where the test can be carried out or provide this information to the importer when it is granted the opportunity under paragraph 3.1.

3.3. A Member shall consider the result of the second test in the release and clearance of goods, and, if appropriate, may accept the results of such test.

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<sup>5</sup> Nothing in this paragraph shall prevent Members from recognizing administrative silence on appeal or review as a decision in favour of the petitioner in accordance with its laws and regulations.

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**ARTICLE 6: DISCIPLINES ON FEES AND CHARGES IMPOSED ON OR IN CONNECTION WITH IMPORTATION AND EXPORTATION****1 General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation**

1.1. The provisions of paragraph 6.1 shall apply to all fees and charges other than import and export duties and other than taxes within the purview of Article III of GATT 1994 imposed by Members on or in connection with importation or exportation of goods.

1.2. Information on fees and charges shall be published in accordance with Article 1 of this Agreement. This information shall include the fees and charges that will be applied, the reason for such fees and charges, the responsible authority and when and how payment is to be made.

1.3. An adequate time period shall be accorded between the publication of new or amended fees and charges and their entry into force except in urgent circumstances. Such fees and charges shall not be applied until information on them has been published.

1.4. Each Member shall periodically review its fees and charges with a view to reducing their number and diversity, where practicable.

**2 Specific disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation**

2.1. Fees and charges for customs processing:

- i. shall be limited in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and
- ii. are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.

**3 Penalty Disciplines**

3.1. For the purpose of Article 6.3, the term "penalties" shall mean those imposed by a Member's customs administration for a breach of the Member's customs law, regulation, or procedural requirement.

3.2. Each Member shall ensure that penalties for a breach of a customs law, regulation, or procedural requirement are imposed only on the person(s) responsible for the breach under its laws.

3.3. The penalty imposed shall depend on the facts and circumstances of the case and shall be commensurate with the degree and severity of the breach.

3.4. Each Member shall ensure that it maintains measures to avoid:

- i. conflicts of interest in the assessment and collection of penalties and duties; and
- ii. creating an incentive for the assessment or collection of a penalty that is inconsistent with paragraph 3.3.

3.5. Each Member shall ensure that when a penalty is imposed for a breach of customs laws, regulations, or procedural requirements, an explanation in writing is provided to the person(s) upon whom the penalty is imposed specifying the nature of the breach and the applicable law, regulation or procedure under which the amount or range of penalty for the breach has been prescribed.

3.6. When a person voluntarily discloses to a Member's customs administration the circumstances of a breach of a customs law, regulation, or procedural requirement prior to the discovery of the breach by the customs administration, the Member is encouraged to, where appropriate, consider this fact as a potential mitigating factor when establishing a penalty for that person.

3.7. The provisions of this paragraph shall apply to the penalties on traffic in transit referred to in paragraph 3.1.

## **ARTICLE 7: RELEASE AND CLEARANCE OF GOODS**

### **1 Pre-arrival Processing**

1.1. Each Member shall adopt or maintain procedures allowing for the submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of goods with a view to expediting the release of goods upon arrival.

1.2. Members shall, as appropriate, provide for advance lodging of documents in electronic format for pre-arrival processing of such documents.

### **2 Electronic Payment**

Each Member shall, to the extent practicable, adopt or maintain procedures allowing the option of electronic payment for duties, taxes, fees and charges collected by customs incurred upon importation and exportation.

### **3 Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges**

3.1. Each Member shall adopt or maintain procedures allowing the release of goods prior to the final determination of customs duties, taxes, fees and charges, if such a determination is not done prior to, or upon arrival, or as rapidly as possible after arrival and provided that all other regulatory requirements have been met.

3.2. As a condition for such release, a Member may require:

- a. payment of customs duties, taxes, fees and charges determined prior to or upon arrival of goods and a guarantee for any amount not yet determined in the form of a surety, a deposit or another appropriate instrument provided for in its laws and regulations; or
- b. a guarantee in the form of a surety, a deposit or other appropriate instrument provided for in its laws and regulations.

3.3. Such guarantee shall not be greater than the amount the Member requires to ensure payment of customs duties, taxes, fees and charges ultimately due for the goods covered by the guarantee.

3.4. In cases where an offence requiring imposition of monetary penalties or fines has been detected, a guarantee may be required for the penalties and fines that may be imposed.

3.5. The guarantee as set out in paragraphs 3.2 and 3.4 shall be discharged when it is no longer required.

3.6. Nothing in these provisions shall affect the right of a Member to examine, detain, seize or confiscate or deal with the goods in any manner not otherwise inconsistent with the Member's WTO rights and obligations.

### **4 Risk Management**

4.1. Each Member shall, to the extent possible, adopt or maintain a risk management system for customs control.

4.2. Each Member shall design and apply risk management in a manner as to avoid arbitrary or unjustifiable discrimination, or disguised restrictions to international trade.

4.3. Each Member shall concentrate customs control and, to the extent possible other relevant border controls, on high risk consignments and expedite the release of low risk consignments.

Each Member may also select, on a random basis, consignments for such controls as part of its risk management.

4.4. Each Member shall base risk management on assessment of risk through appropriate selectivity criteria. Such selectivity criteria may include, *inter alia*, HS code, nature and description of the goods, country of origin, country from which the goods were shipped, value of the goods, compliance record of traders, and type of means of transport.

## 5 Post-clearance Audit

5.1. With a view to expediting the release of goods, each Member shall adopt or maintain post-clearance audit to ensure compliance with customs and other related laws and regulations.

5.2. Each Member shall select a person or a consignment for post-clearance audit in a risk-based manner, which may include appropriate selectivity criteria. Each Member shall conduct post-clearance audits in a transparent manner. Where the person is involved in the audit process and conclusive results have been achieved the Member shall, without delay, notify the person whose record is audited of the results, the person's rights and obligations and the reasons for the results.

5.3. Members acknowledge that the information obtained in post-clearance audit may be used in further administrative or judicial proceedings.

5.4. Members shall, wherever practicable, use the result of post-clearance audit in applying risk management.

## 6 Establishment and Publication of Average Release Times

6.1. Members are encouraged to measure and publish their average release time of goods periodically and in a consistent manner, using tools such as, *inter alia*, the WCO Time Release Study.<sup>6</sup>

6.2. Members are encouraged to share with the Committee their experiences in measuring average release times, including methodologies used, bottlenecks identified, and any resulting effects on efficiency.

## 7 Trade Facilitation Measures for Authorized Operators

7.1. Each Member shall provide additional trade facilitation measures related to import, export or transit formalities and procedures, pursuant to paragraph 7.3, to operators who meet specified criteria, hereinafter called authorized operators. Alternatively, a Member may offer such facilitation measures through customs procedures generally available to all operators and not be required to establish a separate scheme.

7.2. The specified criteria shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member's laws, regulations or procedures. The specified criteria, which shall be published, may include:

- a. an appropriate record of compliance with customs and other related laws and regulations;
- b. a system of managing records to allow for necessary internal controls;
- c. financial solvency, including, where appropriate, provision of a sufficient security/guarantee; and
- d. supply chain security.

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<sup>6</sup> Each Member may determine the scope and methodology of such average release time measurement in accordance with its needs and capacity.

The specified criteria to qualify as an operator shall not:

- a. be designed or applied so as to afford or create arbitrary or unjustifiable discrimination between operators where the same conditions prevail; and
- b. to the extent possible, restrict the participation of small and medium-sized enterprises.

7.3. The trade facilitation measures provided pursuant to paragraph 7.1 shall include at least 3 of the following measures:<sup>7</sup>

- a. low documentary and data requirements as appropriate;
- b. low rate of physical inspections and examinations as appropriate;
- c. rapid release time as appropriate;
- d. deferred payment of duties, taxes, fees and charges;
- e. use of comprehensive guarantees or reduced guarantees;
- f. a single customs declaration for all imports or exports in a given period; and
- g. clearance of goods at the premises of the authorized operator or another place authorized by customs.

