

Widdowson, David (2006) *Border Protection and Trade Facilitation – Are the Two Compatible?* presentation to the Korea Research Society for Customs Conference on Globalization of Customs Administration & Border Protection, Seoul, Korea, May 2006.

Border Protection and Trade Facilitation – Are the Two Compatible?

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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.

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. Conscious of this imperative, in June 1999 the Council of the World Customs Organization (WCO) approved the revised International Convention on the Simplification and Harmonization of Customs Procedures (the revised Kyoto Convention), which was developed in the face of mounting pressure from the international trading community to minimise the level of customs intervention in cargo movements and to maximise the level of trade facilitation.

Since the time of the Convention's inception, however, international events have led to heightened international security concerns, resulting in significant pressures being placed on governments to provide increased security to the global supply chain. This paper examines the issues being faced by customs authorities as they seek to satisfy these competing demands.

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The Traditional Customs Role

For centuries, the customs role has been one of ‘gatekeeper’, with customs authorities representing a barrier through which international trade must pass, in an effort to protect the interests of the country. The essence of this role is reflected in the traditional customs symbol, the portcullis, which is a symbolic representation of a nation’s ports - the gates through which international trade must pass².

Such a role is often manifested by regulatory intervention in commercial transactions simply for the sake of intervention. Customs has the authority to do so, and no one is keen to question that authority. In this day and age, however, social expectations no longer accept the concept of intervention for intervention’s sake. Rather, the current catch-cry is *intervention by exception*, i.e. intervention when there is a legitimate need to do so; intervention based on identified risk.

WTO Trade Facilitation Agenda

The changing attitude towards the customs role is in no small part due to the increasing momentum of the global trade facilitation agenda. In particular, the Doha Ministerial Declaration and subsequent decisions of the General Council of the WTO have sought to intensify international commitment to further expedite the movement, release and clearance of internationally traded goods, including goods in transit. The Doha Ministerial Declaration includes the following decision relating to trade facilitation:

Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.³

The Articles referred to relate to Freedom of Transit (Article V), Fees and Formalities connected with Importation and Exportation (Article VIII) and Publication and Administration of Trade Regulations (Article X).

² See for example Pond, C.C. 1992 *The Portcullis*, Factsheet No.12, Public Information Office, House of Commons, London.

³ Paragraph 27 of the Doha Ministerial Declaration, adopted on 14 November 2001.

The fifth Ministerial Conference, which was held in Cancún, Mexico in September 2003, was unsuccessful in achieving agreement on these matters. However, it was subsequently decided that negotiations on trade facilitation would continue, and on 31 July 2004 the General Council agreed to adopt the ‘July Package’ that will now guide the next phase of the WTO Doha Round negotiations. It includes:

Trade Facilitation: taking note of the work done on trade facilitation by the Council for Trade in Goods under the mandate in paragraph 27 of the Doha Ministerial Declaration and the work carried out under the auspices of the General Council both prior to the Fifth Ministerial Conference and after its conclusion, the General Council decides by explicit consensus to commence negotiations on the basis of the modalities set out in Annex D to this document.⁴

Annex D requires a negotiating group on trade facilitation to aim to clarify and improve relevant aspects of Articles V, VIII and X with a view to further expediting the movement, release and clearance of goods, including goods in transit. It also requires the group to aim to enhance technical assistance and support for capacity building in the area of trade facilitation, recognising in particular that developing and least-developed countries are dependent upon technical assistance and support for capacity building if they are to fully participate in and benefit from the negotiations.

WTO Members have since put forward a broad range of proposals in response to the Annex D requirement, in an effort to clarify and improve the GATT Articles⁵.

A More Facilitative Regulatory Approach

The Customs Co-operation Council (now known as the World Customs Organization), was an early proponent of the need for customs to reconsider its traditional approach to international trade control, and for some years now the issues identified by the WTO have been high on its agenda.

