

WTO Law:

Customs Formalities and Procedures to Be Administered in a Uniform, Impartial and Reasonable Manner



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On 14 August 2013 the customs authorities of the Russian Federation (RF) unexpectedly strengthened control under customs clearance of all products arriving from Ukraine. All imported products went through a thorough verification, weighting and/or loading/unloading and additional scrutinized verification of all documents submitted for customs clearance purposes, etc. As a result, almost all Ukrainian imports were delayed and the Ukrainian importers faced sharp increase of transport expenses and losses. The RF's official position was that the customs authorities have been acting in line with the Russian customs regulations. The import operations from Ukraine were renewed in almost 2 weeks. It goes without saying that the Ukrainian authorities tried and are still trying to find a solution how to counteract similar actions by the Russian customs authorities in the future.

In this article our aim is to provide an overview of Ukraine's counteracting the actions of the Russian customs authorities based on the RF obligations within the WTO and/or the CIS.

It goes without saying that unfair and arbitrary application of national customs formalities and procedures' complying with WTO Agreements as such, and the degree of uncertainty and

unpredictability this generates for other states and traders, also constitutes significant barrier to trade in goods that restrict to various degrees and in different ways, market access for goods¹. Thus, we will focus our analysis on the said issue in this article.

Customs formalities and procedures under GATT 1994

Even though delays on the customs borders usually results in numerous losses for the importers and thus, customs clear-

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¹ Peter Van den Bossche, *The Law and Policy of the World Trade Organization*, Cambridge University Press, 2008 — p.460-461, 466-472.

ance simplification is an issue of great concern, unfortunately only a few provisions of WTO Agreements address the above issues. In particular, only Article VIII of *GATT 1994*² stipulates several basic principles rather than mandatory obligations of the WTO Members, namely:

— Article VIII:1 (c) of *GATT 1994*: the contracting parties recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements;

— Article VIII:2 of *GATT 1994*: a contracting party shall, upon request by another contracting party, review the operation of its laws and regulations

in the light of the provisions of this Article VIII, incl. Article VIII:1 (c) of *GATT 1994*;

— Article VIII:3 of *GATT 1994*: no contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

CIS FTA

The Agreement on Free Trade Zone 2011, concluded within CIS

countries, also stipulates a very brief requirement — fees shall be collected and all formalities related to import and export, trade rules application shall be made in line with Articles VIII and X of *GATT 1994*.

In the absence of the comprehensive regulation applicable to customs formalities and procedures, what should suppliers/traders do, while facing considerable obstacles within customs clearance procedures caused by actions of the customs authorities of WTO Members? In our view, one may refer to Article X:3 of *GATT 1994* setting out the requirements to the administration of trade regulations.

Unfair and arbitrary administration of trade measures

In order to prevent unfair and arbitrary administration of trade measures, WTO Agreements stipulate the following mechanisms:

— Requirement to administer the relevant national legislation in a uniform, impartial and reasonable manner — Article X:3(a) of *GATT 1994*; and

— Requirement to ensure an objective and impartial review of administrative actions of the state authorities of WTO Members — Article X:3(b)-(c) of *GATT 1994*.

Article X:3(a) of GATT 1994

Prior to analyzing what should be understood by the term “administration in a uniform, impartial and reasonable manner”, one should first take a look to what legislation the

² Notably, in the WTO there are the following agreements applied in some particular cases which are not related to the situation with the RF and thus, are not analyzed here in details: the *Agreement on Implementation of Article VII of GATT 1994* (related to customs valuation issues), the *Agreement on Preshipment Inspection*, the *Agreement on Rules of Origin*, the *Agreement on Import Licensing Procedures*.

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OVERVIEW of
UKRAINE'S
COUNTER-
ACTING the
ACTIONS of
the RUSSIAN
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the Russia's
OBLIGATIONS
WITHIN the
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Even though DELAYS on the CUSTOMS BORDERS usually RESULTS in numerous LOSSES for the IMPORTERS and thus, CUSTOMS CLEARANCE SIMPLIFICATION is an ISSUE of great CONCERN, unfortunately only a FEW PROVISIONS of WTO AGREEMENTS ADDRESS the above ISSUES

above requirements should apply.

Article X:3 (a) of *GATT 1994* relates to the broad scope of different legislative acts, namely: according to Article X:1 of *GATT 1994* laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use (legislative acts).

First of all, it is crucial that the legislative acts shall be of general application. According to the WTO jurisprudence⁵, as the measure did not try to become specific as to the individual persons or entities engaged in exporting the products to the importing member and hence affected by the proposed restraint, the measure shall be regarded as a measure of general application. Article X:1 of *GATT 1994* makes it clear that Article X does not deal with specific transactions. The approach to Article X of *GATT 1994* would require that the particular treatment accorded to each individual shipment cannot be considered a measure of general application.

Moreover, under Article X:3 (a) of *GATT 1994* not the legislative acts as such shall be challenged, but administration thereof. Article X of *GATT 1994* relates to the publication and administration of “laws, regulations, judicial decisions and

⁵ The Report of the Appellate Body, United States — Restrictions on Imports of Cotton and Man-made Fibre Underwear, 10 February 1997 — p.21; the Report of the Appellate Body, the European Communities — Measures Affecting the Importation of Certain Poultry Products, 13 July 1998 — paragraphs 111-113

administrative rulings of general application”, rather than to the substantive content of such measures. The text of Article X:3 (a) of *GATT 1994* clearly indicates that the requirements of “uniformity, impartiality and reasonableness” do not apply to the laws, regulations, decisions and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of *GATT 1994*. Without exception, Article X:3 (a) of *GATT 1994* always relates to the application of laws and regulations, but not to laws and regulations as such⁴.

