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# The Uruguay Round and the World Trade Organization: A New Era Dawns in the Private Law of International Customs and Trade

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# CORPORATE COMMENT

## THE URUGUAY ROUND AND THE WORLD TRADE ORGANIZATION: A NEW ERA DAWNS IN THE PRIVATE LAW OF INTERNATIONAL CUSTOMS AND TRADE

*Paulsen K. Vandever, Esq.\**

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## I. INTRODUCTION

In 1995, the Uruguay Round of the General Agreement on Tariffs and Trade (the GATT)<sup>1</sup> concluded at Marrakech,<sup>2</sup> opening a new era in international trade regulation. The most visible product of this Round was the replacement of the loosely organized and ill-defined GATT with the more formally organized and newly empowered World Trade Organization (WTO).<sup>3</sup> The WTO symbolizes the watershed achievement of the Uruguay Round: the subscription to, implementation of, and adherence to all the provisions of all the agreements constituting the GATT as a pre-condition to, and ongoing obligation of, WTO membership.<sup>4</sup> In many ways returning to its roots in the ill-fated International Trade Organization (ITO),<sup>5</sup> the Uruguay Round profoundly changed the way international trade will be conducted and regulated by all countries around the world, regardless of whether they are WTO members or not.

What has not been fully appreciated, but will prove to be just as profound, is the Uruguay Round's impact on the private sector. In the WTO environment, importers, exporters, multinational corporations, or any business engaged in the movement of goods across international borders (collectively referred to here as "traders") will be required to restructure the ways in which they engage in cross-border transactions. In the WTO environment, traders will have an increased responsibility because they will be charged with making initial legal determinations as to the admissibility, tariff classification, and dutiable value of the goods they import and export, instead of the largely passive role of merely reporting to the Customs authorities the facts of the transactions these traders have enjoyed in the past.<sup>6</sup> This in-

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<sup>1</sup> See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

<sup>2</sup> Marrakech Protocol to the General Agreement on Tariffs and Trade, 33 I.L.M. 1165 (1994).

<sup>3</sup> Agreement Establishing the World Trade Organization, 33 I.L.M. 9 (1994) [hereinafter WTO Agreement].

<sup>4</sup> See WTO Agreement, art. XI(1).

<sup>5</sup> See *World Trade Organization*, (last modified December 21, 1998) <<http://www.wto.org/wto/about/facts4.htm>> (Setting forth a lengthy discussion of the history leading to the establishment of the WTO).

<sup>6</sup> The Uruguay Round Agreements do not specify specific responsibilities to be assigned traders. As international treaties negotiated and signed by governments, these Agreements enhance the role of trader by suggesting and prescribing what national governmental authorities can do in the regulation of international trade. See Agreement on Implementation of Article VII of the General Agreement on Tariffs

creased responsibility will require traders to acquire or develop knowledge, expertise, and policies that actively manage their respective international trade flows. But beyond increased responsibility, the WTO-Uruguay Round environment presents traders with a tremendous opportunity (never before presented) to develop customs and international trade planning policies and strategies that will reduce the cost and burden of international trade by taking positions that legally reduce duty payments and implementing cost-efficient customs and trade management programs. The new responsibilities and opportunities for traders presented by the Uruguay Round, under the aegis of the WTO, are the subject of this Article.

Before getting into the substance of this Article, it is necessary to describe some of the principles that govern international trade, the context in which international trade historically has been conducted, and the relationship between traders and governments. The first principle is that international trade is inherently a governmentally regulated activity due to the universal sovereign right of nations to control the flow of goods and persons across their borders.<sup>7</sup> Exercise of this sovereign power serves two important purposes: the raising of revenue from customs duties and other import-related taxes and the promotion and protection of domestic economic and social interests. The

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and Trade 1994, Apr. 15, 1994, General Introductory Commentary ¶ 2, Hein's No. KAV 3778 [hereinafter Valuation Agreement]: "Where the customs value cannot be determined under the Provisions of Article 1 [transaction value], there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 and 3 [comparative transaction values]." See *id.* Also, "no customs values shall be determined under the provisions of this Article on the basis of (a) the selling price in the country of importation . . . (f) minimum customs values . . ." See *id.* at art. 7, ¶ 2.

