ACTUALITÉS

2 DROIT ÉCONOMIQUE INTERNATIONAL
TRADE LAW

THE WORLD WIDE DEVELOPMENTS OF INTERNATIONAL CUSTOMS LAW

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INTRODUCTION

As Customs laws are a part of the national tax — as well of the national trade — and economic — laws international Customs law is a part of the international economic law. That seems self evident insofar as Customs rules and tariffs are deliberately designed to regulate the traffic of merchandise across the border as this is the case now in industrialised countries, whose budgets are fueled mainly by other revenues but Customs duties. But also in countries, often in the developing world, where Customs duties are the main source for the national budget, the economic impact of rules, procedures and tariffs, administered by Customs, has to be taken into account. Since trade after the Second world ar War has brought all countries in the world closer together the international approach to all aspects of trade has become more and more intensive and can not be neglected by any partner in trade. This is well-known, as far as the activities of the General Agreement on Tariffs and Trade (GATT) are concerned, because of its foundation in the late 40's many restraints in the content of trade rules have been abolished.

The Customs Co-operation Council, which is the worldwide organization of Customs administrations and which has — as of now — 102 Members, which apply the trade rules, is however less known. The CCC has also achieved a large event of harmonization and simplification of these rules worldwide,

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which has facilitated enormously the handling of cargo and passengers, who cross borders.

A. CREATION AND FORM OF INTERNATIONAL CUSTOMS LAW

It is difficult already to define national Customs law [1]. It is even more difficult to find a definition for international Customs law. When States began to collect Customs duties — for financial or economic reasons — bilateral, regional or worldwide co-operation to do so was unknown. Every State considered national Customs rules as a purely national matter. Only the development and growing importance of the exchange of goods made it obvious that some common denominator had to be created. Therefore the first developments of international Customs law began in the area of facilitation these exchanges [2]. Today there is possibly no other areas at an international level where there is found so much overlapping between national and international law as in Customs matters.

International Customs law is a part of public international law because it does not deal with matters of relations between private citizens, but rather is applicable in the relations between two supreme powers (be it a State, a Territory, a Customs or Economic Union or a monarchy, a dukedom, etc.) or between such a supreme power and a private person (natural) person or legal entity), the letter referred to as international administrative Customs law.

I. GENERAL SOURCES OF INTERNATIONAL CUSTOMS LAW

Sources of International law are

— particular norms of the general international law,

— rules recognized as such by all civilised nations around the globe (customary law) and

— contractual law.

1. General international Customs law

No peremptory norms of general international Customs law (ius cogens) exist. A peremptory norm of general international law, a norm accepted and recognized by the international community of States as a whole or a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

2. International customary Customs law

It is also very interesting to note that there does not seem to exist an international Customs law based upon worldwide conviction or customary law neither for the public international Customs law nor for the international administrative Customs law. As far as the public international Customs law is concerned, at least it does not exist anymore. As far as public law is concerned it is to be taken into consideration that States have been left always with considerable freedom on how to tax importation. The experiences during the times preceding the Second World War led many lawyers to the conviction that this latitude does not exist anymore. One author [3] says that these changes, which are closely associated with the evolution of the United Nations have emerged out of the borderland between customary law and treaty law. The three examples he gives have however been in the meantime regulated by multinational treaty law, so that there is in my view no more room for customary law, namely :

— States are now no more free to inflict injury by such means as boycotts and economic sanctions because of the GATT Rules. If a country is not a Member of GATT like some State regulated economies, no complaints of valuations are yet raised, and if with no avail ;

— The demand of preferential standards by developing countries is now granted in many systems by many countries and

— The treaty interpretation, which was a great area for many centuries, is now considered to be accurately stated in the provisions of the Vienna Convention on the Law of Treaties. The relevant principles are contained in Article 31 and 32. The most important is that in Article 31 (1) by which a Treaty is to be interpreted "in good face in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose". Supplementary means of interpretation are stated in Article 32, according to which recourse may be had to supplementary means, including the preparatory work and the circumstances of the Treaty's conclusions. These are only invoked in order to confirm the result of using Article 31, or to fill the gap when that provision leaves the meaning ambigous or obscure or leads to a manifestly absurd or unreasonable result.