7.4. Members are encouraged to develop authorized operator schemes on the basis of international standards, where such standards exist, except when such standards would be an inappropriate or ineffective means for the fulfillment of the legitimate objectives pursued.

7.5. In order to enhance the facilitation measures provided to operators, Members shall afford to other Members the possibility to negotiate mutual recognition of authorized operator schemes.

7.6. Members shall exchange relevant information within the Committee about authorized operator schemes in force.

## **8 Expedited Shipments**

8.1. Each Member shall adopt or maintain procedures allowing for expedited release of at least those goods entered through air cargo facilities to persons that apply for such treatment, while maintaining customs control.<sup>8</sup> If a Member employs criteria<sup>9</sup> limiting who may apply, the Member may, in published criteria, require that the applicant shall, as conditions for qualifying for the application of the treatment described in paragraphs 8.2 a. – d. to its expedited shipments:

- a. provide adequate infrastructure and payment of customs expenses related to processing of expedited shipments, in cases where the applicant fulfills the Member's requirements for such processing to be performed at a dedicated facility;
- b. submit in advance of the arrival of an expedited shipment the information necessary for release;
- c. be assessed fees limited in amount to the approximate cost of services rendered in providing the treatment described in paragraph 8.2 a. – d.;
- d. maintain a high degree of control over expedited shipments through the use of internal security, logistics, and tracking technology from pick-up to delivery;
- e. provide expedited shipment from pick-up to delivery;
- f. assume liability for payment of all customs duties, taxes, and fees and charges to the customs authority for the goods;
- g. have a good record of compliance with customs and other related laws and regulations;

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<sup>7</sup> A measure listed in sub-paragraphs a.-g. will be deemed to be provided to authorized operators if it is generally available to all operators.

<sup>8</sup> In cases where a Member has an existing procedure that provides the treatment in paragraph 8.2, this provision would not require that Member to introduce separate expedited release procedures.

<sup>9</sup> Such application criteria, if any, shall be in addition to the Member's requirements for operating with respect to all goods or shipments entered through air cargo facilities.

- h. comply with other conditions directly related to the effective enforcement of the Member's laws, regulations and procedural requirements, that specifically relate to providing the treatment described in paragraph 8.2.

8.2. Subject to paragraphs 8.1 and 8.3, Members shall:

- a. minimize the documentation required for the release of expedited shipments in accordance with Article 10.1, and to the extent possible, provide for release based on a single submission of information on certain shipments;
- b. provide for expedited shipments to be released under normal circumstances as rapidly as possible after arrival, provided the information required for release has been submitted;
- c. endeavour to apply the treatment in sub-paragraphs 8.2 a. and b. to shipments of any weight or value recognizing that a Member is permitted to require additional entry procedures, including declarations and supporting documentation and payment of duties and taxes, and to limit such treatment based on the type of good, provided the treatment is not limited to low value goods, such as documents; and
- d. provide, to the extent possible, for a *de minimis* shipment value or dutiable amount for which customs duties and taxes will not be collected, aside from certain prescribed goods. Internal taxes, such as value added taxes and excise taxes, applied to imports consistently with Article III of the GATT 1994 are not subject to this provision.

8.3. Nothing in paragraphs 8.1 and 8.2 shall affect the right of a Member to examine, detain, seize, confiscate or refuse entry to goods, or to carry out post-clearance audits, including in connection with the use of risk management systems. Further, nothing in paragraphs 8.1 and 8.2 shall prevent a Member from requiring, as a condition for release, the submission of additional information and the fulfillment of non-automatic licensing requirements.

## 9 Perishable Goods<sup>10</sup>

9.1. With a view to preventing avoidable loss or deterioration of perishable goods, and provided all regulatory requirements have been met, each Member shall:

- a. provide for the release of perishable goods under normal circumstances within the shortest possible time; and
- b. provide for the release of perishable goods, in exceptional circumstances where it would be appropriate to do so, outside the business hours of customs and other relevant authorities.

9.2. Each Member shall give appropriate priority to perishable goods when scheduling any examinations that may be required.

9.3. Each Member shall either arrange, or allow an importer to arrange, for the proper storage of perishable goods pending their release. The Member may require that any storage facilities arranged by the importer have been approved or designated by its relevant authorities. The movement of the goods to those storage facilities, including authorizations for the operator moving the goods, may be subject to the approval, where required, of the relevant authorities. The Member shall, where practicable and consistent with domestic legislation, upon the request of the importer, provide for any procedures necessary for release to take place at those storage facilities.

9.4. In cases of significant delay in the release of perishable goods, and upon written request, the importing Member shall, to the extent practicable, provide a communication on the reasons for the delay.

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<sup>10</sup> For the purposes of this provision, perishable goods are goods that rapidly decay due to their natural characteristics, in particular in the absence of appropriate storage conditions.

#### **ARTICLE 8: BORDER AGENCY COOPERATION**

1. A Member shall ensure that its authorities and agencies responsible for border controls and procedures dealing with the importation, exportation and transit of goods cooperate with one another and coordinate their activities in order to facilitate trade.

2. Members shall, to the extent possible and practicable, cooperate on mutually agreed terms with other Members with whom they share a common border with a view to coordinating procedures at border crossings to facilitate cross-border trade. Such cooperation and coordination may include:

- i. alignment of working days and hours;
- ii. alignment of procedures and formalities;
- iii. development and sharing of common facilities;
- iv. joint controls;
- v. establishment of one stop border post control.

#### **ARTICLE 9: MOVEMENT OF GOODS UNDER CUSTOMS CONTROL INTENDED FOR IMPORT**

Each Member shall, to the extent practicable, and provided all regulatory requirements are met, allow goods intended for import to be moved within its territory under customs control from a customs office of entry to another customs office in its territory from where the goods would be released or cleared.

#### **ARTICLE 10: FORMALITIES CONNECTED WITH IMPORTATION AND EXPORTATION AND TRANSIT**

##### **1 Formalities and Documentation Requirements**

1.1. With a view to minimizing the incidence and complexity of import, export, and transit formalities and of decreasing and simplifying import, export and transit documentation requirements and taking into account the legitimate policy objectives and other factors such as changed circumstances, relevant new information and business practices, availability of techniques and technology, international best practices and inputs from interested parties, each Member shall review such formalities and documentation requirements, and, based on the results of the review, ensure, as appropriate, that such formalities and documentation requirements:

- a. are adopted and/or applied with a view to a rapid release and clearance of goods, particularly perishable goods;
- b. are adopted and/or applied in a manner that aims at reducing the time and cost of compliance for traders and operators;
- c. are the least trade restrictive measure chosen, where two or more alternative measures are reasonably available for fulfilling the policy objective or objectives in question; and
- d. are not maintained, including parts thereof, if no longer required.

1.2. The Committee shall develop procedures for sharing relevant information and best practices as appropriate.

##### **2 Acceptance of Copies**

2.1. Each Member shall, where appropriate, endeavour to accept paper or electronic copies of supporting documents required for import, export or transit formalities.

2.2. Where a government agency of a Member already holds the original of such a document, any other agency of that Member shall accept a paper or electronic copy, where applicable, from the agency holding the original in lieu of the original document.

2.3. A Member shall not require an original or copy of export declarations submitted to the customs authorities of the exporting Member as a requirement for importation.<sup>11</sup>

### **3 Use of International Standards**

3.1. Members are encouraged to use relevant international standards or parts thereof as a basis for their importation, exportation or transit formalities and procedures except as otherwise provided for in this Agreement.

3.2. Members are encouraged to take part, within the limits of their resources, in the preparation and periodic review of relevant international standards by appropriate international organizations.

3.3. The Committee shall develop procedures for the sharing by Members of relevant information, and best practices, on the implementation of international standards, as appropriate. The Committee may also invite relevant international organizations to discuss their work on international standards. As appropriate, the Committee may identify specific standards that are of particular value to Members.

### **4 Single Window**

4.1. Members shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner.

4.2. In cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or data requirements shall not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.