The actual transition of legal responsibility away from the customs authorities to traders for legal decisions affecting the cross-border movement of goods is left to national legislation either implementing the Uruguay Round Agreements or reforming existing customs laws or both. See *Mexico: National Trade Estimate Report on Foreign Trade Barriers* (Bank of America, 1996) (visited Nov. 28, 1998) <<http://www.tradeport.org/ts/countries/mexico/ftbar.shtml>> as an example of the former [hereinafter *Mexico: Trade Barriers*] and 19 U.S.C. §1484 as an example of the latter.

<sup>7</sup> See generally *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 315-321 (1936) (providing a lengthy discussion of the distinction between sovereign power, which relates to all external affairs of a nation, and which derives from the sovereign power of other nations, and domestic authority, which in the United States derives from the people and the Constitution). Sovereign power cannot be subject to domestic law because it preexisted and is superior to it. See *id.*

second governing principle is that importing and exporting goods is not a right, but a privilege, that can be lost if the applicable laws and regulations are violated.<sup>8</sup>

The sovereign right of nations to control their borders and the revocable privilege of traders to import and export goods defines the context in which international trade is conducted and establishes the parameters of the relationship between the traders and the governments. In order to retain their privilege, traders must comply with the rules and regulations imposed upon them by national authorities. Because historically it was the government officials who had, essentially, the first and last word on what could be imported or exported, the relationship between traders and the authorities has been characterized by active, virtually unquestionable enforcement by government authorities and passive, relatively unquestioning compliance by traders. In many respects, strict control over trade regulation by government authorities has been made necessary by barriers to trade erected by governments as the products of national political and social policies. In order to better understand the advancements made possible by the Uruguay Round, this Article will first discuss three barriers to trade: sectoral segregation,<sup>9</sup> the lack of conformity among national customs and regulated trade regimes,<sup>10</sup> and the lack of a meaningful participatory role for traders in the regulated trade process.<sup>11</sup>

Mere compliance, however, should not be the only objective of traders. As presumed profit seekers, the more important goal for traders in the international trade environment should be to minimize the cost and burden of governmental regulation. Thus, the proper relationship between government and traders should be one of balancing sometimes conflicting interests: raising revenue and trade law enforcement on the part of government and minimizing the cost and burden of regulation and enforcement by traders. This Article suggests that the Uruguay Round made significant progress toward creating an environment in which this balanced relationship between government and traders can be established.<sup>12</sup>

In reading this Article, it should be kept in mind that much of what is discussed has yet to occur. The three barriers to trade still exist in many WTO member countries, not because of a lack of com-

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<sup>8</sup> *See id.*

<sup>9</sup> *See discussion infra* Part II A.

<sup>10</sup> *See discussion infra* Part II B.

<sup>11</sup> *See discussion infra* Part II C.

<sup>12</sup> *See discussion infra* Part IV.

mitment to abolish them as they are obligated by the WTO to do, but because the barriers have been significant parts of these countries' political, social, and economic structures for a long time and the global standards that are to replace these barriers will be radical departures from the methodologies and processes that have been employed to date.

Yet, it is the signs of progress and indications of the member countries' sincere commitment to fulfilling their WTO obligations that prompted this Article. Although progress on the part of government authorities will be measured in years and not days, and in steps and not great leaps, it is high time for the private sector to begin making its own progress and changes to accommodate and take advantage of the regulated international trade environment created by the Uruguay Round and overseen by the WTO.

## II. THE THREE BARRIERS TO TRUE GLOBAL TRADE

During the modern era of international trade, which began at the end of World War II,<sup>13</sup> there have been three monumental barriers to a true global trade regime: sectoral segregation, the uniqueness of national customs and trade laws, and the lack of a meaningful participatory role for traders in the substantive process of determining what and how goods move across borders. The signal achievement of the Uruguay Round was the creation of an environment overseen by the WTO that will lead to the dismantling of these barriers.

### A. Sectoral Segregation

What this Article will call "sectoral segregation"<sup>14</sup> involves the extraction of an industrial or economic sector from the overall national customs and regulated trade regime and the promulgation of special rules and regulations governing both trade and investment in that sector. Sectoral segregation followed nationalization policies which typically involved the seizing of foreign controlled businesses and enterprises, making them the property of the national government, and running these businesses under political and social, but not neces-

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<sup>13</sup> See *World Trade Organization*, *supra* note 5.

