

TRADE & CUSTOMS

ANNUAL REVIEW 2015



FINANCIER
WORLDWIDE corporate finance intelligence

Published by
Financier Worldwide
23rd Floor, Alpha Tower
Suffolk Street, Queensway
Birmingham B1 1TT
United Kingdom

Telephone: +44 (0)845 345 0456
Fax: +44 (0)121 600 5911
Email: info@financierworldwide.com

www.financierworldwide.com

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Annual Review • September 2015

Trade & Customs

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Trade & Customs

SEPTEMBER 2015 • ANNUAL REVIEW

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in trade and customs.

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INTRODUCTION

Complying with today's increasingly complex trade and customs environment while maximising global opportunities is the overriding challenge for companies engaging in cross-border business.

Multinational corporations looking to establish and maintain multijurisdictional operations must contend with a host of demanding requirements, including regulatory compliance, dispute handling, export issues, end-to-end supply chain risks and the impact of new technologies.

Meanwhile, companies are under constant pressure to implement processes that will allow them to improve efficiency, mitigate risk and ultimately keep their costs down to maintain a strategic advantage in the marketplace.

Newly introduced regulations play their part, with trade sanctions and export controls said to be the most problematic. New developments covering the negotiation of new preferential trade agreements, compliance with numerous intellectual property laws, trade defence instruments, and customs enforcement, have all contributed to the regulatory whirlwind.

Providing some assistance has been the introduction of new initiatives, such as the Authorised Economic Operator (AEO) status mechanism. Expanding rapidly in use, traders granted AEO status (having satisfied certain criteria) are considered to be reliable in their customs related operations throughout the European Community (EC) and can take advantage of certain benefits. And the single-window system used by customs authorities around the world is also likely to result in significant efficiencies for traders.

Although increasing growth alongside compliance with local laws and regulatory trade requirements is of course fundamental for multinational corporations, an adherence to rapidly developing trade and customs requirements, whilst challenging, will give traders the knowledge to maintain a competitive advantage in the global marketplace.





UNITED STATES

MICHAEL CONE
FISHERBROYLES

Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN THE US? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

CONE: One of the larger developments is the internal reorganisation of US Customs and Border Protection (CPB) whereby trade facilitating activities are now being performed in 10 'Centres of Excellence and Expertise' (CEE) located in different cities around the US. Functionally, the CEE an importer is assigned to will be its CBP point of contact for all its shipments, regardless of the particular port in which the goods arrive. The CEEs will perform all validation activities, review administrative protests and deal with post-entry amendments. Although participation in the programme is currently voluntary and open only to participants in the supply chain security programme entitled 'Customs - Trade Partnership Against Terrorism' (C-TPAT), the CEE platform is clearly going to be the future basis of the importing trade's relationship with CBP.

Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

CONE: Forward thinking by importers is critical to effective management of trade-related costs, on-time delivery and risk management. Participation in the voluntary C-TPAT programme is an excellent example, where investment in supply chain security not only tightens the flow of goods but can also move shipments into the cutting edge CEE entry line. More generally, company personnel must remain current with updated trade regulations on the government side, as well as changes in internal production. Getting goods delivered on time is a top priority but when speed trumps compliance an importer flirts with potential disasters, including detained or excluded goods, customs penalties and lost customer relations. Finally, shrewd manufacturers exploit free trade agreements to lower customs duties and remain poised to take advantage of the pending Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).



Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN THE US? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

CONE: Trade-related regulatory issues tend to be industry-specific. Thus, an importer of aluminium extrusions must be aware of the US antidumping order on such products from China, but an importer of steel extrusions would not be affected. Food importers need to remain abreast of the highly onerous rules the government continues to roll out under the Food Safety Modernisation Act, and so on. On the export side, enforcement of the recently revised US export control regime continues to give exporters nightmares. Across the board, effective and engaged companies are establishing and fine-tuning their compliance programmes to help ensure their commercial activities do not create undue risks within the new and expanding regulatory arena.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

CONE: The use of RFID chips and UPC laser scanning devices is expanding. These technologies – both of which serve crucial roles in C-TPAT certified supply chains – allow companies to closely monitor the progress of their goods from the foreign retrieval point to the point of final delivery in the US. They also enable warehouses to manage incoming and outgoing stock in an efficient and simple manner, and help prevent unexplained loss of inventory. On the government side, CBP has implemented side-scanning X-ray technology to check containers for contraband.

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“Customs and trade attorneys serve as a clearing house of sorts for companies engaged in international business that now find themselves in trouble.”

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

CONE: US export control penalties are so severe that for many companies they present an existential challenge: run afoul of the export controls and you may risk your company’s future viability. The possible penalties should be on the mind of all company personnel dealing with foreign sales, foreign business contacts, foreign employees working in the US, and so on. At risk companies should hire or identify and train an export control officer to ensure adequate controls are in place and any necessary licences are obtained. Technically, all exported goods are subject to the US export control regime. Whether particular goods require a licence for exportation is a different and sometimes surprisingly complicated question.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

CONE: Recent trends continue, including the more frequent use of so-called ‘Section 337’ actions instituted at the US International Trade Commission in an effort to exclude imports of foreign goods that allegedly violate US patents, trademarks or copyrights. CBP is also aggressively seeking payment from importers whose merchandise has been assessed with significant antidumping duties, and is scrutinising shipments to see if merchandise actually falls within the scope of an antidumping duty order despite the importer’s representation to the contrary. The CBP’s Regulatory Audit branch remains a force to be reckoned with, and penalises importers who do not have their houses in order.



Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

CONE: Regular internal monitoring of trade controls and compliance is a best practice as well as a fundamental aspect of proper risk management. Customs and trade attorneys serve as a clearing house of sorts for companies engaged in international business that now find themselves in trouble. Quite often these companies have been operating for years or even decades without facing an enforcement issue and now the government has brought them to their knees, sometimes dangling a sword of Damocles over an accused business for years. Making a concerted effort to avoid this perilous scenario is perhaps the best reason to implement compliance procedures and periodically check to make sure they are functioning properly.



FISHERBROYLES
A LIMITED LIABILITY PARTNERSHIP



Michael Cone

Partner
FisherBroyles
+1 (212) 655 5471
mcone@fisherbroyles.com

Michael Cone concentrates his practice in the areas of administrative, customs and international trade law. He counsels clients on a wide array of regulatory compliance issues, with administrative expertise that includes matters falling under the jurisdiction of US Customs and Border Protection and the panoply of other administrative bodies that regulate the importation, exportation, marketing and sale of merchandise.



BRAZIL

VERA KANAS
TOZZINIFREIRE ADVOGADOS



Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN BRAZIL? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

KANAS: Brazil is seeking to reduce customs costs and bureaucracy and to increase transparency through the implementation of a series of measures. In the scope of the implementation of the WTO Agreement on Trade Facilitation, Brazil is creating the single window program, which will allow all proceedings relating to import and export operations, including licences granted by different governmental agencies, to be concentrated in a single electronic process. Brazil is also implementing the Authorised Economic Operator Program (AEO), which will replace the Blue Line program. The AEO will benefit certified companies with faster and more simplified customs clearance. As a second step of the program, Brazil will seek mutual recognition with other countries that have already implemented the AEO, allowing certified Brazilian companies to profit from this simplified procedure also in their exports to foreign markets.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

KANAS: Companies must analyse local and international trade regulations, including preferential trade agreements, tariff and tax exemptions, as well as non-tariff barriers of each country where there might be established a supplier of the value chain. A comprehensive study of the benefits of each location allows reduction of costs in the supply chain. Special attention should be granted to market access and domestic regulations on trade in services, since the sector includes essential tasks to global value chains, such as freight, communication, business services, and direct investments – commercial presence, often representing a large part of the value chain. Finally, infrastructure and efficiency in customs clearance of each country must also be taken into account. Because global value chains result in many import and export operations, efficiency in transport and at the clearance processes at the borders will have a significant impact on the product's final price.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN BRAZIL? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

KANAS: Brazilian customs authorities have enhanced controls on import and export operations, enforcing legislation more strictly, initiating investigations, and applying penalties more often. Thus, customs compliance is increasingly important for companies that have activities in international trade. At the same time, measures aiming to facilitate trade and incentive exports are being implemented. The federal government has recently launched the Exports National Plan, which aims to enhance Brazilian participation in international trade. Among the planned measures are the negotiation of new preferential trade agreements with rules on non tariff barriers, as well as market access, regulatory coherence with Brazil's main markets and negotiation of agreements on cooperation and facilitation of investments. These measures are supported by the main sectors of the Brazilian economy.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

KANAS: Technology can help in facilitating trade, by creating interconnected databases that help in the surveillance of customs compliance. Furthermore, it reduces costs and timeframes for customs clearance in import and export operations. Technology can also enhance transparency at the borders, by increasing access for the economic operators to the relevant customs legislation. The digitalisation of processes and initiatives such as the single window can reduce paperwork while increasing control over operations, since all data can be easily accessed by competent authorities. The ease of access also contributes to more cooperation between customs agencies around the world, enhancing surveillance and facilitating investigations.

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“International trade is becoming more complex and it is only natural that this results in a greater number of disputes.”

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

KANAS: Export controls have become a major concern for firms. Regulation is increasing, changing frequently and becoming more complex. Controls vary and can be related to sensible products, country-based embargos and blacklisted parties. Thus, it is important that companies are constantly monitoring these regulations and are aware of the sensitive aspects of their operation in the light of export controls rules. They should take into account not only the legislation of their own country but potential applicability of extraterritorial rules regarding other countries' controls.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

KANAS: International trade is becoming more complex and it is only natural that this results in a greater number of disputes. Presently there are almost 500 disputes at the World Trade Organisation (WTO), with a significant increase in request of consultations in recent years. Disputes have covered sensible domestic programs of countries and are frequently connected with health, environmental and industrial policy issues. Many of these disputes have systemic impacts and the decisions are defining the limits of trade regulation and its relationship with other aspects of international law and domestic policies. Participation in the WTO Dispute Settlement System is also changing, with an increased number of cases initiated by developing countries.



Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

KANAS: Companies should implement internal customs compliance programs in order to identify the red flags in their operations and to prevent violations of customs regulations. Customs related fines and penalties tend to be high and certain violations can represent a significant burden on the company's budget. An efficient customs compliance program should engage the different departments of the company that may have any activity related to import and export operations. The program should include training of personnel, periodical reports and exchange of information between departments. It is also crucial to engage third parties such as customs brokers and trading companies, which are usually more exposed to risks in customs operations.