The WCO’s revised International Convention on the Simplification and Harmonization of Customs Procedures (the revised Kyoto Convention), which entered into force on 3 February 2006, is intended to promote the achievement of a highly facilitative international travel and trading environment while maintaining appropriate levels of regulatory control. It is designed to provide the underlying conditions and instruments to help contracting parties achieve a modern customs administration and to make a major contribution to the facilitation of international trade by:

- eliminating divergence between the customs procedures and practices of contracting parties that can hamper international trade and other international exchanges,
- meeting the needs of both international trade and customs authorities for facilitation, simplification and harmonisation of customs procedures and practices,

⁴ Paragraph (g) of the decision adopted by the General Council of the WTO on 1 August 2004.

⁵ These proposals have been compiled by the WTO in document TN/TF/W/43 (as revised).

- ensuring appropriate standards of customs control,
- enabling customs authorities to respond to major changes in business and administrative methods and techniques,
- ensuring that the core principles for simplification and harmonisation are made obligatory on contracting parties, and
- providing customs authorities with efficient procedures, supported by appropriate and effective control methods.⁶

Partnerships

The development of the revised Kyoto Convention has incorporated important concepts of contemporary compliance management. These include the application of new technology, the implementation of new philosophies on Customs control and a willingness to establish mutually beneficial partnerships between customs authorities and the private sector.

The last point is of particular significance in the context of contemporary compliance management, which includes initiatives for formally recognising identified compliers⁷. In this context, the term *recognition* describes those compliance management strategies that regulators may employ in situations where certain members of the regulated community are deemed to be relatively trustworthy, i.e. present a relatively low risk of non-compliance.

Employing a program of recognition implies that an active decision to ‘reward’ compliers has been taken on the part of a regulatory authority. It is quite different to the passive response of simply paying less attention to compliant companies, although some of the potential benefits represent a reduced level of regulatory intervention. Indeed, under a recognition program, low-risk companies are permitted to operate under less onerous regulatory requirements and may anticipate little in the way of regulatory intervention.

Other benefits for compliant companies under a recognition program may include greater reliance on their self-assessed liabilities and entitlements; release of goods on minimum documentation; less onerous reporting requirements; reduced processing fees; periodic payment arrangements; and simplified procedures. Whilst the concept of self-assessment may appear to imply a regulatory ‘free reign’, it is important to note that, under such an arrangement, the parties are permitted to undertake their own assessment of their compliance with the relevant regulations, on the understanding that such assessment may be subjected to some form of government verification

⁶ World Customs Organization (1999) *International Convention on the Harmonization and Simplification of Customs Procedures (as amended)*, General Annex, Standard 6.2, Brussels, known as the revised Kyoto Convention.

⁷ See Widdowson, D. (2004) ‘Managing Risk in the Customs Context’ pp. 91-99, in: Luc De Wolf & Jose B Sokol (eds) *Customs Modernization Handbook*. World Bank, Washington DC.

The Swedish Customs Stairway® system is an excellent example of a contemporary compliance management philosophy that provides tangible benefits to highly compliant companies. The following extract provides a particularly succinct overview of what the system is designed to achieve:

In a contemporary world that is affected by increasing globalization, IT-development and increased trade volumes, Customs administrations have to improve its business in order to meet and succeed the demands of our customers, therefore Swedish Customs developed The Stairway® during a period of five years.

The philosophy behind the Stairway® is as simple as genius: in order to manage trade volumes with scarce resources Swedish Customs had to create a system that rewarded compliance and gave facilitation so resources could be allocated to areas assessed to have a high risk. Therefore some kind of programme or scheme was needed in order to determine whether an operator is compliant or not. Swedish Customs designed a certification programme, similar to the basic ideas in for instance the ISO family, and adopted it to the conditions existing for Customs.⁸

Increased Focus on Supply Chain Security

As a direct result of 9/11, supply chain security now consumes regulatory thinking, and with this comes a real danger of focussing on tighter regulatory control at the expense of trade facilitation. In his address to Center for Strategic and International Studies on 17 January 2002, the US Customs Commissioner, Robert Bonner said:

Immediately following the terrorist attacks on September 11th, at about 10:05 a.m. on September 11, Customs went to a Level 1 alert across the country -- at all border entry points. Level 1 requires sustained, intensive anti-terrorist questioning, and includes increased inspections of travelers and goods at every port of entry. Because there is a continued terrorist threat, we remain at the Level 1 alert today.