<sup>14</sup> This article distinguishes what will be called here "sectoral segregation" from the generally recognized economic term "import substitution." Import substitution is any trade policy designed to promote domestic consumption of goods over imports. The purpose of sectoral segregation, on the other hand, is to develop and promote a domestic industry that is capable of producing goods that can be substituted for imports.

sarily sound economic or commercial policies (such as full employment and promotion of industries that were deemed to be essential to national pride and advancement). Nationalization caused foreign capital and expertise to either leave or be banished from their former host countries. In too many instances, nationalization proved to be a disaster.<sup>15</sup> Sectoral segregation was an attempt to reintroduce foreign investment and know-how, while at the same time preserving national control over the development of the country's economy and the conduct of foreign interests.

Typically, segregated sector programs offer incentives to attract foreign investment and participation in exchange for meeting certain conditions. Incentives, beyond permission to enter and sell in the domestic market, typically include tax holidays, subsidized loans, favored access to land, and, most pertinent to this discussion, waived or reduced customs duties and other import-related taxes or charges on specified imports deemed to be necessary to the investment project. In exchange, the national government requires the beneficiary foreign investors to meet certain performance conditions, such as minimum levels of capital investment and employment, types and amounts of technology transfers, required purchases of domestic products and services, and/or minimum amounts of exports. Sectoral segregation often has achieved the goal of attracting foreign investment, both from interests that had been in the market before nationalization and from new sources, and so to that extent can be said to have been a successful policy.<sup>16</sup>

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<sup>15</sup> See, e.g., V.S. NAIPUL, *A New King for the Congo: Mobutu and the Nihilism of Africa*, in *THE RETURN OF EVA PERON* (Vintage Books 1<sup>st</sup> ed., 1981). (discussing Zaire's experience with nationalism). Naipul's essay vividly describes how the Zairians' inability to maintain or repair the industrial equipment brought to the country by European corporate personnel resulted in rusting hulks or vehicles and equipment littering the countryside.

<sup>16</sup> Sectoral segregation effectively directs foreign investment into those economic and industrial sectors that have been favored and promoted by host national governments. By segregating a particular sector of the economy, governments encourage foreign investment by signaling that these ventures have the ostensible favor and protection of the government. This has great appeal to risk adverse private capital. The converse is where a government attempts to liberalize its economy or simply loses control over economic developments, causing foreign investment to drop off. See discussion of Indonesian automotive programs, *infra*. Similarly, some speculate that economic weakness in China will cause foreign investment to dry up, although the government's ability to centrally plan the economy may mitigate this. *China Is Sticking to Its Official Forecast of 8 % Growth This Year*, FIN. TIMES, Nov. 16, 1998.

Because each segregated sector has its own set of regulations, rules, and definitions and the segregated sector regime stands apart not only from the national customs and trade regime, but from other segregated sector programs as well, significant barriers to trade in the form of lack of transparency and commonality continue to exist. For example, the segregated sector program for the automotive industry will differ not only from the normal customs and trade regulations for automotive products, parts, material, and manufacturing equipment, but also from the segregated sector program established for the textile industry. Further complicating this scenario is the fact that the government agency that negotiates and approves the investment project is usually not the same agency that ultimately regulates and enforces the terms and conditions of the foreign investment project once it is underway.

The typical process for getting approval for a foreign investment project in a segregated sector is as follows. The foreign investor applies to an economic development and promotion agency, generically called the Board of Investment (BOI). The BOI, a part of the Commerce Ministry or Department, receives the application and negotiates the terms and conditions of the project. Even where the criteria and conditions for foreign investment in a segregated sector are published and appear to be well articulated and certain, experience teaches that all benefits and conditions are negotiable. Once a project is approved, however, regulation and enforcement become the responsibility of the revenue and other policing authorities, such as the Customs or Internal Revenue services, who generally will enforce the literal terms and conditions of an investment project. It is not uncommon for the BOI to negotiate and approve a foreign investment project without first notifying and/or consulting with those agencies that will be responsible for enforcing the project. Because the segregated sectors stand outside the normal regulatory and enforcement structures, the fate of the foreign investor who encounters a question as to whether a commitment has been fulfilled or an incentive will be realized will most likely be determined by that agency which prevails in exerting its will.<sup>17</sup>

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<sup>17</sup> For example, this author was told by a lawyer who practices in Poland that a foreign investment project was granted duty free imports of certain goods by the Polish investment approval agency, only to find when the goods arrived in Poland that Customs assessed and demanded payment of the normal customs duties and taxes. Customs, under the authority of the Finance Ministry, told the foreign investor that the investment agency had no legal authority to grant waivers or exemptions from customs duty. Appeals to higher authorities within the Polish government were of no avail.



