

TRADE FACILITATION ISSUES IN THE DOHA MINISTERIAL DECLARATION REVIEW OF THE GATT ARTICLES

ARTICLE X

Communication from the World Customs Organization

The following communication, dated 21 May 2002, has been received from the World Customs Organization.

Introduction

1. The WTO Ministerial Conference in Doha in November 2001 agreed on the historic Ministerial Declaration that contained a Work Programme in which trade facilitation has been identified as one of the items to be considered during the period leading up to the next Ministerial Meeting. The Work Programme foresees that, in the period until the Fifth Session of the Ministerial Conference, the Council for Trade in Goods shall review and, as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of Members.
2. We welcome the reference to Trade Facilitation in the Declaration since we understand that one of the focus areas for trade facilitation is Customs procedures. Over the years, GATT negotiations have resulted in a substantial reduction in tariff levels, and it is therefore natural that the focus of the trading community has gradually shifted to non-tariff barriers. These include ineffective and expensive procedural and documentary requirements which have to be completed at national borders and which act as a disincentive to development of industry, commerce and trade. These requirements may result in the cost of complying with trade procedures becoming higher than the duties and taxes that are to be paid.
3. At the same time, there has been a growing recognition of the role that Customs can play in economic and social development through the promotion of trade and investment. The manner in which the Customs functions to expedite the movement of goods across borders has a significant impact on the economic competitiveness of nations; it encourages investment and the development of industry. It also increases the involvement of small and medium-sized enterprises in international trade. In fact, the effectiveness and expeditiousness of border measures have been one of the major factors in the determination of foreign direct investment by multinational corporations.
4. Needless to say, the role of Customs is not limited to trade facilitation - other functions such as revenue collection and protection of society are also highly important. Many least-developed and developing countries still heavily depend on Customs duties to ensure their national revenue. Customs also assumes the role of protection of society against the inflow of hazardous goods, such as illicit drugs. The terrorist attacks of September 11 have highlighted the role of Customs in protecting national security. In addition, Customs also plays an important role in other areas such as collection

of trade statistics, which serves as the basis for WTO market negotiations. With its multipurpose role, we are convinced that Customs is a critical institution to good governance, prosperity and the protection of society. We also believe that the Customs community can make a very positive contribution to promoting trade facilitation, while discharging its other functions effectively.

5. Recognizing the case for trade facilitation, Customs procedures have undergone substantial changes to ensure a balance between the different functions of Customs, namely providing facilitation for legitimate trade while exercising appropriate controls for the protection of society and revenue collection. In order to avoid congestion and delays at the border in the clearance of goods, Customs activities have expanded to the pre-arrival and post-clearance stages. Examples of this are the use of pre-arrival information in respect of goods and persons to speed up clearance, as well as post-clearance audit to ensure compliance. The development of information technology has enabled Customs to improve its risk management techniques through better access to information on traders. These measures require co-operation between Customs and the trading community. On the one hand, they enable Customs to effectively deploy its limited resources, while on the other, they enable traders with a good compliance record to benefit from the simplified procedures specifically designed for authorized compliant traders. Customs has also expanded its co-operation with other government agencies to enhance the smooth flow of goods, especially through co-ordinated interventions.

6. It is against this background that the WCO has been working since 1952 as an intergovernmental body whose mission is to enhance Customs cooperation. The WCO has 161 Member administrations world-wide, accounting for 97 % of world trade. To fulfil its mission, the WCO develops and maintains instruments and recommendations for the standardization and simplification of Customs systems and procedures governing the cross-border movement of goods. We also provide Members with training and technical assistance to implement trade and Customs instruments and best practices.

7. The WCO has developed and circulated instruments that provide principles for simple, effective and modern procedures. We offer solutions that allow countries to meet their legitimate goals of revenue collection and protection of society, while at the same time delivering practical trade facilitation dividends. The uniform, predictable and transparent application of these instruments facilitates international trade, while also ensuring compliance with national laws and regulations. These modern principles for simplification of procedures to provide trade facilitation were later incorporated in a single instrument as "The International Convention on the Simplification and Harmonization of Customs Procedures", or the "Kyoto Convention" adopted in 1973. We continuously update our instruments to keep abreast of developments in information technology and in Customs techniques such as risk management, and to take account of the highly competitive business environment. As a result of years of deliberation among our Members, the revised Kyoto Convention of 1999 contains international standards that provide the predictability and efficiency that modern trade and commerce require. Many countries have already incorporated the principles of the revised Kyoto Convention in their national legislation even without waiting for its formal entry in force.