4.3. Members shall notify to the Committee the details of operation of the single window.

4.4. Members shall, to the extent possible and practical, use information technology to support the single window.

### **5 Pre-shipment Inspection**

5.1. Members shall not require the use of pre-shipment inspections in relation to tariff classification and customs valuation.

5.2. Without prejudice to the rights of Members to use other types of pre-shipment inspection not covered by paragraph 5.1, Members are encouraged not to introduce or apply new requirements regarding their use.<sup>12</sup>

### **6 Use of Customs Brokers**

6.1. Without prejudice to the important policy concerns of some Members that currently maintain a special role for customs brokers, from the entry into force of this agreement Members shall not introduce the mandatory use of customs brokers.

6.2. Each Member shall notify and publish its measures on the use of customs brokers. Any subsequent modifications thereof shall be notified to the Committee and published promptly.

6.3. With regard to the licensing of customs brokers, Members shall apply rules that are transparent and objective.

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<sup>11</sup> Nothing in this paragraph precludes a Member from requiring documents such as certificates, permits or licenses as a requirement for the importation of controlled or regulated goods.

<sup>12</sup> This sub-paragraph refers to pre-shipment inspections covered by the Pre-shipment Inspection Agreement, and does not preclude pre-shipment inspections for SPS purposes.



## 7 Common Border Procedures and Uniform Documentation Requirements

7.1. Each Member shall, subject to paragraph 7.2, apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout its territory.

7.2. Nothing in this Article shall prevent a Member from:

- a. differentiating its procedures and documentation requirements based on the nature and type of goods, or their means of transport;
- b. differentiating its procedures and documentation requirements for goods based on risk management;
- c. differentiating its procedures and documentation requirements to provide total or partial exemption from import duties or taxes;
- d. applying electronic filing or processing; or
- e. differentiating its procedures and documentation requirements in a manner consistent with the Agreement on Sanitary and Phytosanitary Measures.

## 8 Rejected Goods

8.1. Where goods presented for import are rejected by the competent authority of a Member on account of their failure to meet prescribed sanitary or phytosanitary regulations or technical regulations, the Member shall, subject to and consistent with its laws and regulations, allow the importer to re-consign or to return the rejected goods to the exporter or another person designated by the exporter.

When such an option is given and the importer fails to exercise it within a reasonable period of time, the competent authority may take a different course of action to deal with such non-compliant goods.

## 9 Temporary Admission of Goods/Inward and Outward Processing

### a. Temporary Admission of Goods

Each Member shall allow, as provided for in its laws and regulations, goods to be brought into a customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are brought into a customs territory for a specific purpose, are intended for re-exportation within a specific period, and have not undergone any change except normal depreciation and wastage due to the use made of them.

### b. Inward and Outward Processing

- i. Each Member shall allow, as provided for in its laws and regulations, inward and outward processing of goods. Goods allowed for outward processing may be re-imported with total or partial exemption from import duties and taxes in accordance with the Member's laws and regulations in force.
- ii. For the purposes of this Article, the term "inward processing" means the Customs procedure under which certain goods can be brought into a Customs territory conditionally relieved totally or partially from payment of import duties and taxes, or eligible for duty drawback, on the basis that such goods are intended for manufacturing, processing or repair and subsequent exportation.
- iii. For the purposes of this Article, the term "outward processing" means the Customs procedure under which goods which are in free circulation in a Customs territory may be temporarily exported for manufacturing, processing or repair abroad and then reimported.

**ARTICLE 11: FREEDOM OF TRANSIT**

1. Any regulations or formalities in connection with traffic in transit imposed by a Member shall not:
  - a. be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a reasonably available less trade restrictive manner,
  - b. be applied in a manner that would constitute a disguised restriction on traffic in transit.
2. Traffic in transit shall not be conditioned upon collection of any fees or charges imposed in respect of transit, except the charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
3. Members shall not seek, take or maintain any voluntary restraints or any other similar measures on traffic in transit. This is without prejudice to existing and future national regulations, bilateral or multilateral arrangements related to regulating transport consistent with WTO rules.
4. Each Member shall accord to products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member.
5. Members are encouraged to make available, where practicable, physically separate infrastructure (such as lanes, berths and similar) for traffic in transit.
6. Formalities, documentation requirements and customs controls, in connection with traffic in transit, shall not be more burdensome than necessary to:
  - a. identify the goods; and
  - b. ensure fulfillment of transit requirements.
7. Once goods have been put under a transit procedure and have been authorized to proceed from the point of origination in a Member's territory, they will not be subject to any customs charges nor unnecessary delays or restrictions until they conclude their transit at the point of destination within the Member's territory.
8. Members shall not apply technical regulations and conformity assessment procedures within the meaning of the Agreement on Technical Barriers to Trade on goods in transit.
9. Members shall allow and provide for advance filing and processing of transit documentation and data prior to the arrival of goods.
10. Once traffic in transit has reached the customs office where it exits the territory of the Member, that office shall promptly terminate the transit operation if transit requirements have been met.
- 11.1. Where a Member requires a guarantee in the form of a surety, deposit or other appropriate monetary or non-monetary<sup>13</sup> instrument for traffic in transit, such guarantee shall be limited to ensuring that requirements arising from such traffic in transit are fulfilled.
- 11.2. Once the Member has determined that its transit requirements have been satisfied, the guarantee shall be discharged without delay.
- 11.3. Each Member shall, in a manner consistent with its laws and regulations, allow comprehensive guarantees which include multiple transactions for same operators or renewal of guarantees without discharge for subsequent consignments.

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<sup>13</sup> Nothing in this provision shall preclude a Member from maintaining existing procedures whereby the mean of transport can be used as a guarantee for traffic in transit.

11.4 Each Member shall make available to the public the relevant information it uses to set the guarantee, including single transaction and, where applicable, multiple transaction guarantee.

11.5 Each Member may require the use of customs convoys or customs escorts for traffic in transit only in circumstances presenting high risks or when compliance with customs laws and regulations cannot be ensured through the use of guarantees. General rules applicable to customs convoys or customs escorts shall be published in accordance with Article 1.

12. Members shall endeavour to cooperate and coordinate with one another with a view to enhance freedom of transit. Such cooperation and coordination may include, but is not limited to an understanding on:

- i. charges;
- ii. formalities and legal requirements; and
- iii. the practical operation of transit regimes.

13. Each Member shall endeavour to appoint a national transit coordinator to which all enquiries and proposals by other Members relating to the good functioning of transit operations can be addressed.

## **ARTICLE 12: CUSTOMS COOPERATION**

### **1 Measures Promoting Compliance and Cooperation**

1.1. Members agree on the importance of ensuring that traders are aware of their compliance obligations, encouraging voluntary compliance to allow importers to self-correct without penalty in appropriate circumstances, and applying compliance measures to initiate stronger measures for non-compliant traders.<sup>14</sup>

1.2. Members are encouraged to share information on best practices in managing customs compliance, including through the Committee on Trade Facilitation. Members are encouraged to cooperate in technical guidance or assistance in building capacity for the purposes of administering compliance measures, and enhancing their effectiveness.

### **2 Exchange of Information**

2.1. Upon request, and subject to the provisions of this Article, Members shall exchange the information set out in paragraph 6 b. and/or c. for the purpose of verifying an import or export declaration in identified cases where there are reasonable grounds to doubt the truth or accuracy of the declaration.

2.2. Each Member shall notify to the Committee the details of its contact point for the exchange of this information.

### **3 Verification**

A Member shall make a request for information only after it has conducted appropriate verification procedures of an import or export declaration and after it has inspected the available relevant documentation.

### **4 Request**

4.1. The requesting Member shall provide the requested Member with a written request, through paper or electronic means in a mutually agreed WTO or other language, including:

- a. the matter at issue including, where appropriate and available, the serial number of the export declaration corresponding to the import declaration in question;

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<sup>14</sup> Such activity has the overall objective of lowering the frequency of non-compliance, and consequently reducing the need for exchange of information in pursuit of enforcement.