As far as the relations between the State and private sector are concerned, no international administrative customary Customs law exists [4]. This appears strange because certainly the activity of collecting contributions when merchandise or persons cross a frontier, is one of the oldest ways of financing public funds. In the Bible, the profession of doing what the Customs do is considered to be the second oldest one in the world. It is also strange taking into consideration the fact that the circumstances leading to the perception of such a contribution are very simple, merely the passage of an existing and often marked or even guarded line.

The rules governing it were very simple most of the

time, even though the delay caused was often considerable. Not much has changed in some parts of the world to date, so it is hard to believe that there was no customary law created.

This is also the case in spite of the fact that in many if not most countries, Customs is one of the oldest parts of the machinery of Government, a history which can be traced back over more than 3000 years. Over the centuries, Customs activities have penetrated the life of the community in many ways. But what was missing was the common conviction of all that the rules governing this work were part of everyday life and were generally accepted [5] as with other rules which had become customary law. One cannot say that these rules are recognized as such.

And that has not changed till today. Ask yourself and ask your friends about the necessity of Customs activities. They are neither well-known nor well accepted. This was regarded as the normal attitude for centuries. Modern Customs tried to make their tasks understood as a task undertaken for the common benefit. Economists began to understand this, so the partners in the economy began to co-operate with Customs for their own benefits.

The general public might begin to develop a positive attitude toward Customs when confronted with the drug problem and when they realize that almost everywhere drugs cross frontiers prior to their arrival in the country of consumption. A world-wide Conference in Vienna has just dealt with this subject and it was even presided over by one of the world's Prime-Ministers.

In the past that did not exist. That might explain why there is no conviction generally perceived to have an international administrative customary Customs law.

There is one good example where in the past one could have spoken of such a customary international Customs law which has now disappeared because of the subsidiary nature of customary law : in a certain measure the privileges of duty and Customs free importations by diplomats were considered a customary international law binding countries. Since they have been now codified by the Vienna Convention on diplomatic relations of 18 April 1961 they are a part of the international contractual law to which the customary law is only subsidiary [6].

So it was and still is necessary at the national level worldwide to have specific rules or laws, statutes or regulations issued by an authority to perceive duties. This is as a consequence of relevance at the international level. It is therefore not necessary to go into detail here how an international Customs law based upon the common conviction of and experienced daily by civilised people may be defined : a customary international Administrative or public Customs law does not exist [7].

3. International contractual law

International Customs law is contractual law and there are mainly three origins :

a) Bilateral agreements, which can exist in many forms ;

b) Regional agreements ; and

c) Multinational worldwide agreements or treaties, which are also often called Conventions.

a) *Bilateral agreements*

Bilateral agreements between governments are very frequently the source of international treaty law in the Customs field, particularly between countries with a common border but not only in such cases.

Most frequently these agreements have as a goal the speedier clearance of goods and passengers and a more intensive co-operation between the Customs administrations of the Contracting Parties. The ideal case is when Customs officers of two bordering States are so located that one building is erected, containing the two Customs officers but the actual borderline divides the two officers from each other. To achieve the goal that cares and trucks have only to stop once on one or the other side of the border an arrangement has to be reached that official functions can be performed by the officials of the one State in the other State. That is even more so necessary if the one building is erected on the territory of one State only where also the formalities of the neighbouring State can be fulfilled. To achieve this a zone has to be described in detail, where the officers of the neighbouring State can act in official function, particularly if smuggling is detected or a wrongdoer to be arrested.

Another content of such an agreement between two States is for example the possibility of controls in a running train which crosses the borders without stopping at the border and in which the Customs controls of both Sates are executed. Also in such agreements questions of sovereignty have to be dealt with.

Many bilateral agreements are concluded, which are the basis to give information to the other State.

b) *Regional agreements*

International public Customs law on the regional level has been created by the decision of the central commission for navigation on the Rhine, created in 1889.

If several countries create on the regional level a third legal entity and transfer certain powers to this legal entity, including for instance the legislation of Customs law, this in my view does not create international Customs law since the main goal is a transfer of certain parts of sovereignty which normally goes far beyond a specific task of enabling this entity to create Customs legislation. The main act there is the creation of the third

entity of international law. Even though this new entity might create Customs laws, directly applicable in the territory of all its Members this is not international but a special supra-national law. (Which will not be dealt with here in detail) [8].