Compatibility of principles in the WCO Instruments and GATT Articles V, VIII and X

8. As stated at the outset, the WCO welcomes the Doha Ministerial Declaration's recognition of the case for further trade facilitation and the need for enhanced technical assistance and capacity building in this area. We see our role as being complementary to the WTO in developing instruments to support the WTO rules as explained below. Another important and also complementary role is delivering training and technical assistance to implement those rules. We are keen to intensify our capacity building in all areas related to trade facilitation.

9. All the legal provisions and the principles in the WCO instruments are compatible with, and complementary to, the three GATT Articles referred to in the context of trade facilitation in the Doha Ministerial Declaration. There is a clear recognition that Customs procedures and their implementation exert a great impact on world trade and the international movement of goods across borders.

10. The GATT Articles set out the high principles for formalities and procedures for movement of goods, transit of goods and publication and administration of trade regulations. On the other hand, the instruments of the WCO - including the Kyoto Convention through its legal provisions and implementation guidelines - provide the basis and practical guidance and information for the implementation of these high principles.

Overview of the Revised Kyoto Convention

11. The key principles of the Kyoto Convention are set out in three parts – the Preamble and Articles to the Convention, the General Annex containing the core principles and the Specific Annexes dealing with each separate operation that goods may be subject to.

- The **Preamble** of the revised Convention contains the key principles of modern Customs administrations and includes :
 - the application of Customs procedures and practices in a predictable, consistent and transparent manner;
 - provision of information on Customs laws, regulations, procedures and practices;
 - adoption of modern techniques such as risk management;
 - maximum practicable use of information technology;
 - co-operation where appropriate with other national authorities, other Customs administrations and the trade;
 - implementation of relevant international standards; and
 - provision of easily accessible administrative and judicial review to affected parties.
- The **Articles of the Convention** provide for clear rules for accession and administration of the Convention.
- The Convention contains a General Annex and ten Specific Annexes. The provisions of these Annexes reflect modern procedures and address the requirements of both the trade and Customs administrations. They also incorporate modern methodologies to ensure that Customs is able to carry out its responsibilities more efficiently and effectively, and facilitate the international movement of goods while ensuring full compliance with national laws.
- A **General Annex** contains the *core procedures and practices which* are the basis for all procedures for the movement and clearance of goods for import and export, including goods in transit. The General Annex contains Standards and Transitional Standards¹ which are obligatory for accession and implementation by Contracting Parties and **no Reservations** can be entered *against these Standards and Transitional Standards*.

¹ “**Standard**” means a provision the implementation of which is recognized as necessary for the achievement of harmonization and simplification of Customs procedures and practices;

“**Transitional Standard**” means a Standard in the General Annex for which a longer period for implementation is permitted;

- The General Annex includes Standards for the clearance of goods, payment of duties and taxes, Customs and trade co-operation, information to be supplied by Customs and appeals in all Customs matters – areas that of concern both to Customs administrations and to the trade. It also includes Standards that set out the principles of modern Customs control, including risk management, audit-based controls and mutual administrative assistance between Customs administrations and with external organizations, and the use of information technology, thus ensuring both effective controls and trade facilitation.
- There are *ten Specific Annexes* dealing with different Customs procedures which contain Standards and Recommended Practices².
- *Comprehensive implementation Guidelines* have been developed for all Standards and Recommended Practices in the Annexes to the Convention. These are a set of explanations of the provisions of the General Annex, Specific Annexes and Chapters therein which indicate some of the possible courses of action to be followed in applying the Standards, Transitional Standards and Recommended Practices, and in particular describing best practices and recommending examples of greater facilities. These Guidelines ensure that the principles and simplified Customs procedures contained in the Convention are applied effectively by Customs administrations. The Guidelines are constantly updated to provide information on new and modern practices, which in the future will form the basis of legal texts in the Annexes to the Convention.
- *Present level of implementation of the revised Kyoto principles* – Though the revised Kyoto Convention is yet to enter into force, a large number of WCO Members have already revised or are in the process of revising and modernizing their Customs legislation based on this revised Convention.