- b. the purpose for which the requesting Member is seeking the information or documents, along with the names and contact details of the persons about which the request relates, if known;
- c. where required by the requested Member, provide confirmation<sup>15</sup> of the verification where appropriate.
- d. the specific information or documents requested;
- e. the identity of the originating office making the request;
- f. reference to provisions of the requesting Member's domestic law and legal system that govern the collection, protection, use, disclosure, retention and disposal of confidential information and personal data;

4.2. If the requesting Member is not in a position to comply with any of the sub-paragraphs of 4.1, it shall specify this in the request.

## 5 Protection and confidentiality

5.1. The requesting Member shall, subject to paragraph 5.2:

- a. hold all information or documents provided by the requested Member strictly in confidence and grant at least the same level of such protection and confidentiality as that provided under the domestic law and legal system of the requested Member as described by it under paragraphs 6.1 b. and 6.1 c.;
- b. provide the information or documents only to the customs authorities dealing with the matter at issue and use the information or documents solely for the purpose stated in the request unless the requested Member agrees otherwise in writing;
- c. not disclose the information or documents without the specific written permission of the requested Member;
- d. not use any unverified information or documents from the requested Member as the deciding factor towards alleviating the doubt in any given circumstance;
- e. respect any case-specific conditions set out by the requested Member regarding retention and disposal of confidential information or documents and personal data; and
- f. upon request, inform the requested Member of any decisions and actions taken on the matter as a result of the information or documents provided.

5.2. A requesting Member may be unable under its domestic law and legal system to comply with any of the sub-paragraphs of 5.1. If so, the requesting Member shall specify this in the request.

5.3. The Requested Member shall treat any request, and verification information, received under paragraph 4 with at least the same level of protection and confidentiality accorded by the requested member to its own similar information.

## 6 Provision of information

6.1. Subject to the provisions of this article, the requested Member shall promptly:

- a. respond in writing, through paper or electronic means;
- b. provide the specific information as set out in the import or export declaration, or the declaration, to the extent it is available, along with a description of the level of protection and confidentiality required of the requesting Member;
- c. if requested, provide the specific information as set out in the following documents, or the documents, submitted in support of the import or export declaration, to the extent it is available: commercial invoice, packing list, certificate of origin and bill of lading, in the

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<sup>15</sup> This may include pertinent information on the verification conducted under paragraph 12.3. Such information shall be subject to the level of protection and confidentiality specified by the Member conducting the verification.

form in which these were filed, whether paper or electronic, along with a description of the level of protection and confidentiality required of the requesting Member;

- d. confirm that the documents provided are true copies;
- e. provide the information or otherwise respond to the request, to the extent possible, within 90 days from the date of the request.

6.2. The requested Member may require, under its domestic law and legal system, an assurance prior to the provision of information that the specific information will not be used as evidence in criminal investigations, judicial proceedings, or in non-customs proceedings without the specific written permission of the requested Member. If the requesting Member is not in a position to comply with this requirement it should specify this to the requested Member.

### **7 Postponement or refusal of a request**

7.1. A requested Member may postpone or refuse part or all of a request to provide information, and shall so inform the requesting Member of the reasons for doing so, where:

- a. it would be contrary to the public interest as reflected in the domestic law and legal system of the requested Member.
- b. its domestic law and legal system prevents the release of the information. In such case it shall provide the requesting Member with a copy of the relevant, specific reference.
- c. the provision of the information would impede law enforcement or otherwise interfere with an on-going administrative or judicial investigation, prosecution or proceeding.
- d. the consent of the importer or exporter is required by domestic law and legal system that govern the collection, protection, use, disclosure, retention and disposal of confidential information or personal data and that consent is not given.
- e. the request for information is received after the expiration of the legal requirement of the requested Member for the retention of documents.

7.2. In the circumstances of paragraph 4.2, 5.2 or 6.2 execution of such a request shall be at the discretion of the requested Member.

### **8 Reciprocity**

If the requesting Member is of the opinion that it would be unable to comply with a similar request in case such a request was made by the requested Member, or if it has not yet implemented this Article, it shall state that fact in its request. Execution of such a request shall be at the discretion of the requested Member.

### **9 Administrative burden**

9.1. The requesting Member shall take into account the associated resource and cost implications for the requested Member's administration in responding to requests for information. The requesting Member shall consider the proportionality between its fiscal interest in pursuing its request and the efforts to be made by the requested Member in providing the information.

9.2. If a requested Member receives an unmanageable number of requests for information, or a request for information of unmanageable scope from one or more requesting Member(s), and is unable to meet such requests within a reasonable time it may request one or more of the requesting Member(s) to prioritize with a view to agreeing on a practical limit within its resource constraints. In the absence of a mutually-agreed approach, the execution of such requests shall be at the discretion of the requested Member based on the results of its own prioritization.

### **10 Limitations**

Requested Members shall not be required to:

- a. modify the format of their import or export declarations or procedures;

- b. call for documents other than those submitted with the import or export declaration as specified in paragraph 6 c.;
- c. initiate enquiries to obtain the information;
- d. modify the period of retention of such information;
- e. introduce paper documentation where electronic format has already been introduced;
- f. translate the information;
- g. verify the accuracy of the information;
- h. provide information that would prejudice the legitimate commercial interests of particular enterprises, public or private.

### **11 Unauthorized use or disclosure**

11.1. In the event of any breach of the conditions of use or disclosure of information exchanged under this Article, the requesting Member that received the information shall promptly communicate the details of such unauthorized use or disclosure to the requested Member that provided the information, and:

- a. take necessary measures to remedy the breach;
- b. take necessary measures to prevent any future breach; and
- c. notify the requested Member of the measures taken under sub-paragraphs a. and b. above.

11.2. The requested Member may suspend its obligations to the requesting Member under this Article until the measures set out in paragraph 11.1 have been taken.

### **12 Bilateral and regional agreements**

12.1. Nothing in this Article shall prevent a Member from entering into or maintaining a bilateral, plurilateral, or regional agreement for sharing or exchange of customs information and data, including on a secure and rapid basis such as on an automatic basis or in advance of the arrival of the consignment.

12.2. Nothing in this Article shall be construed to alter or affect Members' rights or obligations under such bilateral, plurilateral or regional agreements or to govern the exchange of customs information and data under such other agreements.

## **ARTICLE 13: INSTITUTIONAL ARRANGEMENTS**

### **1 COMMITTEE ON TRADE FACILITATION**

1.1. A Committee on Trade Facilitation is hereby established.

1.2. The Committee shall be open for participation by all Members and shall elect its own Chairperson. The Committee shall meet as needed and envisaged by the relevant provisions of this Agreement, but no less than once a year, for the purpose of affording Members the opportunity to consult on any matters related to the operation of this Agreement or the furtherance of its objectives. The Committee shall carry out such responsibilities as assigned to it under this Agreement or by the Members. The Committee shall establish its own rules of procedure.

1.3. The Committee may establish such subsidiary bodies as may be required. All such bodies shall report to the Committee.

1.4. The Committee shall develop procedures for sharing by Members of relevant information and best practices as appropriate.

1.5. The Committee shall maintain close contact with other international organizations in the field of trade facilitation, such as the World Customs Organization, with the objective of securing the

best available advice for the implementation and administration of this Agreement and in order to ensure that unnecessary duplication of effort is avoided. To this end, the Committee may invite representatives of such organizations or their subsidiary bodies to:

- a. attend meetings of the Committee; and
- b. discuss specific matters related to the implementation of this Agreement.

1.6. The Committee shall review the operation and implementation of this Agreement 4 years from its entry into force, and periodically thereafter.

1.7. Members are encouraged to raise before the Committee questions relating to issues on the implementation and application of this Agreement.

1.8. The Committee shall encourage and facilitate ad hoc discussions among Members on specific issues under this Agreement, with a view to reaching a mutually satisfactory solution promptly.