TOZZINIFREIRE
A D V O G A D O S



Vera Kanas

Partner
TozziniFreire Advogados
+55 11 5086 5314
vkanas@tozzinifreire.com.br

Head of TozziniFreire's International Trade practice group, Vera Kanas was an intern in the Legal Affairs department of the World Trade Organisation (WTO) in Geneva in 2002, and served at the Brazilian Mission before the WTO in Geneva in 2003 and in the General-Coordination of WTO Disputes of the Ministry of Foreign Affairs in Brasília in 2005. She is a graduate of the Law School of Universidade de São Paulo, holds a Master's in International Economic Law from the Université de Paris-I Panthéon-Sorbonne, France and a PhD in International Law of the Law School of Universidade de São Paulo.



ARGENTINA

PATRICIA LOPEZ AUFRANC
MARVAL O'FARRELL & MAIRAL



Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN ARGENTINA? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

LOPEZ AUFRANC: In 2012, the Argentine government introduced an Import Prior Sworn Statement requirement, applicable to almost all imports of goods, referred to as 'DJAI'. Importers must submit a DJAI electronically, prior to issuing a purchase order, production order or similar document used for documenting transactions abroad. The information included in the DJAI is available to all agencies of the government which have adhered to the DJAI system, and those agencies will be able to raise objections to the import. In the case of objections, the importer must resolve the objections directly with the relevant agencies. Once approved, the importer will be able to make the import under an approved DJAI within 180 days from the DJAI's filing, although this term may be extended. The DJAI system actually works as a prior approval system, since the purchase order cannot be placed until the DJAI is approved by the relevant agencies. The approval rate of the Import Prior Sworn Statements varies over time, since their approval is discretionary. In 2014, within the World Trade Organisation (WTO) dispute settlement procedure, the panel 'Argentina – Measures Affecting the Importation of Goods', issued its report regarding the DJAI procedure, the import licensing requirements and the restrictive trade-related requirements imposed by Argentina. The panel found that they are inconsistent with the GATT, since those measures have a limiting effect on imports, and thus constitute an import restriction. In 2015, the WTO Appellate Body issued its report, which upheld the key findings of the panel's report. In July 2015 the Argentine government submitted a statement before the WTO by which Argentina agreed that the reasonable period of time for Argentina to implement the recommendations and rulings of the Dispute Settlement Body (DSB) expires on 31 December 2015. As a result of all the above, the foreign trade strategy has been at the top of the agenda for most Argentine companies in recent years. After 2015, and considering that in October 2015, Argentina will be electing a new president for a 4-year-term, Argentine foreign trade policy may focus on a new direction. Local specialists have forecasted that the DJAI system



will be most probably replaced, among other measures, by antidumping and safeguards proceedings, to filter a potential invasion of imported products.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

LOPEZ AUFRANC: The ability of companies to manage cost and increase their effectiveness in this connection is severely constrained by restrictions on the import of goods and particularly, by the unpredictability of the approval process for DJAIs, as well as by the terms applicable to the repatriation of proceeds from exports under exchange control regulations. Most companies' priority is to be able to import the goods needed for their business. Efficiency and reduction of cost is largely subordinated to these concerns. Many importers are willing to increase their logistics cost and financial cost, to continue importing and remain in business. Also, the foreign exchange regulations impose maximum terms for the collection of exports after clearing customs, and therefore pose a significant constraint on the efficiency of the supply chain.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN ARGENTINA? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

LOPEZ AUFRANC: The DJAI system that requires all imports to Argentina to have prior authorisation from the authorities is the key regulatory issue affecting trade in Argentina. The approval rate of the DJAIs varies over time, but it has been increasingly difficult for companies to obtain such approvals. Exchange control regulations in force, by which exporters must repatriate and liquidate in the exchange market the proceeds of exports of goods and services, within timeframes established by the regulations, also have an impact. The regulations on repatriation are complex and cumbersome. The risk of exchange control violations is higher when the counterparty of an exporter fails to pay for the goods in a timely fashion or if there is a shortage in the payment, since in these cases specific foreign exchange rules apply to avoid sanctions, with which some exporters are



not familiar. The key is to have a strong trade compliance department that keeps updated on the regulations and their interpretation, while keeping close track of all exports and the terms for repatriating the proceeds.

Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

LOPEZ AUFRANC: New technology is essential and an important tool to monitor and follow the import/export proceedings for import of goods. Programs and online services have been developed to track the import and export of goods, as well as to verify the requirements to comply with the import/export processes that have become increasingly complex and time consuming. Companies will benefit from investing in new technology. Also, companies' trade and customs compliance departments should be trained and kept updated on foreign exchange rules and regulations.