The Court of Justice of the EEC defined community law as a new legal order in international law which is independent of the law of the Member states 8A) and beyond the classic framework of international public law 8B).

c) *Multinational worldwide agreements or treaties*

Multilateral contractual international Customs law consists of treaties and agreements, sometimes also called Conventions, with a multitude of Contracting Parties. It is common conviction that the international treaties, Conventions or agreements are of great importance and constitute the most eminent sources for national Customs law. Contracts are compromises. As in private business this is also the case when international Customs law is prepared in an international organization. This accounts often for the lack of precision and the not so far reaching scope of simplification and harmonization. International organizations who have created international Customs law also do not have the power to make countries Contracting parties to such Conventions and — when they have acceded — to apply them according to their spirit.

In some areas however like nomenclature, documentation, electronic data interchange, enforcement — the development of facts (faster trade and modern means of communications) will force countries to accept more concrete agreements on the international level, which will have to be applied.

Recommendations and Resolutions, adopted by international organizations and then formally accepted by its Members or non-Members constitute normally no source of international law.

As far as Resolutions are concerned an exception might be the OECD. The Council of Ministers of OECD countries whose Resolutions are according to Article 5 (a) of the OECD Convention of 1960 obligatory for its Members has for instance in its Resolution of 20 July 1965 [9] issued rules concerning facilities (no or reduced import duties) for goods carried by tourists, for advertising material and for leased cars. These Resolutions are directly applicable in its Member countries but very seldom used.

Some Recommendations could be called "soft laws" because they influence in a large measure national rules and practices.

The procedures to issue these national instruments are similar to those used for the preparation of international Conventions, Agreements and Treaties. They are directed to their Members and carry different names (Recommendations, Resolutions, Conclusions, etc.).

Not only the names of these instruments vary from organization to organization but also the juridical quality, namely if they are somewhat binding or have only a moral value. Sometimes it is difficult and often without a practical result, how the quality of such an instrument is defined, since the enforcement of any such act in international law is not very much developed, if it exists at all compared with national law.

As far as Customs matters are concerned the instrument of a lower than legal quality is called a Recommendation and based upon Article III of the Convention establishing the Customs Co-operation Council, Brussels 1950, which deals with Recommendations without defining this term in detail. It is mainly used in questions of Customs technique and in the area of enforcement, which means the control and fight against smuggling.

The text of the Recommendation is prepared by the technical Committees like a Convention. It carries the motives in its considerations and has a decisive part in its "Recommends —" Section. The Recommendation is directly towards the Member States of the organization, to Economic and Customs Unions, to territories, which can become separate Members, and in the recent past also to non-Members. After the decision by the legislative body, the Customs Co-operation Council itself, the Recommendation is published and the addresses are requested to accept the Recommendation. The Recommendation can be accepted as a whole or with qualifications.

The scope of the Recommendation depends on the concept of what constitutes a Recommendation and, consequently, on the definition of the term. However, there is no definition of the Recommendation in any Council text. According to the Convention establishing the Customs Co-operation Council, Article III, paragraphs (d) and (e), the Council is required :

"— to make recommendations to ensure the uniform interpretation and application of the Conventions concluded as a result of its work... ;

— to make recommendations, in a conciliatory capacity, for the settlement of disputes concerning the interpretation or application of the Conventions...".

These are the only two passages in the Convention in which the term occurs, and they simply indicate the objective of Council Recommendations, without defining the term itself.

In practice, the Council's Recommendations have not been drawn up to ensure the uniform interpretation and application of Conventions, since many of them predate the relevant Conventions, but rather to achieve another of the Council's objectives (Article III (b) of the Council Convention, namely "to examine the technical aspects... of Customs systems with a view to proposing to its Members practical means of attaining the highest possible degree of harmony and uniformity". In fact this is the concept

which figures in the Customs Techniques Compendium [10] where it is stated, under "General", that "Ever since the Customs Co-operation Council was set up, Recommendations have been regarded as providing one of the best practical ways of securing the highest possible degree of harmony and uniformity in Customs systems".

The CCC has adopted recommendations for Customs technique [11], in Nomenclature and in Customs Valuation, which are however not so important in the two latter areas.

For the purposes of framing a tentative definition of the Recommendation, the concept of the "Recommended Practice" must be taken into consideration. As most of the Council Recommendations predate the Kyoto Convention, a parallel can be drawn with the concept of the Recommended Practice as applied in Annex 9 to the Convention on International Civil Aviation (ICAO), which concerns facilitation and whose structure, comprising Standards and Recommended Practices, served as the model for Kyoto Convention. The Recommended Practice is defined as "Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve..." the achievement of certain objectives.