## **2 NATIONAL COMMITTEE ON TRADE FACILITATION**

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

## SECTION II

### SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS FOR DEVELOPING COUNTRY MEMBERS AND LEAST DEVELOPED COUNTRY MEMBERS

#### 1 General Principles

1.1. The provisions contained in Articles 1 to 12 of this Agreement shall be implemented by developing and least developed country Members in accordance with this Section, which is based on the modalities agreed in Annex D of the July 2004 Framework Agreement (WT/L/579) and paragraph 33 and Annex E of the Hong Kong Ministerial Declaration (WT/MIN(05)/DEC).

1.2. Assistance and support for capacity building<sup>16</sup> should be provided to help developing and least-developed country Members implement the provisions of this agreement, in accordance with their nature and scope. The extent and the timing of implementing the provisions of this Agreement shall be related to the implementation capacities of developing and least developed country Members. Where a developing or least developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.

1.3. Least developed country Members will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.

1.4. These principles shall be applied through the provisions set out in Section II.

#### 2 CATEGORIES OF PROVISIONS

2.1. There are three categories of provisions:

- a. Category A contains provisions that a developing country Member or a least developed country Member designates for implementation upon entry into force of this Agreement, or in the case of a least developed country Member within one year after entry into force, as provided in paragraph 3.
- b. Category B contains provisions that a developing country Member or a least developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement, as provided in paragraph 4.
- c. Category C contains provisions that a developing country Member or a least developed country Member designates for implementation on a date after a transitional period of time following the entry into force of this Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building, as provided for in paragraph 4.

2.2. Each developing country and least developed country Member shall self-designate, on an individual basis, the provisions it is including under each of the Categories A, B and C.

#### 3 Notification and Implementation of Category A

3.1. Upon entry into force of this Agreement, each developing country Member shall implement its Category A commitments. Those commitments designated under Category A will thereby be made an integral part of this Agreement.

3.2. A least developed country Member may notify the Committee of the provisions it has designated in Category A for up to one year after entry into force of this Agreement. Each least developed country Member's commitments designated under Category A will thereby be made an integral part of this Agreement.

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<sup>16</sup> For the purposes of this Agreement, "assistance and support for capacity building" may take the form of technical, financial, or any other mutually agreed form of assistance provided.



#### 4 Notification of Definitive Dates for Implementation of Category B and Category C

4.1. With respect to the provisions that a developing country Member has not designated in Category A, the Member may delay implementation in accordance with the process set out in this paragraph.

##### Developing Country Member Category B

- a. Upon entry into force of this Agreement, each developing country Member shall notify to the Committee the provisions that it has designated in Category B and corresponding indicative dates for implementation.<sup>17</sup>
- b. No later than one year after entry into force of this Agreement, each developing country Member shall notify to the Committee its definitive dates for implementation of the provisions it has designated in Category B. If a developing country Member, before this deadline, believes it requires additional time to notify its definitive dates, the Member may request that the Committee extend the period sufficient to notify its dates.

##### Developing Country Member Category C

- c. Upon entry into force of this Agreement, each developing country Member shall notify to the Committee the provisions that it has designated in Category C and corresponding indicative dates for implementation. For transparency purposes, notifications submitted shall include information on the assistance and support for capacity building that the Member requires in order to implement<sup>18</sup>.
- d. Within one year after entry into force of this Agreement, developing country Members and relevant donor Members, taking into account any existing arrangements already in place, notifications pursuant to paragraph 10.1 and information submitted pursuant to sub-paragraph c. above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.<sup>19</sup> The participating developing country Member shall promptly inform the Committee of such arrangements. The Committee shall also invite non-Member donors to provide information on existing or concluded arrangements.
- e. Within 18 months from the date of the provision of the information stipulated in sub-paragraph 4.1 d., donor Members and respective developing country Members shall inform the Committee on progress in the provision of assistance and support. Each developing country Member shall, at the same time, notify its list of definitive dates for implementation.

4.2. With respect to those provisions that a least developed country Member has not designated under Category A, least developed country Members may delay implementation in accordance with the process set forth in this paragraph.

##### Least Developed Country Member Category B

- a. No later than one year after entry into force of this Agreement, a least developed country Member shall notify the Committee its Category B provisions and may notify corresponding indicative dates for implementation of these provisions, taking into account maximum flexibilities for least developed country Members.
- b. No later than two years after the notification date stipulated under sub-paragraph a. above, each least developed country Member shall notify the Committee to confirm designations of provisions and notify its dates for implementation. If a least developed country Member, before this deadline, believes it requires additional time to notify its

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<sup>17</sup> Notifications submitted may also include such further information as the notifying Member deems appropriate. Members are encouraged to provide information on the domestic agency/entity responsible for implementation.

<sup>18</sup> Members may also include information on national trade facilitation implementation plans or projects; the domestic agency/entity responsible for implementation; and the donors with which the Member may have an arrangement in place to provide assistance.

<sup>19</sup> Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organizations, consistent with paragraph 9.3.

definitive dates, the Member may request that the Committee extend the period sufficiently to notify its dates.

#### Least Developed Country Member Category C

- c. For transparency purposes and to facilitate arrangements with donors, one year after entry into force of this Agreement each least developed country Member shall notify the Committee of the provisions it has designated in Category C, taking into account maximum flexibilities for least developed country Members.
- d. One year after the date stipulated in sub-paragraph c. above, least developed country Members shall notify information on assistance and support for capacity building that the Member requires in order to implement.<sup>20</sup>
- e. Within two years after the notification under sub-paragraph d. above, least developed country Members and relevant donor Members, taking into account information submitted pursuant to sub-paragraph d. above, shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and support for capacity building to enable implementation of Category C.<sup>21</sup> The participating least developed country Member shall promptly inform the Committee of such arrangements. The least developed country Member shall, at the same time, notify indicative dates for implementation of corresponding Category C commitments covered by the assistance arrangements. The Committee shall also invite non-Member donors to provide information on existing and concluded arrangements.
- f. Within 18 months from the date of the provision of the information stipulated in sub-paragraph 4.2 e., relevant donor Members and respective least developed country Members shall inform the Committee on progress in the provision of assistance and support. Each least-developed country Member shall, at the same time, notify its list of definitive dates for implementation.

4.3. Developing country Members and least developed country Members experiencing difficulties in submitting definitive dates for implementation within the deadlines set out in paragraphs 4.1 and 4.2 because of the lack of donor support or lack of progress in the provision of assistance and support should notify the Committee as early as possible prior to the expiration of those deadlines. Members agree to cooperate to assist in addressing such difficulties, taking into account the particular circumstances and special problems facing the Member concerned. The Committee shall, as appropriate, take action to address the difficulties including, where necessary, by extending the deadlines for the Member concerned to notify its definitive dates.

4.4. Three months before the deadline stipulated in paragraph 4.1 b. or 4.1 e., or in the case of a least developed country Member paragraph 4.2 b. or 4.2 f., the Secretariat shall remind a Member if that Member has not notified a definitive date for implementation of provisions that it has designated in Category B or C. If the Member does not invoke paragraph 4.3 or paragraph 4.1 b., or in the case of a least developed country Member paragraph 4.2 b., to extend the deadline and still does not notify a definitive date for implementation, the Member shall implement the provisions within one year after the deadline stipulated in paragraph 4.1 b. or 4.1 e., or in the case of a least developed country Member paragraph 4.2 b. or 4.2 f., or extended by paragraph 4.3.

4.5. No later than 60 days after the dates for notification of definitive dates for implementation of Category B and Category C in accordance with paragraphs 4.1, 4.2 or 4.3, the Committee shall take note of the annexes containing each Member's definitive dates for implementation of Category B and Category C provisions, including any dates set under paragraph 4.4, thereby making these annexes an integral part of this Agreement.

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<sup>20</sup> Members may also include information on national trade facilitation implementation plans and projects and information on the domestic agency/entity responsible for implementation, and the donors with which the Member may have an arrangement in place to provide assistance.

<sup>21</sup> Such arrangements will be on mutually agreed terms, either bilaterally or through appropriate international organizations, consistent with subparagraph 9.3.