Shortly afterwards, the US Customs Container Security Initiative (CSI) and Customs-Trade Partnership Against Terrorism (C-TPAT) were announced. Primarily designed to protect global supply chains from concealment of terrorist weapons, these initiatives have had a major impact on the way in which customs and others involved in the international supply chain go about their business.

The idea behind C-TPAT is for US Customs and Border Protection (CBP) to work with those involved in international trade to improve the security of their supply chains. The aim is to provide CBP with a method of identifying and focusing their resources on potentially high-risk consignments, i.e. those that do not form part of a supply chain that is assessed to be 'secure'. This approach reflects a key element of contemporary

⁸ Swedish Customs (2002) *The Stairway® - the Customs system for improved service, higher quality, optimal logistics and more efficient controls*, Swedish Customs Future Centre, Stockholm

compliance management - the need to focus on identifying both compliance and non-compliance.

Traditionally, customs administrations have tended not to focus on compliers, mainly because the only recognised ‘result’ of compliance assessment activities has been the identification of non-compliance, together with the associated enforcement action (such as prosecution and/or monetary sanction). The saying, “if it isn’t counted, it won’t get done” applies aptly to this situation – in other words, if management focus is solely on the identification of non-compliers, then the identification of compliant traders will not be considered to be important by their staff.

However, for every complier that is identified, the population of non-compliers must reduce by one. Furthermore, if a significant company (e.g. a major importer, exporter, manufacturer, etc.) is identified as being highly compliant, the overall consequence of potential non-compliance will reduce significantly. That is why some administrations direct a significant compliance assessment effort towards their top 100 companies (in terms of significance to their regulatory charter). Assessing the compliance levels of such companies, regardless of the result, provides administrations with a clearer picture of compliance levels and the potential impact of non-compliance. This in turn greatly assists in determining where future compliance resources should be directed.

In this way, the C-TPAT program provides CBP with an opportunity to risk-manage its activities by assessing the integrity its C-TPAT partners’ supply chains, and in turn to provide those private sector partners with expedited processing and clearance.

Drawing heavily on the US C-TPAT initiative, the WCO released its Framework of Standards to Secure and Facilitate Global Trade, which is intended to represent “a regime that will enhance the security and facilitation of international trade”⁹. According to the WCO, the Framework aims to:

- Establish standards that provide supply chain security and facilitation at a global level to promote certainty and predictability.
- Enable integrated supply chain management for all modes of transport.
- Enhance the role, functions and capabilities of Customs to meet the challenges and opportunities of the 21st Century.
- Strengthen co-operation between Customs administrations to improve their capability to detect high-risk consignments.
- Strengthen Customs/Business co-operation.
- Promote the seamless movement of goods through secure international trade supply chains.

⁹ WCO (2005) Framework of Standards to Secure and Facilitate Global Trade, World Customs Organization, Brussels, p.6

Under the Framework, there is a requirement that:

Each Customs administration will establish a partnership with the private sector in order to involve it in ensuring the safety and security of the international trade supply chain. The main focus of this pillar is the creation of an international system for identifying private businesses that offer a high degree of security guarantees in respect of their role in the supply chain. These business partners should receive tangible benefits in such partnerships in the form of expedited processing and other measures.¹⁰

In his address to the Center for Strategic and International Studies on 17 January 2002, Bonner talks about the need to ‘harden’ national borders, and he finishes his speech with the following quote:

Together, we must strive, as Tom Friedman put it so well the other day in the New York Times, “to maintain a free and open society while being a little less open, a little less trusting, a little more vigilant and a little more risk-averse.”

These words did not sit comfortably with the private sector, as the clear inference was a return to the traditional ‘gatekeeper’ role for customs authorities. However, the opportunity for partnership arrangements which C-TPAT and the Framework of Standards offer has helped to allay such concerns. As noted by John Simpson, Director General, Global Express Association:

The US terrorist incident of 11 September 2001 threatened, and may still threaten, to reverse the significant gains in Customs modernization and trade facilitation. The WCO’s new Framework of Standards is a step away from such a disastrous scenario. The Framework is a balanced response to the threat of terrorism, and provides both Customs and businesses with a set of standards that, if fully and properly implemented, will enhance international supply chain security without interrupting the seamless movement of goods, through increased co-operation and co-ordination between Customs administrations in importing and exporting countries and, perhaps more importantly, between Customs administrations and businesses.¹¹