Unlike the Recommended Practice, which is part of a large whole, the Recommendation is an international instrument in its own right. Unfortunately, the Vienna Convention of the Law of Treaties contains no general definition of the term. However the view most widely accepted, in particular within the United Nations, is that a Recommendation is an instrument which an international body directs at one or more recipients outside it, containing an invitation to adopt, or refrain from a given policy or practice.

It seems to be accepted that even though the Vienna Convention on the Law of Treaties of 1969 cannot be applied to the Recommendation directly it could serve as a book of reference for the general principles governing international relations. It does not have to carry the same legal quality as a Treaty or a Convention.

A Recommendation is, in the first place a decision of an international organization. This links up with the internationally accepted difference made between Treaties and decisions of international organizations. It is the free choice of a State to bind itself in respect of a Recommendation by acceptance thereof, or not to do so. If it chooses to accept the Recommendation, this is a unilateral commitment, whereas becoming Party to a Treaty is based entirely on the principle of reciprocity ("do ut des"). Therefore States and Customs or Economic Unions can accept Recommendations with whatever conditions of application they deem necessary provided these conditions are not contrary to the object or the purpose of the Recommendation.

The country accepts an obligation toward the organization. It is very doubtful if it also accepts such an obligation toward other countries who have accepted the same recommendation.

It has been discussed at length within the CCC whether such an obligation is also legally binding and what that means. Countries differ widely in their views on the binding effect and the scope of Recommendations issued by these organizations.

Probably it cannot be defined as customary law since it misses the long established acceptance.

Therefore no definition on the international level exists yet as said above. The discussion within the CCC has also not revealed an urgent need to define a precise legal framework for Recommendations since — except inconveniences resulting from the inexact wording of a Recommendation — no major difficulties have arisen from the application of these Recommendations and since in this event it would be necessary to envisage amending the Convention establishing the CCC and nobody would like to do this within an organization of now more than 100 Members.

4. Reservations

Some international Conventions and Treaties permit reservations to be made either in a declaration at the time of signing or acceding to the Convention or anytime thereafter. For instance Article 5 of the international Convention on the simplification and harmonization of Customs procedures (Kyoto, 1973) provides for such a possibility as far as the Annexes (and now the body of the Convention) is concerned. In the declaration the Standards and Recommended Practices in respect of which reservations are entered and the differences between the provisions of its national legislation and those of the Standards or Recommended Practices concerned have to be stated. Another example is article 3 of the Customs Convention concerning facilities for the importation of goods for display, or use at exhibitions, fairs, meetings or similar events [12], where a reservation can be entered in cases when owing to the nature of the import duties involved or for all such duties a country may be unable to waive import duties in respect of goods given free of charge to visitors to such fairs. These reservations have as a consequence that the other Contracting Parties are not bound in relation to this Contracting Party to waive import duties (in the last example) or to apply certain facilitation measures (in the first example).

In other cases such reservations are deliberately not permitted (see for instance Article 18 of the international Convention on mutual administrative assistance for the prevention, investigation and repression of Customs offences, Nairobi 1977, the Nairobi Convention [13], where however efforts are now being undertaken to include a rule which allows reservations. This is because a Convention without reservation very often has difficulties in attracting Contracting Parties).

If nothing is said in a Convention itself it should be possible however, according to my view, that a country could enter a reservation with the consensus of all other Contracting Parties. That is a change from the old Treaty or the rejection of the old Convention and the offer to consider a new one. Such an offer can be presumed to be accepted even implicitly if nothing is said in the Convention and no Contracting Party protests if a reservation is entered. That is the practice for instance for the Recommendations of the Customs Co-operation Council where there is no formal wording which allows the entering of reservations, but reservations have always been entered without the resistance of countries which have already accepted the Recommendation.

If however the entering of reservations is explicitly excluded such an agreement to disobey such a rule could not be implicitly concluded but would need the formal agreement of all Contracting Parties.

