

# TradeWatch

## EY Global Trade

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Building a better  
working world

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# How companies should think about their supply chains and geographical risks: implications for the trade function

Companies are dealing with an unprecedented supply chain environment. It is characterized by firm-level challenges, including labor constraints, uncertain demands and a public health crisis. Externally, closed or overrun ports and ongoing trade wars are just some of the business challenges confronting firms. On top of that, governments are actively looking to alter their role in the economy and are seeking to bring supply chains home in strategic sectors. All these lead to production uncertainty and unpredictable demand – and the mismatch between supply and demand compounds supply challenges.

The key question is: will the confluence of these challenges lead to incremental changes or will it require a fundamental shift from the lean, globalized supply chains, which have defined production for the past 20 years?

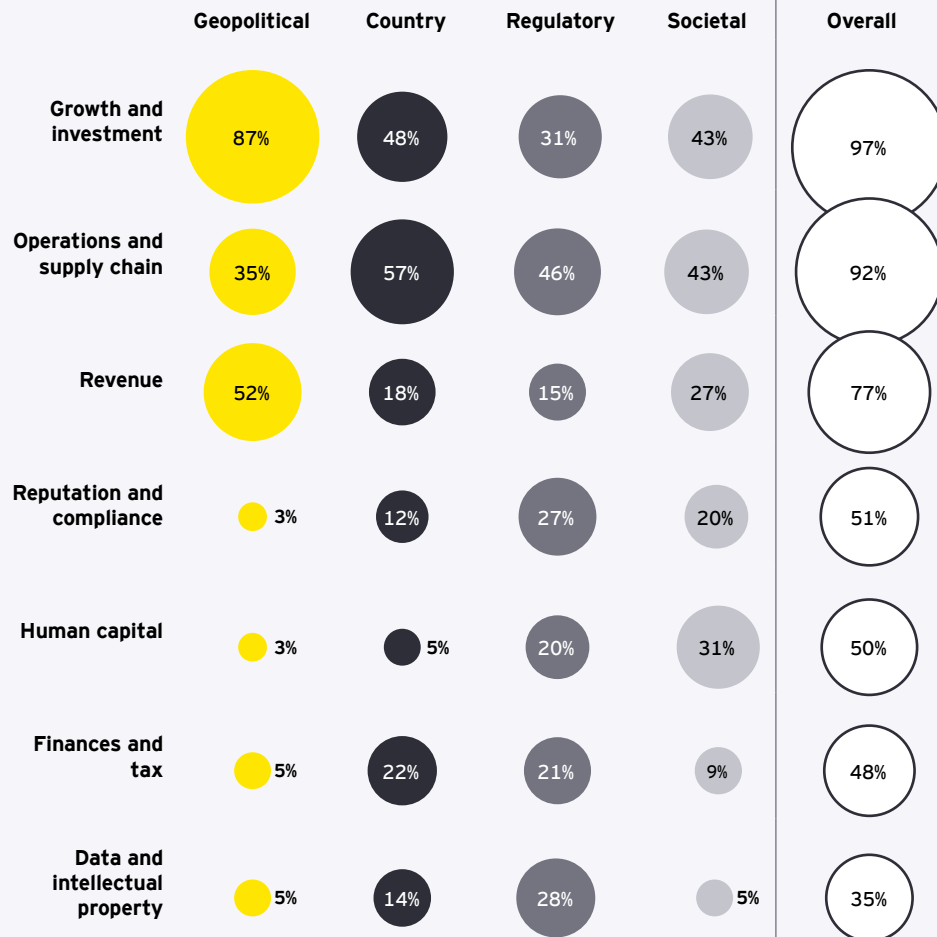
## **C-suite executives see significant political risk impacts on supply chains ...**

The EY Geopolitical Business Group conducted a [survey](#) of over 1,000 C-suite executives and explored this question, and it's clear that respondents are keenly aware of the complexity of their economic and political environment. Thirty-five percent identified geopolitical issues as impacting their operations, and an aggregate of 92% see supply chain impacts when country, regulatory and societal risks are added in (see graphic below). These concerns span all geographies and are particularly pronounced for small- and medium-sized firms.



**Political risks will continue to have impact across the enterprise**

For the top political risks in each risk type, in what area(s) of your business would they have the greatest impact if they occurred?



Note: Data presented are a summary of individual risk impacts with each risk type. "Overall" data represent the total share of companies that would be impacted in each area across any risk type.

Source: Geostrategy in Practice 2021

Digging deeper, executives identify the shifting role of major powers in the international system and the conflict between those major powers as the most significant geopolitical risks. And when assessing country risk, 49% highlighted the risk from industrial policies and protectionism<sup>1</sup> as major concerns. Within regulatory risks, data localization along with changing environmental and climate regulations, with their cross-border implications for companies' ability to trade and invest, were identified as significant concerns.

**... and are shifting strategies accordingly**

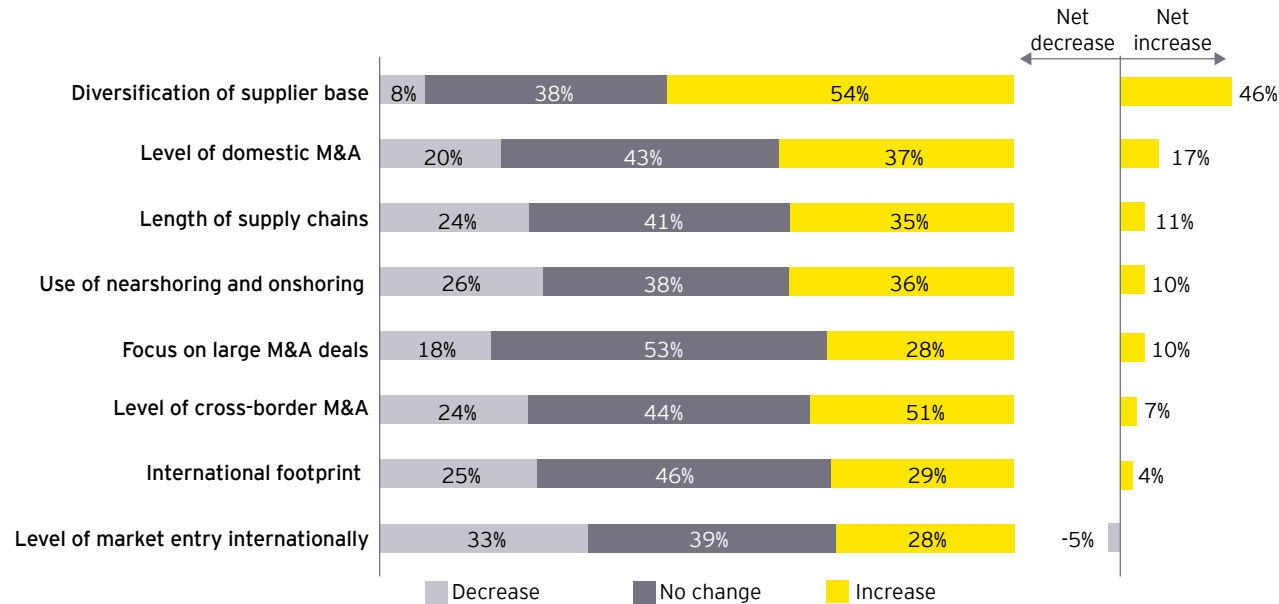
Against this backdrop of international developments and market access concerns, executives were asked how they anticipated trade protectionism and industrial policies, in response to COVID-19, would affect their company's supply chain. The survey results are compelling and show a clear hierarchy of expected outcomes, starting with more than 50% noting the need to diversify their supplier base. Many executives also expect to take measures to restructure their supply chain, whether through engaging in M&A activity, adjusting length of supply chain or onshoring (see below graphic). These findings were particularly pronounced in the Americas, with a greater percentage of executives expecting to take concrete measures to alter their supply chains. Those strategic actions were marginally lower in Europe and are less likely to be pursued in Asia.



<sup>1</sup> "Global Dynamics," *Global Trade Alert website*, accessed 2 November 2021. [Find it here](#)

**Government policies in response to COVID-19 are driving companies to seek supply chain resiliency**

How do you anticipate trade protectionism and industrial policies in response to COVID-19 will affect your company's supply chain, M&A and market entry strategy in the next 12 months?



**Note: Figures may not add up to 100 due to rounding.**

Source: Geostrategy in Practice 2021

Asia-based companies are more likely to plan to increase their international market entry and expand their international footprint. This strategy may be the most prudent given the increased geopolitical and trade risk with the US and China markets, as well as the protectionist shift that has taken place in US trade policy over the last four-plus years, which has been challenging for European and Asian firms.

Not surprisingly, sectors such as transportation and technology expressed the greatest uptick in the quest for supply chain resiliency. These sectors have a much greater exposure to geopolitical supply chain risks given their existing highly globalized structures and the greater emphasis by governments on developing their own domestic-based presence in these sectors.

**Reinforcements may be needed to tackle these political and trade risks**

Supply chain challenges clearly have the attention of the C-suite with the expectation that supply chains will have to evolve to address increasing geopolitical, country, regulatory and societal risks – and companies are looking at a range of supply chain and trade strategies to address their concerns. Recently, we surveyed trade professionals from 400 international firms on their capabilities to deal with political risks, and it's clear that many firms are struggling to take a strategic approach when confronted with external challenges.

Seventy-five percent of respondents felt their trade teams were well equipped to manage traditional responsibilities such as import/export licensing. That response rate dropped to 44% when participants were asked about emerging risks such as government subsidies and procurement practices and was 41% with regard to investment screening measures. C-suite executives need to be proactive in working with their trade teams – including ramped-up trade mitigation measures – to proactively manage these geopolitical challenges. Trade teams also should be part of supply chain transformation efforts. In responding to these challenges, firms have the opportunity to differentiate themselves with the development of a proper trade function integrated into their cross-functional teams, combined with initiatives to develop more transparent, resilient and sustainable supply chains. ■

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# WCO: Major changes to the Harmonized System for 1 January 2022



The Harmonized System (HS) is a multipurpose hierarchical nomenclature developed by the World Customs Organization (WCO) that serves as the basis for customs duties, tariffs, admissibility and cross-border activities, and the compilation of international trade statistics in 211 countries. As of 1 January 2022, the seventh edition of the HS nomenclature will replace the 2017 edition worldwide for the uniform classification of goods. The amended nomenclature, HS 2022, will be the seventh iteration of the HS since the International Convention on the Harmonized Commodity Description and Coding System entered into force in 1988.<sup>1</sup> HS 2022 introduces significant changes with a total of 351 sets of amendments covering a wide range of goods such as agricultural, food and tobacco; chemicals; textiles; base metals; and electrical and electronic goods.<sup>2</sup>

The HS nomenclature is arranged in a structure that is currently divided into 21 sections, where each product is identified by a six-digit code referred to as the subheading. Every five years, the WCO publishes a revision to the HS to reflect emerging developments in technology and changing trade patterns, as well as to settle classification questions and disputes.

Key amendments in the HS 2022 include:

- ▶ Smartphones will gain their own subheading and chapter note that aims to clarify and confirm the current heading classification of these multifunctional devices. A new product category for multipurpose intermediate assemblies, such as those found in flat panel display modules, will also be added.
- ▶ Electrical and electronic waste, commonly referred to as e-waste, will gain its own specific provisions for classification to address environmental concerns and assist countries in their work under the Basel Convention.<sup>3</sup>

<sup>1</sup> "HS Convention," WCO website, accessed 4 November 2021. [Find it here.](#)

<sup>2</sup> "WCO has published accepted amendments to HS 2022," WCO website, accessed 4 November 2021. [Find it here.](#)

<sup>3</sup> "Text of the Convention," Secretariat of the Basel Convention website, accessed 4 November 2021. [Find it here.](#)

- ▶ A new heading, “Machines for additive manufacturing,” has been created to account for 3D printers, with specific subheadings to distinguish the machines based on the type of deposit.
- ▶ Novel tobacco and nicotine-based products, including vaping devices, e-cigarettes and nicotine products not containing tobacco, have been added due to the difficulties in the classification of these products, the lack of visibility in trade statistics and the increasing monetary value of this trade.
- ▶ Unmanned aerial vehicles (UAVs), commonly referred to as drones, gain their own specific provisions to simplify the classifications of this aircraft.
- ▶ Amendments are also made to the Chapter Notes, which further explain and clarify the provisions to promote uniform application of the nomenclature across different countries. Additionally, revised Explanatory Notes describing the new classifications have been issued. While not binding, the Explanatory Notes are instructive and often cited by customs administrations and courts around the world.

Health and safety also are emphasized with these changes:

- ▶ To fight against terrorism, new subheadings were added for “dual-use” goods, which, in addition to normal commercial uses, may also be subject to unauthorized use, including radioactive materials, biological safety cabinets, items related to improvised explosive devices, certain types of lab equipment, toxins and organic pollutants that could be used in chemical warfare.
- ▶ Provisions for diagnostic kits, placebos, clinical trial kits and other items were added to assist with medical research and the rapid diagnosis of infectious diseases during outbreaks.
- ▶ More specific provisions for cell cultures and cell therapy were added.
- ▶ New subheadings were added for certain chemicals controlled under the Chemical Weapons Conventions, hazardous chemicals controlled under the Rotterdam Convention,<sup>4</sup> and persistent organic pollutants controlled under the Stockholm Convention.<sup>5</sup>

4 “Overview,” Secretariat of the Rotterdam Convention website, accessed 4 November 2021. [Find it here.](#)

5 “Text of the Convention,” Secretariat of the Stockholm Convention website, accessed 4 November 2021. [Find it here.](#)

- ▶ The Food and Agriculture Organization of the United Nations also worked with the WCO to add subheadings and notes for items such as edible and non-edible insects; eight new genera of edible mushrooms; and flours, meals and pellets made of fish products that are for human consumption.
- ▶ New subheadings were added to assist with the monitoring and control of fentanyls and their derivatives as well as two fentanyl precursors. Major changes, including new heading Note 4 to Section VI and new heading 38.27, have been introduced for gases controlled under the Kigali Amendment of the Montreal Protocol, which seeks to reduce production and consumption of hydrofluorocarbons worldwide.<sup>6</sup>

### Implementation

Customs administrations and regional economic communities are required by the HS Convention to implement HS 2022 in a timely manner by amending their national customs tariffs and statistical nomenclatures to enter into force on 1 January 2022. The WCO has increased its capacity-building efforts to assist members with this implementation.

For the US, in May 2021, the US International Trade Commission (USITC) recommended that the president make certain modifications to the Harmonized Tariff Schedule of the United States (HTSUS) to conform with WCO amendments to the global HS.<sup>7</sup> If the president determines that the recommended modifications conform with United States’ obligations, then the president, through the United States Trade Representative, will submit the USITC report to congressional committees. Following expiration of a 60-day layover period that begins with submittal before the Congress, the president is authorized to declare that the modifications to the HTSUS have officially taken effect.<sup>8</sup> Without any disruptions in these procedural formalities, the amendments will be updated accordingly on 1 January 2022.

6 “The Montreal Protocol on Substances that Deplete the Ozone Layer,” *UN Environment Programme website*, accessed 4 November 2021. [Find it here.](#)

7 “Recommended Modifications to the Harmonized Tariff Schedule, 2021” *USITC website*, accessed 4 November 2021. [Find it here.](#)

8 19 USC § 3006(b); See “USITC Recommends That the President Make Certain Modifications to the U.S. Harmonized Tariff Schedule Nomenclature,” *USITC website*, accessed 4 November 2021. [Find it here.](#)





### Steps to take now

The HS 2022 revision is one of the largest HS expansions to date. Given the broad and evolutionary scope of the changes, companies spanning multiple industries may be impacted and should proactively assess HS classification revisions.

To avoid disruptions to their supply chains, importers should map existing codes to the HS 2022 updates by identifying and verifying products that are affected by HS 2022 changes and begin updating their import profiles to avoid corrections and penalties. As a first step, importers can review the WCO Correlating Table 1<sup>9</sup> as well as USITC Recommended Modifications of the HTSUS<sup>10</sup> to verify the correct 10-digit HTSUS for their products. Importers also should read all Section Notes, Chapter Notes and Explanatory Notes related to classifications of HS 2022 to thoroughly understand these changes and subsequent impacts to products.

From an operations perspective, importers should consider reviewing their trade management software, master data and the like to confirm these systems are equipped to identify changes to the tariff, including making entries under new subheadings and removing old subheadings. Companies should remember to notify their entry writers, suppliers, customers, and service providers and inform them of these changes, which may involve internal trainings and preparations.

<sup>9</sup> "Table I – Correlating the 2022 Version to the 2017 Version of the Harmonized System," *WCO website*, accessed 4 November 2021. The correlation tables bridge the headings and subheadings from the current HS 2017 to HS 2022 and contain a column for remarks in the margins to help readers understand the change. [Find it here.](#)

<sup>10</sup> "Recommended Modifications to the Harmonized Tariff Schedule, 2021" *USITC website*, accessed 4 November 2021. [Find it here.](#)

Finally, companies should consider the impact these changes will have on obligations pertaining to other areas of trade compliance, such as antidumping duties, utilization of free trade agreements and other government agency requirements, as these programs may be linked to a product and its corresponding HS code. US imports of products impacted by HS 2022 will need to consider the impact on punitive duties levied on specific products of Chinese origin under Section 301 of the Trade Agreement Act of 1974 as well as potential corresponding exclusions, as these are closely tied to classification. Lastly, if an importer relies on an opinion or ruling issued by a customs authority on a specific classification and that classification is changing, an importer may consider seeking a modification. ■

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# Technical Committee on Customs Valuation approves new advisory opinion on a combined royalty

The Technical Committee on Customs Valuation (TCCV) is a committee of customs authorities created by the World Trade Organization Valuation Agreement. The committee is tasked with providing interpretation and guidance on the Valuation Agreement and is administered by the World Customs Organization (WCO). While its guidance is not binding on any jurisdiction, its pronouncements are regularly cited by customs authorities worldwide.

At its October 2021 meeting, the TCCV approved a new advisory opinion regarding a single royalty for both use of a patented product and license of a trademark. The TCCV concludes that the royalty should be added to the dutiable value of the imported goods. After approval by the WCO Council, it is expected to be released as Advisory Opinion 4.19.

## Advisory Opinion 4.19

Advisory Opinion 4.19 involves an importer that imports a soft drink concentrate. After importation, the importer dilutes the concentrate and packages the soft drink for resale to consumers. In this scenario, the importer pays a per-liter charge for the concentrate – 30 currency units per 0.10 liter of concentrate – and then also pays a royalty to the seller for the use of the patented concentrate and use of a trademark that the importer will place on the packaging of the soft drink. The royalty is 15% of the importer's sales of the packaged soft drinks.

Article 8.1(c) of the Valuation Agreement provides that royalties paid by the importer of a product must be added to the price paid for the product to determine transaction value when the royalty satisfies both of the following:

1. Is related to the imported product
2. Must be paid as a condition of the sale to the importer

The facts establish that the importer is required to pay the royalty as part of its agreement to purchase the concentrate, so that the royalty is a condition of sale of the concentrate to the importer. Thus, the issue is whether the royalty is related to the imported goods and, if so, what amount of royalty payment is to be added to the price actually paid or payable for the imported.

Advisory Opinion 4.19 builds on Advisory Opinions 4.4 and 4.6, which address royalties paid for the right to use a patented concentrate and for the right to use a trademark, respectively, and concludes



that each right to use (i.e., the patent and the trademark) is individually a dutiable addition to value. The TCCV concludes in this advisory opinion that the single royalty for both the patent and the trademark must also be added to the value of the imported concentrate. Thus, the dutiable value for the concentrate is the per-liter charge, plus the 15% royalty. To illustrate the value, the advisory opinion specifies that 0.10 liter of concentrate is needed to make 1 liter of soft drink, and the importer sells the 1-liter soft drink for 100 currency units. The dutiable value of 0.10 liter of imported concentrate is 45 currency units (i.e., 30 currency units paid for 0.10 liter, plus 15 currency units, 15% of the sales price of 1 liter of soft drink) as an addition to value under Article 8.1(c).

### Implications

The facts in Advisory Opinion 4.19 are straightforward, and the conclusion is clear from the facts. In addition, a careful look at the facts illustrates two important concepts. First, while ‘assists’ that are additions to value under Article 8.1(b) are to be “apportioned as appropriate,” there is no apportionment specified for royalties that are added to value under Article 8.1(c). In this case, the facts were carefully crafted so that the process was conducted in the county of importation limited to dilution, an activity that would not require the patent to perform. Consequently, the patent was solely related to the imported goods, and the entire royalty is included in the customs value.