Article X of the GATT as reflected in WCO instruments and Customs legislation

12. Article X of GATT 1994 - Publication and Administration of Trade Regulations - requires in the main that :

- All laws, regulations, judicial decisions and administrative rulings affecting imports and exports be **published**; measures that impose a new or more burdensome requirement, restriction, or prohibition on imports, or on the transfer of payments are to be published before enforcement.
- With regard to **Appeal procedures**, Members should “maintain or institute judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters”, providing for uniform, impartial, and reasonable administration of laws, decisions and rulings affecting import and export.

Publication and availability of information

13. To ensure predictability, efficiency and integrity, all laws and rules that govern Customs systems and processes must be readily available to all parties involved in international trade. This availability of information provides transparency both to trade and to governments with regard to rules, rights and obligations of all parties involved in the movement and clearance of goods through Customs. It also ensures, for the trading community, a high degree of predictability of the processes involved. Thus, publication of Customs laws, rules and the requirements to be fulfilled and how they are implemented and administered guarantees transparency, improves efficiency and promotes

² “Recommended Practice” means a provision in a Specific Annex which is recognized as constituting progress towards the harmonization and the simplification of Customs procedures and practices, the widest possible application of which is considered to be desirable;

integrity.

14. The principles of transparency through publication of laws, regulations, administrative guidelines, and executive instructions - collectively defined as Customs Law in the Kyoto Convention - have been reflected clearly in WCO legal instruments, Recommendations, best practices and in the Customs legislation of countries. The requirements for publishing information relating to Customs, the setting up of an appeals procedure and information concerning tariff classification of goods were recommended to Customs administrations through WCO instruments as early as the 1960s.

Principles in the Revised Kyoto Convention

15. **Chapter 9 of the General Annex** to the Kyoto Convention relates to “Information, Decisions and Rulings Supplied by Customs”. The legal text is at **Annex I** to this paper.

16. This Chapter provides for :

- Making readily available to interested persons information of general application regarding Customs laws, i.e. all statutory and regulatory provisions - including those specifically assigned to Customs and any regulations made by the Customs under its statutory powers. This information should also be made available in electronic format where possible;
- Making available changes to information supplied due to amendment of law, administrative arrangements and requirements sufficiently in advance of the entry into force of the new requirements, except in instances where advance notice is precluded;
- Making available, as quickly and accurately as possible, specific information requested (tariff classification, duties and taxes, documentary and procedural requirements, etc.);
- Confidentiality of information – not to divulge details of a private or confidential nature affecting the Customs or the trade unless required or authorized by national legislation;
- Providing information free of cost or limiting the cost to the services rendered;
- Providing decisions in writing within a period specified in national legislation when requested and, where the decision is adverse to the person concerned, reasons to be provided and right of appeal to be advised; and
- Issue of binding rulings on the request of the interested person, provided all information deemed necessary is made available.

17. The **Guidelines to this Chapter** provide detailed information for administrations to set up their procedure for publication of information. These include :

- information on quality and clarity of information,
- trade consultation,
- exhibitions,
- enquiry offices,
- availability of tariff information,
- liability of information provided,
- explanation of the concept of freedom of information,.
- procedure for issue, notification and annulment of binding rulings by Customs.

18. The Guidelines also contain information on the method used by Member administrations and the EU on provision of information of different types. The WCO Recommendation on the use of World Wide Web sites by Customs administrations also expands on the application of the legal provision for use of information technology to enhance the supplying of information.

Appeal procedures

19. All persons who deal with Customs must be afforded the opportunity to lodge an appeal on any matter. Persons who deal with the Customs may be affected by a decision or omission on the part of the Customs. It is therefore important that provision be made for the person concerned to be given, upon request, an explanation of the reasons for the decision or omission, and for the person to have a right of appeal to a competent authority. The competent authority may be the Customs itself, another administrative authority, one or more arbitrators, a special tribunal and, in the final instance, a judicial authority.