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

LOPEZ AUFRANC: The export/import of sensitive information or goods to or from foreign partners or third parties may be subject to specific requirements and authorisations from governmental agencies, which change from time-to-time. For instance, exports of military arms, weapons, vehicles, and all related materials to the Republics of Liberia, Congo and Sierra Leone are forbidden by law, until the Argentine government ceases such prohibition. Imports and exports of nuclear elements and material require a previous authorisation from the Nuclear Regulatory Authority. Argentine companies and firms should allocate resources and invest time to be updated on special requirements and authorisations necessary to deal in sensitive goods and information.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

LOPEZ AUFRANC: In recent years there has been an increase in customs disputes relating to the ability to import goods, as well as in relation to compliance with repatriation of funds regulations. Importers have filed claims before the courts related to the ability to import goods prior to obtaining the import licences – for example, import certificates or an Import Prior Sworn Statement, which are a condition to the import of almost any good. In most cases, the importers claimed that the



“The key is to have a strong trade compliance department that keeps updated on the regulations and their interpretation.”

governmental authorities unduly delayed or denied such licences. In general, importers have been successful in obtaining courts orders, which allowed them to import the goods without such licences, when the delays or denials by the authority were unjustified.

Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

LOPEZ AUFRANC: Customs compliance management has been at the top of the agenda for most companies. It is important that the customs department closely monitors the status of exports and collection, since such exports are subject to repatriation obligations. Also, the ability of the logistics and foreign trade departments to keep a steady track on the flow of government authorisation for imports can provide a key competitive advantage. Most Argentine companies are fully aware of the importance of customs compliance management.



Patricia Lopez Aufranc

Partner
Marval O'Farrell & Mairal
+54 11 4310-0100 ext. 1359
pla@marval.com

Patricia López Aufranc is a partner at Marval, O'Farrell & Mairal, she specialises in corporate, finance and international trade. Her practice has focused on international financial and commercial transactions, mergers and acquisitions, joint ventures, anti-dumping investigations and a wide range of business contracts. She has published articles in Argentina and abroad and regularly makes presentations in local and international forums related to her practice. She is vice-president of the Business Law Commission of the Buenos Aires Bar Association and is a member of the International Bar Association and chair of the Corporations Commission of the International Association of Lawyers.





UNITED KINGDOM

DANIEL MARTIN
HOLMAN FENWICK WILLAN LLP

Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN THE UK? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

MARTIN: International trade sanctions continue to dominate the agenda of politicians, enforcement agencies and compliance officers. There is a real focus on Iran, with people looking closely at what is and is not permitted as we wait to see what happens next, particularly whether the US Congress will approve the deal in Iran, and how quickly and fully Iran will perform its obligations. With no comprehensive sanctions relief yet in place, the authorities have made clear that they will continue to enforce the existing sanctions. On the customs side, issues associated with e-commerce and fulfilment houses are a high priority.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

MARTIN: Due diligence is still the watchword. The more businesses can collect, verify and recover important information about their customers and other counterparties, the better. Getting information at the outset, understanding the restrictions and taking early steps to ensure compliance are all key to managing costs and minimising delays and other disruption. Firms should also contract on appropriate terms, so that they get the necessary warranties from counterparties, can manage issues as they arise, and, if necessary, suspend performance or even terminate the contract.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN THE UK? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

MARTIN: Trade sanctions and export controls probably cause the most headaches. In many ways they provide a 'perfect storm' for companies' sales, operational and compliance teams, in that they are complex, fast-changing and attract criminal penalties for those who get it wrong. Companies need to respond to the challenges by adopting robust processes, training staff so they understand the issues, and ensuring that they really know their customer. Firms should be keeping careful records of their operations, looking closely at their counterparties, and they should also be keeping an eye on the changing regulatory landscape so that they can monitor and react to developments with respect to Iran, Russia and Cuba.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

MARTIN: Technology will, of course, only ever be a tool, and part of the solution. Where it can assist, however, is in managing data, particularly data about goods and counterparties. In order to use the data effectively it is vital that critical information is held in one centralised database, so that everyone in the organisation can access it instantly, and it becomes second nature to refer back to the database. The database should hold all relevant data, which might include information about customers' shareholders, incorrect customs classifications or valuations which have been provided in the past, so that potential problems can be identified at an early stage. The other selling point of technology is that the system should keep a tamper-proof record of the due diligence checks which were carried out, so if there is a problem in the future, contemporaneous evidence is available about what was done at the critical time.

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“Internal compliance checks and audits are critical to ensure that you identify any problem before the regulator does.”

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

MARTIN: Any breach of export controls – including the restrictions imposed under various sanctions programmes – carries the risk of severe penalties, so it is vital that firms are fully compliant with all export controls. The possible sanctions include criminal penalties such as fines and imprisonment, seizure of goods, and loss of export privileges – for example, use of general licences. Firms need to know what restricted goods, services and technology they are handling, where it is going, including the ultimate destination and end user, and what the terms and conditions of their licences require. The flip side is that firms can sell their robust export control processes and track record of compliance as a competitive advantage.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

MARTIN: In our experience, companies and their counterparties prefer to work together to resolve any issues relating to trade and customs in advance, to ensure that problems do not arise in the first place. As a result, litigation is rare, but the key areas for discussion tend to relate to understanding the precise nature and characteristics of the cargo, and obtaining as much information as possible about counterparties in sensitive countries. It is also important that businesses which are subject to differing regulatory burdens – for example, because they operate in different countries or in different sectors – talk to each other so that they can understand the issues which affect each of them, and manage the risks effectively.



Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

MARTIN: Trade compliance should be the top priority of any business which has significant levels of trade with sanctioned countries, or which deals in controlled goods. This is because the consequences of a breach can be so extreme, with fines that could cripple the business, imprisonment of key individuals or, ultimately, being made a sanctions target and excluded from international trade. Internal compliance checks and audits are critical to ensure that you identify any problem before the regulator does. That way you can self disclose – which is usually a mitigating factor for any fines – and improve your processes and procedures to ensure it does not happen again. In a changing regulatory landscape you need to ensure that policies are up to date and effective to mitigate the current risks.



holman fenwick willan **hfw**

Daniel Martin

Partner
Holman Fenwick Willan LLP
+44 (0)20 7264 8189
daniel.martin@hfw.com

Daniel Martin advises traders, ship-owners, freight forwarders, insurers and brokers on a host of regulatory and compliance issues, including international trade sanctions, export controls, customs and anti-corruption legislation. He advises on all aspects of the EU and UK sanctions legislation, and he is also familiar with the application of US sanctions to non-US persons. As well as advising clients on customs and regulatory compliance in particular circumstances, including ways to engage effectively with HMRC and other regulators, he also advises on compliance procedures and controls which traders, ship-owners, logistics companies, banks, insurers and brokers should adopt to minimise risk.



BELGIUM

EVA MONARD
JONES DAY



Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN BELGIUM? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

MONARD: While in previous months, the economic sanctions imposed on Russia, and the attention paid to these by the press was a 'hot topic', the recently concluded nuclear agreement between Iran, the P5+1 – China, France, Russia, UK, US and Germany – and the European Union, is presently the talk of the day. It is, however, important to be aware of the fact that the sanctions against Iran currently still remain in place, and are likely to be so for the foreseeable future. Companies should therefore continue to be diligent with any dealings with Iran.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

MONARD: Firms making use of global supply and production chains can obtain significant efficiencies and cost savings by making use of free trade agreements (FTAs) and duty relief programs. In order to do so, it is important to analyse the source of inputs, production sites and customer locations. In doing so, costs can be reduced considerably. It may be necessary to re-evaluate the source of inputs and even possibly to relocate existing production facilities to other jurisdictions. When choosing new production sites, the possibility of benefitting from FTAs and duty relief programs should be factored in. However, the impact of rules of origin should not be underestimated, as this may impact the possibility of benefitting from several FTAs or duty relief programs.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN BELGIUM? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

MONARD: There are countless areas of law, and an ever increasing amount red-tape affecting trade significantly, an overview of which could fill volumes. Nevertheless, three regulatory issues affecting trade and customs stand out. The first relates to trade defence instruments. While this is an issue primarily facing companies exporting to the European Union, it can result in significant costs for importers. Furthermore, they can be an invaluable tool for the domestic industry to shield themselves from certain kinds of trade that cause them harm. Secondly, there is customs enforcement. European importers, especially those active in several Member States, often face customs enforcement that differs depending on the Member State concerned. It is important for companies to be aware of this fact, as the experience related to importing into one Member State may not be the same as that related to importing into another. Finally, there are issues regarding export controls. Export controls are a force to be reckoned with and should not be ignored by companies engaged in international trade.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

MONARD: New technology tools are always useful for companies for the purposes of screening customers and transactions and for complying with export controls. Technology tools may also be used to help companies identify the most efficient and cost effective production and supply chains, in particular by making optimal use of duty relief programs and FTAs. Finally, the increasing use of the single-window system by customs authorities around the world is likely to result in significant efficiencies for traders. The single-window system allows importers, exporters, and others to submit customs related documents at a single location or a single entity, usually by electronic means. Such systems help speed up customs formalities.

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“If firms do not tread carefully, they risk severe reputational damage, as well as administrative and even criminal sanctions, depending on the jurisdiction concerned.”

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

MONARD: Firms should never underestimate the importance of being aware of export issues when moving any information or goods to foreign partners or third parties, whether sensitive or not. The mere sharing of particular information by telephone or other electronic means with foreign partners may be sufficient to violate export controls. If firms do not tread carefully, they risk severe reputational damage, as well as administrative and even criminal sanctions, depending on the jurisdiction concerned. A further aspect that is often overlooked is that, regardless of whether violations of export controls are detected, such violations may very well be a deal breaker in possible future mergers or acquisitions.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

MONARD: The steady increase in disputes at the level of the World Trade Organisation (WTO) appears to have continued. Recently, the US has been the target of several disputes, regarding regulatory measures as well as trade defence measures. Chinese trade defence measures equally appear to be a frequent target of WTO disputes, and the past year has seen several disputes being initiated between the European Union and Russia. Common issues primarily continue to concern trade defence measures. Most publicised disputes, however, continue to concern environmental and health issues. In this respect, there appears to be a marked increase in disputes regarding sanitary and phytosanitary measures.



Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

MONARD: It is vital for companies engaging in international trade to have a robust internal compliance system in place, which should be reviewed and reassessed on a regular basis. While having IT systems in place is, of course, essential, it is equally important to regularly train and inform staff of the compliance policy in place. This should be complemented with folders or handbooks with detailed instructions. A compliance officer should be available for staff to turn to with any questions they may have. Finally, it is crucial that the identity of customers is always verified, and companies should be especially diligent when screening new customers. Finally, extensive records should always be kept in order to be in a position to demonstrate that reasonable steps were taken to ensure compliance.