If, instead, the activity in the country of importation had required use of the patented process, then at least some of the royalty would not be related to the imported goods but instead would be related to a process that occurs after importation. With no specific reference to allocation in Article 8.1(c), it would not appear appropriate to have any addition to value for the royalty. In fact, the Interpretive Note to Article 8, paragraph 3 suggests that in a situation such as this, transaction value cannot be used, as it is not possible to determine the addition to value with objective and quantifiable data. This illustrates the importance of contractual language that specifies exactly what the royalty is for, and sometimes what it is not for, whenever a patent is intended to be used in the country of importation.

Second, the fact pattern involves a single royalty for a license of two types of intellectual property – a patent and a trademark royalty. The facts establish that both were paid as a condition of sale of the imported concentrate. Citing Advisory Opinion 4.6, the TCCV concludes that trademark royalty is related to the imported concentrate, diluted and sold in packaging using the trademark.

There are many instances, however, in which multiple types of intellectual property are licensed in a single license agreement with a single royalty payment. If reviewed individually, some of the licensed intellectual property would be a dutiable addition to value, and some would not. When the license is for a bundle of intellectual property and has a single

royalty, it is quite likely that a customs administration will conclude that the royalty is an addition to value when some of the licensed intellectual property is for the imported goods and payment is a condition of the sale. Alternatively, if it is clear that only some of the royalty is related to the goods, similar to the situation above, a customs administration could conclude that transaction value is inapplicable as there is not objective and quantifiable evidence of the royalty to be added. Separating the royalty into components for different types of intellectual property, with specific royalty rates attributable to each (properly supported by transfer pricing if paid to a related party) can be very beneficial to avoid these situations and optimize the duty payable. Use of separate licensing agreements for different categories of intellectual property also can be helpful in illustrating the differentiation of dutiable and non-dutiable royalties to customs officials. ■

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# Trade as a lever for value creation

Global trade is undergoing a period of unprecedented change, which is providing new opportunities for businesses looking to create value while navigating volatile geopolitical environments as well as divergent regulatory and trading regimes. This article identifies a number of areas that could present challenges to businesses seeking value-creation opportunities in emerging markets and recommends three steps to manage them.

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## What is value creation?

Value creation refers to more than financial returns. It considers longer-term value for a wider pool of stakeholders, factoring in social and environmental impacts. For example, creating value in new markets could involve investing in new manufacturing capabilities, greening supply chains or adapting to emerging technologies.

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## Emerging economies

From the end of the Cold War until the turn of the 21st century, global trade was dominated by three players: the United States (US), Europe and Japan. Starting in 2006, the balance began to shift with the emergence of the BRICS countries (i.e., Brazil, Russia, India, China and, most recently, South Africa). Multinational businesses seeking to accrue

and grow value from these countries soon learned that existing business models and assumptions did not work as well in emerging markets. With the arrival of new players, the pieces of the global trade puzzle no longer fit together as seamlessly as they once did.

This lesson has become even clearer as nations continue to develop and grow. In addition to the BRICS countries, emerging markets such as Vietnam, Egypt, Indonesia, Kenya, Mexico, Nigeria and Turkey are shifting the world's center of gravity for economic and population growth. All of these countries are becoming increasingly important in the global trade landscape. This shift has profound implications for international trade and investment flows over the next two decades and beyond. It will add new layers of complexity that businesses must take into account when making long-term investment decisions.

**Through research and data analysis**, EY teams have identified several key areas that demand particular attention from businesses making long-term investment decisions: intellectual property (IP) and intangible assets; data privacy and commercial secrecy; and establishment and financing. Basing future plans on yesterday's truths is an outdated approach. Businesses need to recognize that the world's emerging economies operate differently.



### Intellectual property

While the international frameworks and treaties governing IP apply to all 193 members of the World Intellectual Property Organization, how different economies interpret and apply their legal and regulatory frameworks can differ greatly. As a result, businesses need to address variations in local ownership rules, challenges associated with protection and enforcement, and barriers to value-creation chains that have highly centralized IP.

The IP environment in many countries is evolving, often in positive ways. China, for example, is seeking to establish more comprehensive IP protection laws. The opening paragraph of the US-China trade agreement<sup>11</sup> signed in 2020 states: “China recognizes the importance of establishing and implementing a comprehensive legal system of intellectual property protection and enforcement as it transforms from a major intellectual property consumer to a major intellectual property producer.”

In contrast, a Brazilian court recently has created significant uncertainty for patent holders. In 2021, the country’s Supreme Court declared that an element of industrial property law that enabled patents to be enforceable for 10 years from the date they are granted was unconstitutional. This meant that patents are now limited to 20 years from the date of application, regardless of the date they were granted – and it is not uncommon

for the Brazilian patent office to take well over a decade to grant a patent. The ruling led to a reduced period of protection for approved patents, and in the case of pharmaceuticals, the ruling was applied retroactively, resulting in terms being shortened.

### Data privacy and commercial secrecy

There are also marked variations in data protection regulations between different territories. Even the developed world lacks a common standard, and there is a wide divergence between the US and European Union. Without a global consensus on how to protect data, mismatches between regulations at the domestic level likely will continue to create friction and risk around trade. Overseas retailers expanding into India, for example, have discovered that amendments to Indian e-commerce regulations as they relate to foreign-owned businesses have forced them to change their business models.

### Establishment and financing

When establishing a presence in a new market, businesses must consider a number of regulatory requirements. They may, for example, encounter restrictions linked to quotas, joint venture requirements, residency rules covering legal entities and management. Other restrictions might apply to nationality obligations as well as licensing or equity caps. Different sectors face higher barriers to establishment than others. Traditionally, the BRICS countries and other emerging economies have higher barriers than the US-Europe-Japan grouping, although new barriers and protectionism have been rising globally since the financial crisis of 2007 and 2008.

### Local market knowledge

Beyond complex and sometimes inconsistent trade regulations lie the more subjective cultural issues that come with creating value in a new territory. Before making long-term strategic investments in emerging economies, it is essential for inbound businesses to thoroughly analyze and build a detailed knowledge of their target customers’ values, tastes and aspirations. In addition to adapting business models to local norms, this involves tailoring products and services to attract local buyers. Businesses also should be mindful of the growing challenge to the historic status quo governing the world’s international trade and investment architecture.



<sup>11</sup> “Economic and Trade Agreement Between the Government of the United States of America and the Government of the People’s Republic of China,” *United States Trade Representative website*, accessed 8 November 2021. [Find it here](#).

### Practical steps for international businesses

Ultimately, creating value in any country demands deep market knowledge supported by informed analysis, attention to detail and an understanding of risk. The same rules apply in the world's emerging markets – but the risks are very different.

To reduce potential downsides and drive return on investment, businesses thinking about making long-term investments in emerging economies should follow three steps:

1. Determine what investments to make. Consider the interests of all stakeholders, not just financial stakeholders, when determining the

investments your business wishes to make. For example, the option with the lowest up-front cost may not be the most sustainable or have the greatest longevity.

2. Identify where to make investments. Evaluate new markets carefully, taking into account the full range of factors to identify the best opportunities. Factors might include population forecasts (both in absolute terms and with regard to the relative number of working-age or middle-class people), the possibility of obtaining grants and incentives, infrastructure, educational attainment, political and legal stability, cultural and religious factors, environmental considerations and more.
3. Understand how to structure investments. Increase long-term value by planning for a range of future scenarios through the development of a dynamic international trade strategy, identifying future value accrual for your business. Examples include the format of establishment, the availability of trade agreements, and the identification and then mitigation of prioritized market access barriers. ■



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# Understanding whether business can trade tomorrow on today's strategies: international trade capability and capacity in 2021



Trade, for a long time seen as a subject better suited to darkened rooms than press rooms, has changed. It is now a hot topic and a regular item in news reports.

This change began with the financial crisis of 2007 and 2008, which marked the end of 60 years of international consensus that reducing trade barriers is a laudable objective. Instead, protectionist measures started to creep in, and that trend has accelerated ever since. The COVID-19 pandemic hasn't helped. Add in sustainability, servicification, geopolitics and technological innovation, and it becomes clear that we live in an increasingly fragile and fragmented trade world.

We recently [surveyed](#) trade professionals from 400 international businesses to ask them about their trade strategies at this critical time. The vast majority of businesses (81%) recognize the disruption that rising protectionism brings and say that their trade strategies are more important than ever. This sentiment is broadly echoed by the C-suite: 67% of businesses say that their C-suite executives currently viewed their international trade strategy as a higher priority than ever.

So, the natural follow-up question we asked was whether businesses are confident that they are on top of their trade strategies. Some good news here, it seemed: an impressive 93% of businesses say they have an international trade strategy, and 88% say they have dedicated in-house capabilities in international trade.

However, when we dove deeper, the picture was less optimistic.

Simply having a trade strategy and some dedicated trade capabilities does not necessarily mean that these functions are operating effectively and being optimized across the business. In fact, EY research suggests that what businesses define as an international trade strategy is often relatively simplistic and does not take into account emerging strategic trade issues. Many seem to be referring to loose international sales plans or operational expertise, rather than the truly strategic thinking that their boards now demand.

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### What is trade strategy?

A trade strategy is a defined and flexible plan of action to achieve long-term trade goals (e.g., entering new markets), respond to disruption amid uncertainty and deliver long-term value. An international trade strategy supports a business plan that contemplates geopolitical tensions, new technologies, regulatory change, consumer behavior and changing supply chains, among other potential disruptions.

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Trade functions are typically good at operational trade matters – which generally means customs and regulatory compliance. Three quarters of businesses feel comfortable with their import/export licensing and other technical requirements (although it is worth noting that one in every four international businesses is not entirely comfortable with import/export formalities). Around two-thirds of respondents were similarly confident about their ability to handle border checks. However, they are not at ease with more strategic trade matters: only half of the businesses surveyed feel that they have a good grasp of critical areas such as digital regulation, intellectual property management, price controls or trade remedies – and significantly fewer than half feel equipped to manage government engagement or investment restrictions.

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### What does the typical international trade function look like?

The average number of staff involved in trade strategies is 20, with 45% of survey respondents saying that fewer than 10 staff are involved. Other than management, these staff members primarily sit in tax, finance and legal. This suggests the more operational elements of international trade are the focus for most organizations, as opposed to strategic areas such as government or public affairs.

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Why might that be? There appear to be several root causes:

- ▶ First, the pace of change in trade is unprecedented in recent times, and is accelerating, as evidenced by the work done by Global Trade Alert in its Global Dynamics report, or the Organisation for Economic Co-operation and Development's Services Trade Restrictiveness Index. Businesses have not had time to catch up with accelerating change, and the global recession triggered by the financial crisis of 2007 and 2008 has often resulted in a lack of funding for (what was previously seen as) nonessential spending to build trade capabilities.
- ▶ Second, trade capability within businesses is usually dispersed throughout the whole business. Our survey found that trade professionals report up through many different business lines – including management, tax, finance, legal, logistics, customs, operations, government affairs and procurement. In other words, most businesses have skills across their organization that could feed into a trade strategy, but they are highly fragmented, with many underutilized or unknown by key decision-makers.



- ▶ Third, trade skills are in short supply globally. A key factor in failure by businesses to build out trade expertise – particularly at a more senior level – is the difficulty of sourcing talent with the right experience. Over half of businesses surveyed (59%) thought it would be difficult to find individuals with relevant trade strategy experience, whereas slightly fewer than one in ten (9%) suggested it might be easy (and none thought it would be very easy).

So, what can businesses do to improve conditions? There are several simple and quick wins that they should consider:

- ▶ Defragmenting trade capabilities is the first step. Recent guidance emphasizes this, saying that businesses should assign board-level responsibility for the development of a comprehensive trade strategy.
- ▶ Appointing a trade policy officer – and possibly going even further by creating clear reporting lines for all trade professionals in their organization. That will give the organization a holistic overview of trade issues, which is currently lacking. Building these strong networks across the business is vital, and yet of all the priorities driving trade strategy, facilitating more collaboration among staff with trade responsibilities across the organization was the least commonly cited – with only 29% of businesses mentioning it.

- ▶ Next, think about how trade people are appraised and evaluated. We have identified nine key performance indicators (KPIs) for trade capability – but the average business was measuring fewer than half. This is why it's essential to have the right trade KPIs in place.
- ▶ Finally, businesses should build in-house skills. This includes being willing to invest in sending operational trade professionals – particularly more senior trade professionals – to training programs. There are many high-quality training programs available, and the relatively modest expense goes a long way toward creating new capabilities within the organization.

Today's businesses must focus on building strategic trade capabilities. As 80% of businesses surveyed believe that those without an international trade strategy in place will be at a competitive disadvantage, this approach is integral to the successful performance of the entire organization. ■



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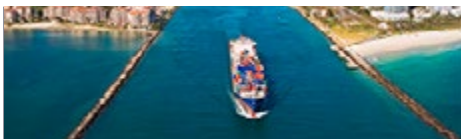
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## Colombia: Origin audits carried out by the customs administration

Colombia has a network of free trade agreements (FTAs) with countries around the world. FTAs allow access to tariff benefits for imports from those countries. To access these benefits, importers need valid certificates of origin, and the level of scrutiny by the customs administration related to proofs of origin has greatly increased in the last three years.

Supplier due diligence is key to creating and maintaining good commercial relationships between importers and exporters, as it gives companies the peace of mind that their imported goods meet the origin criteria defined in each FTA.

In this article we look at the importance of origin and examine the increase in origin audits by the Colombian tax authority.

### **Why the origin of the goods was not proven**

Being able to prove the origin of goods is essential. Otherwise, imports that fail to meet the necessary origin requirements may be subject to an audit by the Colombian customs administration. Customs taxes (duty and VAT), penalties and late interest may be due for imported good that enter Colombia with an incorrect certificate of origin”

Often, the resulting payments are large sums of money, which can hurt the cash flow and profitability of companies in unexpected ways. In addition, Colombia is experiencing a devaluation of the Colombian peso against the United States dollar, so late payments may end up being even more costly.

However, some importers may blindly trust their foreign suppliers – even without knowing them completely – when reviewing the origin requirements, and they may forget to carry out due diligence processes to confirm that the goods that are used in the manufacture of finished products comply with the origin criteria defined in the relevant FTA.

### **How the investigations regarding certification of origin are being carried out by the Colombian customs administration**

Importers should be aware that the customs administration in Colombia has changed the way that it carries out audits. Under the current process, the request for information is not sent to the importer of the merchandise into Colombia but rather goes to the exporter of the goods, in the country of origin. For example, if the Colombian importer buys goods from a company in Mexico, the administration will send its queries to the supplier in Mexico. If that foreign supplier does not respond, the Colombian customs administration may obtain the required information through the relevant customs entity in that country (by invoking mutual cooperation agreements concluded between customs authorities).

**Textiles and clothing**

One sector that is being impacted by the origin audit process is the textiles and clothing sector. Examples of issues that the administration is finding in this sector include:

- ▶ Several threads or yarns used in the manufacture of clothing were not produced directly in the country of origin but were imported by the manufacturers.
- ▶ Non-originating threads and yarns may represent a small percentage of the weight of the manufactured clothing, but once they are declared as an imported component, the final composition of the garment changes and prevents full compliance with the criteria, even if they are *de minimis*.
- ▶ The origin of the threads or yarns is not always verified by the producer.
- ▶ The producer certifies origin based on the purchases made without carrying out the corresponding verifications with the suppliers of its raw materials.
- ▶ The producers are not acting in bad faith; they are simply not performing the corresponding due diligence on their suppliers of raw materials.
- ▶ The rule of origin states that the goods used for the manufacture of a product classified under the given subheading should have an originating component, but the goods do not, in fact, meet the requirements.

**Example of audit information: Trade Agreement: G2 (Colombia-Mexico)**

**Composition of garments certified by the exporter with a certificate of origin:**

| <i>List of yarns and fabrics used in the production of shirts exported to Colombia</i> |        |       |           |         |         |        |         |       |
|--|--------|-------|-----------|---------|---------|--------|---------|-------|
| Item   | Fabric | Color | Provider  | Type    | Code    | Origin | Product | Share |
| Men's sports shirt   | F1     | White | Company X | Knitted | 5402.33 | Mexico | 6105.20 | 38%   |
|  | F2     | White | Company Z | Knitted | 5402.33 | Mexico |         | 38%   |
|  | F3     | White | Company X | Knitted | 5402.33 | USA    |         | 7%    |
|  | F4     | Red   | Company X | Knitted | 5402.33 | Mexico |         | 7%    |
|  | F5     | Blue  | Company X | Knitted | 5402.33 | Mexico |         | 9%    |
|  | F6     | Blue  | Company X | Knitted | 5402.33 | Mexico |         | 1%    |

**Real composition of the garments found by the customs administration after questionnaires were issued:**

| <i>List of yarns and fabrics used in the production of shirts exported to Colombia</i> |        |       |           |         |         |        |         |       |
|--|--------|-------|-----------|---------|---------|--------|---------|-------|
| Item   | Fabric | Color | Provider  | Type    | Code    | Origin | Product | Share |
| Men's sports shirt   | F1     | White | Company X | Knitted | 5402.33 | China  | 6105.20 | 38%   |
|  | F2     | White | Company Z | Knitted | 5402.33 | Mexico |         | 38%   |
|  | F3     | White | Company X | Knitted | 5402.33 | USA    |         | 7%    |
|  | F4     | Red   | Company X | Knitted | 5402.33 | China  |         | 7%    |
|  | F5     | Blue  | Company X | Knitted | 5402.33 | China  |         | 9%    |
|  | F6     | Blue  | Company X | Knitted | 5402.33 | China  |         | 1%    |

Under the *de minimis* criteria, the goods can have Mexican origin if the non-originating yarns used (that do not result in a change in the tariff classification) do not exceed 7% of the total weight of the goods. However, after carrying out an audit, the customs administration concluded that the weight of yarns from the United States (US) and China exceeded that 7% threshold, and therefore the goods did not qualify.

**The impact on the importer**

To verify the origin, the Colombian customs administration sends a questionnaire to the producer of the textiles or clothing, asking it to specify the origin of each of the raw materials used in manufacturing these items, supported by invoices and sworn certifications from each supplier, which can often reveal a lack of due diligence in establishing the true origin of the materials.

These due diligence challenges are largely due to the fact that administration inquiries request documentation directly from the exporters. In many cases, by the time the importer of goods into Colombia learns that the origin of materials wasn't properly vetted, it is too late to act, since the investigation has already advanced far enough to indicate the origin criteria have not been met and the certificate used in the import to claim FTA tariff benefits was not acceptable. Subsequently, the customs administration in Colombia will ask the importer to pay the customs duties that should have been paid from the outset, as well as late payment interest and corresponding penalties. Therefore,

while the proof must be provided by the exporter in the FTA partner country, the importer in Colombia is held responsible if the certificates are incorrect.