II. CREATORS OF INTERNATIONAL MULTILATERAL CONTRACTUAL LAW

Since the Second World War the result of the work of international organizations has had a tremendous influence on the national Customs laws of individual countries. As mentioned above the General Agreement on Tariffs and Trade (GATT) and the Customs Co-operation Council (CCC) are — as already the names of these organizations indicate — the most important in the sector, but not the only international organizations relevant there. The following international organizations can be considered as the major creators of international contractual Customs law :

1. GATT

After the Second World War the United Nations Economic and social Council has held an international Conference on trade and employment matters where it was intended to draft an Agreement on an international trade organization. After preparatory meetings in London, in Geneva, in Havana (Cuba) a Charter for such an organization was adopted. Since by 1950 it became clear that the United States would not become a part of that Havana Charter in parallel tariff negotiations some 23 participating countries signed a provisional Treaty which formed the GATT.

The principal obligations of this Treaty are :

a) the granting of most favourite nations treatment ;

b) to observe the maximum level of tariffs in its schedule of a concession ;

c) to limit or to abstain from the use of non tariff measures and

d) to make use of special procedures for solving disputes.

In seven rounds of negotiations GATT had a severe and most important impact on trade regulations. It intends now also as a result of the last rounds, the Uruguay Round, to deal with the trade aspect of for instance services and piracy (violation of copyright and trademark laws and its consequences on legitimate trade). The main goals are to be achieved by entering into reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade and the elimination of discriminating treatment in international commerce.

2. CCC [14]

The origin of the Customs Co-operation Council dates back to the late 1940's. In a joint declaration made in Paris on 12 September 1947 thirteen governments represented in the Committee for European Economic Co-operation agreed to give consideration to the possibility of establishing one or more inter-European Customs Unions based on the principles of the Geneva General Agreement on Tariffs and Trade (GATT). With that in view, they decided to accept the hospitality which had been offered by the Benelux countries for the setting up in Brussels of a Study Group to prepare the way for this project. The Study Group devoted particular attention to the establishment of a common tariff nomenclature and the adoption of a common definition of value for Customs purposes. It also studied other aspects of Customs procedures : the structure of tariffs ; provisions relating to the determination of weights ; questions affecting Customs administrations ; the origin of goods ; the level of duties ; regulations providing for the duty-free admission of goods ; and provisions for the regulations of Customs disputes.

In 1949, the Study Group decided that, irrespective of the progress which might be made with the Customs Union Project, the achievements already attained in the fields of nomenclature and valuation should be turned to advantage and that similar endeavours should be made in other fields of Customs technique.

This decision was the origin of the three Conventions signed in Brussels on 15 December 1950 ; the Convention on Nomenclature for the Classification of Goods in Customs Tariffs (entered into force on 11 September 1959) ; the Convention on the Valuation of Goods for Customs Purposes (entered into force on 28 July 1953) ; and the Convention establishing a Customs Co-operation Council (entered into force on 4 November 1952). The Customs Co-operation Council was born.

The purpose of the participating countries in setting up the Customs Co-operation Council was not only to assemble the executive machinery required for the interpretation and application of the two

specialized Conventions in a single international organization but also to entrust that organization with more general responsibility : "to secure the highest degree of harmony and uniformity in Customs systems, especially to study the problems inherent in the development and improvement of Customs technique and Customs legislations in connection therewith" and to create appropriate legal instruments for that purpose.

From its limited European origins the CCC has developed into an international organization or world-wide scope and influence. Its membership has grown from 17 in 1953 to 102 in 1988, a truly remarkable increase. Today, those 102 Members are jointly responsible for the management of 15 international Conventions and some 50 Recommendations dealing with important Customs questions for the facilitation of international trade.

The Delegates to the Council are representatives of the Contracting Paries to the Council Convention and those representatives are usually the Heads of national Customs administrations.

The official languages of the Council are English and French and all documents and publications are issued in these two languages.

The Council works mainly through its Technical Committees. There are six such Committees : Permanent Technical Committee, Enforcement Committee, Valuation Committee, Technical Committee on Customs Valuation, Nomenclature Committee and Harmonized System Committee. In their work the Committees may be assisted by the presessional or other more permanent Working Parties, Sub-Committees or Expert Groups.

As mentioned previously, the Council's functions include not only ensuring the uniform interpretation and application of the Conventions on Nomenclature and Valuation but also the study of all aspects of Customs technique in order to find practical means of attaining the highest possible degree of harmony and uniformity in Customs systems.

One of the Council's primary objectives is to achieve increased co-operation and mutual assistance for the prevention, investigation and repression of Customs offences.