## **5 Early Warning Mechanism: Extension of Implementation Dates for Provisions in Categories B and C**

### 5.1.

- a. A developing country Member or least developed country Member that considers itself to be experiencing difficulty in implementing a provision that it has designated in Category B or Category C by the definitive date established under paragraph 4.1 b. or 4.1 e., or in the case of a least-developed country Member paragraph 4.2 b. or 4.2 f., and should notify the Committee. Developing countries shall notify the Committee no later than 120 days before the expiration of the implementation date. Least developed countries shall notify the Committee no later than 90 days before such date.
- b. The notification to the Committee shall indicate the new date by which the developing country Member or least developed country Member expects to be able to implement the provision concerned. The notification shall also indicate the reasons for the expected delay in implementation. Such reasons may include the need for assistance not earlier anticipated or additional assistance to help build capacity.

5.2. Where a developing country Member's request for additional time for implementation does not exceed 18 months or a least developed country Member's request for additional time does not exceed 3 years, the requesting Member is entitled to such additional time without any further action by the Committee.

5.3. Where a developing country or least developed country Member considers that it requires a first extension longer than that provided for in paragraph 5.2 or a second or any subsequent extension, it shall submit to the Committee a request for an extension containing the information described in 5.1 b. no later than 120 days in respect of a developing country and 90 days in respect of a least developed country before the expiration of the original definitive implementation date or that date as subsequently extended.

5.4. The Committee shall give sympathetic consideration to granting requests for extension taking into account the specific circumstances of the Member submitting the request. These circumstances may include difficulties and delays in obtaining assistance.

## **6 Implementation of Category B and Category C**

6.1. In accordance with paragraph 1.2, if a developing country Member or a least developed country Member, having fulfilled the procedures set forth in sub-paragraph 4.1 or 4.2 and in paragraph 5, and where an extension requested has not been granted or where the developing country Member or least developed country Member otherwise experiences unforeseen circumstances that prevents an extension being granted under paragraph 5, self-assesses that its capacity to implement a provision under Category C continues to be lacking, that Member shall notify the Committee of its inability to implement the relevant provision.

6.2. The Trade Facilitation Committee shall immediately establish an Expert Group, and in any case no later than 60 days after the Committee receives the notification from the relevant developing country Member or least developed country Member. The Expert Group will examine the issue and make a recommendation to the Committee within 120 days of its composition.

6.3. The Expert Group shall be composed of five independent persons, highly qualified in the fields of trade facilitation and assistance and support for capacity building. The composition of the Expert Group shall ensure balance between nationals from developing and developed country Members. Where a least developed country Member is involved, the Expert Group shall include at least one national from a least developed country. If the Committee cannot agree on the composition of the Expert Group within 20 days of its establishment, the Director-General, in consultation with the chair of the Committee, shall determine the composition of the Expert Group in accordance with the terms of this paragraph.

6.4. The Expert Group shall consider the Member's self-assessment of lack of capacity and shall make a recommendation to the Trade Facilitation Committee. When considering the Expert Group's recommendation concerning a least developed country Member, the Committee shall, as appropriate, take action that will facilitate the acquisition of sustainable implementation capacity.

6.5. The Member shall not be subject to proceedings under the Dispute Settlement Understanding on this issue from the time the developing country Member notifies the Committee of its inability to implement the relevant provision until the first meeting of the Committee after it receives the recommendation of the Expert Group. At that meeting, the Committee shall consider the recommendation of the Expert Group. For the least developed country Member, the proceedings under the Dispute Settlement Understanding shall not apply on the respective provision from the date of notification to the Committee of its inability to implement the provision until the Committee makes a decision on the issue, or within 24 months after the first Committee meeting set out above, whichever is the earlier.

6.6. Where a least developed country Member loses its ability to implement a Category C commitment, it may inform the Committee and follow the procedures set out in paragraph 6.

### **7 Shifting between Categories B and C**

7.1. Developing Country Members and least developed country Members who have notified provisions under Categories B and C may shift provisions between such categories through the submission of a notification to the Committee. Where a Member proposes to shift a provision from Category B to C, the Member shall provide information on the assistance and support required to build capacity.

7.2. In the event that additional time is required to implement a provision as a result of it having been shifted from Category B to Category C, the Member may:

- a. use the provisions of paragraph 5, including the opportunity for an automatic extension; or
- b. request an examination by the Committee of the Member's request for extra time to implement the provision and, if necessary, for assistance and support for capacity building, including the possibility of a review and recommendation by the Expert Group under paragraph 6; or
- c. in the case of a least developed country Member, any new implementation date of more than four years after the original date notified under Category B shall require approval by the Committee. In addition, a least developed country continues to have recourse to paragraph 5. It is understood that assistance and support for capacity building is required for a least developed country Member so shifting.

### **8 Grace Period for the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes**

8.1. For a period of 2 years after entry into force of this Agreement, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against a developing country Member concerning any provision that the Member has designated in Category A.

8.2. For a period of 6 years after entry into force of this Agreement, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against a least developed country Member concerning any provision that the Member has designated in Category A.

8.3. For a period of 8 years after implementation of a provision under Category B and C by a least developed country Member, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall not apply to the settlement of disputes against that least developed country Member concerning those provisions.

8.4. Notwithstanding the grace period for the application of the Understanding on Rules and Procedures Governing the Settlement of Disputes, before making a request for consultations pursuant to Articles XXII or XXIII, and at all stages of dispute settlement procedures with regard to a measure of a least developed country Member, a Member shall give particular consideration to the special situation of least developed country Members. In this regard, Members shall exercise due restraint in raising matters under the Understanding on Rules and Procedures Governing the Settlement of Disputes involving least developed country Members.

8.5. Each Member shall, upon request, during the grace period allowed under this paragraph, provide adequate opportunity to other Members for discussion with respect to any issue relating to the implementation of this Agreement.

## **9 Provision of Assistance for Capacity Building**

9.1. Donor Members agree to facilitate the provision of assistance and support for capacity building to developing country and least developed country Members, on mutually agreed terms and either bilaterally or through the appropriate international organizations. The objective is to assist developing country and least developed country Members to implement the provisions of Section I of this Agreement.

9.2. Given the special needs of least developed country Members, targeted assistance and support should be provided to the least developed country Members so as to help them build sustainable capacity to implement their commitments. Through the relevant development cooperation mechanisms and in coherence with the principles of technical assistance and capacity building as referred to in paragraph 9.3, development partners shall endeavour to provide assistance and support in this area in a way that does not compromise existing development priorities.

9.3. Members shall endeavour to apply the following principles for providing assistance and support for capacity building with regard to the implementation of this Agreement:

- a. take account of the overall developmental framework of recipient countries and regions and, where relevant and appropriate, ongoing reform and technical assistance programs;
- b. include, where relevant and appropriate, activities to address regional and sub-regional challenges and promote regional and sub-regional integration;
- c. ensure that ongoing trade facilitation reform activities of the private sector are factored into assistance activities;
- d. promote coordination between and among Members and other relevant institutions, including regional economic communities, to ensure maximum effectiveness of and results from this assistance. To this end:
  - i. coordination, primarily in the country or region where the assistance is to be provided, between partner Members and donors, and among bilateral and multilateral donors, should aim to avoid overlap and duplication in assistance programs and inconsistencies in reform activities through close coordination of technical assistance and capacity building interventions;
  - ii. for least developed country Members, the Enhanced Integrated Framework should be a part of this coordination process; and
  - iii. Members should also promote internal coordination between their trade and development officials, both in capitals and Geneva, in the implementation of the Agreement and technical assistance.
- e. encourage use of existing in-country and regional coordination structures such as roundtables and consultative groups to coordinate and monitor implementation activities; and
- f. encourage developing countries Members to provide capacity building to other developing and least developed country and consider supporting such activities, where possible.