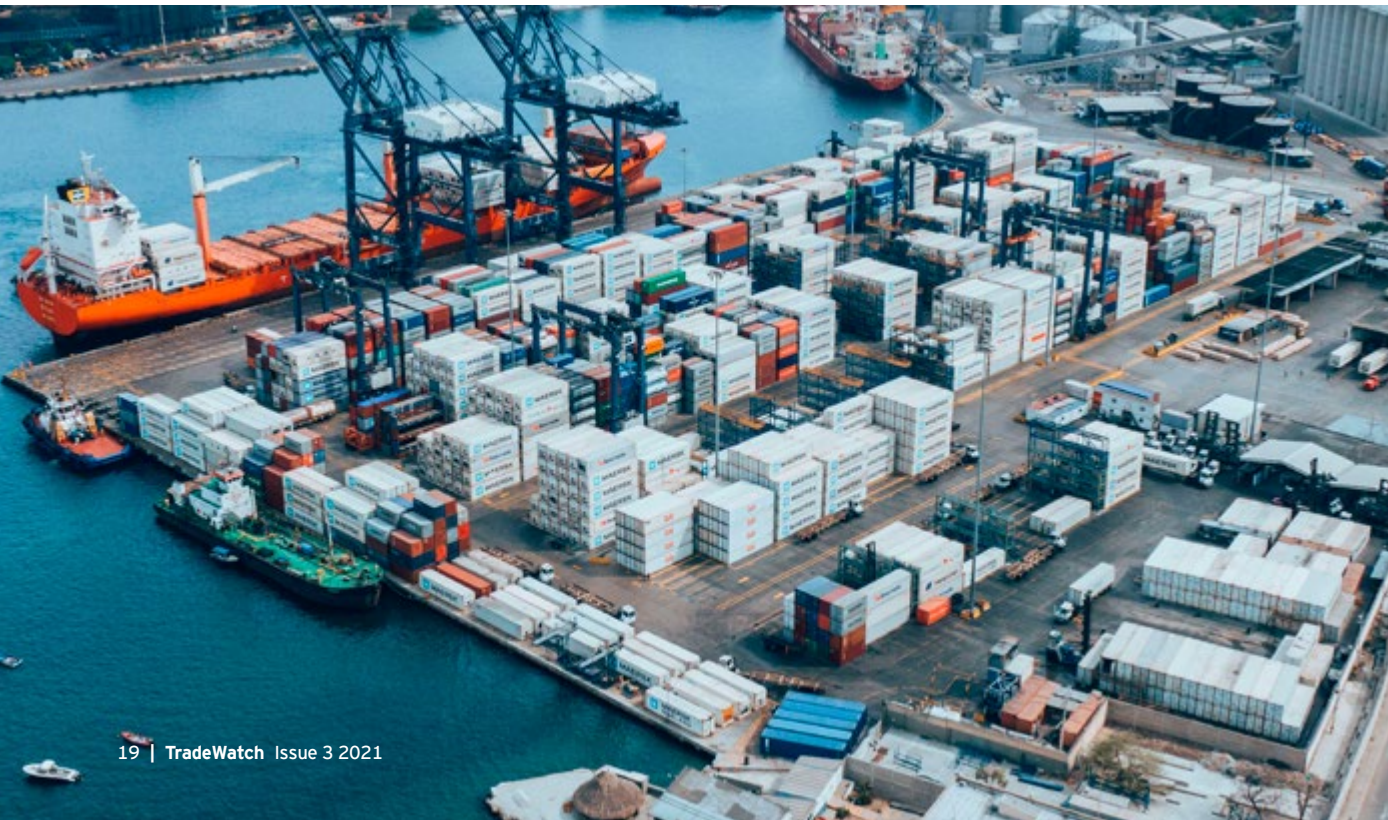
### **Trend in FTAs that are being audited**

As more FTAs are being signed and companies embrace them to benefit from low tariffs, the customs administration has focused its attention on three FTAs – G2 (Colombia-Mexico), United States – Colombia Trade Promotion Agreement and the Andean Community FTA (Peru, Ecuador and Colombia). However, this does not mean that other agreements are not subject to audits.

### **The need for due diligence is greater than ever**

In recent years, the Colombian customs administration has significantly changed how it scrutinizes importers and exporters – including during the COVID-19 pandemic. Therefore, importers must verify not only their suppliers' capabilities and background, but also the suppliers' products, raw materials, production processes and so on. Visiting premises, filling out verification questionnaires and requesting signed statements or sworn certifications on the purchase of raw materials are some of the steps that are necessary to validate that the information the supplier provided in the certificate of origin is accurate.

These actions do not remove the burden of proof from the exporter, who is ultimately responsible for providing truthful and reliable information in the certificate of origin. Rather, this approach helps the importer corroborate the information given. Because the importer in the destination country bears responsibility for the related fees and penalties, effective due diligence is an essential part of starting and maintaining lasting business relationships across borders. ■



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# US: Court of Appeals invalidates Customs regulation restricting excise tax drawback

On 23 August 2021, the US Court of Appeals for the Federal Circuit affirmed the 2020 decision of the Court of International Trade, finding that US Customs and Border Protection (CBP) and US Department of the Treasury (collectively, the Agencies) regulations, which restricted excise tax recovery through substitution drawback, were contrary to the statutory language adopted by the US Congress and thus invalid. This decision should finally end the latest chapter in the ongoing saga of the Agencies' attempt to limit the ability of businesses to recover excise taxes paid on an import when a like-kind product is exported.

## Background

Drawback is the ability to obtain a refund of customs duties, fees and taxes paid with respect to the importation of articles into the US when those articles, or like-kind articles, are exported or destroyed.<sup>1</sup> The export of a like-kind article is referred to as substitution drawback because the export of the like-kind article allows the refund of duties, fees and taxes paid on the imported article.

The rules on like-kind articles were changed in 2016 to allow an export with the same eight-digit Harmonized Tariff System (HTS) classification to be substituted for an import.<sup>2</sup> The previous standard, with two limited exceptions, was based on commercial interchangeability, which meant that a branded product import required the export of the same brand and stock keeping unit (i.e., SKU or identified product number). With the change in substitution standard, drawback opportunities were significantly expanded. For example, cars are classified based on engine size, so a six-cylinder import of one brand and model can now be matched with a six-cylinder export of a different brand and model. Consumer items subject to excise tax also benefit; any import of beer can be matched with an export of beer, and any import of gin can be matched with an export of gin.

The two limited exceptions to the previous like-kind rule applied to two categories of products subject to excise taxes, petroleum and wine. Petroleum product drawback using eight-digit HTS substitution has been in place for many years, and exports of petroleum products have routinely allowed for the recovery of oil spill excise tax paid on imports. Wine substitution has been allowed if the color of the wine is the same

<sup>1</sup> The Customs drawback rules are codified at 19 USC § 1313.

<sup>2</sup> Amendments were made by the Trade Facilitation and Trade Enforcement Act of 2015.

(red or white) and the value of the export is within 50% of the value of the import. Wine exporters also have been receiving drawback on excise taxes paid on imports.

While Congress specifically authorized recovery of excise taxes paid at import via substitution drawback in 2004, the Agencies have repeatedly objected to substitution drawback of excise taxes on policy grounds. Excise taxes are generally imposed both on imported products and on domestically made products that are consumed domestically. Excise taxes do not apply to exports. So, for example, red wine produced in the US can be exported without incurring excise tax. The exporter could use that exported wine as a substitute for imported wine and file a drawback claim for a refund of 99% of the excise taxes paid on the imported wine (along with the duties and fees paid).

In 2009, both Agencies proposed regulations to restrict the drawback of excise taxes.<sup>3</sup> Following a substantial number of comments opposing the proposed regulation, including 28 from members of Congress, the proposals were withdrawn in early 2010.<sup>4</sup> Excise tax drawback for petroleum and wine companies then continued without issue. With the relaxation of the like-kind standard enabling more substitution of alcohol and tobacco products subject to excise tax, the Agencies resurrected the failed 2009 proposal restricting excise tax recovery, this time as part of the CBP's comprehensive set of revised drawback regulations in 2018.

The revised drawback regulations were adopted in December 2018 as new Part 190 of Title 19 to the Code of Federal Regulations and included the

restriction on excise tax recovery.<sup>5</sup> In explaining its rationale for the excise tax restriction, CBP posited that the export of a product without payment of excise tax should be considered a drawback and that such an export cannot be used to recover excise taxes paid on an import because the statute allows a single export to be used in only one drawback claim. To bolster its argument that a tax-free export is a drawback, CBP also changed the long-standing regulatory definitions of "drawback" and "claim for drawback" to state that each term also includes any tax-free export.

Following adoption of the final regulation, the National Association of Manufacturers filed suit, challenging the regulations restricting excise tax recovery – and the expanded definitions to support the restriction – as violative of the governing statute. In 2020, the Court of International Trade, a federal district court with jurisdiction over customs matters, held that the regulation was invalid in that it was contrary to the express language of the statute. The Agencies appealed the decision to the US Court of Appeals for the Federal Circuit. Because the case involved the correct interpretation of the statute and regulations, the Court of Appeals reviewed the Court of International Trade decision *de novo*.

<sup>3</sup> Drawback of Internal Revenue Excise Tax, 74 Fed. Reg. 52928 (proposed 15 October, 2009), and Drawback of Internal Revenue Taxes, 74 Fed. Reg. 52937-01 (proposed 15 October 2009).

<sup>4</sup> Drawback of Internal Revenue Excise Taxes, 75 Fed. R. 9359-02 (withdrawn 2 March 2010).

<sup>5</sup> The final regulation specially excluded environmental excise taxes from scope, allowing petroleum companies to continue recovery of oil spill tax with substitution drawback.

### Standard of review

Courts review agencies' interpretations of statutes by applying the two-step framework established by the Supreme Court in *Chevron USA Inc., v. Nat'l Res Def Council, Inc.*, 467 US 837 (1984). The Court explained:

In applying *Chevron*, the Court first uses "traditional tools of statutory construction" to determine whether Congress has "directly spoken to the precise question at issue"; if so, "that is the end of the matter." [citation omitted]. If not, the Court asks whether the regulation reflects "a permissible construction."

In this case, the Court concluded that the statutory language is unambiguous. A tax-free export is not a drawback, so the Court's analysis concludes with *Chevron* step one: the regulation conflicts with the statute and is invalid, and that is "the end of the matter."

### Court's analysis

The Court first looked at the regulation's addition to the end of the long-standing definition of "drawback" and "claim for drawback," with one additional phrase: "More broadly, drawback also includes the refund or remission of other excise taxes pursuant to other provisions of law." The Agencies claimed that this amendment to the definition of "drawback" is merely a clarification of its commonly understood meaning. According to the Agencies, the term "should also be used to describe transactions in which excise-tax liability is extinguished under provisions where products are withdrawn for export without payment of tax."



The Court, however, rejected this interpretation. Pointing to the clear congressional use of the term “drawback” to describe the refund of taxes that have been paid or determined (accrued for payment by tax return), as opposed to situations where products upon which tax has not been paid or determined may be exported free of tax, the Court states that the Agencies’ position “defies logic,” adding:

*A tax that has never been paid or determined cannot be said to have been “drawn back,” and goods that have been exported without payment of tax cannot give rise to a “claim” for drawback, because there would be no refund to be paid out or cancellation of liability to be made.*

With the Court concluding that the expanded definition of drawback “conflicts with the unambiguous text of the statute,” the Agencies’ case fails. The Court did go on to address other Court of International Trade conclusions that were contested by the Agencies, finding the Agencies’ arguments deficient in each instance. The Court noted that the Agencies’ interpretation conflicts with the statutory language on determining the correct amount of drawback to be paid and that it would produce an absurd result by prohibiting the recovery of any duties and fees paid on an import if the tax-free export were considered a drawback. The Court also agreed with the Court of International Trade that

“the legislative history of the drawback regime demonstrates that Congress chose to expand access to drawbacks at the expense of excise taxes,” going on to quote the Court of International Trade decision:

*This history demonstrates that Congress made a policy choice to encourage exports by expanding the ability to claim drawback, even with the knowledge that industries may then avoid some payment of excise tax.*

### Implications for importers

This case demonstrates the limits of regulatory actions. Congress makes policy decisions, and CBP cannot override those decisions by regulation. It is also instructive to look at the time frames involved. This litigation took over two years to conclude, so importers who believe CBP has overstepped its authority should recognize the time and effort needed for judicial review.

On the specific topic of substitution drawback recovery of excise taxes, US importers and exporters of excisable product can confidently look for drawback opportunities.<sup>6</sup> There may be immediate opportunities or, in some cases, supply chains can be adjusted to optimize drawback. Drawback claims can be made up to five years after the import date, so claims can be made now for imports that occurred from late 2016 forward. ■

<sup>6</sup> As of the date written, the time frame for the Agencies to request review by the US Supreme Court has not expired. Review by the Supreme Court is discretionary and is unlikely to be granted if requested.



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# Australia and UK Free Trade Agreement



On 15 June 2021, the Australian and United Kingdom (UK) governments achieved a significant milestone with the Agreement in Principle (AIP) of a long-awaited free trade deal between the two nations. It took five negotiating rounds in total since the first was launched on 17 June 2020, with the common goal of increasing trade in goods and services as well as contributing to economic growth and job creation in both countries. This is a historic agreement as it is the UK's first post-Brexit bilateral trade agreement negotiated from scratch, and both nations are expected to gain improved access to high-value markets and support continued post-pandemic economic recovery.

While the specific terms of the agreement are still a work in progress, the announced AIP provides the core elements of the framework to be included in the Australia-UK Free Trade Agreement (AUKFTA), broadly outlining what the deal will look like.

We provide details below on key aspects of the AIP from a global trade perspective.

## **Trade in goods**

The agreement will contain provisions affirming commitments from Australia and the UK for establishing mechanisms that will provide for the liberalization of tariffs on each other's goods and address non-tariff barriers to trade between the two countries.

From a goods market access standpoint, Australia will be eliminating tariffs on all imported goods of UK origin, and the UK also will be removing tariffs and quotas on the vast majority of imported goods with Australian origin, taking into account UK product sensitivities in relation to certain agricultural goods.

See the table on the next page for a snapshot of tariff elimination for some goods under the AUKFTA.



| Importing country | Goods                   | Tariff elimination effective date  |
|-------------------|-------------------------|--|
| Australia         | Whiskey <sup>1</sup>    | Immediately  |
|                   | Cars <sup>2</sup>       | Immediately  |
| UK                | Wine <sup>3</sup>       | Immediately  |
|                   | Beef <sup>4</sup>       | <ul style="list-style-type: none"> <li>▶ This tariff is eliminated after 10 years.</li> <li>▶ Duty-free quotas will increase in equal installments over the time.</li> <li>▶ Out-of-quota tariffs will remain at most-favored-nation (MFN) status until year 10 and then be eliminated.</li> <li>▶ In the subsequent 5 years, a safeguard will be applied on imports exceeding a further volume threshold and then levy a tariff safeguard duty of 20% for the rest of the calendar year.</li> </ul> |
|                   | Sheep meat <sup>5</sup> | <ul style="list-style-type: none"> <li>▶ This tariff is eliminated after 10 years.</li> <li>▶ Duty-free quotas will increase in equal installments over 10 years.</li> <li>▶ Out-of-quota tariffs will remain at MFN until year 10 and then be eliminated.</li> <li>▶ In the subsequent 5 years, a safeguard will be applied on imports exceeding a further volume threshold and then levy a tariff safeguard duty of 20% for the rest of the calendar year.</li> </ul>                              |
|                   | Sugar <sup>6</sup>      | <ul style="list-style-type: none"> <li>▶ This tariff is eliminated after 8 years.</li> <li>▶ Duty-free quotas will increase in equal installments over 8 years.</li> </ul>   |
|                   | Dairy <sup>7</sup>      | <ul style="list-style-type: none"> <li>▶ This tariff is eliminated after 5 years.</li> <li>▶ Duty-free quotas will increase in equal installments over 5 years.</li> </ul>   |
|                   | Rice <sup>8</sup>       | <ul style="list-style-type: none"> <li>▶ This tariff is eliminated immediately for short- and medium-grain milled rice.</li> <li>▶ There is a permanent duty-free quota of 1,000 tons per year on long-grain milled rice.</li> </ul>   |

1. "New free trade agreement to deliver jobs and business opportunities in Australia and The United Kingdom," *Australian Minister for Trade, Tourism and Investment website*. [Find it here](#)

2. Ibid.

3. "Australia-UK FTA negotiations fact sheet," *Australian Government Department of Foreign Affairs and Trade website*. [Find it here](#)

4, 5, 6, 7, 8. "Australia-UK FTA negotiations: agreement in principle," *Australian Government Department of Foreign Affairs and Trade website*. [Find it here](#)

## Trade remedies

Australian and UK businesses will have protection from unfair trading practices or unforeseen surges in imports under the free trade agreement, which will affirm both countries' rights and obligations under the World Trade Organization framework, including safeguards.

## Rules of origin

Product-specific rules will be adopted to determine the country of origin of imported goods, and this is expected to streamline processes to prove the origin status of goods and ease utilization of the reduced tariffs.

## Customs procedures and trade facilitation

To promote certainty in supply chain management and cost reduction, clear time frames are expected to be set for the release of goods. In general, goods will be released within 48 hours of arrival at customs, where possible. In case of expedited shipments (for example, fast-track parcels) and perishable goods, however, it will be reduced to six hours where possible to release shipments and to prevent avoidable loss or deterioration of perishable goods, respectively.

A separate bilateral instrument is also currently under negotiation (the Cooperation and Mutual Administrative Assistance in Customs Matters, with the expectation that it will strengthen customs cooperation between Australia and the UK).

## Technical barriers to trade

The agreement will include provisions on ensuring that technical barriers to trade are non-discriminatory and do not create unnecessary hurdles to trade, while improving cooperation regarding technical regulations, standards and conformity assessments.

### Services

Service suppliers will have full market access to the other country, including cross-border trade in professional, financial, maritime and delivery services, and telecommunications. Market access will extend to Australia- and UK-flagged vessels, except for some specific reservations.

### Digital trade

The agreement will include strong rules on data flows and the prohibition of unjustifiable data localization requirements to create a more certain and secure online environment and support increased growth in digital trade between Australia and the UK. Provisions will also ensure the recognition of electronic contracts and signatures and legal frameworks on electronic transactions that facilitate e-commerce.

### Intellectual property

The agreement will include provisions on copyright, design rights, patents, trademarks, artist resale rights, trade secrets and test data. These commitments will not lead to increased medicines prices in either country. Also, if Australia introduces bespoke geographical indication (GI) schemes for spirits and agri-foods, the UK will be able to put forward GIs for potential protection subject to Australia's legal procedures.

### Government procurement

Suppliers will have opportunities to participate in each other's government procurement markets. The agreement will ensure that Australian and UK suppliers will always have access to the same information about procurement opportunities.

### Environment

The agreement will contain provisions affirming commitments under multilateral environmental agreements, including the Paris Agreement, and will maintain and effectively enforce domestic environmental laws and policies across a broad range of issues.

Both countries commit to undertaking cooperative activities, including those targeted at key technologies in the transition to a low-carbon and climate-resilient economy.

### Sanitary and phytosanitary measures

Australia and the UK will recognize their independent sanitary and phytosanitary (SPS) regimes to ensure protection of human, animal, and plant life and health. As a result, imports still will have to meet the same respective UK and Australian food safety and biosecurity standards. Provisions on verification, and certification will be incorporated to facilitate trade through verifications and certification requirements.

### Innovation

The agreement will incorporate the world's first ever chapter on innovation, allowing for specific cooperation on the development and adoption of future technologies and associated trade. This recognizes the importance of futureproofing the agreement when it is updated.

### Opportunities for businesses

The AUKFTA should present many opportunities for businesses in Australia and the UK, with greater access to the respective markets driving economic growth and job creation in both countries.

Businesses in Australia and the UK should remain abreast of developments relating to AUKFTA's ratification in order to confirm the applicability of the provisions of the AUKFTA to their businesses and products. ■

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# Japan: Additional guidance on RCEP origin application process

On 13 September 2021, the ministers of economy of the Association of Southeast Asian Nations (ASEAN) member countries, China, Japan and South Korea announced in a joint statement that they aim to have the Regional Comprehensive Economic Partnership (RCEP) Agreement (Agreement) enter into force by early January 2022. This timeline for implementation had not been announced previously.

With its 15 member countries, including the above-mentioned countries as well as Australia and New Zealand, the Agreement will be the world's largest free trade agreement (FTA) upon entry into force, which accounts for about 30% of the global GDP and trade. The Agreement will enter into force 60 days after the date on which at least six ASEAN signatory countries and three non-ASEAN signatory countries have completed ratification and notified the Depositary. Although the Agreement was signed in November 2020, Singapore is the only ASEAN signatory to have completed the domestic procedures, and only China and Japan have done so among non-ASEAN countries. The joint statement by the ministers is expected to accelerate the ratification process among the other signatory countries.

In June 2021, relevant Japanese ministries held a seminar to provide an overview of the rules of origin included in the Agreement.<sup>1</sup> Some updates on the operational procedures were provided.

## Proof of origin

Under the RCEP Agreement, the following are considered as proof of origin<sup>2</sup>:

- (a) Certificate of origin issued by the competent body in the exporting country
- (b) Declaration of origin by approved exporter
- (c) Declaration of origin by exporter or producer
- (d) Declaration of origin by importer (only available for imports to Japan)

All four types of proof of origin will be acceptable for imports into Japan, while a declaration of origin by the importer will not be acceptable in other member countries. Further, a declaration of origin by the exporter or producer will be acceptable only when the importing country accepts it as a proof of origin.

As such, businesses that export to many RCEP member countries would need to check the acceptable types of proof of origin in importing countries and likely would need to manage different types of proof of origin when exporting goods under



the Agreement. To mitigate such complications, businesses should consider obtaining authorization as an approved exporter from the competent authority of the exporting country. For Japanese exports, a declaration of origin by an approved exporter will be acceptable in all member countries. Because the approved exporter can complete the declaration of origin, the cost and time required to obtain the certificate of origin from the competent body issuing the declaration would not be incurred.

Some businesses still may choose to obtain a certificate of origin, considering the strict conditions that approved exporters must satisfy.<sup>3</sup> However,

1 Slides from the seminar (available in Japanese) are available [here](#). The seminar Q&A (available in Japanese) is available [here](#).