20. This right of appeal ensures protection for the individual against decisions of Customs that may not be in compliance with the laws and regulations which it is responsible for administering and enforcing. It also ensures protection against omissions by Customs in any matter. At the same time, the review of challenged decisions or omissions by a competent authority and the verdicts of these reviews can be a suitable means of ensuring uniform application of the laws and regulations. The provisions of the revised Kyoto Convention provide for a transparent and multi-stage appeal process. Furthermore, the availability of an independent judicial review as a final avenue of appeal should inspire the public and the trade with confidence in the government institutions and, in particular, in the Customs administration.

Principles in the revised Kyoto Convention

21. **Chapter 10 of the General Annex** sets out the principles for “Appeals in Customs Matters.” The legal text is at **Annex II** to this paper.

22. This Chapter provides for :

- National legislation to provide for a right of appeal in Customs matters;
- Reasons for a decision or omission by Customs to be provided in writing within a period specified in national legislation, and persons affected by these to have a right of appeal;
- Different levels of appeal including initial appeal to Customs, further appeal to an authority independent of the Customs administration and final right of appeal to a judicial authority;
- Forms and grounds of appeal, including fixing of a time limit for lodgement of an appeal that should be sufficient to study the contested decision and prepare the appeal. Sufficient time to be provided for lodgement of supporting documents for the appeal.
- The methods for ruling on appeals and advising the right to further appeal;
- Consideration of appeals; and
- Implementing the decision or ruling of the independent or judicial authority.

23- The **Guidelines** to this Chapter contain detailed information for administrations to develop and set out their appeal procedure. The rights of appeal are also set out for tariff classification issues in appropriate Recommendations under the Harmonized System Convention.

Other related provisions of the Kyoto Convention General Annex

24. In addition to these two specific Chapters 9 and 10 of the General Annex, there are several other provisions in the General Annex that enhance and supplement the transparency of Customs procedures that establish Customs trade consultations and rights and obligations of related parties. They provide for:

- Customs to institute and maintain formal consultative relationships with the trade – “The Customs shall institute and maintain formal consultative relationships with the trade to increase co-operation and facilitate participation in establishing the most effective methods of working commensurate with national provisions and international agreements.” Standard 1.3 - General Annex.
- Memoranda of Understanding with the trade to enhance effectiveness – “The Customs shall seek to co-operate with the trade and seek to conclude Memoranda of Understanding to enhance Customs control”: Standard 6.8 – General Annex.
- Provisions in Chapter 3 of the General Annex dealing with the rights and obligations of a declarant.
- Provisions in Chapter 3 to allow release of goods even when an offence is detected – “When an offence has been detected, the Customs shall not wait for the completion of administrative or legal action before they release the goods, provided that the goods are not liable to confiscation or forfeiture or to be needed as evidence at some later stage and that the declarant pays the duties and taxes and furnishes security to ensure collection of any additional duties and taxes and of any penalties which may be imposed.” Standard 3.43 – General Annex.
- Chapter 8 of the General Annex, which sets out the provisions for the relationship between Customs and third parties³, including their rights and obligations.

Significance of the principles of the Kyoto Convention for WTO Agreements implemented by Customs

24. Several WTO Agreements have a direct bearing on trade facilitation and, in many instances, it is the Customs which is directly involved in implementation of these Agreements. The national requirements of these agreements have to be confirmed at the borders before clearance of the goods. **Thus, the publication and administration of trade regulations in these areas are often within the purview of Customs administrations.** Examples of the WTO Agreements are :

- Agreement on Customs Valuation,
- Agreement on Origin,
- Import Licensing Procedures,
- Rules of Origin,
- Agreement on the Application of Sanitary and Phytosanitary Measures.
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

³ “third party” means any person who deals directly with the Customs, for and on behalf of another person, relating to the importation, exportation, movement or storage of goods.