The application and approval processes and the regulation of segregated sector foreign investment projects have numerous pitfalls that themselves constitute trade barriers. The complete negotiability of any term or condition lacks both transparency and continuity. There will always be in the minds of participants at the very least the suspicion that someone else, a competitor, got a better deal. In addition, the disjunction between the BOI and the enforcement agencies creates a lack of predictability for the foreign investor. Unfortunately, neither the inability to know that the terms and conditions of a project will be applied as negotiated nor the potential for surprise when a particular term or condition is not applied as negotiated has proved a serious deterrent to foreign investors entering developing and emerging markets for the first time. However, they have caused investors to suspend or cancel a project that is underway.<sup>18</sup> The ultimate loser is not the foreign investor, but the country in which the project was to be placed.

#### A.1. Case Study: Indonesia and the Automotive Industry

Indonesia's segregated sector regime for the automotive industry is a good example of the retarding effect sectoral segregation has on the development toward a WTO-conforming customs and regulated trade regime. As a charter WTO member, Indonesia has an obligation under the TRIMs Agreement<sup>19</sup> and Subsidies Code<sup>20</sup> to phase out any programs that violate the commitments made under the Uruguay Round.<sup>21</sup> For many of the reasons that most countries give for a segregated sector regime, Indonesia attempted to implement an auto sector program in 1993 and (despite vigorous opposition from Japan, the European Union, and the United States) sought to maintain it until the WTO ruled that it violated WTO terms and it, coincidentally, col-

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<sup>18</sup> In 1996, General Motors announced that it was suspending all future investment in Indonesia in protest of the changes to the automotive sector programs under which GM had established itself there. See *G.M. Cuts Indonesian Investments*, N.Y. TIMES (June 12, 1996) at D21. For a detailed discussion of Indonesia's auto sector program, *infra*.

<sup>19</sup> Agreement on Trade Related Investment Measures, WTO Agreement, Annex 1A, reprinted in FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS 139 (Office of the United States Trade Representative, 1994) [hereinafter TRIMs Agreement].

<sup>20</sup> Agreement on Subsidies and Countervailing Measures, WTO Agreement, Annex 1A, reprinted in FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS 229 (Office of the United States Trade Representative, 1994) [hereinafter Subsidies Agreement].

<sup>21</sup> See *id.* at art. 3; TRIMs Agreement, *supra* note 19, at art. 5, ¶ 2.

lapsed under gross mismanagement during implementation. Indonesia's auto sector experience illustrates very well both the WTO's enforcement policies and procedures as well the flaws of sectoral segregation.

In 1993, Indonesia adopted the so-called "1993 Incentive Program"<sup>22</sup> for the automotive industry. The stated purpose of the Incentive Program was "supporting and promoting the development of the automotive industry and/or the component industry" in Indonesia.<sup>23</sup> Where duty rates in the normal customs tariff regime for imported passenger vehicles were 200%,<sup>24</sup> participants in the Incentive Program could import a certain number of vehicles and pay at most only half the normal rate, 100%!<sup>25</sup> For automotive parts, normal customs duties were 100%, but Incentive Program participants could import parts with a top duty rate of forty percent.<sup>26</sup> In addition, a luxury tax of between twenty and thirty-five percent (depending on the engine size of the vehicle) that was imposed on all vehicle sales was waived for vehicles sold under the auspices of the Incentive Program.<sup>27</sup> The basic condition for participants was achieving prescribed levels of local content in both vehicles assembled and parts manufactured in Indonesia. Actual duty rates payable for imports declined as the amount of local content increased.<sup>28</sup>

The basic objective of the Incentive Program was to stimulate development of the domestic automotive industry in Indonesia for both vehicle assemblers and parts makers.<sup>29</sup> This objective was to be realized through steadily increasing the levels of local content in vehicles and parts sold domestically.<sup>30</sup> Both vehicle and parts producers were to be rewarded with lower duties on their imports as they increased

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<sup>22</sup> WTO Dispute Resolution Panel Report on Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54R, WT/DS55/R, WT/DS59/R, WT/DS64/R 4-5 ¶ 2.4 (July 2, 1998) (visited Nov. 28, 1998) <<http://www.wto.org>> (document search) [hereinafter the Panel Report].

<sup>23</sup> *Id.* at 340, citing Decree of the Ministry of Industry, No. 114/M/S/6/1993, 9 June, 1993.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> Panel Report, *supra* note 22, at 14.

<sup>28</sup> *Id.* at 4-5.

<sup>29</sup> *Id.* at 340.