2 Another seminar is being planned (date to be announced) to share knowledge on the types of proof of origin that are accepted in member countries before the Agreement enters into force.

3 For Japanese exporters to obtain authorization as an approved exporter from the Ministry of Economy, Trade and Industry (METI), they must obtain certificates of origin from the Japan Chamber of Commerce and Industry periodically have designated persons in charge of managing declarations of origin, etc., and have a communication system with METI and the producer. "Approved Exporter Under the Law on Proof of Origin," METI website, accessed 6 October 2021. [Find it here](#)

in this scenario, the requirement to demonstrate the originating status of the goods, as well as the responsibility of the exporter and producer, is the same regardless of the type of proof of origin selected. That is, all exporters operating under the Agreement must satisfy the same conditions to which approved exporters must adhere. Although some businesses may prefer to obtain the certificate of origin from the issuing body in the hope that it will confirm the originating status of their goods, issuing bodies may not always confirm the manufacturing process and originating materials in detail. Thus, the certificate of origin from an issuing body would not serve as assurance that the goods are originating.

Importers also should avoid fully relying on the exporter and producer when declaring the originating status, as importers not only receive a direct benefit from the FTA but also are liable for paying duties. Importers should confirm that the exporter and/or producer are determining the origin of goods under appropriate FTA compliance management and operation. This would be a good opportunity for businesses to review and improve their FTA management processes when they consider the type of proof of origin to be used under the Agreement.

### Post-importation claims for preferential tariff

Under the Agreement, importers may apply retroactively the RCEP rate of duty and obtain refunds of excess duties based on Article 3.23, paragraph 1. Paragraph 2 provides that each

member country may require importers to notify customs authorities at the time of importation if they intend to claim RCEP tariff treatment notwithstanding Article 3.23, paragraph 1.

In this regard, since Japanese Customs will not approve retroactive claims for the RCEP rate, Japanese importers should use the Before Permit (BP) system, in which goods can be withdrawn before obtaining import approval in cases where the proof of origin cannot be prepared at the time the import declaration is filed.

Confirming if goods satisfy the origin criteria may take several months, including obtaining the supplier's declarations on origin of the supplied goods, where relevant. Businesses wishing to claim RCEP tariff treatment after entry into force of the Agreement should prepare in advance without determining whether to claim preferential tariff after importation. Businesses also should confirm how a post-importation claim for preferential tariff can be applied in importing countries in case origin could not be confirmed by the intended importation date.

### Back-to-back proof of origin

Back-to-back proof of origin may be issued by the competent body, approved exporter or exporter of a transit member country based on a valid original proof of origin, as provided for in Article 3.19 of the Agreement. With back-to-back proof of origin, goods can be divided into consignments in transit member countries before consignments are re-exported to their final destinations. Back-to-back proof/certificate of origin is accepted in many FTAs in which ASEAN member countries participate.

However, as member countries may choose whether to issue back-to-back proof of origin, businesses should confirm whether the transit member country may issue back-to-back proof of origin as well as the applicable requirements for the types of proof of origin to be used.

### Action for businesses

Although many other FTAs and economic partnership agreements (EPAs) are already concluded among groups within RCEP member countries, products that are out of scope of tariff reduction or elimination under existing FTAs/EPAs may be eligible for preferential treatment under the Agreement. However, as it is expected that duties may not be reduced further or eliminated by the Agreement for some businesses<sup>4</sup> and tariff reduction may take 16 to 21 years for some goods, businesses may choose to continue using existing FTAs/EPAs and also may use the Agreement where it is more advantageous.

Businesses should review the rules of RCEP and existing FTAs/EPAs in use and continue to maintain and strengthen the FTA management and operation to facilitate compliance with the FTAs/EPAs in use. ■

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<sup>4</sup> RCEP eliminates or reduces duties for 91% of goods overall. This is lower than other large FTAs/EPAs, such as CPTPP11 (99.9%).

# EU: Trade policy developments

In the previous edition of *TradeWatch*, we discussed the new trade policy presented by the European Commission on 18 February 2021.<sup>1</sup> Now that we approach the end of 2021, we reflect on the past year and present a brief outlook on European Union (EU) trade policy developments we expect to happen in 2022.

## Cooling down of EU-US trade disputes

After the United States (US) imposed additional tariffs on EU aluminum and steel on 1 June 2018 under Section 232 of the Trade Expansion Act of 1962, the EU reacted by imposing countermeasures on iconic American products on 22 June 2018. In 2019, the World Trade Organization (WTO) Dispute Settlement Body allowed the US to impose additional tariffs on EU products following the outcome in the long-running EU-US dispute over illegal aid to the world's biggest aircraft makers. A year later, in the same dispute, the EU was also allowed to impose additional duties on US products.

After the inauguration of Joe Biden as President of the United States, the EU-US trade tension slowly cooled down. Talks between President Biden and European Commission President Ursula von der Leyen, on 5 March 2021, led to the suspension of additional duties related to the large civil aircraft

dispute. The US and EU also issued a common statement on 17 May 2021, noting that they agreed to chart a path that ends the WTO disputes following the US application of tariffs on imports from the EU under Section 232. On 31 October 2021, it was announced that the US and the EU have reached an interim arrangement regarding a dispute over imports of EU-origin steel and aluminum into the US.<sup>2</sup>

## Digital services taxes

In July 2020, under President Biden's predecessor, President Donald Trump, additional duties were imposed on French goods following the introduction of a digital services tax (DST) in France. These same duties were suspended indefinitely on 7 January 2021. The Biden Administration furthermore announced additional duties on Spanish, Italian and Austrian goods following an investigation into several countries that introduced a DST. These duties were, however, immediately suspended to create momentum for the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS 2.0) negotiations that seek to find a solution to address the tax challenges arising from the digitalization of the economy. These negotiations resulted in an agreement on 8 October 2021, about a new special purpose nexus rule for the purpose of allocating profits and a minimum tax rate of 15%.

1 "TradeWatch Issue 2 2021," *EY website*, accessed 8 November 2021. [Find it here](#)

2 "US and EU agree to end steel and aluminum tariffs and cooperate to address carbon intensity," *EY website*, accessed 17 November 2021. [Find it here](#)



On 21 October 2021, a [joint statement](#)<sup>3</sup> from Austria, France, Italy, Spain, the UK and the US was released describing a compromise reached by the countries on a transition approach to the treatment of existing DSTs and other relevant similar measures during the interim period before new Pillar One rules come into effect.

Under the compromise, the five European countries, which are not required to withdraw their existing DST regimes until Pillar One takes effect, have agreed to allow a portion of taxes accrued by a multinational enterprise (MNE) under their DSTs or any other unilateral measures before Pillar One takes effect to be credited against the MNE's future Pillar One Amount. The US has agreed to terminate its proposed trade actions against the five countries with respect to their existing DSTs and commits to not imposing further trade actions with respect to such countries and their DSTs during this interim period. Finally, the six countries are to remain in close contact so that there is a common understanding of the agreement and will endeavour to resolve any differences of opinion on the matter.<sup>4</sup>

The EU is, however, still planning to introduce a digital levy possibly as early as 1 January 2023, and it remains to be seen what the reaction of the US will be at that point.

<sup>3</sup> "Joint Statement from the United States, Austria, France, Italy, Spain, and the United Kingdom, Regarding a Compromise on a Transitional Approach to Existing Unilateral Measures During the Interim Period Before Pillar 1 is in Effect," *U.S. Department of the Treasury website*, accessed 9 November 2021. [Find it here](#)

<sup>4</sup> "Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect," *EY website*, accessed 9 November 2021. [Find it here](#)

### Carbon border adjustment mechanism

On 14 July 2021, the European Commission released a proposal for a carbon border adjustment mechanism (CBAM) as part of its "Fit for 55" plan to cut 1990 emissions levels by 55% by 2030. The CBAM is a climate measure that aims to prevent the risk of carbon leakage by imposing a carbon levy on the imports of certain materials into the EU. The publication of the proposal provoked positive as well as negative reactions from the EU's main trading partners. Jurisdictions that do not support CBAM, such as Russia and China, commented that the CBAM is discriminatory in nature as it does not distinguish between low- and high-income countries, is not in line with WTO rules and/or negatively affects international trade due to the administrative obligations it imposes on businesses. Although none of the EU's trading partners took any concrete retaliation measures until now in relation to the CBAM, this might still occur if the proposal is accepted by the European Council and the European Parliament or when the European Commission publishes more detailed legislation in the form of delegated and implementing acts. The CBAM can, in other words, increase trade tensions with some of the EU's main trading partners in 2022.

### Rising tension between China and the EU

In December 2020, the EU and China reached an agreement in principle on investment: the EU-China Comprehensive Agreement on Investment (CAI). Since then, trade tensions between China and the EU have increased significantly due to sanctions imposed by the EU and countermeasures taken by China. In May 2021, the European Parliament therefore froze ratification of the CAI. Despite this, the EU does not wish to sever trade relations with China

as the EU wants to join forces with China and other jurisdictions in their fight against climate change. However, the EU's relationship with China cannot be seen in isolation. The US-China relationship also should be taken into account. The EU is trying to maintain its relationships with both the US and China, and interactions among the three may change the landscape.

Therefore, the EU's ability to maintain its current relationship with China also depends on how the relationship between the US and China develops. However, the EU and US are not aligned in their approaches.

### Outlook for 2022

From an EU perspective, trade tensions seem to have decreased in 2021. However, that could change. New climate measures, taxes and evolving trade relationships may have an adverse effect in 2022, resulting in a revival of trade tensions. Businesses need to be ready for these developments, which may result in increased duty costs and trade disruption. ■

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# EU: Customs valuation developments – statistical values and new guidance

The customs value of imported goods remains an important customs topic. Some pending court cases at the European Court of Justice (ECJ) and new guidance of the European Commission (Commission) show that the interpretation of the customs valuation rules in the European Union (EU) are not fixed but are

continuously developing. In that regard, it appears that statistical values are becoming more important as a method to test the accuracy of declared values and, in exceptional cases, to set the new customs value of imported goods.

## Statistical values

Customs authorities may have doubts about the accuracy of the declared value. In practice, in an increasing number of cases, statistical values are used as means to substantiate doubts and support the claim that goods have been undervalued. A pending case before the ECJ illustrates that statistical values listed in EU Member States' databases are in some instances used to substantiate the claim that the declared values of imported goods are too low. In this particular case, the statistical values were even used by the customs authorities to revalue the imported goods, i.e., the statistical values were being used as new customs values.<sup>1</sup>

In the pending case, a company imported textile products from China into Hungary. The Hungarian customs authority took the view that the declared transaction values for the textile products were too low. As identical and similar goods could not be identified and there was, according to the competent authorities, no way to determine the customs value using a unit price or computed value, the customs value should have been determined by using the fallback method. The Hungarian customs authority used data from the national database falling within a time period of about 45 days around the time of import to determine the customs value, ignoring undisputed transaction values used by the company itself for previous customs clearances. The question brought forward is whether this approach is acceptable under the EU customs valuation

<sup>1</sup> Case C-187/21: Request for a preliminary ruling from the Kúria (Hungary) lodged on 25 March 2021 – FAWKES Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága





rules, which are based on the Customs Valuation Agreement of the World Trade Organization (WTO). This agreement was intended to prevent customs values from being determined based on fictitious and arbitrary values. Therefore, another key issue is whether the ECJ will allow statistical values extracted from a national database as a means to reject a declared transaction value and, moreover, as a basis to determine customs value. Another interesting question is whether the importer's own undisputed transaction values should prevail over data from a database and, if data from a database is used, whether it should be a national or European database – the argument for the latter being that the EU comprises one customs territory.

Another pending case before the ECJ is about an action started by the Commission against the United Kingdom (UK). It also partly deals with the use of statistical values. In this case, the Commission accused the UK of a loss of own resources.<sup>2</sup> According to the Commission, the UK did not have effective

customs controls in place, and during the period in scope, several goods had been undervalued on importation as a consequence. As the goods had already been released for free circulation, their actual value could no longer be determined. Both the Commission and the UK seem to agree that this is why statistical values need to be used to determine the loss of own resources. They disagree about the methodology for using the statistical data. The case shows significant differences between the methods put forward by the parties. While the Commission's approach is based on average prices at the EU level as a whole, the UK's method is based on the use of data from the UK alone. The difference in outcome between the two methods is huge; the estimated loss is approximately €2.7 billion if the methodology of the Commission is to be applied, while it is approximately £100 million if the UK's methodology is found to be correct by the ECJ. The Advocate-General recently concluded that he agrees on the methodology utilized by the European Commission.<sup>3</sup>

The ruling itself is expected to be published in the first half of 2022. If the ECJ follows the conclusion of the Advocate General, the impact should not be underestimated. We understand that the Commission started similar actions against several Member States that will be brought before the ECJ if the action against the UK is successful for the Commission. For example, in May 2021, the Commission informed the Dutch authorities to make available €148 million because, according to the Commission, ineffective customs controls resulted in textile products being imported against values that were too low. Not surprisingly, Dutch Customs authorities announced in July 2021 that they would increase their customs controls and, in particular, would pay closer attention to the customs value of textiles and shoes in import declarations going forward.

What follows from these two pending cases is twofold. First, it is clear that statistical values are becoming increasingly important, although their application and underlying methodology have not taken full shape yet. Second, the customs controls on customs values are under scrutiny by the Commission. In addition to the UK, some EU Member States are subject to proceedings and have been informed that the Commission has started investigations. For this reason, some EU Member States have already announced that they will increase their customs controls on imported goods, focusing in particular on the customs values of imported goods.

<sup>2</sup> EU Member States are responsible to levy the import duties upon free circulation of goods in the EU and should make available 80% of the levied import duties to the traditional own resources of the EU.

<sup>3</sup> Opinion of the Advocate General Pikamäe of 9 September 2021, C-213/19 (European Commission v. United Kingdom of Great Britain and Northern Ireland), ECLI:EU:C:2021:724.

### **New guidance of the European Commission**

In July 2021, the European Commission published a new edition of the Customs Valuation Compendium that replaces the 2018 edition. The Customs Valuation Compendium includes an overview of the customs valuation provisions in the EU, interpretative notes on customs valuation extracted from the Customs Valuation Agreement of the WTO, instruments concluded by the Customs Code Committee and the Customs Expert Group – Customs Valuation Section (CEG VAL) as well as summaries of ECJ judgments on matters related to customs valuation.

In the 2021 edition of the Compendium, several new instruments have been added:

#### **Commentary No 16: License fees and royalties – outward processing procedure**

*The amount of import duty for processed products resulting from the outward processing procedure shall, in principle, be calculated on the basis of the cost of the processing operation undertaken outside the customs territory of the Union. In this particular Commentary party Y entered into a production contract with a toll manufacturer outside the EU. Party Y provided free of charge the fabrics that will be used in the production of the processed goods and on the trademarks are being placed on the processed goods for which party Y pays a royalty fee to party X. Although there is no transfer of legal ownership upon entry of the processed goods into the EU, according to the CEG VAL the customs value of the imported processed goods can be determined by using the transaction value whereby the customs value is formed by the i) cost of the processing operation, ii) purchasing price for the fabric used, iii) the license fee paid by X to Y for the use of the trademark, and iv) the transport and insurance cost up until the EU border.*

#### **Conclusion No 35: Goods purchased in internet auctions (penny auctions)**

*For goods purchased in internet auctions as described in this Conclusion, the transaction value can be utilized, whereby the transaction value is build-up by summing-up the 'winning bid' and the sum of the bidding rights (i.e. the total payment made by the buyer for the right to place the bid or bids) and supplement it as necessary with the transport and insurance costs related to the transportation of the goods up until the border of the EU.*

#### **Conclusion No 36: Emission premium for excess CO2 emissions**

*Payments for emission premium for excess of CO2 emissions under EU legislation are in this Conclusion being paid by the non-EU manufacturer and subsequently invoiced to its EU distributors for each of the motor vehicles imported into the EU. These payments are not necessarily part of the customs value of the imported goods, provided that the premium is clearly identifiable and presented separately from a price for the goods in an invoice used to determine the customs value under the transaction value method. If the premiums are reflected in the price of the imported motor vehicles, the premiums can, however, not be deducted as import duties or other charges payable in the Union by reason of import or sale of the goods.*

#### **Conclusion No 37: Treatment of payment for activating an additional software function of goods after release for free circulation**

*In a supply chain whereby a non-EU manufacturer sells cars to an EU distributor/importer based on a purchase order placed by an EU customer, the customs value can be based on the sales price between the manufacturer and the distributor/importer. Separate payments made by the EU customer to the distributor based on a sales contract that is concluded prior to the importation of the cars for the activation of an extra software function after importation, shall not be part of the customs value according to the CEG VAL.*

Additionally, the guidance document on Articles 128 and 136 of the Implementing Act to the Union Customs Code has been included in the 2021 edition of the Compendium as Commentary 13, and the commentaries on hunting trophies and waste, which were released in September 2020, have now been included as Commentaries 14 and 15, respectively. Although the instruments do not constitute a legally binding act, they are being considered a valuable aid by the customs authorities and businesses should take them into account while valuing their goods at import in the EU. ■

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# EU: Modernized PEM rules entered into force on 1 September 2021 in the majority of PEM countries



After years of turbulent discussions on modernizing the 2013 Pan-Euro-Mediterranean (PEM) agreement, the participating countries failed to reach a unanimous agreement in 2019. As an alternative solution, and awaiting adoption by all Members, the European Commission (EC) adopted a series of proposals to already bilaterally and transitionally apply the modernized rules of origin in the PEM region. These new rules of origin, which will exist in parallel to those of the PEM convention, entered into force from 1 September 2021 for most of the PEM participating countries. The new rules provide greater flexibility, allowing for further improvements around integrated supply chains and trade within the PEM region.

## Background

The new rules of origin are the outcome of the EC's proposal to modernize the PEM Convention in November 2019. While a majority of the PEM countries were in favor of the proposal, some countries expressed concerns about the proposed amendments. As a result, the PEM committee failed to secure the necessary unanimity, which prevented the proposal from being adopted.

Nevertheless, the EC continued to pursue PEM modernization by adopting a set of proposals on 24 August 2020 concerning bilateral protocols on origin. This package of proposals would allow supportive PEM countries to start applying the updated rules of origin as an alternative, without the agreement of those countries that oppose the revision.

From 1 September 2021, the revised origin rules have become applicable on a bilateral basis between the European Union (EU) and Albania, the Faroe Islands, Georgia, Iceland, Jordan, Liechtenstein, Norway, Palestine and Switzerland. In a more recent development, it was announced that the new PEM rules will also be adopted for the UK-Switzerland Free Trade Agreement (FTA), enabling the

cumulation of input materials originating in the EU and Turkey (see *A focus on Switzerland* section below). Additionally, the new rules became applicable between the EU and North Macedonia as of 9 September 2021. The proceedings around adoption of the transitional rules are still ongoing and at different stages in several countries, including Bosnia and Herzegovina, Egypt, Israel, Kosovo, Lebanon, Montenegro, Republic of Moldova, Serbia, Turkey and Ukraine. While Israel also is expected to adopt the new rules shortly, Morocco, Tunisia and Algeria have yet to express their willingness to apply the transitional rules. It is uncertain if, and when, these countries will adopt the new rules.

So far, no information is available on implementation or negotiation status with regard to the remaining PEM countries.

### Most significant changes

The revised rules are applicable in parallel to the current rules of the PEM Convention. The application is optional, and participating countries implement the new rules on a bilateral and transitional basis, while awaiting a unanimous agreement on the revision of the PEM Convention. In other words, two different sets of rules exist side by side as of 1 September 2021. Economic operators can apply the traditional PEM rules or alternatively apply the set of revised rules as provided for in their bilateral origin protocols. However, it is not possible to combine the two schemes, meaning that “cross-cumulation” between the origin rules of both sets is not allowed.

The new PEM rules are largely derived from the so-called “new generation” free trade agreements, allowing for the harmonization of modern rules and standards in the field of international trade.

An overview of some of the most significant amendments is provided below:

#### ► Increased flexibility in the calculation of preferential origin criteria

Upon request – and when authorized by the customs authorities – economic operators are allowed to calculate the value of non-originating input materials and the ex-works price of final products based on an average price or value. This possibility is based on certain conditions and is mainly introduced to take fluctuations in costs and exchange rates into account.

#### ► Increased tolerance levels for non-originating material

The tolerance levels for non-originating materials are to be increased from 10% to 15% in the value of the ex-works price for products. A similar change from 10% to 15% is provided in the net weight of products falling within Chapters 2 and 4 to 24 of the Harmonized System (excluding processed fishery products).