Technical assistance

25. The WCO Technical Assistance Programmes, including dedicated assistance to individual Members as well as regional seminars and other programmes, are available for WCO Members. These are aimed at explaining the legal provisions, examining national legislation with a view to making changes to provide for compliance with the revised Kyoto principles, and reviewing national legislation that is revised or in the process of being drafted. In addition, there is a detailed programme for technical assistance for the implementation of the Harmonized System which includes the procedures for improvement of tariff classification work and related infrastructure which are compatible with - and supplement - the publication of information, the issue of pre-entry classification and the setting up of appeal procedures.

Additional information

26. The legal texts of the revised Kyoto Convention and its implementation Guidelines and other related instruments, such as the Recommendations on the Harmonized System, are available on the WCO Web site – www.wcoomd.org

Annex I

CHAPTER 9

INFORMATION, DECISIONS AND RULINGS SUPPLIED BY THE CUSTOMS

A. INFORMATION OF GENERAL APPLICATION

9.1. Standard

The Customs shall ensure that all relevant information of general application pertaining to Customs law is readily available to any interested person.

9.2. Standard

When information that has been made available must be amended due to changes in Customs law, administrative arrangements or requirements, the Customs shall make the revised information readily available sufficiently in advance of the entry into force of the changes to enable interested persons to take account of them, unless advance notice is precluded.

9.3. Transitional Standard

The Customs shall use information technology to enhance the provision of information.

B. INFORMATION OF A SPECIFIC NATURE

9.4. Standard

At the request of the interested person, the Customs shall provide, as quickly and as accurately as possible, information relating to the specific matters raised by the interested person and pertaining to Customs law.

9.5. Standard

The Customs shall supply not only the information specifically requested but also any other pertinent information which they consider the interested person should be made aware of.

9.6. Standard

When the Customs supply information, they shall ensure that they do not divulge details of a private or confidential nature affecting the Customs or third parties unless such disclosure is required or authorized by national legislation.

9.7. Standard

When the Customs cannot supply information free of charge, any charge shall be limited to the approximate cost of the services rendered.

C. DECISIONS AND RULINGS

9.8. Standard

At the written request of the person concerned, the Customs shall notify their decision in writing within a period specified in national legislation. Where the decision is adverse to the person concerned, the reasons shall be given and the right of appeal advised.

9.9. Standard

The Customs shall issue binding rulings at the request of the interested person, provided that the Customs have all the information they deem necessary.

Annex II

CHAPTER 10

APPEALS IN CUSTOMS MATTERS

A. RIGHT OF APPEAL

10.1. Standard

National legislation shall provide for a right of appeal in Customs matters.

10.2. Standard

Any person who is directly affected by a decision or omission of the Customs shall have a right of appeal.

10.3. Standard

The person directly affected by a decision or omission of the Customs shall be given, after having made a request to the Customs, the reasons for such decision or omission within a period specified in national legislation. This may or may not result in an appeal.

10.4. Standard

National legislation shall provide for the right of an initial appeal to the Customs.

10.5. Standard

Where an appeal to the Customs is dismissed, the appellant shall have the right of a further appeal to an authority independent of the Customs administration.

10.6. Standard

In the final instance, the appellant shall have the right of appeal to a judicial authority.

B. FORM AND GROUNDS OF APPEAL

10.7. Standard

An appeal shall be lodged in writing and shall state the grounds on which it is being made.

10.8. Standard

A time limit shall be fixed for the lodgement of an appeal against a decision of the Customs and it shall be such as to allow the appellant sufficient time to study the contested decision and to prepare an appeal.

10.9. Standard

Where an appeal is to the Customs they shall not, as a matter of course, require that any supporting evidence be lodged together with the appeal but shall, in appropriate circumstances, allow a reasonable time for the lodgement of such evidence.

C. CONSIDERATION OF APPEAL

10.10. Standard

The Customs shall give its ruling upon an appeal and written notice thereof to the appellant as soon as possible.

10.11. Standard

Where an appeal to the Customs is dismissed, the Customs shall set out the reasons therefor in writing and shall advise the appellant of his right to lodge any further appeal with an administrative or independent authority and of any time limit for the lodgement of such appeal.

10.12. Standard

Where an appeal is allowed, the Customs shall put their decision or the ruling of the independent or judicial authority into effect as soon as possible, except in cases where the Customs appeal against the ruling.