For the purpose of implementing a Customs Co-operation Programme the Council decided to establish a special fund and approved a Customs Co-operation Programme which included several important projects such as :

— CCC Management Fellowship courses ;

— Training courses on Customs Valuation, Nomenclature and Enforcement ;

— Assistance given at Council Headquarters to Customs officials from developing countries to implement the CCC Conventions ;

— Technical Attachés received in the Secretariat bringing much valuable expertise to the areas of training, enforcement and Customs legislation ;

— Detachment of a number of Customs experts from the CCC Secretariat and Member administrations for short-term missions in Member countries ;

— Several seminars in various regions of the world, in collaboration with Member countries and regional organizations. The subjects include the GATT Valuation Agreement, the Harmonized System, the Kyoto Convention, Container control and Customs enforcement.

A seminar on Customs training is held annually. These seminars give Members an opportunity to discuss and compare various approaches to the training of Customs officials. Teaching philosophy and methods are examined as well as the structure and content of training programmes.

3. United Nations Economic Commission for Europe (ECE)

The ECE was established by a Resolution of the Economic and Social Council of the United Nations in 1947 with the goal of creating measures for facilitating concerted action for re-construction of Europe, for raising the level of european activities and for maintaining and strengthening the economic relations of european countries both among themselves and with other countries of the world. ECE was the spare heading agency for economic co-operation between countries not only within Europe but worldwide. Even though non european countries have formally only the status of observers they participate actively so that the work result is of worldwide importance.

Standardization was the first (by creating the UN-layout key for documents) and is even now probably the most important work aspect, the development of a worldwide, in all parts of commerce, transport and trade usable means of communication for computers its youngest child : EDIFACT, the language (messages and standards) with which computers can directly talk to each other. ECE has established many Committees in the transport field to overcome obstacles. It works, as far as Customs matters are concerned,

— via the Inland Transport Committee, which has Working Parties and a Group of Experts on Customs questions affecting transport, and

— via the Committee on the development of trade, which has a Working Party on facilitation of international trade procedures (which has established many task forces on specific subjects and with the participation of business and commerce).

Similar tasks are undertaken by the other regional commissions of the UN (for instance, Economic and Social Commission for Asia and the Pacific — ESCAP ; Economic Commission for Africa — ECA). None of these other economic commissions have established themself as a source of international law. Therefore the other regional commissions have de-

pended on the work of ECE and have now also begun to promote the work products in their own regions.

4. UN Conference on Trade and Development (UNCTAD)

It can not be considered directly as a source of international Customs law because it does not have the legal power to issue rules applicable by its Members. UNCTAD however is very active particularly via its FALPRO branch to promote trade facilitation in developing countries.

5. Organization for Economic Co-operation and Development (OECD)

OECD was founded as the successor of the OEEC (which was particularly european) and has now Member countries of Western and Southern Europe as well as the United States, Canada, Australia, New Zealand and Japan. It has the legal power to issue binding international agreements which it is however very reluctant to do. Therefore it has issued mainly " understandings ", " Gentlemen's Agreements " and pledges rather than formal legal instruments.

6. International Civil Aviation Organization (ICAO)

ICAO is a worldwide governmental organ to regulate air travel. It has issued rules and regulations which have now been accepted by almost all countries in the world, where there is an airport.

7. International Bureau for the publication of Customs tariffs

This is not a source of international law. It is one of the oldest international organization however, founded in 1980. It publishes the national Customs tariffs and its frequent changes (however of no great practical use for the trade since this is done with considerable delays). Without success it has been tried recently to merge it with the CCC ; this was however not sucessful since the CCC provides the structure of the nomenclature, as far as the Bureau deals with the national Customs rates.

8. UN Commission on Narcotic Drugs (UNCND)

This Commission was founded with the view to deal with the abolition of production of narcotic drugs, the prevention of the abuse and to combine efforts against the illicit traffic of drugs and psychotropic substances.

From earliest times, there has existed an interest in classifying goods. Usually this interest arose from a desire on the part of the authorities to impose taxes or tolls on goods being moved within their territories or across their territorial boundaries. Later, with the development of industrialized societies, it became important to know the level of such trade, aven where the imposition of taxes or tolls did not arise.

The first "goods classification systems" were, of course, very simple in nature, consisting, as they did in most cases, of nothing more than an alphabetical list of goods to which a particular tax or toll (rate of duty) applied or which were exempted from such levies. However, as the number of differential duty rates or exemptions and separate alphabetical lists increased, it was realized that a goods classification system based on criteria other than the same tax treatment (duty rate or exemption) would be advantageous. Customs tariffs based on criteria such as the nature of the goods rather than their duty status were thus developed, particular products being identified for differential tax or other treatment within these classification systems.