#### ► Introduction of full cumulation

Whereas the traditional PEM Agreement – in most cases – only provides for diagonal cumulation between countries that participate in the diagonal cumulation clause, the revised PEM rules no longer include this requirement. This implies that full (diagonal) cumulation will become the general



rule under the revised rules, except for textile products falling within Chapters 50 to 63. For the latter, the baseline involves bilateral cumulation; however, it's possible that participating countries would allow for full (diagonal) cumulation in the near future.

#### ► Revised proofs for preferential origin

The new PEM rules no longer allow for a EUR-MED certificate or EUR-MED origin declaration to be used. Under these new rules, the standard forms to be used regarding the proof of origin include a EUR.1 certificate or origin declaration, both referring to the transitional (revised) rules. The new PEM rules also provide for the possibility of a future inclusion of the Registered Export system (REX) and/or digitizing EUR.1 certificates.

In contrast to the old PEM rules, where no time limit is indicated, the issuing customs authorities may grant a request for the retrospective issue of a EUR.1 certificate up to two years from the date of export. Furthermore, the revised rules also provide for a broader context in which a EUR.1 certificate can be issued retrospectively.

The period of validity concerning a proof of origin will be extended from 4 to 10 months as from the date of issuance of that proof.

### ► Introduction of the non-alteration rule

The direct transport rule will be replaced by the less strict non-alteration rule. According to this rule, economic operators need to prove that the products were not altered or transformed during transit. Under the non-alteration rule, the splitting of consignments as well as operations for the adding or affixing of marks, seals and so on to facilitate compliance with specific domestic requirements is allowed. In addition, the operations provided for under the stricter direct transport rule (i.e., unloading, reloading, or any operation designed to preserve the goods in good condition) are also permitted.

### ► Revision of the duty drawback rules

The prohibition on duty drawback for the materials used in the manufacture of any product will be removed, except for materials used in the manufacture of textile products falling within Chapters 50 to 63. For the latter products, some exceptions to the prohibition on duty drawback will however be foreseen. This removal may result in customs duty optimizations by exempting input materials from customs duties when placed under inward processing procedures and also duty free access in the final destination market for the processed products through preferential origin.

### ► Accounting segregation

Under the current PEM Convention, accounting segregation for originating and non-originating fungible input materials is allowed only if considerable costs or material difficulties can be demonstrated. These conditions no longer apply when operators apply for such authorization under the revised PEM rules.

### ► Territoriality

Whereas the current rules allow for certain working or processing to be done outside the territory under certain conditions, with the exception of products of HS Chapters 50 to 63. The revised rules no longer contain the exclusion for these products.

### A focus on Switzerland

The revision of the rules also has an impact beyond PEM borders. The UK-Switzerland joint committee agreed during its first meeting, on 8 June 2021, that the new PEM rules will also apply for the UK-Switzerland Free Trade Agreement from September 2021 onward. In addition, the joint committee also agreed that cumulation with EU and Turkish inputs materials is possible, effective immediately (starting 9 June 2021). Previously, cumulation with raw materials originating in the EU or Turkey was not possible under the UK-Switzerland FTA.

The outlook for and impact of the new rules is clear. Thanks to the amendment to the UK-CH FTA and the PEM Convention, Swiss companies will benefit from modern and flexible rules of origin in trade, not only for trade between Switzerland and the UK, but also for the wider PEM zone.

### Recommendations for businesses

The adoption of the new set of rules is expected to bring an overall positive impact to businesses, allowing for increased opportunities, flexibility and simplifications to trade within the PEM region. Companies should monitor any future developments and assess the potential impact of the revised rules on their supply chain. They may, among other areas, need to reconsider the following:

- Whether to apply the new or old PEM rules during the transition period
- Whether input materials that acquired preferential origin under the new rules are incorporated into finished or semifinished products that obtain preferential origin under the old rules (note that a consistent approach is needed)
- Preferential origin clauses in supplier and customer contracts. ■

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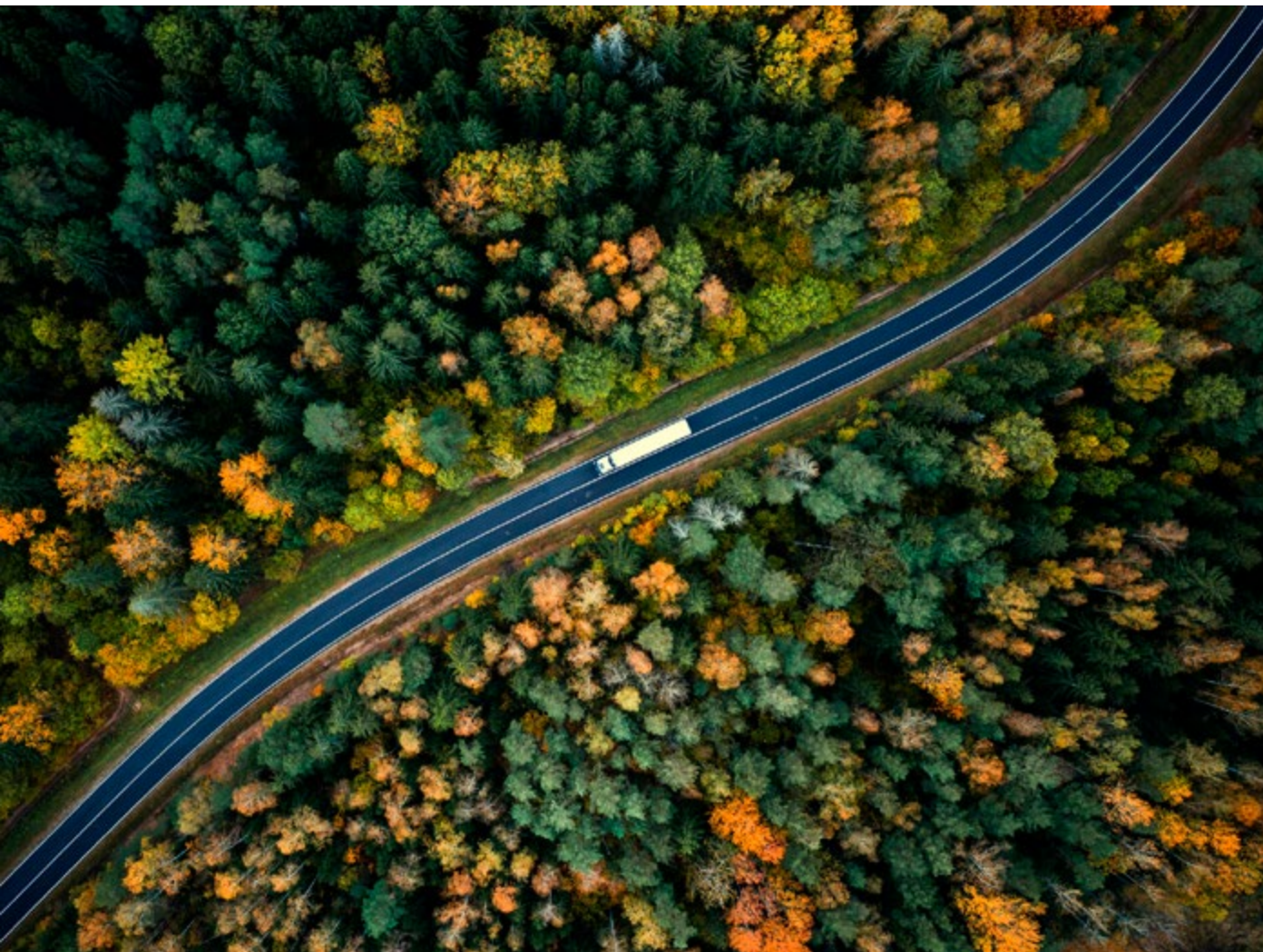
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## EU: Emissions – Europe's new frontier



One of the central elements of the European Union (EU) Green Deal is the Carbon Border Adjustment Mechanism (CBAM). The border compensation levy is intended to prevent producers of affected goods who are based in the EU market or in the European Free Trade Association states from suffering a competitive disadvantage compared to businesses operating in third countries. The competitive distortion could arise if EU businesses were required to buy carbon certificates for emissions related to the goods that they manufacture but businesses in third countries were not required to do so (or not at the same level). Therefore, the rules will relate to the importing of certain goods produced in energy-intensive conditions to the EU.

The EU's CBAM plans are likely to have far-reaching effects, both on businesses and on the EU's trading relationships. CBAM raises controversy internationally. In the worst-case scenario, the measure could lead to new trade disputes if the EU's trade partners considered the CBAM to be in conflict with the common rules of the World Trade Organization (WTO). WTO rules forbid the implementation of additional duties that function like customs duties.

Meanwhile, despite this uncertainty, the EU's plans to implement CBAM in the near future mean that affected businesses must act quickly to prepare for the impact of the new regime. They should start to plan by, for example, identifying affected goods and their suppliers in third countries, determining the emissions contained in EU imported products, and modeling expected future additional costs and compliance obligations. One key aspect will be

considering the need for structural changes as well as the implications for business competitiveness, which affect investment strategy, commercial strategy and a number of perspectives.

Importantly, given the changes in the EU Emissions Trading System happening concurrently and being interlinked with the CBAM, EU manufacturers that export and sell their goods on the world market also need to analyze all the changes around carbon and energy taxation. For example, according to current plans for EU manufactured goods, there will be no carbon cost reimbursement or export rebate mechanism. For EU manufacturers that have not yet transformed to zero or minimized emissions, there could be a competitive disadvantage when selling on the world market from having a higher cost burden arising from the EU carbon payments.

### **A far-reaching product portfolio**

The proposal for a regulation for the implementation of CBAM covers a wide range of items in the product categories of electricity, cement, fertilizers, iron and steel as well as aluminum. These goods are to be subject to border compensation as soon as they enter the customs territory of the EU and are cleared for import. Other product groups could be introduced into the scope and may fall under the regulation, including various organic basic chemicals, inorganic chemicals and polymers. The EU Commission also expressly reserves the right to expand the product range if the border compensation mechanism is circumvented or regulations are misused.

In terms of content, the border compensation is related to the already existing system for the greenhouse gas emission trading system (Directive 2003/87/EC), although the planned acquisition of CBAM certificates will be a separate regime. The new system is to be introduced in two steps. First, there should be a simplified transitional system, which could start as early as 2023 if the political will is right. The final system of CO<sub>2</sub> border compensation is to start in 2026 after a three-year transition phase (2023 to 2025).

### **Reporting obligation in the transition phase**

During the transitional period, customs declarants of affected goods must submit CBAM reports on a quarterly basis. This reporting obligation will include information on the quantity of imported goods and the associated production facility in the country of origin, the emissions contained in the imported goods and the costs of greenhouse gas emissions already paid.

The EU Commission considers that declarants who do not submit a CBAM report should be provided with a proportionate and dissuasive penalty. However, the extent to which incorrect information in reporting will be subject to sanctions is still unclear.

### **Impact from 2026**

For the final system, each EU Member State should have a national CBAM authority that, among other things, certifies authorized customs declarants. At that point, only authorized customs declarants will be allowed to import the goods affected by the CBAM regulation.

All businesses that may be impacted by the new regime should consider which contracting party will have to fulfill the obligations associated with border compensation in the future. In some cases, it is likely that the import process will have to be reorganized because certain parties either can no longer take on the import according to the future rules or no longer wish to do so. Anyone who wants to qualify as an authorized customs declarant must be resident in the EU and must fulfill certain compliance obligations. Also, bank guarantees must be provided for the expected costs of purchasing CBAM certificates.

### **Surrendering of CBAM certificates**

Beginning in 2026, authorized customs declarants must submit a border compensation declaration by 31 May of the following year in which the emissions embedded in the import goods are calculated. These are to be compensated (“surrendered”) by CBAM certificates purchased during the previous year. Various details of this process still need to be clarified. According to the current proposal, for companies that purchased CBAM certificates in excess, it should be possible for up to one third of the certificates acquired in the previous year to be returned to the CBAM authority. Beyond that limit, CBAM certificates in excess would be forfeited. The fact that certain industries in the EU still benefit from the free allocation of emission allowances for the time being is taken into account in calculating the required CBAM allowances, by way of reductions.



### **Determination of emissions**

The emissions embedded in imported goods are the direct emissions occurring during the manufacturing process. If any raw materials and any precursors are used during production of the goods covered by the CBAM, their direct emissions also must be

considered. Further information will be provided in the expected implementing regulation with regard to certain emissions that may not need to be reported. In the future, the scope of emissions to be taken into consideration may be extended to also cover certain indirect emissions.

If actual data referring to direct emissions cannot be adequately established, a default value will be used for calculating the embedded emissions by the authorized customs declarant. According to current understanding, the default values will be determined by the EU Commission and will be published and revised periodically through legislative acts. Operationally, this means that the authorized customs declarant uses these values, which are determined at the average emission intensity of each exporting country and for each of the goods covered by the CBAM. In addition, a markup factor will be determined in the expected regulation. In case reliable data for the exporting country is not available for a certain type of imported goods, the default values are determined based on the average emission intensity of the 10% worst-performing EU installations for that type of goods.

### **Ways to reduce costs**

No CBAM charges will apply when importing goods that are considered to be returned goods under EU customs regulations. For the customs procedure of inward processing relief (IPR), the obligation to acquire CBAM certificates can be avoided when an organization is manufacturing processed goods that are subject to the CBAM in the EU, if the processed goods are re-exported from the EU. Correspondingly, the customs procedure of outward processing relief provides for the possibility that the emissions embedded in the goods previously exported from the EU for processing abroad are offset upon the CBAM calculation when re-importing the processed goods into the EU.



In the future, due to the division of labor processes along the supply chain, the use of the inward processing customs procedures will be increasingly relevant for businesses. We expect that, in a number of cases, authorization needs to cover several companies across the supply chain in an industrial ecosystem to avoid the CBAM cost. Implementing inward processing across an ecosystem requires multiple parties to meet the customs authorization requirements, and an efficient process needs to be set up among these parties.

Businesses that might benefit from this customs procedure should identify opportunities in this area as early as possible to allow sufficient time to follow up with business partners and implement the standards required for inward processing across the ecosystem.

### **Requirement to involve accredited verifiers and certifiers**

The determination of actual emissions from 2026 always must be confirmed by accredited verifiers. The individual determination of the emission values is particularly useful if possibly fewer emissions are produced during production than would be assumed if the benchmark values were applied. The involvement of independent certifiers also is required to confirm carbon costs levied in the country of origin and claimed as a reduction in the calculation of CBAM certificates to be surrendered upon importation into the EU.

### **Sanctions**

Anyone who provides false information or does not surrender the relevant CBAM certificates by 31 May for the goods imported in the previous year may be subject to financial penalties. This also applies if customs irregularities occur in connection with CBAM-covered goods and this results in the application of import duties. In addition to the monetary fines, the required CBAM certificates must be purchased and offset. Furthermore, procedural violations also may be prosecuted in accordance with national fines or criminal law regulations. Additional legislative details on these areas are expected in the future.

### **Outlook and need for action**

Even if the regulations on CBAM are currently still under political discussion and changes are to be expected (at least in the details), the measures outlined are likely to become reality overall. The reporting obligations starting from 2023 will already present many companies with considerable challenges, as data has to be collected, organized and contributed to reporting. Many expect that some current importers will not want or be able to meet the requirements of the CBAM report, so the arrangements to import these goods into the EU will have to be reviewed. It is now crucial to quickly identify the manufacturers of affected goods in third countries and to calculate the emissions contained in the products. The available benchmark data on emissions also should be examined for scenario modeling purposes. On this basis, the future cost burden of the CBAM can be determined indicatively.

As such, the landed cost of many products in the EU likely will increase significantly.

Taking a broader view, this consideration applies to not only the import of goods subject to the CBAM, but also to goods manufactured in the EU, as fundamental changes in this area are also pending, including to the framework of EU emissions trading, energy taxation and circular economy requirements. The additional costs of using fossil fuels will accelerate the transformation to a zero-carbon economy that will become competitive through new technologies applied to large-scale processes.

Companies should analyze how the additional costs resulting from CBAM, emissions trading, energy taxation and other regulations affect their business models and competitiveness in the future. These considerations should include circular economy requirements, which also come with a number of tax and customs implications. Based on these insights, discussions can begin on the design of the future business model, the design of future places and conditions of manufacture, the setup of global flows of goods and on the impact on the broader corporate investment and product strategy. ■

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# India: Faceless assessment of imported goods by Indian Customs

Indian Customs has introduced the concept of faceless assessment (effectively, remote audits) of imported goods. The program aims to bolster India's position in the Trading Across Borders rankings in The World Bank's Doing Business Index<sup>1</sup> and is an integral part of a series of facilitation measures put in place by the Ministry of Finance in India.

## Facilitation measures

In 2019, the Central Board of Indirect Taxes and Customs triggered next-generation reform in the customs clearance process under the ambit of Turant Customs (immediate customs) with the objectives of speedy clearance of goods, transparency in decision-making and ease of doing business. Related initiatives included the facility for self-registration of goods by importers, automated clearance of bills of entry, digitalization of customs documents and paperless clearance.

The single window interface for facilitating trade was put in place, and when an electronic bill of entry is filed, it is automatically addressed to the relevant participating government agencies and receives a "no objection" certificate at the click of a button.

This measure was followed by eSanchit, a portal whereby stakeholders could electronically upload supporting documents, such as the commercial invoice, packing list and certificate of origin, to avoid physical interaction with officers and the related delays that are often created.

<sup>1</sup> Trading Across Borders is a category of the World Bank's Doing Business index wherein countries are ranked with respect to the measures of regulatory compliances in place for import and export of goods. "Trading across Borders," *World Bank website*, accessed 4 November 2021. [Find it here](#); "Doing Business 2020," *World Bank website*, accessed 4 November 2021. [Find it here](#)



These steps were further augmented with Direct Port Delivery of goods, the revised authorized economic operator program and the radio frequency identification e-seal program of goods sought to be exported. Combined, these measures reduced the time and cost of clearance of goods in customs ports across India.

## Faceless assessment

The key objectives of faceless assessment are faceless, contactless and paperless customs clearance processes, using technology to drive transparency and accountability. It seeks to delineate the customs assessment process from the physical location of a customs officer at the port of arrival of the goods to an officer stationed at any other location in any state. This should provide for a free, fair and just assessment of the goods without physical interface between the importer and customs, as well as promote uniformity of assessment across locations and sector-specific and functional specialization in assessments. The end result is expected to substantially reduce the lead time for the clearance of cargo.

### Introduction of faceless assessment of goods

The first pilot program of faceless assessment was introduced in Chennai (in the Indian state of Tamil Nadu) on 14 August 2019 and covered articles primarily falling under Chapter 84 of the Customs Tariff Act, 1975. Thereafter, articles covered under Chapters 39, 50 to 71, 72 to 83, 85 and 86 to 92, of the Customs Tariff Act, 1975, were allotted to customs teams in Delhi, Bengaluru (in the state of Karnataka), Gujarat and Visakhapatnam (in the state of Andhra Pradesh). In light of the experiences of the pilot assignments and inputs from different stakeholders, the modalities and process flow for faceless assessment were further revised before the program was implemented throughout India in 2020.

### Pan-India rollout – Phase I

Phase 1 of Pan-India Faceless Assessment was introduced at the Bengaluru and Chennai Ports with effect from 8 June 2020, by way of gazette notifications, for imports primarily made under Chapters 84 and 85 of the Customs Tariff Act, 1975. Another notification was also issued empowering the jurisdictional Commissioners of Customs (Appeals) at Bengaluru and Chennai to take up appeals filed in respect of faceless assessments pertaining to imports made in their jurisdictions, even though the assessing officer may be located at another customs station.

### Doing away with physical printouts of assessed documents

To further complement the faceless, contactless and paperless clearance objective, the practice of using bulky printouts from the customs service center and the maintenance of voluminous physical dockets in the customs houses have also been abolished. Instead, a digitalized copy of the bill of entry (after discharge of the goods) and the shipping bill (after the grant of a “let export” order) is now electronically transmitted to the importer and exporter, respectively. These digital copies are further protected by QR codes to verify their authenticity.

### Establishment of Turant Suvidha Kendras in customs houses

Turant Suvidha Kendras (immediate help centers) have been set up to cater to businesses in every customs station manned by custom officers. Their functions include and are not restricted to accepting bond or bank guarantees; carrying out any other verifications that may be referred by faceless assessment groups; defacing or debiting documents, permits and/or licenses; and serving as a point of interface between the faceless assessment and businesses.