- 9.4. The Committee shall hold at least one dedicated session per year to:
- a. discuss any problems regarding implementation of provisions or sub-parts of provisions;
  - b. review progress in the provision of technical assistance and capacity building to support the implementation of the Agreement, including any developing or least developed country Members not receiving adequate technical assistance and capacity building;
  - c. share experiences and information on ongoing assistance and implementation programs, including challenges and successes;
  - d. review donor notifications as set forth in paragraph 10; and
  - e. review the operation of paragraph 9.2.

#### **10 Information on Assistance to be Submitted to the Committee**

10.1. To provide transparency to developing and least developed Members on the provision of assistance and support for implementation of Section I, each donor Member assisting developing country and least developed country Members with the implementation of this Agreement shall submit to the Committee, at entry into force of the Agreement and annually thereafter, the following information on its assistance and support for capacity building that was disbursed in the preceding twelve months and, where available, that is committed in the next twelve months<sup>22</sup>:

- a. a description of the assistance and support for capacity building;
- b. the status and amount committed/disbursed;
- c. procedures for disbursement of the assistance and support;
- d. the beneficiary country, or, where necessary, the region; and
- e. the implementing agency in the Member providing assistance and support.

The information shall be provided in the format specified in Annex 1. In the case of OECD members, the information submitted can be based on relevant information from the OECD Creditor Reporting System. Developing country Members declaring themselves in a position to provide assistance and support are encouraged to provide the information above.

10.2. Donor Members assisting developing country and least developed country Members shall submit to the Committee:

- a. contact points of their agencies responsible for providing assistance and support for capacity building related to the implementation of the provisions of Section I of this Agreement including, where practicable, information on such contact points within the country or region where the assistance and support is to be provided; and
- b. information on the process and mechanisms for requesting assistance and support.

Developing country Members declaring themselves in a position to provide assistance and support are encouraged to provide the information above.

10.3. Developing country and least developed country Members intending to avail themselves of trade facilitation-related assistance and support shall submit to the Committee information on contact point(s) of the office(s) responsible for coordinating and prioritizing such assistance and support.

10.4. Members may provide the information in paragraphs 10.2 and 10.3 through internet references and shall update the submitted information as necessary. The Secretariat shall make all such information publicly available.

10.5. The Committee shall invite relevant international and regional organizations (such as the IMF, OECD, UNCTAD, WCO, UN Regional Commissions, the World Bank, or their subsidiary bodies, and regional development banks) and other agencies of cooperation to provide information referred to in paragraphs 10.1, 10.2 and 10.4.

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<sup>22</sup> The information provided will reflect the demand driven nature of the provision of technical assistance.

**FINAL PROVISIONS**

1. For the purpose of this Agreement, the term "Member" is deemed to include the competent authority of that Member.
2. All provisions of this Agreement are binding on all Members.
3. Members shall implement this Agreement from the date of its entry into force. Developing country Members and least developed country Members that choose to use the provisions of Section II shall implement this Agreement in accordance with Section II.
4. A Member which accepts this Agreement after its entry into force shall implement its Category B and C commitments counting the relevant periods from the date this Agreement enters into force.
5. Members of a customs union or a regional economic arrangement may adopt regional approaches to assist in the implementation of their obligations under the Agreement on Trade Facilitation including through the establishment and use of regional bodies.
6. Notwithstanding the General interpretative note to Annex 1A, nothing in this Agreement shall be construed as diminishing the obligations of Members under the GATT 1994. In addition, nothing in this Agreement shall be construed as diminishing the rights and obligations of Members under the Agreement on Technical Barriers to Trade and the Agreement on the Application of Sanitary and Phytosanitary Measures.
7. All exceptions and exemptions<sup>23</sup> under the General Agreement on Tariffs and Trade 1994 shall apply to the provisions of this Agreement. Waivers applicable to the GATT 1994 or any part thereof, granted according to Article IX:3 and Article IX:4 of the Marrakesh Agreement establishing the WTO and any amendments thereto as of the date of entry into force of this Agreement, shall apply to the provisions of this Agreement.
8. The provisions of Articles XXII and XXIII of the General Agreement on Tariffs and Trade 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided for in this Agreement.
9. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Members.
10. The Category A commitments of developing and least developed country Members annexed to this Agreement in accordance with paragraphs 3.1 and 3.2 of Section II shall constitute an integral part of this Agreement.
11. The Category B and C commitments of developing and least developed country Members taken note of by the Committee and annexed to this Agreement pursuant to paragraph 4.5 of Section II shall constitute an integral part of this Agreement.

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<sup>23</sup> This includes Articles V:7 and X:1 of the GATT 1994 and the Ad note to Article VIII of the GATT 1994.

**ANNEX 1: FORMAT FOR NOTIFICATION UNDER ARTICLE 10.1**

Donor Member:

Period covered by the notification:

Description of the technical and financial assistance and capacity building resources	Status and amount committed/disbursed	Beneficiary country/ Region (where necessary)	The implementing agency in the Member providing assistance	Procedures for disbursement of the assistance

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**DUBLIN RESOLUTION**

**RESOLUTION OF THE POLICY COMMISSION OF THE WORLD CUSTOMS  
ORGANIZATION ON THE CONCLUSION OF AN AGREEMENT ON TRADE  
FACILITATION BY THE WORLD TRADE ORGANIZATION**

(Dublin, 11 December 2013)

**THE POLICY COMMISSION**

**WELCOMING** the World Trade Organization (WTO) Agreement On Trade Facilitation (the "Trade Facilitation Agreement") as embodied in the Bali Package's Ministerial Decision, adopted at the WTO's Ninth Ministerial Conference in Bali, Indonesia from 3 to 7 December 2013, under the framework of the Doha Development Agenda;

**NOTING that :**

the Ministerial Decision highlights the role of the World Customs Organization (WCO) in the implementation and administration of the Trade Facilitation Agreement;

full implementation of the Trade Facilitation Agreement will contribute to economic growth and recovery, improved revenue collection and the alleviation of poverty, and that the WCO has long supported the conclusion of a WTO Agreement;

Customs plays a fundamental role in trade facilitation and that the Customs administrations of many WTO Members have made positive contributions to the WTO Trade Facilitation negotiations which have now culminated in the Trade Facilitation Agreement;

the WTO Agreement is fully consistent with WCO tools and programmes on trade facilitation and compliance, including the WCO Economic Competitiveness Package, which incorporates, among other things, the Revised Kyoto Convention, the Data Model, Authorized Economic Operator programmes, the Coordinated Border Management Compendium and the Time Release Study;

**RECOGNIZING that :**

the implementation of the Trade Facilitation Agreement will reduce red tape, promote Customs modernization, provide for simplified, harmonized and seamless procedures to allow goods to move along the supply chain more easily, more rapidly and at lower cost, and improve revenue collection and social protection;

the WCO is the centre of excellence on Customs matters;

the implementation of the Trade Facilitation Agreement depends on capable and efficient Customs and requires the empowerment of national Customs authorities;

**RESOLVES that the WCO :**

is committed to the efficient implementation of the Trade Facilitation Agreement;

will engage immediately with the WTO in respect of the governance and future implementation of the Trade Facilitation Agreement, in particular in the framework of the WTO Trade Facilitation Committee to be established;

will assist its Members to identify their needs, including availing of donor funding, in order to enhance capacity building to implement the Trade Facilitation Agreement;

will, together with other international organizations and the business community, further enhance the provision of technical assistance/capacity building in an efficient and coordinated manner to achieve Customs reforms and modernization, and to support implementation of the Trade Facilitation Agreement;

will base its technical assistance/capacity building on existing WCO tools, tools under preparation and expertise in Member administrations, and will include tailor-made assistance to meet Members' identified and specific needs;

will further enhance its communication activities to raise its profile and that of national Customs administrations among political and business leaders.