At the same time, as the level and importance of international trade increased, everyone concerned became aware of the difficulties caused by differences in national Customs tariffs. These differences involved, for example, the order and internal arrangement of the items or headings, the names and definitions of the products, or even the fundamental classification principles on which the tariffs were based. Some national tariffs were drawn up empirically ; others, although originally based on a methodical but currently outdated plan, were subsequently amended and altered to give effect to subsequent national protective measures, international commercial arrangements or multilateral tariff agreements. It became apparent, therefore, that a perssing need existed for a standard Customs nomenclature to ensure :

a) The systematic classification of all goods found in international trade.

b) Internationally uniform classification of all goods on a sound basis in the tariffs of all countries adopting this Nomenclature.

c) The adoption of a common internationally accepted Customs "language" so that Customs terminology should be readily understood by experts and the public alike, thus simplifying the task of importers, exporters, producers, carriers and Customs administrations.

d) Simplicity and certainty of meaning in the negotiation, application and correct interpretation of bilateral or multilateral Customs agreements.

e) An internationally uniform colllation of data to facilitate analysis and comparison of world trade statistics.

The efforts to produce a common world nomenclature designed to facilitate trade span more than a century.

As a first significant step in 1937 after 10 years of study a systematic nomenclature, the Geneva or the League of Nations nomenclature, was drafted and accepted, but never really applied worldwide.

The drive for economic reconstruction and the desire for greater freedom of trade which characterized the post-war period created favourable conditions for the standardization of Customs tariffs, and the need for an internationally recognized common nomenclature became once again apparent.

The CCC Nomenclature Convention made special provision for the administration of the new instrument (the Nomenclature Committee), and laid down a procedure for its periodic updating. There is no doubt that these measures were instrumental in the success of the new Convention.

Fifty-two countries were Contracting Parties to the Nomenclature Convention and therefore required, under the terms of that Convention, to frame their Customs tariffs in accordance with the CCC Nomenclature. In actual fact over 150 countries and territories, together accounting for 70 % of international trade, used the CCC Nomenclature as a basis for their Customs tariffs.

This Nomenclature is now replaced by a Harmonized and Commodity Description and Coding System (the Harmonized System) which has as it's most important feature that unlike conventional international Customs tariff nomenclatures it is intended to identify goods at all the different stages of international trade from producer to final buyer. It is a multi-purpose nomenclature to be used not only by Customs people but also by statisticians, shipping companies, airline traders, etc. [15].

With the Harmonized System everyone concerned in international trade will be able to use a common language and common code numbers or categories of goods existing in international trade.

The Harmonized System Convention comprises 20 Articles and the Annex, the latter being the Harmonized System proper.

Article 3 of the Convention requires the Contracting Parties to respect the structure lavout and coding system of the nomenclature but authorizes them to make such further subdivisions as may be necessary beyond the six-digit level. All parties will have to use the same breakdowns, descriptions and codes.

Articles 4 and 5 provide for partial application of the system by developing countries and for technical assistance to be furnished to such countries.

Article 6 establishes a Harmonized System Committee, composed of representatives from each of the Contracting Parties, to manage the system. The article also provides for the participation of representatives of intergovernmental and international organizations as observers, thereby continuing the multidisciplinary approach adopted from the outset of the work on the Harmonized System.

The Convention has entered into force on 1 January 1988 and as far as membership is concerned it covers already the largest part of world trade.

It is infortunate that two Conventions on Nomenclature exist beside each other — but hopefully only for some time and identical insofar as the four digit system is concerned.

There exists also the Standard International Trade Classification (SITC) which in its different versions cannot be considered as an international Customs law in my view. Efforts are underway to guarantee that the SITC as far as possible is identical with the Harmonized System and in time can also be merged.

1. Limits

Is there a limit for the fixation of a duty ? As far as the Nomenclature determines under which heading a merchandise falls, the rate of duty can be fixed by national legislation — with two exceptions

a) within the most favoured nations rule and by

b) obeying GATT concessions.

a) The most favoured nations rule is the tool by which all export countries are given the same chance of importation as far as the rate of Customs duty is concerned. The most favoured nations principles says that a tariff rate reduced in a trade agreement with one country or multilaterally granted to one country is available to all other trading partners in GATT. Article I of GATT provides this for by far the largest part of world trade. Normally the most favoured nations rule provides for the lowest rates of Customs duty for importation of all goods from a country to whom this preference is granted without the necessity that the other country offers the same or similar advantages.