At the same time, according to the WTO jurisprudence⁵ the scope of administration that is subject to a challenge under Article X:3 (a) of *GATT 1994* includes (1) the manner in which the legal acts are applied or implemented in particular cases; (2) a legal instrument that regulates such application or implementation; (3) administrative processes leading to administrative decisions. In the latter case, the complainant must demonstrate how and why certain features of the administrative processes necessarily lead to a lack of uniform, impartial, or reasonable administration of legislative acts.

Moreover, under Article X:3 (a) of *GATT 1994* should be verified the treatment accorded by government authorities to the traders in question⁶, rather than

⁴ The Report of the Appellate Body, the European Communities — Measures Affecting the Importation of Certain Poultry Products, 13 July 1998 — paragraph 115; the Report of the Appellate Body, the European Communities — Selected Customs Matters, 13 November 2006 — paragraph 309 (b) (i)

⁵ Report of the Panel, Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, 15 November 2010 — paragraph 7.873

⁶ Report of the Panel, Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 19 December 2000 — paragraph 11.76

whether there has been discriminatory treatment in favour of exports to one member relative to another.

Additionally, as allegations that the conduct of a WTO Member is biased or unreasonable are serious under any circumstances, such allegations should not be brought lightly, or in a subsidiary fashion. Moreover, a claim under Article X:3 (a) of *GATT 1994* must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X:3 (a) of *GATT 1994*.⁷

Article X:3 (a) of *GATT 1994* sets out three distinct and legally independent obligations — an obligation to administer laws and regulations in a uniform, impartial and reasonable manner⁸. It is worth emphasizing that WTO jurisprudence does not provide for exhaustive definitions of the above requirements. However, it goes without saying that analysis of the particular cases considered within the WTO and interpretations made therein provides an opportunity to understand the scope of the requirements.

Reasonable administration

According to WTO jurisprudence⁹, a process aimed at assuring the proper classification of products, but which inherently contains the possibility of

⁷ Report to the Appellate Body, United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, 29 November 2004 — paragraph 217.

⁸ Report of the Panel, Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, 15 November 2010 — paragraph 7.30.

⁹ Report of the Panel, Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 19 December 2000 — paragraph 11.94.

¹⁰ Report of the Panel, Dominican Republic — Measures Affecting the Importation and Internal Sale of Cigarettes, 26 November 2004 — paragraph 7.388.

revealing confidential business information (in this dispute the representatives of the domestic industry, consuming raw materials, were able to participate in the customs clearance procedures applicable to export of such raw materials), is an unreasonable manner for administering the laws, regulations and rules and, therefore, is inconsistent with Article X:3 (a) of GATT 1994.

In another case¹⁰ the Panel found that the fact that the Dominican Republic authorities did not support its decisions regarding the determination of the tax base for imported cigarettes by resorting to the rules in force at the time and that they decided to disregard retail selling prices of imported cigarettes, is not “in accordance with reason”, “having sound judgement”, “sensible”, “within the limits of reason”, or “articulate”.

Impartial administration

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction, there is an inherent danger that customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right¹¹.

Uniform administration

Pursuant to the WTO jurisprudence¹², the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts

differ. It is considered that the requirement of uniform administration of laws and regulations is not violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts.

However, the lack of any definition, guidelines or standards in how local authorities should apply certain import rules constitutes relevant evidence in establishing non-uniform administration for those rules. Moreover, the lack of any definition, guidelines or standards poses a very real risk that these rules will be administered differently depending on which local authority handles the import matter¹³.

Moreover, the uniform administration shall mean that customs laws and regulations should not vary, that every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members¹⁴.

Article X:3 (b)-(c) of GATT 1994

Article X:3 (b) of GATT 1994 stipulates that each contracting party shall maintain, or institute judicial, arbitral or administrative tribunals or procedures for the purpose *inter alia* of prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with

administrative enforcement. However, Article X:3 (b) of GATT 1994 shall not require the elimination or substitution of procedures in force in the territory of a contracting party which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement (Article X:3 (c) of GATT 1994). Any contracting party employing such procedures shall, upon request, furnish the other parties with full information thereon in order that they may determine whether such procedures conform to the requirements of Article X:3 (b)-(c) of GATT 1994.

Future developments...

The trade facilitation issues, including improvement of customs formalities and procedures, is one of the key issues discussed in the Doha round. According to the information posted on the official WTO web-site, the Members agreed that the negotiations “shall aim 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”. Negotiations also aim to “enhance technical assistance and support for capacity building in this area,” and develop “provisions for effective cooperation between customs or any other appropriate authorities on trade facilitation and customs compliance issues”. On 12 October 2004 the Trade Negotiations Committee established the Negotiating Group on Trade Facilitation.

We hope that the above negotiations succeed and that comprehensive regulations applicable to customs formalities and procedures will be implemented shortly and thus, that most customs implications will be removed.

The TRADE FACILITATION ISSUES, including IMPROVEMENT of CUSTOMS FORMALITIES and procedures, is one of the KEY ISSUES DISCUSSED in the DOHA ROUND

¹¹ Report of the Panel, Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 19 December 2000 — paragraph 11.100

¹² Report of the Panel, United States — Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, 22 December 2000 — paragraph 6.51

¹³ Report of the Panel, China — Measures Related to the Exportation of Various Raw Materials, 5 July 2011 — paragraphs 7.750-7.751

¹⁴ Report of the Panel, Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, 19 December 2000 — paragraphs 11.83-11.84