### Phase II of faceless assessment rollout

Phase II of the pan-India rollout of faceless assessment went into effect on 3 August 2020 by including the Delhi and Mumbai Customs Zones in the program and extending the scope of faceless assessment at the Chennai and Bangalore Customs Zones. This phase of faceless assessment covered the following specified customs zones and the imports primarily under the specified chapters of the Customs Tariff Act, 1975.

| S. no. | Chapter(s) of the Customs Tariff Act, 1975 | Assessing Group | Customs Zones                      | Remarks  |
|--------|--|-----------------|------------------------------------|--|
| 1.     | 84   | 5               | Bengaluru, Chennai, and Delhi      | Bengaluru and Chennai Zones were covered in first phase.   |
| 2.     | 85   | 5A              | Bengaluru, Chennai, and Delhi      | Delhi Zone is newly covered.   |
| 3.     | 89 to 92                                   | 5B              | Bengaluru, Chennai, and Delhi      | Pilot program has been running in Delhi Zone since September 2019, and Bengaluru and Chennai are newly covered.    |
| 4.     | 50 to 71                                   | 3               | Bengaluru, Chennai, and Delhi      | Pilot program has been running in Chennai Zone since September 2019 and now Bengaluru and Delhi are newly covered. |
| 5.     | 29   | 2A              | Mumbai I, Mumbai II and Mumbai III | Newly introduced zones.  |

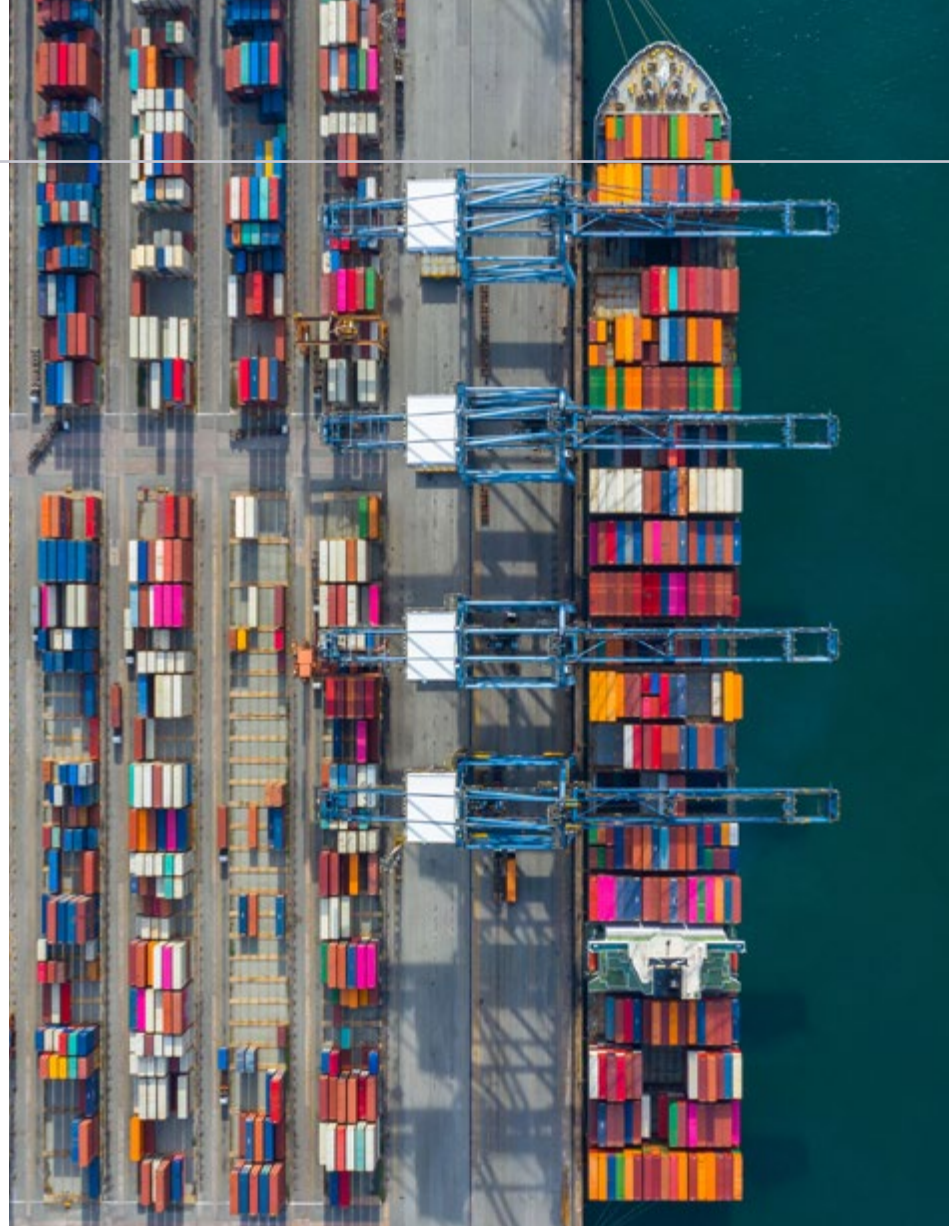
Senior officers with the rank of Commissioner were nominated for monitoring and facilitating speedy and uniform assessments in the above customs zones with regard to bills of entry assigned by the customs automated system to the officers in the faceless assessment groups.

### **Pan-India rollout and establishment of national assessment centers**

The faceless assessment at a pan-India level in all ports of import and for all imported goods was rolled out on 31 October 2020. For the smooth functioning and monitoring of faceless assessment across all customs stations, national assessment centers (NACs) have been constituted to be led by a principal chief commissioner/chief commissioner and include principal commissioners/commissioners of customs and other subordinate officers. Apart from playing a key role in the seamless implementation of faceless assessment, the NACs also work in a coordinated fashion so that all assessments are carried out in a timely manner and there is no delay for the bills of entry. The NACs also examine the assessment practices for imported goods across customs stations to bring about uniformity and enhance the quality of assessments.

### **Conclusion**

The above reforms have helped both businesses and the on-ground officers amid the COVID-19 pandemic by removing the need for physical customs clearance processes. The faceless, contactless and paperless assessment of goods and their clearance has been welcomed as a positive development to the customs clearance regime. While there could still be some teething issues in seamless implementation of this scheme, this change is expected to help reduce customs controversy and eventually facilitate faster clearance of goods. It is a significant and welcome shift from the existing assessment practices in the Indian customs administration. ■



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## Kenya: Customs valuation – the transfer pricing nexus

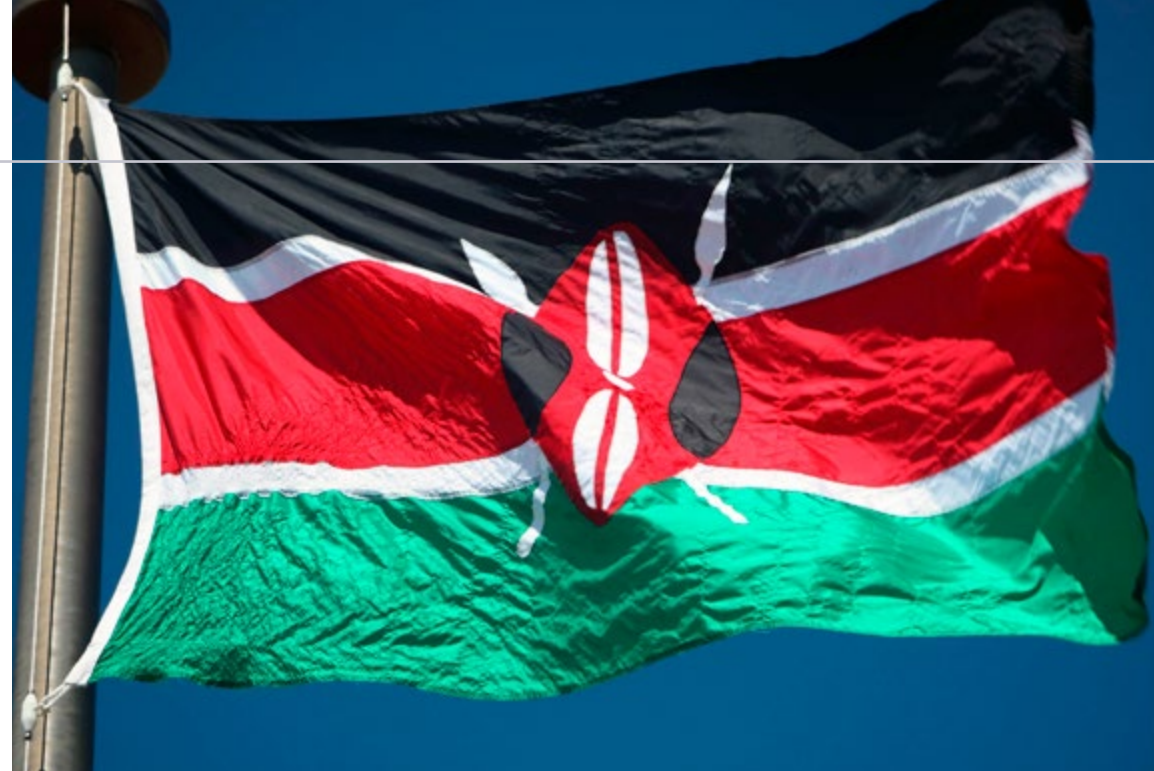
Historically, the Kenya Revenue Authority's Customs Department treated transfer pricing as a matter for the Domestic Taxes Department and specifically the International Tax Office. It is now clear, however, that the Customs Department is gaining interest in and exploring transfer pricing documentation and the arm's-length principle. Although the Customs Department has considerable experience in determining the value of imported goods, it previously lacked capacity to explore the connection between transfer pricing and customs valuation.

### **The connection between customs valuation and transfer pricing principles**

Customs valuation is the determination of the value of goods imported or exported, and it is key to determining customs and other duties levied on an ad valorem basis (value basis). The transaction value method is the primary and preferred method for determining the price paid or payable for goods in cross-border commerce and has its origin in the World Trade Organization (WTO) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, otherwise known as the WTO Valuation Agreement.

Customs authorities aim to validate that the price declared for customs purposes in related party transactions is not influenced by the relationship between the supplier and the buyer.

The arm's length principle is an Organisation for Economic Development and Co-operation standard for determining pricing in transactions between related parties. The arm's-length principle also aims to validate that pricing between related parties is not influenced by the relationship.



Some customs valuation methods have been likened to certain transfer pricing methods. For instance, the transaction value method is seen as similar to the comparable uncontrolled price method in transfer pricing. The deductive value method also may be likened to the resale price transfer pricing method and the computed value customs valuation method to the cost-plus transfer pricing method.

### **Similar aims but different results**

While the overall principle between customs and tax authorities is to determine a price uninfluenced by the relationship between the supplier and the buyer, the motivation, operational framework and legislative approach may differ between the two regimes. The East African Community Customs Management Act, 2004, requires the sequential application of valuation methods to determine the value of goods in cross-border commerce, while the application of transfer pricing methods is subject to no such requirement. Therefore, differences in valuation may arise.



As a consequence, greater cooperation is needed between the International Tax Office and customs departments so that taxpayers and importers are fairly treated for tax and customs purposes and any adjustments by one department are recognized by the other in relation to any refunds due or taxes levied.

#### **The circumstances of the sale**

The fact that a transaction is concluded by related parties does not, on its own, present grounds for doubting the transaction value of the goods under paragraph 2(2)(a) of the Fourth Schedule to the East African Community Customs Management Act, 2004. This means that customs ought to have additional reasons for doubting the transaction value declared for goods traded between related parties, which may result in an examination by customs into the circumstances of the sale.

In determining the circumstances surrounding the sale, the Customs Department sometimes calls for transfer pricing documentation, which includes the transfer pricing policy and other documents that constitute the local file in order to determine the terms and conditions under which the price was set. This inquiry by the Customs Department is aimed at determining whether the transaction value declared at the time of importation was accurate and reflected a typical transaction between unrelated parties. In other words, was it really at arm's length?

The transfer pricing policy, together with the sale agreement and licensing agreement where applicable and other transaction documents, should be properly aligned to reflect the actual conduct of business between the related parties. Inconsistencies in clauses and terms between documents relating to the same transaction will raise suspicion as to the accuracy and, indeed, adequacy of the transaction value.

Price review clauses are especially problematic if the review occurs post-importation and it is reflected in the financial statements of the company. It is imperative for the importer to bring such adjustments, which may be proper from a transfer pricing perspective, to the attention of the customs authority to determine if extra duties are payable or if the importer is entitled to a refund.

The customs authority in Kenya has, however, not provided clear guidelines on how importers with price review clauses in contracts can comply with customs legislation and pay any duties that may fall due without attracting penalties for having paid an apparently insufficient amount of duty at the time of importation.

### **Advance valuation rulings**

The Commissioner of Customs is also empowered by law to issue advance valuation rulings, which are akin to the advance pricing arrangements used in domestic taxes, to grant certainty and a favorable business environment to taxpayers who request them. In granting such arrangements, the customs and tax departments are encouraged to collaborate to secure the necessary interests of both departments while making consistent decisions for taxpayers. For countries like Kenya that are signatories to the WTO Trade Facilitation Agreement, this is crucial to help achieve the aims of the agreement.

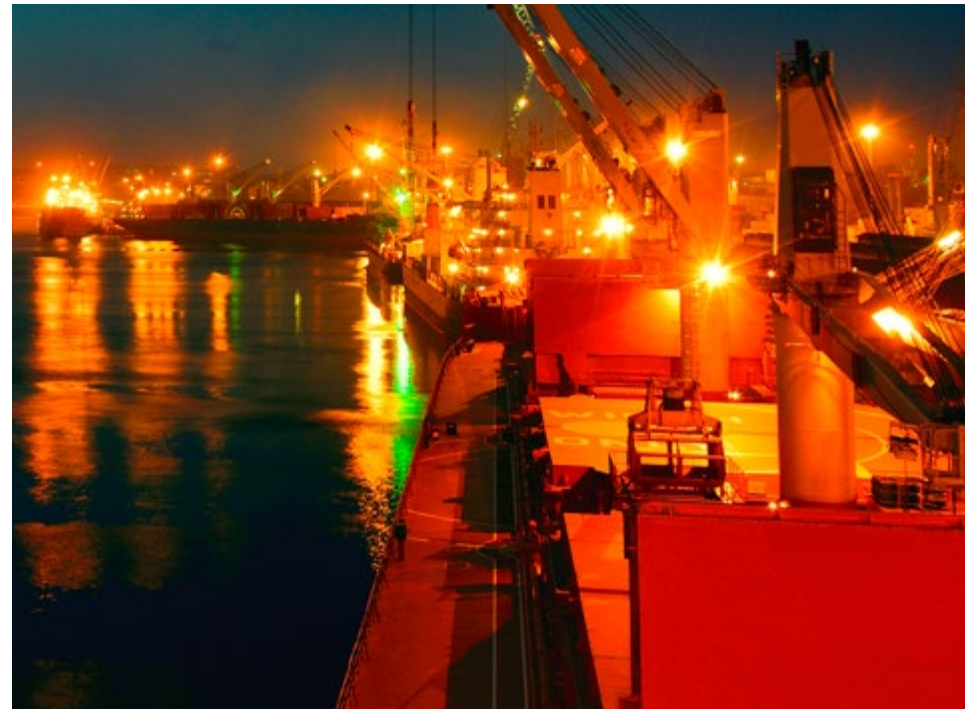
However, the Kenyan Revenue Authority has not yet attained the level of integration and collaboration reached by the International Tax Office and the Customs Department. This is why, when doubts arise about the value of transactions between related entities, the determination of whether to use transfer pricing documents from customs to determine the circumstances of a sale should be done on a case-by-case basis. Whereas customs determines the price of each item that is imported, transfer pricing studies may cover a range of items or even services and thus may not be of significant use in the determination of customs value.

### **Conclusions**

Importers who are part of a multinational corporation should keep proper transfer pricing documentation, which may be useful to customs in determining whether the declared transaction value was influenced by the relationship between the supplier and the importer. Transfer pricing documentation should be aligned with all the requisite transaction documents. Further, importers are

required by law to reveal the existence of a relationship between themselves and their suppliers, in addition to bringing to customs' attention any post-importation adjustments made to the value of goods in order to achieve an arm's-length price from a transfer pricing perspective.

Cooperation between the customs and domestic tax departments is key to validating that taxpayers pay adequate taxes but also that there is fair administration of tax and customs laws anchored to trade facilitation. ■



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# Switzerland: Elimination of import customs duties on industrial goods may enter into force on 1 January 2024



The Swiss Federal Parliament (Parliament) adopted a bill to unilaterally abolish import duties on almost all industrial goods and simplify the Swiss customs tariff to reduce costs for consumers and companies alike. The final vote is still subject to an optional referendum; however, the legislation is expected to enter into force on 1 January 2024 if no political party introduces the referendum.

## Background

In late 2017, the Swiss Federal Council announced its plan to abolish import duties for industrial products (Harmonized System (HS) chapters 25 to 97), among other policies to tackle the high prices in Switzerland. Based on government calculations, the expected duty deficit of CHF500 million per annum could be compensated through higher tax returns from companies, as zero tariffs reduce not only costs for pre-materials but also bureaucracy for customs clearance procedures. Furthermore, consumers would benefit from reduced tariffs, with overall savings of approximately CHF350 million per annum.

After an extensive debate, the bill to abolish industrial tariffs was eventually accepted by both chambers of the Parliament in the final vote on 1 October 2021. The Federal Council Dispatch, dated

27 November 2019, intended the amendment of the customs tariff act (reduction of tariffs to zero and reduction of customs tariff codes) to enter into force on 1 January 2022, but postponements regarding the vote (due to the COVID-19 pandemic) led to a delayed discussion in Parliament. Since the 100-day deadline of the facultative referendum ends in the beginning of January 2022, the elimination of industrial tariffs is not possible by 1 January 2022. If no referendum is launched, it can be assumed that the Federal Council will set the date for the abolishment of import duties within the first quarter of 2022. Given the required lead time of involved parties for planning and (technical) implementation as well as the fact that the Federal Budget 2022 has already been approved, the tariff elimination could be anticipated by 1 January 2024. With regard to the tariff elimination and the HS 2022 revision, the Swiss customs tariff is also to be reduced from the current 6,172 tariff codes to 4,592 tariff codes.

## Simplified import procedures and tariff classifications

Except for a few industrially produced agricultural products (such as albumin, dextrin or acid oils from refining, as covered in HS chapters 35 and 38), the tariffs would be zero, meaning that all other industrial goods could be imported without paying any customs duties. Once in effect, the compliance and import procedures for such products will therefore be less complicated and time-consuming, as special procedures (e.g., temporary importation, inward processing relief) may be redundant. Furthermore, the downsizing of Swiss customs tariff lines will coincide with the HS revision, which will

simplify the whole tariff classification of products and ease the change of lines in master data.

### Whether red tape can be reduced

In general, the import clearance for companies will be less challenging as tariff classification will be simplified and companies will no longer need proofs of origin to benefit from duty reductions in Switzerland. However, companies that manufacture with pre-materials, resell or process products sourced from other countries still have to be compliant with preferential origin-related rules of free trade agreements (FTAs) in case their customers request certain proofs of origin. Thus, preferential proofs of origin are still needed and have to be declared for imported goods to enable origin compliance accordingly. Furthermore, import VAT, import licenses, excise taxes (e.g., vehicle tax, tax on volatile organic compounds) and the corresponding compliance will remain applicable even if there are no customs tariffs.

In addition, the intended change following the vast reduction of Swiss tariff codes and the upcoming HS revision requires early preparation. Even though tariff classification will be simplified, the tariff codes are still the core item in connection with customs clearance, especially with regard to possible permit requirements, origin calculations and export restrictions. It is therefore essential that the internal master data be updated in due time to prevent any unforeseen events and risks.

### Conclusion

The elimination of almost all customs duties for industrial goods and the adaptation of the Swiss tariff codes are rather comprehensive and require careful consideration by companies. In this regard, Swiss-based companies should prepare early to facilitate compliance and to make use of new opportunities. In order to be ready, companies should:

- ▶ Quantify the impact in terms of potential duty savings and compliance
- ▶ Fully update existing master data (e.g., tariff codes, origin calculation) and prepare for the new arrangements
- ▶ Update origin compliance procedures
- ▶ Prepare assessments of third-party providers to facilitate accurate declaration of imports
- ▶ Explore new sourcing options and partner countries without existing FTAs to optimize supply chain (e.g., for pre-materials)
- ▶ Assess possible domestic processing for (intermediate) manufacturing due to duty reduction
- ▶ Evaluate current customs procedures for optimization

Even though the decline of customs duties reduces bureaucracy and costs, companies also should be aware of possible new developments. As the European Union is currently planning to implement so-called “green taxes” (e.g., taxes levied on plastics or carbon emissions), Switzerland may follow suit and could tax imports based on sustainability and environmental concerns in the near future. ■

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## UK: New deadlines for importers into GB from EU

On 14 September 2021, the UK Government set out a new timetable for introducing full import controls for goods being imported from the EU to the UK. A lack of preparation for post-Brexit trading had been further exacerbated by externally driven supply chain impacts, such as recovery from the COVID-19 pandemic.