This degree of comfort is not, however, shared by all concerned. Indeed, there is clear evidence to suggest that some economies are seeking to tilt the balance heavily towards regulatory intervention in the name of supply chain security. To some extent this is to be expected in the current climate of heightened security concerns. However, we are witnessing situations in which very high levels of control are being imposed on the

¹⁰ WCO Framework of Standards, page 13

¹¹ WCO Framework of Standards, page 43

international trading community on the incorrect premise that such action is required by initiatives such as CSI and the WCO Framework of Standards¹².

It is of concern that an administration may seek to impede the facilitation of legitimate trade in such a way, bearing in mind that, in the current international climate, it takes a very brave soul to actively oppose the imposition of regulatory requirements that are allegedly introduced for the purposes of national security.

Partnerships Revisited

The theory and reality of the benefits of partnership and Approved Economic Operator (AEO) initiatives under C-TPAT and the Framework are already being questioned, with early indications being that, in the longer term, ‘verified’ traders are unlikely to receive facilitated treatment. One reason for this is the sheer number of operators who are keen to become involved in the process for fear of being subjected to less-favourable clearance arrangements.

While the provision of tangible benefits under partnership arrangements is questionable in the longer-term, there is little doubt that those who do not participate in such schemes will come under increased regulatory scrutiny. Consequently, while supply chain security ‘partners’ may receive tangible benefits in the short term, as the number of partnerships increases, such benefits are likely to dissipate.

What is in fact occurring is a global tightening of regulatory requirements in relation to supply chain security. The international compliance bar is being lifted to a point which will become the norm, and the longer term expectation is for traders to comply with the new requirements or face routine regulatory intervention (or even sanctions). In other words, an AEO of the future will merely continue to receive the same level of service as is currently the case, whereas a non-AEO will experience a backward step.

In this way, the broader partnership initiatives, similar to the Swedish Customs Stairway® system, will continue to form the basis for tangible forms of global trade facilitation, as opposed to the more recently established ‘security partnerships’. Recognised compliers will of course need to demonstrate the integrity of their global supply chains in order to maintain their low-risk status. This logical approach has been adopted by Sweden which has built on its Stairway® system in its response to calls for a more secure supply chain, :

Swedish Customs has for several years used accreditation of economic operators as a working method in order to promote compliance and facilitate the international trade for operators proven compliant through application of sophisticated risk management. Acknowledging the necessity to improve security in the global supply chain, efforts has been focused on designing a global Supply

¹² For example, in 2005 one administration erroneously advised traders that 100% scanning of containers was mandatory under CSI.

Chain Security System to be integrated with the existing Customs system The Stairway® - a Customs system for improved service, quality and efficiency based on partnership between Customs and the business community.¹³

The inclusion of supply chain security requirements into a broader partnership arrangement is a logical move, which overcomes the likely evaporation of private sector benefits under a security-specific regime. Such an approach will enable customs authorities to continue to provide compliant enterprises with tangible methods of facilitation, whilst mitigating risks associated with supply chain security and other regulatory objectives.

Conclusion

For many years there has been an international acceptance of the need to provide the international trading community with increased levels of trade facilitation. Achievement of the international trade facilitation agenda relies heavily on the commitment of customs authorities to maintain an appropriate balance between trade facilitation and regulatory intervention. However, pressures to provide increased security to the global supply chain may tilt the balance heavily towards regulatory intervention.

International initiatives designed to provide the desired increase in supply chain security seek to do so in an environment that provides tangible benefits to those who cooperate with customs authorities. In the longer term, however, such benefits are likely to dissipate, and the steps to secure the supply chain that are currently regarded as voluntary are likely to become standard requirements, with sanctions likely for those who fail to comply. Appropriate levels of both trade facilitation and border protection may be achieved and maintained, however, by incorporating supply chain security requirements into broader partnership arrangements between customs authorities and the private sector.

¹³ Swedish Customs 2003, *White Paper on accreditation of operators and the supply chain security (StairSec®)*, Swedish Customs, Stockholm