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Eva Monard

Associate
Jones Day
+32 2 645 15 10
emonard@jonesday.com

Eva Monard's practice focuses on WTO law and EU trade, export controls and customs law. She has assisted clients in EU trade defence investigations involving antidumping, antisubsidy, safeguard, and anticircumvention issues as well as in a full range of other trade matters. She also has successfully defended clients' interests before EU institutions and EU courts. Ms Monard has advised clients on obligations under EU export controls law and has assisted clients in complying with obligations relating to dual-use goods and restrictive measures (so-called sanctions) taken by the EU.



RUSSIA

WILHELMINA SHAVSHINA
DLA PIPER



Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN RUSSIA? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

SHAVSHINA: There are a number of recent trends in customs practices in Russia which should be underlined. We have seen the implementation of electronic declaration of goods, a shifting emphasis to control after release of goods, and application of the Risk Management System in the course of customs control, which includes categorisation based on the application of a foreign trade participant – for example, holders of industrial assembly agreements – and automatic categorisation. The implementation of 'remote release' technology has been a further feature, as has expanding the use of the Authorised Economic Operator (AEO) status, which allows companies to be related to the group with the lowest risk of committing customs offences. Companies should keep in mind that the customs authorities consider collection of the greatest possible amount of customs payments as essential part of their activity.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

SHAVSHINA: One of the possible ways to manage costs and increase the operational effectiveness of the end-to-end supply chain is to obtain AEO status. AEO status allows companies to reduce their transportation costs and improve their logistic schemes. Moreover, AEOs are considered by customs authorities as 'bona fide' participants in foreign trade activities, which means, in practice, a minimisation of customs control. The other option for companies is to file an application on inclusion into the so-called 'white lists' with the Federal Customs Service, which will help to reduce customs control.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN RUSSIA? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

SHAVSHINA: One of the most discussed regulatory issues affecting trade and customs in Russia is the import ban imposed in response to the anti-Russian sanctions. Taking into consideration this issue, some companies have changed their activity to buying products from the regions not subject to the import ban and other companies are trying to evade the law.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

SHAVSHINA: An AEO, using some simplifications, such as release prior to the filing of a customs declaration, within an electronic system of information exchange, monitors the entire process of moving goods. Moreover, electronic declaration and the use of remote release allow customs authorities to monitor the customs border and the status of goods in customs relations.

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“In accordance with legislation, Russian customs authorities can conduct customs checks up to three years after release of the goods.”

Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

SHAVSHINA: According to Russian legislation, the export control rules are established with respect to certain categories of products and technologies such as chemicals and technologies that can be used to produce chemical weapons and dual-use products that can be used to produce rockets and other military equipment, nuclear materials, and so on. It is essential for companies to comply with export control requirements due to the fact that violations of export controls may cause administrative and criminal liability.

Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

SHAVSHINA: There are no any official statistics with respect to the amount of disputes involving customs authorities. It seems that the total amount of disputes has not changed dramatically in recent years. At the same time, due to the political and economic situation, a new category of dispute has appeared: challenging the decisions of customs authorities on the imposition of administrative liability for violating the import ban.



Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

SHAVSHINA: It is very important to carry out internal checks. In accordance with legislation, Russian customs authorities can conduct customs checks up to three years after release of the goods. However, the recent amendments to the Administrative Offences Code of the Russian Federation provide for exemption of a declarant – meaning a customs representative – from administrative responsibility for a false declaration if a declarant reported their mistake to customs authorities. Therefore, regular internal checks may help companies to avoid administrative liability.



Wilhelmina Shavshina

Legal Director & Head of Foreign Trade Regulation

DLA Piper

+7 812 448 7200

wilhelmina.shavshina@dlapiper.com

Wilhelmina Shavshina is an expert in foreign trade regulation with extensive experience relating to customs administration and the implementation of customs policy in investment activities. She coordinates major projects in the sphere of foreign economic activity, including negotiations with the Eurasian Economic Commission, a number of the State Duma Committees and Russian Ministries, customs authorities, and other public institutions. Ms Shavshina is the author of over 70 publications on customs and tax matters. According to Best Lawyers, she was ranked as Russia's best lawyer in the regulatory and customs/excise sectors in 2011-2015.



INDIA

T. VISWANATHAN
LAKSHMIKUMARAN & SRIDHARAN

Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN INDIA? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

VISWANATHAN: The authorities have been expending their time and energy on issues relating to the classification of imported goods, as per the Customs Tariff of India, which is based on the World Customs Organisation's Harmonised System. Often, disputes of classification are also linked with exemptions availed by importers from payment of duties of customs granted by notifications issued by concerned government departments. Usually, the authorities claim that importers have not correctly classified the goods, or have provided incorrect particulars while filing Bills of Entry. Recently, the department has been focusing on imports from India's Free Trade Agreement partner countries. The authorities have also been implicating customs brokers in many of the scenarios mentioned above, as aiders and abettors. This used to be a rare occurrence but now customs brokers are being extra cautious so that their licences are not suspended.

Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

VISWANATHAN: The Ministry of Finance has introduced the Accredited Clients Programme and the Authorised Economic Operator Programme for importers and other stakeholders that satisfy eligibility conditions. These programmes enable firms to enjoy benefits, such as reduced dwell time by way of a secure end-to-end supply chain, a system of self-assessment by the importers and post-clearance audit by customs of the assessment done at the time of entry. Firms that are not already authorised to enjoy such benefits under these programmes must definitely apply for eligibility. The EDI system and risk management system introduced by the customs authorities have also helped to reduce transaction costs and dwell time. The infrastructure required to handle and transport the cargo would need support from the government. Importers should constantly engage with the authorities to keep them abreast of new trends of emerging business models. In this way, various bottlenecks can be removed even before problems



arise. Such involvement with authorities would not only be beneficial to the trading community; it would also help to bridge the information gap between concerned stakeholders.

Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN INDIA? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

VISWANATHAN: Recently, the authorities have been extra cautious to ensure that imported goods meet the standards prescribed in various domestic laws, such as the Food Safety & Standards Act, 2006, the Hazardous Waste Rules, 1989, the Legal Metrology Act, 2009 and the Drugs & Cosmetics Act, 1940. Importers must also keep in mind that goods should be compliant with the various intellectual property laws prevalent in India. Indian laws are regularly updated by way of amendments, but it so happens that end-to-end solutions for certain contingencies have still not been provided, and this creates an uncertain atmosphere for both authorities and firms alike, and ultimately leads to delays in clearing the goods. Nowadays, goods are undergoing stricter examination by the authorities. These regulatory compliances are, in a way, non-tariff barriers but these barriers are in line with the General Agreement on Tariffs and Trade, 1994, since locally manufactured goods also have to comply with the same regulatory requirements. In view of the barriers not according discriminatory treatment to imported goods, firms have not responded negatively to the stringent laws in place in India but have expressed desire for complete transparency in all dealings with the departments. Companies are also keen on the implementation of a single window clearance mechanism in India, which is yet to be established uniformly across the country, in spite of it being mentioned as a trade facilitation measure in the 2015-2020 Foreign Trade Policy.



Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

VISWANATHAN: While it is difficult to monitor and have control over the movement of goods that are in transit, the Authorised Economic Operator Programme is geared toward monitoring the movement of goods, but this cannot be enjoyed by all firms.

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Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

VISWANATHAN: Exporters should be aware of all applicable laws and regulations. The Customs Act and other central acts set out the law governing prohibitions on exportation of goods and prevention or detection of illegal export of goods. Goods that are improperly exported are liable to confiscation and penalty. Additionally, the Foreign Trade Policy also regulates export of dual-use goods and technologies, otherwise known as special chemicals, organisms, materials, equipment and technologies, or SCOMET. A list of such items is also available on the Directorate General of Foreign Trade's (DGFT) website. It will be useful for exporters to have a look at the list and check whether the intended export is prohibited, whether a licence is required, or if any special condition needs to be fulfilled, either prior to or post exportation.

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Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

VISWANATHAN: There has been an increase in disputes arising out of trade and customs compliance. The common issues that arise frequently are those relating to the classification and valuation of goods. Disputes relating to classification are often related to benefits availed by importers vide exemption notifications, circulars, clarifications issued by either the Central Board of Excise and Customs or the Office of the DGFT. The department regularly argues that firms intentionally act in a fraudulent manner so as to evade payment of customs duties. Other widespread disputes are those pertaining to the valuation of the imported goods between related persons, imports from China, licence fees or royalties paid to trademark owners or know-how providers.

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“Cyclical audits are highly recommended in an era when goods are cleared under the Risk Management System or self assessment system.”

Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

VISWANATHAN: It is vital for companies to have a comprehensive internal compliance system in place, and to conduct regular audits of the internal procedures, formats of company documents, method of record-keeping and financial accounting. These checks will be important in discovering whether there are any inconsistencies or gaps in the internal system followed by the company. Cyclical audits are highly recommended in an era when goods are cleared under the Risk Management System or self assessment system. Now that more and more importers are self-assessing the applicable customs duties, the onus is on the importers to ensure that they are legally-compliant in all respects, especially when the Accredited Clients Programme is only accorded to companies that possess a clean track record and are legally compliant in every way.



T. Viswanathan

**Principal Partner
Lakshmikumaran & Sridharan
+91 22 2439 2500
viswanathan@Lakshmisri.com**

T. Viswanathan is an advocate whose areas of practice include indirect taxes, such as customs, excise and FEMA. He holds a Degree in Commerce from Annamalai University and a Law degree from Kanpur University. He has been practicing law since 1995. He has delivered a number of lectures on the issue relating to customs. Mr Viswanathan heads the customs team of Lakshmikumaran & Sridharan. He is responsible for matters relating to litigation and consulting. He has handled many cases before different Forums namely, Supreme Court of India, High Courts and the Customs, Excise and Service Tax Appellate Tribunal.



SOUTH AFRICA

MELULEKI NZIMANDE

WEBBER WENTZEL



Q WHAT RECENT DEVELOPMENTS HAVE YOU SEEN IN TRADE AND CUSTOMS PRACTICES IN SOUTH AFRICA? WHERE ARE AUTHORITIES FOCUSING THEIR EFFORTS?