Last year, the UK Government stated that import controls would be introduced in three phases for EU goods entering Great Britain (GB), with declarations being required for all standard goods imported from 1 July 2021 (GB consists of England, Scotland and Wales). Subsequently, in March 2021, the UK adjusted the declaration requirement timeline, pushing back the deadline for most import checks from the EU to 1 January 2022.

The new timeline announced on 14 September 2021 means that, while full customs declarations and controls for most goods will continue to be introduced on 1 January 2022 as announced in March, safety and security declarations for standard goods will now not be required until 1 July 2022, and sanitary and phytosanitary (SPS) requirements have been updated.

For imports into GB from the EU, the updated timetable means that:

- ▶ Safety and security declarations on imports will be required as of 1 July 2022 as opposed to 1 January 2022. Full customs declarations and controls will be introduced on 1 January 2022 as previously announced.
- ▶ The requirements for pre-notification of SPS goods, which were due to be introduced on 1 October 2021, will now be introduced on 1 January 2022.
- ▶ The new requirements for export health certificates, which were due to be introduced on 1 October 2021, will now be introduced on 1 July 2022.



- ▶ Phytosanitary certificates and physical checks on SPS goods at border control posts, due to be introduced on 1 January 2022, will now be introduced on 1 July 2022.

Detailed guidance released on 21 September 2021 covering new safety and security declaration arrangements is available [here](#).

Furthermore, from 1 January 2022, if making out a statement on origin for movements of goods between the EU and GB under the EU-UK Trade and Cooperation Agreement (EU-UK TCA), a supplier's declaration must be held – a requirement that until now had been waived.

### **Other key developments regarding the UK customs regime**

As the post-Brexit UK customs regime has stabilized, further practical changes are evident in UK trade compliance.

In recent months, businesses have noted that the UK customs administration, Her Majesty's Revenue and Customs (HMRC), has begun to inquire into the customs activities of UK businesses, with particular focus on compliance matters such as customs valuation.

The more stable importing environment and simplifications to the Authorized Economic Operator (AEO) application (C117 and C118) issued in early 2021 may have also yielded further interest from UK businesses in obtaining AEO status.

Finally, businesses are beginning to turn their attention toward the implications of Customs Declaration Service (CDS) migration, given the HMRC announcement on 3 August 2021 that the CDS will serve as the UK's single customs platform beginning on 31 March 2023.

Recently, it was announced that the primary current UK import declaration system (CHIEF) is being withdrawn according to the following timelines:

- ▶ 30 September 2022: import declarations close on CHIEF
- ▶ 31 March 2023: export declarations close on CHIEF and the National Exports System (or NES)

### Key actions in response

Given the upcoming UK changes, it is imperative for businesses to prepare to protect supply chain continuity, mitigate potential cost impacts and manage queries made by the UK customs authorities.

With the upcoming GB declaration and documentation submission deadlines and potential increasing HMRC queries, importers should undertake a review of import and export entries made since the UK's exit from the EU to identify compliance issues (e.g., inconsistent customs classifications or customs valuations). To facilitate this, many traders are making use of trade analytics tools that can rapidly analyze customs data to identify potential compliance failures.

To claim preferential duty rates under the EU-UK TCA, businesses providing statements on origin must provide supplier declarations beginning in 2022. Consequently, in addition to conducting any retrospective reviews of import and export entries in the UK, those in this position will need to review their future movements of goods and solicit supplier declarations from relevant businesses as appropriate. Meanwhile, suppliers to impacted businesses will need to consider whether these requests will arise and implement compliance processes.

The changed safety and security declaration deadlines primarily place obligations on logistics providers and those moving goods themselves, who will need to put processes and systems in place to acquire safety and security declaration inputs

and to submit the declarations. In turn, UK importers and exporters may face additional requests for information from their logistics providers to facilitate the submission of these declarations. Proactively engaging with logistics providers to understand any future changes to data submission requirements is a common activity to prepare for this.

Similarly, the direct impacts of CDS migration will typically be to logistics companies and those who already make their own declarations. However, businesses that currently use logistics companies to make declarations on their behalf may see their logistics providers request a number of new data elements. As a result, companies should prioritize reviewing the data elements required for CDS customs declarations when compared to CHIEF customs declarations where a CDS migration will be of relevance. They should also simultaneously perform an assessment of the readiness of the business for generation and provision of these data elements.

Each of these key actions requires a time commitment from trade compliance teams in affected companies, which is why validating internal and external expertise in customs and trade is available to affect businesses is a key activity. Typical approaches range from using analytics technology and automation to leveraging managed services to drive cost efficiencies and improve resource flexibility. ■

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# Focus on Middle East and North Africa

Significant efforts by the Gulf Cooperation Council (GCC) and Middle East and North Africa (MENA) countries to restructure and simplify their international trade and customs regimes have been observed in the past year. In addition, there has been increased participation by the Kingdom of Saudi Arabia (Saudi Arabia) and the United Arab Emirates (UAE) in the World Trade Organization (WTO) dispute settlement process, and the GCC countries (i.e., Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE) have clarified their rules of origin requirements and are streamlining their customs laws. We capture and discuss the key developments in the following articles:

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Saudi Arabia: National rules of origin for GCC manufactured goods  
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Saudi Arabia: Guidelines on the VAT e-invoicing regulations  
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# Key developments by customs authorities across the region

## **Increase in post-clearance audits in Saudi Arabia and Egypt**

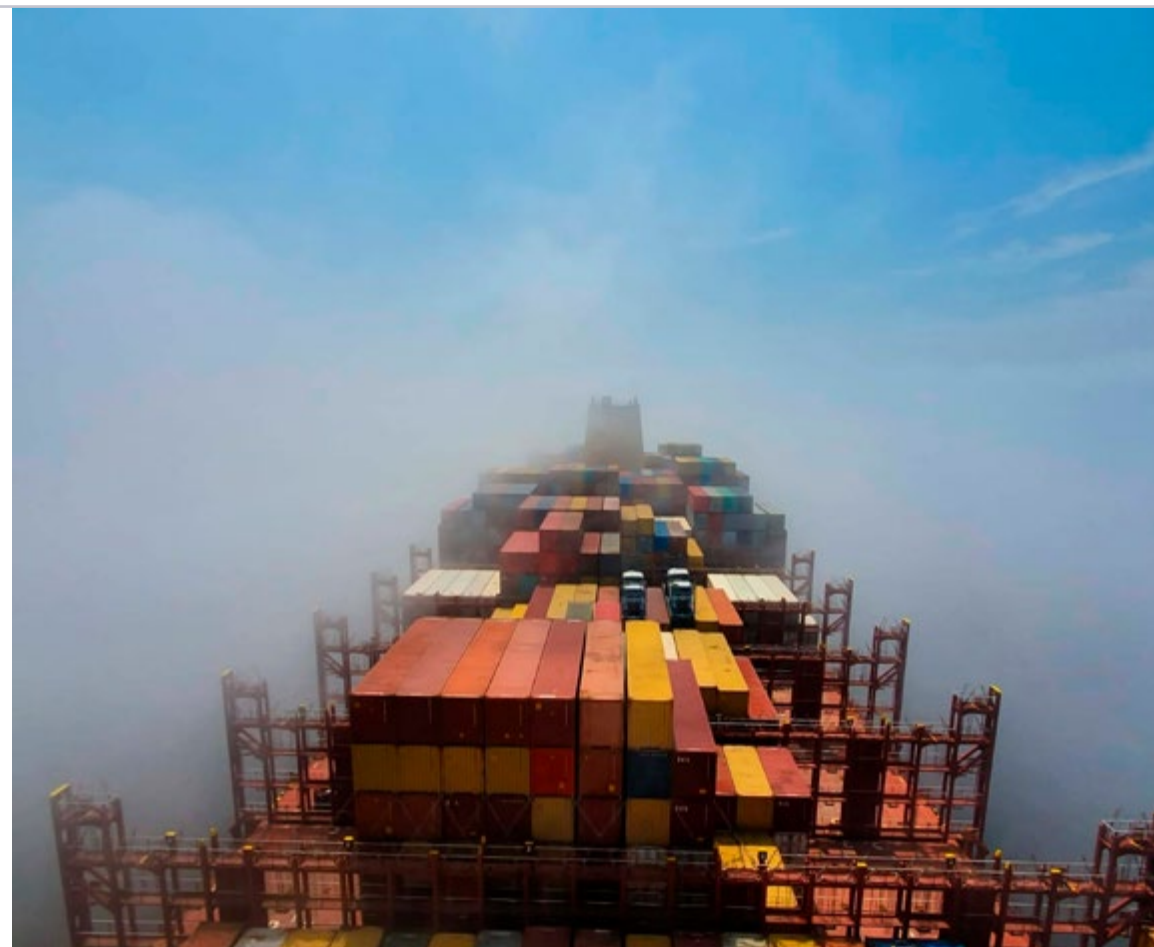
The Zakat, Tax and Customs Authority in Saudi Arabia and the Egyptian Customs Authority have been expanding their post-clearance audit activities and are becoming increasingly active in approaching multinationals and local importers for customs audits, spanning a wide range of issues, such as payment terms, financial statements and records, and examination of transaction value.

## **Automation of exit/entry certificates at Jebel Ali Port**

Dubai Customs, in collaboration with DP World, has launched the automation of exit/entry certificates to expedite exports from Jebel Ali Port. This automation enables customers to digitally apply for refunds immediately after the export of goods, thereby reducing the time for processing refund claims at Dubai Customs.

## **Increase in free zone audits in UAE**

The UAE Federal Customs Authority has been increasing its audits across free zones to facilitate compliance with customs and related laws and regulations. The audits are focused on assessing whether free zone entities are able to reconcile goods with their import and export declarations, and on verifying whether there are any discrepancies in the inventory maintained by the free zone entities. ■



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# Egypt: Government issues customs regulations and makes Advance Cargo Information System mandatory as of 1 October 2021

## **Customs Law No. 207 of 2020 to simplify customs procedures and expedite movement of goods**

Egypt published Customs Law No. 207 of 2020 in November 2020 to restructure and update Egypt's customs regime. In furtherance of the new customs law, the Minister of Finance issued Decree No. 38 of 2021 (the Decree) to regulate the Advance Cargo Information (ACI) System and Decree No. 430 of 2021 to set out the new customs regulations.

## **Launch of Egypt's single window system (Nafeza) and mandatory requirement for Advance Cargo Information for all imports at seaports as of 1 October 2021**

To meet its commitments under the World Trade Organization (WTO) Trade Facilitation Agreement and transform its customs regime, Egypt introduced the National Single Window for Foreign Trade Facilitation platform called Nafeza – an online integrated information portal requiring importers to submit essential customs and border-clearance-related documentation and information on the portal to expedite the assessment of imports by the Egyptian Customs Authority.

The Decree, issued on 1 February 2021, clarifies the procedures for an ACI system that now requires pre-registration of shipments on the Nafeza portal, at least 48 hours before the goods arrive at Egypt's seaports. The ACI System uses blockchain technology to simplify and automate customs administration and processes.

The pilot phase of Nafeza was introduced on 1 April 2021, permitting importers and carriers to familiarize themselves with the new procedures until 30 June 2021. Even though the Decree had mandated the implementation of the ACI System from 1 July 2021, the Minister of Finance extended the timeline to 1 October 2021 to accommodate requests from the business community to extend the trial run of the new system.

As of 1 October 2021, it is now mandatory for Egyptian importers to use the ACI System to obtain prior clearance for incoming shipments at Egyptian seaports. The system will be applied at airports and inland ports at a later stage.



## **Summary of ACI procedures**

The first steps would be for the importer (or agent) to register and submit digital advance cargo data on the Nafeza portal, at least 48 hours before the shipment reaches Egypt's seaports, to obtain an Advanced Cargo Information Declaration (ACID) number, which is a unique customs identification number. For the purposes of data entry in the system and electronic registration of the advance cargo data, the importer must use an e-signature obtained from one of the accredited authorities authorized to issue e-signatures.

Within 48 hours following successful submission of the shipment data on the Nafeza platform, the Customs Authority will issue the ACID, which must be used by the exporter on all documents electronically uploaded on the platform. The importer will then have to certify the documents and data shared by the exporter before the shipment reaches Egypt's ports.

### Changes introduced by the executive regulations of the Customs Act

The executive regulations of the Customs Act issued on 31 August 2021 by the Minister of Finance Resolution 430 of 2021 (the Regulations) streamline Customs Law No. 207 of 2020 (the Customs Act) to facilitate and standardize Egypt's international trade regime.

Key changes and updates introduced by the Regulations are discussed below:

#### ► Provision to pay duties in installments

Provision for customs duties to be paid in installments by certain importers subject to meeting certain conditions are set out in the Regulations. Importers engaged in certain activities that are not eligible for preferential duty rates or customs exemptions are permitted to pay the applicable customs duties in a year's time.

#### ► Revising customs post-audit processes

The Regulations revise and set out detailed steps and procedures for customs post-audit processes, including procedures for escalation.

#### ► Temporary storage in bonded warehouses

The Regulations allow for temporary warehousing for imported or exported goods in bonded warehouses for a maximum period of two months until customs clearance procedures have been completed.

#### ► Temporary admission

Goods entered under the temporary admission scheme may be re-exported within 18 months from the date of clearance into the country, which may be extended by a maximum period of a year.

#### ► Refunds

Provision was made for refund on customs duties on raw material that was imported under a duty drawback scheme and used in goods exported. Immediate refunds of guarantees were furnished for imports under temporary admission regime and/or temporary release regime upon export of goods.

#### ► Certificates of origin

Under the Regulations, certificates of origin do not need to be legalized or notarized. The printed certificates of origin may be used until all the electronic procedures have been completed on the Nafeza portal.

#### ► Settlement of customs disputes through arbitration

In certain cases, customs disputes may be settled through arbitration, even in the absence of the goods. Commercial invoices or other related information, such as samples or catalogs, may suffice in this instance.

#### ► Appeals and settlement of customs disputes

The Regulations elaborate the procedures to be followed in case of disputes with the Egyptian Customs Authority.

### Impact of Egypt's current customs regime

The single window system and provisions for electronic submission and exchange of documents is a huge boost to all concerned stakeholders. The upgraded customs regime and the digital transformation streamline the customs clearance process, allowing for expeditious movement of goods and significant reduction in costs associated with the clearance of goods. The changes also will lead to an increase in investment in Egypt due to simplified customs laws and regulations that are in line with international standards. ■

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# Saudi Arabia: National rules of origin for GCC manufactured goods

On 2 July 2021, The Minister of Finance of Saudi Arabia and the Chairman of the Board of the Zakat, Tax and Customs Authority (ZATCA) published Ministerial Decision No. 3852, dated 22/11/1442, introducing the new national rules of origin (the Regulations) based on the Gulf Cooperation Council (GCC) Unified Economic Agreement. The Regulations set out the national rules of origin for the eligibility of preferential duty treatment when goods produced by GCC countries are imported into Saudi Arabia.

The Regulations, in effect from 2 July 2021, require the following for goods manufactured in GCC countries to be eligible for preferential duty exemption in Saudi Arabia:

- ▶ The goods must obtain a valid certificate of origin from the relevant GCC country.
- ▶ The goods must be shipped directly from the GCC country of origin to Saudi Arabia.
- ▶ The local added value from production of the goods in any GCC member state must equate to at least 40% of the ex-works final price.
- ▶ The licensed manufacturer generally must meet a standard requirement of a minimum 25% national workforce.

Penalties may apply where goods are declared to originate from a GCC country but do not meet the requirements under the Regulations.

Businesses should review how the Regulations affect their supply chain, manufacturing processes, and the movement and invoicing of goods between GCC countries. ■



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# Saudi Arabia: Guidelines on the VAT e-invoicing regulations



The Zakat, Tax and Customs Authority (ZATCA) published Value Added Tax (VAT) e-invoicing regulations (Regulations) on 4 December 2020. The Regulations, though effective from the date of publication, require the taxpayers to mandatorily implement them in phases, with phase 1 implementation starting from 4 December 2021. Phase 1 requires all taxpayers to store, generate and issue e-invoices with pre-defined data fields and any related notes using compliant electronic systems. The Regulations will not apply to taxable persons who are not resident in Saudi Arabia.

Article 3 of the Regulations defines the parties subject to the Regulations:

- ▶ Taxable persons in Saudi Arabia
- ▶ Third parties issuing tax invoices on behalf of resident taxable persons

In furtherance of the Regulations, ZATCA issued controls, requirements, technical specifications and procedural rules for implementing the provisions of the Regulations. ZATCA also has issued detailed guidelines on e-invoicing, in Arabic and English, providing definitions related to e-invoicing and clarifying the categories of e-invoicing and the types of transactions subject to e-invoicing regulations. The guidelines aim to simplify and clarify the end-to-end journey of taxable persons through electronic invoicing, their obligations and the overall solution requirements to comply with the e-invoicing regulations. However, the guidelines do not provide technical implementation details directed at invoicing solution vendors or integration process details, as these will be specified at a later date.

As of 4 December 2021, manual invoices, such as handwritten or scanned invoices or invoices generated with text-editing tools, will not be accepted as a compliant invoice. Phase 1 does not specify a format for the e-invoices, but there are certain requirements that must be met depending on the type of invoice:

- ▶ Simplified tax invoice and their associated notes. The simplified tax invoice, designed for business-to-consumer (or B2C) transactions, mandates a QR code to be generated by the taxpayer's electronic system. Once the QR code is scanned, the invoice should contain the minimum fields: seller's name, seller's VAT registration number, time stamp of the e-invoice or the note, total amount of the e-invoice or note, and total amount of VAT.

- ▶ Tax invoice and their associated notes. The tax invoice, designed for business-to-business (or B2B) transactions, must include the buyer's VAT number if the buyer is a registered VAT taxpayer. QR code is optional.
- ▶ "Associated notes" refers to debit and credit notes. It is compulsory for the e-invoice to be issued in Arabic, but businesses are free to issue the invoice in other languages as well.

Phase 2 of the e-invoice implementation will be rolled out on 1 January 2023, by taxpayer group and will require integration with ZATCA in order to share data and information. The procedures and detailed guidelines are expected to be published by ZATCA in due course.

Businesses that want to implement e-invoicing successfully should finalize restructuring their digital reporting and tax accounting systems to conform to the requirements set out by ZATCA. ■



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# Saudi Arabia: General Secretariats of the Customs and Tax Committees merge

The General Secretariat of Tax Committees of the Kingdom of Saudi Arabia announced on 21 September 2021, its decision to merge the Secretariats of Tax and Customs Committees into one secretariat under the new name of General Secretariat of Zakat, Tax and Customs Committees. The newly merged secretariat will act as an independent body supporting the Zakat, Tax and Customs Committees by providing legal, accounting, technical and administrative assistance.

## Objective of merging secretariats

In May 2021, the Saudi Council of Minister approved the integration of the General Authority of Zakat and Tax and the General Authority of Customs to create the Zakat, Tax and Customs Authority as a part of Saudi Arabia's goal of enhancing the functioning of government agencies.

Similarly, the decision to merge the secretariats is intended to simplify the litigation process

and to further Saudi Arabia's vision of unifying organizational, administrative and technical procedures, improving the efficiency and quality of the service for all its stakeholders.

According to the announcement issued by the General Secretariat of Tax Committees on 21 September 2021, all legal procedures and related transactions can be conducted through the website of the General Secretariat of the Zakat, Tax and Customs Committees ([www.gstc.gov.sa](http://www.gstc.gov.sa)). ■



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# Saudi Arabia: Challenge to the EU's provisional anti-dumping duty on monoethylene glycol at the WTO

The Kingdom of Saudi Arabia (Saudi Arabia), in its first-ever consultation before the World Trade Organization (WTO), has challenged the imposition by the European Union (EU) of a provisional anti-dumping duty on imports of monoethylene glycol (MEG) from Saudi Arabia.<sup>1</sup>

By way of Commission Implementing Regulation (EU) 2021/939 of 10 June 2021, the EU imposed

a provisional anti-dumping duty on imports of MEG originating in the United States (US) and Saudi Arabia for a period of six months. In response to the imposition of the provisional anti-dumping duty of 11.1% on its exports, Saudi Arabia requested consultations with the EU on 17 August 2021. Saudi Arabia claims that the challenged regulation is inconsistent with the EU's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994.