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# Developing an ‘Excise Working Tariff Schedule’ for South East Asia: a resource for regional excise policy

*Rob Preece, Senior Lecturer  
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## 1. Background

During the ninth annual meeting of the *Asia-Pacific Tax Forum* (APTF),<sup>1</sup> a ‘closed session’ was held for Ministry of Finance officials from the ASEAN<sup>2</sup> region to discuss issues relating to coordination and standardisation of certain excise taxation policy and administrative aspects ahead of the ASEAN Economic Community (AEC) 2015.<sup>3</sup> The meeting agreed that there would be benefit in gaining an understanding of each country’s excise tax systems as part of any potential future excise tax policy reforms undertaken in the lead up to, and after the commencement of the AEC.

## 2. Scope: what is an excise tax?

To understand the nature and extent of excise taxation in the ASEAN region, such a project requires clarity about what is meant by the term ‘excise tax’ given the diverse range of indirect taxes that currently apply across South East Asia. For this project, it was decided to utilise the OECD definition as used for tax revenue collection statistics as follows:

*5121 – Excises*

*60. Excises are taxes levied on particular products, or on a limited range of products, which are not classifiable under 5110 (general taxes), 5123 (import duties) and 5124 (export duties). They may be imposed at any stage of production or distribution and are usually assessed by reference to the weight or strength or quantity of the product, but sometimes by reference to value. Thus, special taxes on, for example, sugar, beetroot, matches, chocolates, and taxes at varying rates on a certain range of goods, as well as those levied in most countries on tobacco goods, alcoholic drinks and hydrocarbon oils and other energy sources.<sup>4</sup>*

As such, excise taxes would be those narrowly based discriminatory consumption taxes targeting goods (and services) traditionally associated with certain externalities and/or of luxurious nature. Therefore, excise taxes would include taxes such as the ‘Special Consumption Tax’ of Vietnam, the ‘Specific Tax on Certain Merchandise & Services’ of Cambodia, the ‘Liquor Act and ‘Tobacco Act’ of Thailand, and the relevant Schedules of the ‘Commercial Tax’ of Myanmar and Laos PDR. After careful consideration, it was also determined to include the ‘Luxury Tax’ of Indonesia despite its relatively wider scope given that Indonesia also has a broad-based VAT as part of its domestic tax system.

## 3. The process of building a working excise tariff

### 3.1 Forming a study group (network)

Representatives from each of the 10 Ministries of Finance within the ASEAN region were invited to form a network to look at regional excise taxation, which became known as the APTF ‘Excise Study Group’. In essence, the study group comprised regular attendees of APTF events with an interest in

excise taxation or, where appropriate, Ministry of Finance attendees at APTF identified more suitable officials to participate in the process. Significantly, the participants in the process covered a range of agencies and expertise, and importantly included officials from both policy and operational work areas.

The involvement of all 10 regional Ministries of Finance is also significant. This level of participation has several benefits, including:

- ensuring a greater level of assurance as to the accuracy of any work performed
- increasing the knowledge of participants in relation to regional excise taxation
- forming a network of ‘excise taxation’ peers across the ASEAN region
- possibly establishing the first step in better coordinating and standardising certain aspects of excise taxation policy in the ASEAN region.

### 3.2 Excise tax survey

With an established network, the author was able to effectively survey all 10 Ministries of Finance within the ASEAN region in relation to excise taxation under the auspices of the APTF ‘Excise Study Group’. The survey requested the relevant excise tax legislation from each country, along with any supporting subsidiary legislation and extrinsic materials which assisted with classification or determination of the value and volume or whether exemptions or concessions applied. The surveys were returned to the author for ‘mapping’.

### 3.3 Excise tax mapping

The excise tax laws of the 10 countries were then ‘mapped’ by finding the more commonly taxed product (and services) categories and assigning the excise rate applicable for each country for the various goods (or services) which comprise that category; for example, alcohol comprises beer, wine, spirits and industrial use alcohol. In terms of categories used, these included:

- alcohol, tobacco, and automobiles which are subject to excise in all 10 countries
- fuel, non-alcohol beverages, and motorcycles which are subject to excise in most of the 10 countries
- goods which are subject to excise in some of the 10 countries on the basis of being luxury items
- goods which are subject to excise in some of the 10 countries on the basis of being harmful to the environment
- services which are subject to excise in some of the 10 countries which are associated with either entertainment, or with harm when consumed
- other services which are subject to excise in some of the 10 countries.

The mapping was circulated to the members of the study group for technical review and ‘sign-off’ from the perspective of their respective countries. After the correction of several areas of the mapping, the final document became known as an ‘Excise Working Tariff Schedule’ for the ASEAN region and later became the basis for further studies and discussions.

The author has attempted to keep the working tariff document up-to-date through contact with the representatives of the 10 ASEAN Ministries of Finance, and the document is believed to be accurate as at its last update on 13 January 2014. However, manufacturers, traders, and researchers should not rely on such accuracy if accessed after that date, and should use the working tariff document as a guide only.

## 4. Repository of regional excise laws

A by-product of the mapping process was the capture of a significant amount of regional excise law. This has enabled the author to catalogue a range of excise-related law for each of the 10 countries in terms of primary tax and administrative law, as well as subsidiary or supporting legal instruments. However, the repository of such regional excise laws is recognised as not being complete, and the fact that important pieces of tax legislation are not readily publicly available is a future challenge for all those working in the area. The ‘catalogue’ of regional excise laws is available from the author.

## 5. Acknowledgments

The ‘Excise Working Tariff Schedule’ for South East Asia has required input from all 10 ASEAN region countries in terms of either supply of excise tax laws, review of original mapping processes, sign-off of a final working tariff document, and advice in relation to excise rate changes since that sign-off. In this regard, the author wishes to publicly thank the following agencies for their contributions:

Country	Agency represented	Ministry represented
Brunei Darussalam	Customs & Excise Department	Finance
Cambodia	General Department of Taxation	Economy & Finance
	General Department of Customs & Excise	Economy & Finance
Indonesia	Fiscal Policy Office	Finance
Laos PDR	Tax Department	Finance
Malaysia	Treasury	Finance
	Customs & Excise Department	Finance
Myanmar	Internal Revenue Department	Finance & Revenue
Philippines	Domestic Finance	Finance
Singapore	Inland Revenue Authority	Finance
Thailand	Fiscal Policy Office	Finance
	Excise Department	Finance
Vietnam	Tax Policy Department	Finance

## 6. Further information

If you wish to view details of the survey, or have questions and comments for the author, please email [editor@worldcustomsjournal.org](mailto:editor@worldcustomsjournal.org).

## Notes

- 1 Hosted by the Philippines Department of Finance in Manila, 3-5 October 2012.
- 2 Brunei Darussalam, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.
- 3 See [www.asean.org/communities/asean-economic-community](http://www.asean.org/communities/asean-economic-community), viewed 22 January 2014.
- 4 Organisation for Economic Co-operation and Development (OECD) 2011, ‘OECD classification of taxes and interpretative guide’, in OECD, *Revenue Statistics 2011*, OECD Publishing, Paris.

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Rob Preece is a senior lecturer in excise studies with the Centre for Customs and Excise Studies (CCES), Charles Sturt University and is currently based in Bangkok, Thailand. He is the Convener of CCES's postgraduate Diploma in Excise Studies program and undertakes various research and training programs in the area of excise taxation. Rob is also an Adjunct Associate Professor at the University of Canberra. He undertakes capacity building, vocational training, policy development, and research on behalf of governments, private sector and academic partners. Rob holds a Master of International Customs Law and Administration, and has 28 years' experience in the areas of excise and customs law, including 15 years with the Australian Customs Service.



## *Section 4*

## *Reference Material*





# Guidelines for contributors

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- bionotes (no more than 100 words for each author) together with a recent, high resolution, colour photograph for possible publication in the Journal
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Professor David Widdowson is Chief Executive Officer of the Centre for Customs & Excise Studies (CCES), Charles Sturt University. He is President of the International Network of Customs Universities (INCU), a member of the WCO's PICARD Advisory Group, and a founding director of the Trusted Trade Alliance. David holds a PhD in Customs Management, and has more than 35 years' experience in his field of expertise, including 21 years with the Australian Customs Service. His research areas include trade facilitation, regulatory compliance management, risk management and supply chain security.

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