NZIMANDE: Earlier this year, the US renewed the Africa Growth Opportunity Act (AGOA) in terms of which goods from certain African countries, including South Africa, are granted preferential access to the US market. South Africa's participation is subject to review because of objections by the US poultry lobby that US chicken exports to South Africa are subject to high anti-dumping duties. Negotiations are ongoing between the South African Poultry Association and the US poultry organisations, as well as between diplomats from the two countries. The customs division of the South African Revenue Service (SARS) has, over the past few years, taken significant steps towards modernising the customs control systems, including electronic filing and processing of documents and an electronic risk assessment system. This allows for more efficient clearance of goods at the border posts, as well as for greater security.

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Q WHAT STEPS CAN FIRMS TAKE TO MANAGE COSTS AND INCREASE THE OPERATIONAL EFFECTIVENESS OF THEIR END-TO-END SUPPLY CHAIN?

NZIMANDE: One of the significant contributors to costs is storage costs when goods are detained by the authorities for inspection. It is therefore important to ensure that customs documents are completed correctly and that the information contained in such documents correctly reflects, among other things, the description and value of the goods being shipped.

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Q WHAT ARE THE KEY REGULATORY ISSUES AFFECTING TRADE AND CUSTOMS IN SOUTH AFRICA? HOW ARE FIRMS RESPONDING TO THE CURRENT REGULATORY ENVIRONMENT?

NZIMANDE: On 21 July 2014, the president signed the Customs Control Act 31 of 2014 and the Customs Duty Act 30 of 2014. These Acts will regulate systems and procedures for customs control of all goods and persons entering or leaving the Republic and the levying and collection of customs duty on goods. The customs provisions of the Customs and Excise Act 91 of 1964 are to be repealed and this Act will be renamed the Excise Duty Act 91 of 1964. The above Acts will come into effect by proclamation, which can only be done once a new customs tariff has been prepared. This customs tariff will replace the existing schedules to the Customs and Excise Act.

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Q IN WHAT WAYS CAN NEW TECHNOLOGY BE EMPLOYED TO MONITOR THE MOVEMENT OF GOODS AND AID IN GLOBAL CUSTOMS COMPLIANCE?

NZIMANDE: The customs division of SARS has introduced new scanners to monitor the contents of containers at some ports, such as Durban Harbour. If upon inspection SARS requires documentation, the same can be sent electronically. SARS intends to continue automating all its customs systems and ultimately to replace all manual processes. Importers and exporters therefore need to familiarise themselves with its future plans in order to adapt their technology, reporting and other processes accordingly.

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Q HOW IMPORTANT IS IT FOR FIRMS TO BE AWARE OF EXPORT ISSUES WHEN MOVING SENSITIVE INFORMATION OR GOODS TO FOREIGN PARTNERS OR THIRD PARTIES?

NZIMANDE: This is very important. In South Africa, dealings in personal information are now subject to the Protection of Personal Information Act, 4 of 2013, which came into effect on 11 April 2014. The Act regulates, among other things, the flow of personal information across our borders. The sender of personal information has to comply with section 72 of the Act which sets out the applicable conditions for transfer of personal information outside South Africa. A company that is moving sensitive goods from South Africa to another country should comply with applicable South African and the importing country legislation. Agricultural goods are a typical example where national, provincial and local government legislation and regulations would apply within South Africa. In addition, any person wishing to export agricultural products from South Africa may only do so with a veterinary certificate which may only be issued if the exporter proves that it meets the requirements of the importing country.

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Q HAVE YOU SEEN AN INCREASE DISPUTES ARISING FROM TRADE AND CUSTOMS ACTIVITIES? ARE THERE ANY COMMON ISSUES THAT SEEM TO SURFACE FREQUENTLY?

NZIMANDE: South African GDP growth was slow in the first quarter of this year and negative in the second quarter. Local producers have therefore been under pressure not only from low domestic demand but also competition from dumped or subsidised imports. They have sought protection in the form of increased import duties and other trade measures. On the other hand, exporters who see South Africa as an important market have strongly opposed applications for tariff increases, in some cases taking matters on judicial review. Anecdotally, applications for increases in import tariffs seem to be higher.

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“Regulatory authorities such as the Council for the Non-Proliferation of Weapons of Mass Destruction have been active of late enforcing the law.”

Q HOW IMPORTANT IS IT FOR COMPANIES TO CARRY OUT INTERNAL COMPLIANCE CHECKS AND CONDUCT REGULAR REVIEWS OF THEIR TRADE AND CUSTOMS PRACTICES?

NZIMANDE: Internal compliance checks are critical as they enable companies to proactively manage the risk of non-compliance. Regulatory authorities such as the Council for the Non-Proliferation of Weapons of Mass Destruction have been active of late enforcing the law. Penalties for non-compliance are significant, and include fines, imprisonment or both.



Meluleki Nzimande

Partner
Webber Wentzel
+27 11 530 5847
meluleki.nzimande@webberwentzel.com

Meluleki Nzimande is a partner in the corporate business unit at Webber Wentzel. His areas of practice are international trade and general commercial law. He sits on the Webber Wentzel Executive Committee for the Corporate Business Unit. Mr Nzimande is a member of the British Institute of International and Comparative Law and sits on the Schneider Education and Development Trust. He is a member of the Johannesburg branch of the National Democratic Lawyers Association. Mr Nzimande obtained his Bachelor of Science in Chemistry & Microbiology and Bachelor of Laws degrees from the University of the Witwatersrand.



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