In its communication submitted to the WTO Dispute Settlement Body, Saudi Arabia claimed that the anti-dumping measures appear to be inconsistent with Articles 5.2, 5.3 and 5.8, inter alia, of the Anti-Dumping Agreement on the grounds that the EU's application did not contain sufficient evidence to show that dumping had caused injury that justified initiation of an investigation. Among other claims, Saudi Arabia also contends that the EU incorrectly cumulated imports from the US and Saudi Arabia in analyzing the impact of the imports on the domestic industry in its anti-dumping investigation.

The request for consultations allows the concerned parties to discuss and find a solution within 60 days from the date of receipt of the request for consultations. If the negotiations fail to resolve the issue within the 60-day period, the complainant, i.e., Saudi Arabia, may request the establishment of a panel to adjudicate its dispute with the EU.

As of 9 November 2021, the parties have not notified the WTO Dispute Settlement Body of a mutually agreed-upon solution. ■



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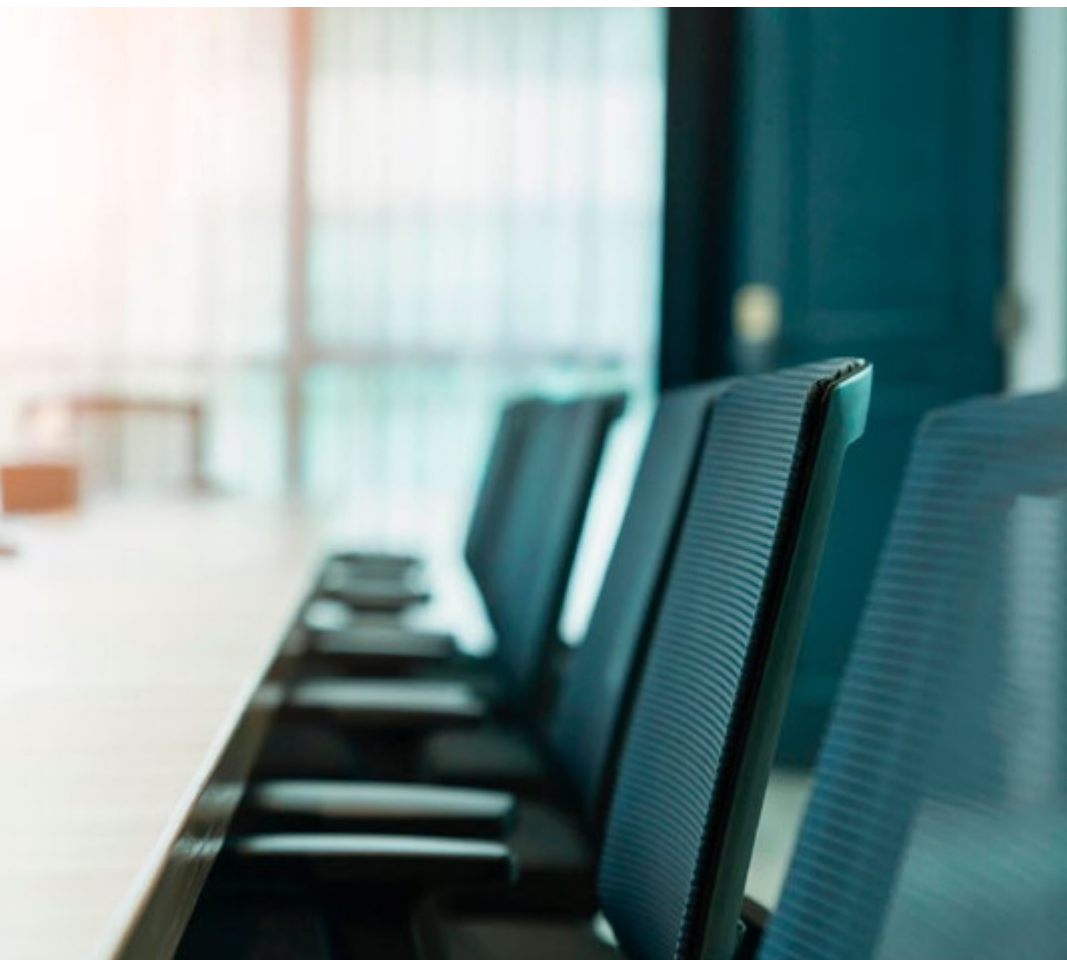
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<sup>1</sup> "DS606: European Union – Provisional Anti-Dumping Duty on Mono-Ethylene Glycol from Saudi Arabia," WTO website, accessed 8 November 2021. [Find it here](#)

# Saudi Arabia and UAE: Third-party rights to participate in WTO panel proceedings



Saudi Arabia reserved its rights to participate as a third party in the following World Trade Organization (WTO) panel proceedings:

- ▶ DS592: Indonesia – Measures Relating to Raw Materials
- ▶ DS600: European Union and certain Member States – Certain Measures concerning Palm Oil and Oil Palm Crop-based Biofuels
- ▶ DS601: China – Anti-Dumping Measures on Stainless Steel Products from Japan

The UAE reserved its third-party rights to participate in the following WTO disputes:

- ▶ DS592: Indonesia – Measures Relating to Raw Materials
- ▶ DS595: European Union – Safeguard Measures on Certain Steel Products ■

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# UAE: Federal Tax Authority implements new design for digital tax stamps for tobacco products



The United Arab Emirates (UAE) Federal Tax Authority (FTA) issued Federal Tax Authority Decision No. 3 of 2021 (Decision), approving digital tax stamps with a new design. The Decision also clarifies that orders for the new design may be submitted starting on 1 October 2021, for the local market and arrival terminals at duty-free markets, and 1 January 2022, for duty-free departure terminals.

## **Background and objective**

The FTA introduced the digital tax stamp system scheme in 2019 to digitally track tobacco and tobacco products from the manufacturing facility until the goods reach end consumers. The scheme requires all tobacco manufacturers and stakeholders, such as importers and supply chain agents, to register and place these high-security control stamps on all tobacco products.

The track-and-trace scheme enables the FTA to tackle tax evasion and verify whether excise duties have been paid on goods, and it also protects users from consuming illicit and low-quality products. Inspectors at customs borders can read the digital information included with the related stamp using a customized device to validate that all taxes have been duly paid.



The Decision announces the features of the new design for digital tax stamps, which must be found on the packaging of all cigarettes, electrically heated cigarettes and waterpipe tobacco as of 1 October 2021. The digital tax stamps are color-coded, based on the kind of tobacco product and where the goods are being sold.

Article 2 of the Decision specifies the following start dates for raising orders of the redesigned digital tax stamps:

1. Local markets and arrival terminals at duty-free markets can raise orders starting from 1 October 2021. As of this date, orders can be placed by local markets and duty-free arrival terminals for:

- ▶ Red-colored stamps incorporating the new design to be placed on packaging of all cigarettes
- ▶ Lilac-colored stamps incorporating the new design to be placed on the packaging of electrically heated cigarettes and waterpipe tobacco

2. Departure terminals at duty-free markets can raise orders for the new designs starting from 1 January 2022. Duty-free departure terminals will have to wait until 1 January 2022 to place orders for:

- ▶ Green-colored stamps with the new design to be placed on packaging of all cigarettes
- ▶ Blue-colored stamps with the new design to be placed on the packaging of electrically heated cigarettes and waterpipe tobacco

The color-coded tax stamps enable easier identification by the authorities and by end consumers. The FTA has clarified that the revised designs will not have any impact on manufacturing activities and that the changes are limited to the base design, with no other change being made to the existing format, size, shape, material, thickness or base color of the current stamps in circulation. ■

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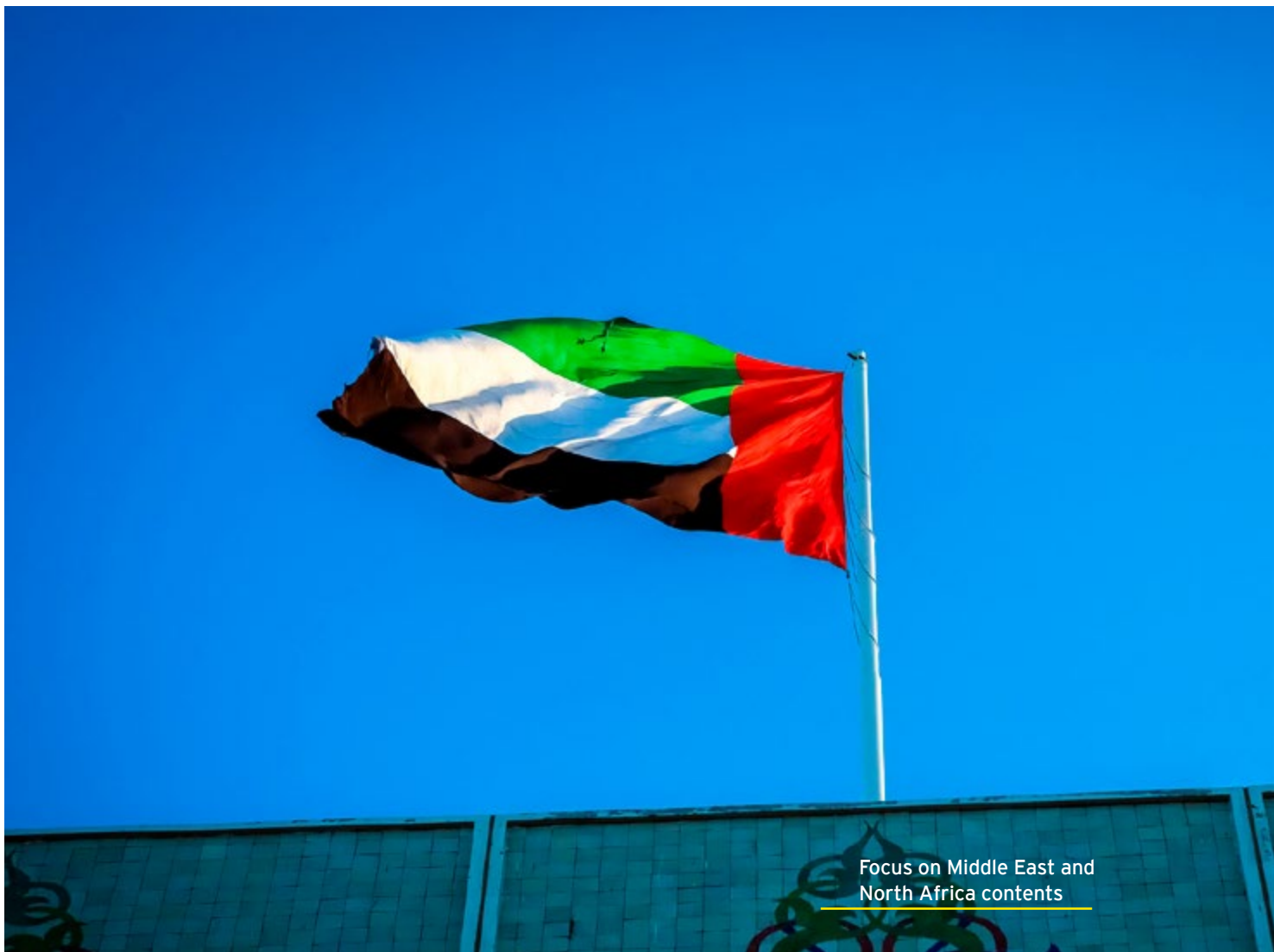
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# UAE: WTO panel recommends Pakistan withdraw anti-dumping duties imposed on certain imports from the UAE

Pakistan has notified the World Trade Organization (WTO) Dispute Settlement Body of its decision to appeal the Panel Report in the case brought by United Arab Emirates (UAE) in “Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the UAE” (DS538). The Panel Report was circulated to WTO members on 18 January 2021, with the panel recommending that Pakistan withdraw the anti-dumping duties (ADD) imposed on imports of biaxially oriented polypropylene (BOPP) film from the UAE to conform to Pakistan’s obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement or ADA).

The UAE had requested consultations on 24 January 2018, challenging Pakistan’s final ADD determination, dated 9 April 2015, that imposed ADD on imports of BOPP film from the UAE until 14 August 2015, and Pakistan’s sunset review determination, dated 1 December 2016, extending ADD for five years.



The final ADD determination of 9 April 2015 was found to be inconsistent with the ADA mainly on the following grounds:

- ▶ The National Tariff Commission (NTC) (Pakistan's anti-dumping investigation authority) did not base its injury determination on evidence of current injury required under Article 5.3 of the ADA. The Panel relied on the fact that NTC did not seek more recent data or explain why the evidence was sufficient to justify the initiation of the anti-dumping investigation.
- ▶ NTC failed to ascertain the existence of current dumping and current injury since there was too long a gap (i.e., 22 months) between the end of the Period of Investigation (POI) and initiation of the investigation, and a longer gap of 31 months between the end of the POI and the final determination, to fulfill the requirements of Articles 2.1 and 3.1 of the ADA.
- ▶ NTC acted inconsistently with Articles 3.1 and 3.2 of the ADA by relying on data for a single year of the POI without adequately explaining why it disregarded conflicting evidence from the rest of the POI. The Panel also noted that NTC compared the aggregate price of dumped imports with the aggregate price of domestic BOPP film without distinguishing between the metallized and non-metallized types, which differed in price and quantities, raising doubts of comparability.

- ▶ NTC did not assess all the 15 economic factors listed in Article 3.4 of the ADA and did not undertake an objective examination of positive evidence.
- ▶ With regard to Article 3.5, the Panel found that NTC's reliance on findings that were inconsistent with Articles 3.1, 3.2 and 3.4 renders its causation analysis inconsistent with Articles 3.1 and 3.5.

The sunset determination of 1 December 2016 is seen to be inconsistent with the ADA on the following grounds:

- ▶ In determining whether the expiry of a duty would be likely to lead to continuation or recurrence of dumping and injury, NTC constructed a margin of dumping inconsistent with Article 2, thereby not fulfilling the requirements of Article 11.3 of the ADA.
- ▶ The Panel found Pakistan to have acted inconsistently with Article 11.4 of the ADA by taking more than 12 months to complete the sunset review, in the absence of abnormal circumstances.

### Panel's recommendations and appeal by Pakistan

The Panel Report found the successive ADD measures imposed by Pakistan to be inconsistent with its obligations under the ADA and recommended that Pakistan withdraw the ADD imposed on imports of BOPP film from the UAE.

On 22 February 2021, Pakistan notified the WTO Dispute Settlement Body of its decision to appeal, to the Appellate Body, the Panel's analysis under Articles 3.4, 3.5 and 11.3 of the ADA. The Panel Report is under appeal and is currently being reviewed by the Appellate Body. ■

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# Tax Alerts



Tax Alerts

# Americas

## Argentina

- ▶ Argentine Government plans to eliminate duties on exports of services (01.10.2021)

## Canada

- ▶ Canada: 2021 Budget implementation bill receives Royal Assent (02.07.2021)

## Colombia

- ▶ Colombia enacts law modifying tax incentives applicable to renewable energy projects (21.07.2021)

## Costa Rica

- ▶ Costa Rica's General Customs Directorate issues guidelines on processes and operations in free trade zones for public comment (11.11.2021)
- ▶ Costa Rica's Economic Affairs Commission of the Legislative Assembly approves reform of General Customs Law (26.10.2021)
- ▶ Costa Rica's Ministry of Finance increases taxes on packaged non-alcoholic beverages and "toilet" soap (26.10.2021)

## Ecuador

- ▶ Ecuador issues oil and gas policy and reduces customs tariffs (21.07.2021)

## El Salvador

- ▶ Salvadoran Minister of Finance files draft bill to establish tax amnesty program (05.10.2021)

## Global

- ▶ G20 Finance Ministers endorse 8 October BEPS 2.0 statement and call for swift implementation to secure entry into effect in 2023 (14.10.2021)

## Mexico

- ▶ Mexico's 2022 economic proposal focuses on eliminating loopholes (17.09.2021)

## Peru

- ▶ Peru's President asks Congress for power to enact different tax measures (03.11.2021)
- ▶ Peru creates a new tax-free zone (20.08.2021)

## Puerto Rico

- ▶ Puerto Rico's Treasury Department announces new monthly return for consolidated sales and use tax and tax on imports effective for the month of October and subsequent periods (04.11.2021)

## United States

- ▶ Reinstatement and expansion of superfund excise taxes under Infrastructure Investment and Jobs Act could mean taxpayers in multiple sectors must pay tax on products they manufacture or import (10.11.2021)
- ▶ Connecticut's tax amnesty program runs through 31 January 2022 (09.11.2021)
- ▶ US and EU agree to end steel and aluminum tariffs and cooperate to address carbon intensity (03.11.2021)
- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)
- ▶ Proposed federal bills would reinstate, expand and increase superfund excise taxes as soon as January 1, 2022 (18.10.2021)
- ▶ US: Update on trade actions (06.10.2021)
- ▶ Arrangements between US and UK competent authorities clarify understanding of terms in the US-UK tax treaty (02.08.2021)

# Asia-Pacific

## China Mainland

- ▶ Mainland China releases master plan for developing Guangdong-Macao In-depth Cooperation Zone (15.10.2021)

## Japan

- ▶ Japan: Application process starts for Carbon Neutrality and Digital Transformation related tax incentives (26.08.2021)

## Global

- ▶ G20 Finance Ministers endorse 8 October BEPS 2.0 statement and call for swift implementation to secure entry into effect in 2023 (14.10.2021)



# Europe, Middle East, India and Africa

## Austria

- ▶ Austrian Ministry of Finance publishes draft bill to reduce Corporate Income Tax and introduce Carbon Tax (18.11.2021)
- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)

## Cyprus

- ▶ Cyprus to introduce new tax measures as part of its National Recovery and Resilience Plan (05.08.2021)

## East Africa

- ▶ East African Community implements tariff changes (09.08.2021)

## European Union

- ▶ European Commission releases proposal for a Carbon Border Adjustment Mechanism (29.07.2021)
- ▶ European Commission proposes legislative package including environmental tax measures to support EU climate ambitions (15.07.2021)

## France

- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)

## Ghana

- ▶ Ghana issues Budget Statement and Economic Policy for 2022 Financial Year (19.11.2021)
- ▶ Ghana Revenue Authority issues Practice Notes on certain provisions of the VAT Act (28.10.2021)

## Global

- ▶ G20 Finance Ministers endorse 8 October BEPS 2.0 statement and call for swift implementation to secure entry into effect in 2023 (14.10.2021)

## India

- ▶ GST Council recommends further rate rationalization and trade facilitation measures (20.09.2021)

## Italy

- ▶ Italian Government approves 2022 Budget document and proposes postponement of Italy's Sugar Tax and Plastic Tax to 2023 (27.10.2021)
- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)

## Kenya

- ▶ Kenya Tax Appeal Tribunal rules on the use of Transaction Value Method for customs valuation (11.11.2021)

## Nigeria

- ▶ Nigerian Government signs Petroleum Industry Bill 2020 into Law (02.09.2021)

## Saudi Arabia

- ▶ Saudi Arabia clarifies GCC origin of goods (13.07.2021)

## Spain

- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)

## Switzerland

- ▶ Swiss Parliament acts to eliminate import customs duties on industrial goods as soon as 1 January 2022 (22.09.2021)

## Tanzania

- ▶ Tanzania's Parliament passes Finance Bill, 2021 (25.06.2021)

## Turkey

- ▶ Turkey's new law on restructuring certain receivables includes customs receivables (18.06.2021)

## United Kingdom

- ▶ UK Plastic Packaging Tax – Legislation in UK Budget Finance Bill and consultation on new regulations (05.11.2021)
- ▶ US and EU agree to end steel and aluminum tariffs and cooperate to address carbon intensity (03.11.2021)
- ▶ UK Chancellor delivers second Budget of 2021 (28.10.2021)
- ▶ Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect (25.10.2021)
- ▶ UK updates guidance on invoicing for upcoming Plastic Packaging Tax (05.10.2021)
- ▶ UK issues updated Plastic Packaging Tax guidance for business (13.08.2021)
- ▶ Arrangements between US and UK competent authorities clarify understanding of terms in the US-UK tax treaty (02.08.2021)

# Additional resources



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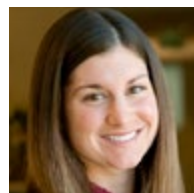
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