The most favoured nations rule is not only applied to Customs duties itself, as far as they concern commercial shipments, but also to Customs procedures.

b) In the past countries have only in bilateral treaties agreed with each other to lower Customs rates. Nowadays such lowering of Customs duties has been the result of many GATT rounds : for instance Kennedy Round, Tokyo Round. Often such reductions on the multilateral level only concern a certain quantity. For the introduction of the new Harmonized System classification system many tariff-duties who were bound under GATT using the old CCCN system had to be renegotiated.

2. Valuation

Calculation of duties : Together with the CCC itself a Convention on the Valuation of Goods for Customs purposes (the Brussels Definition of Vaiue, BDV) was created in 1953. It was therefore decided in favour of a system which, by using the value of a merchandise was closer to economic reality than a specific system involving the use of the weight, quantity or other measurements as the basis for calculating the Customs duty [16].

This decision was reaffirmed when within discussion of the GATT a new valuation System was developped in the Agreement on implementation of Article VII of the GATT (the GATT Code) which also uses the value as a basis for the calculation of the Customs duty.

The BDV was designed to :

a) provide for the establishment of Customs values by reference to a formula to be uniformly applied to all classes of importations, thus ensuring equitable treatment as between all imported goods ;

b) conform as closely as possible to commercial practice in open market conditions ;

c) ensure that administrations are safeguarded against evasion ;

d) ensure that honest traders are protected against unfair competition and arbitrary administration ; and

e) meet the needs for commercial simplicity and administrative convenience.

These requirements were met by :

a) selecting the standard of the price made under a contract of sale concluded :

(i) in respect of the imported goods, and

(ii) in the open market between a buyer and a seller independent of each other ;

b) giving precision to this standard by specifying the contracts of sale to be a contract concluded at a price :

(i) appropriate to the time when the duty becomes payable, and

(ii) giving delivery to the buyer at the port.

c) setting up this standard in the Definition as a national concept expressed in terms of the price which the goods "would fetch" on a sale.

Whereas this system was based upon a "normal price" between independent parties the new GATT Valuation Code was prepared with the aim, that to the greatest extent possible the value should be based on the price actually paid or payable for the goods [17].

The new Agreement on Customs Valuations was one the Codes resulting from the Tokyo Round of multilateral trade negotiations which were concluded in Geneva in 1979, under the auspices of GATT. These negotiations were intended to "achieve the expansion ans ever-greater liberalization of world trade, inter alia, through the progressive dismantling of obstaces to trade". One means of furthering these aims was to adopt an international system of Customs valuation that would be more widely accepted than the systems applied at the time.

The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade seeks to define a fair, uniform and neutral for the valuation of goods for Customs purpose that is consistent with commercial practices and precludes the use of arbitrary of fictitious Customs values.

The Agreement lays down a set of valuation rules which develop and elaborate upon the relevant provisions of the GATT by introducing a methodological approach to Customs valuation, providing for six different methods of determining Customs value to be applied in a prescribed sequence.

The Agreement notes that Customs value should, to the greatest extent possible, be based on the price actually paid or payable for the goods being valued ; this price, subject to certain adjustments, is called the "transaction value". The latter should be the Customs value in the great majority of importations and constitutes the primary basis for valuation under the Agreement. Where there is no transaction value or where the transaction value cannot be accepted because the price has been influenced by distortions resulting from certain conditions or restrictions, the Agreement provides for five other methods of determining Customs value, to be applied in a prescribed order, namely :

— the transaction value of goods identical to the goods being valued ;

— the transaction value of goods similar to the goods being valued ;

— the deductive method ;

— the computed value method ;

— the "fall-back" method.

The Agreement also contains certain other provisions concerning, for example, currency conversion, the right of appeal to a judicial authority, the publication of laws and regulations concerning Customs valuation, and the prompt clearance of goods.

A Protocol, deemed to be an integral part of the Agreement, deals with the particular problems and special needs of the developing countries with regard to trade, and in addition to providing for technical assistance to these countries, allows them a certain flexibility in applying some of the technical provisions of the Agreement.