<sup>30</sup> *Id.* at 4-5.

their levels of domestically sourced parts and material.<sup>31</sup> However, for the duration of both the Incentive Program and the National Car Program, there was, in fact, very little local content available. Consequently, the Indonesian authorities devised very elaborate formulas for calculating local content and created unusual definitions of what would be considered local content in order to compensate for the lack of actual domestically produced parts and material<sup>32</sup> (while still maintaining the appearance of requiring local content thresholds to be met by Program participants).

Under the Incentive Program, the amount of import duty reduction depended on (1) whether the imported good was defined as a "part" or a "subpart"; (2) the amount of local content deemed to have been attained under application of an elaborate point system; (3) whether the part was being imported for direct incorporation into a vehicle or was being imported by a parts maker who would be performing some additional assembly or manufacturing on the imported element before selling the finished part to a vehicle assembler; and (4) the type of vehicle, passenger or commercial, that was to be produced from the imported part.<sup>33</sup> The duty range for participating vehicle assemblers was as high as 100%, where the local content of the finished vehicle was calculated to be less than twenty percent.<sup>34</sup> A local content level greater than sixty percent allowed the vehicle assembler to import the remaining parts at no cost.<sup>35</sup>

For parts makers, the definitions and formulas were even more complex. Depending on whether the import was deemed to be a "part" or a "subpart," the applicable duty rates ranged from 100% to zero percent for parts (the same scale applied to vehicle assemblers), but only from forty to zero percent for subparts.<sup>36</sup> Yet, the required local content for subparts was actually more generous, in that it was less than the local content requirements for vehicles and parts. Subparts could be imported for zero percent duty if only forty percent of the finished subpart was locally sourced, as opposed to the sixty percent

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<sup>31</sup> *Id.*

<sup>32</sup> Panel Report, *supra* note 22, at 7-8.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 5. Thus, by merely entering the Incentive Program, a participant could import fully finished vehicles at half the duty rate applicable to non-participants, conditioned only on the participant's promise to achieve at some time in the future a level of local content.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6.

requirement for vehicles and parts.<sup>37</sup> This deviation and resulting savings in duties paid invited (at least in theory) manipulation by Incentive Program participants. By building up all of the necessary components for a vehicle from subparts, a finished vehicle that was produced from nothing but deemed subparts could have sixty percent foreign content that had been imported duty free! Moreover, people involved in the Incentive Program have said that the local content formulas for parts and subparts involved a point system—allowing points for local labor used and giving weighted points for locally sourced materials.<sup>38</sup> Although overall local content was supposed to be only material based, labor and other factors could actually contribute to achieving local content and thus get significant duty reductions, while not really developing the domestic automotive industry at all.

The purpose of this example is not to provide a clear understanding of how the Indonesian Incentive Program worked, but to illustrate its arcane and arbitrary complexity. In essence, the Incentive Program established requirements and goals that could not be met. The dilemma of the inability of the Incentive Program's participants, who had critical commercial and economic needs for the Program's benefits, but could never fulfill its conditions, caused both the government and the participants to manipulate and contort the program to such an extent that the basic goal (development and promotion of a domestic automotive industry in Indonesia) was never obtained and could never have been obtained under the circumstances.

Beyond its particular failings, the Indonesian Incentive Program manifests a basic flaw in all sectoral segregation: the complexity and apparent arbitrariness of a program's rules, definitions, and levels of enforcement give participants, foreign investors, and traders in general the impression that no rules or standards apply at all. The rules, standards, and definitions created for segregated sector programs have

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<sup>37</sup> Panel Report, *supra* note 22, at 8.

<sup>38</sup> This author was told by people involved in the administration of the Incentive program for private sector participants that, in fact, the Incentive Program was more elaborate and complex than the Panel Report indicates. All of the elements of the manufacturing processes (material and labor) for both parts and subparts were broken down and assigned point values. Each material was assigned points. Each completed part or subpart was assigned total point values that translated into a local content percentage. For example, a brake assembly deemed to have twenty percent or less local content would have six or fewer points. If it were deemed to have greater than sixty percent local content, it would have ten or more points. Points were weighted for those materials that were domestically available. Because the points varied according to the domestic availability of material for the particular part or subpart, actual local content was largely irrelevant.

little basis in the fundamental principles of customs and trade law. Rather, they are the artifices of politically motivated economic and social policy. Because they make little business sense and often defy rational economic interpretation, neither the government officials charged with their implementation and enforcement nor the traders who are subjected to these programs in order to conduct business have any incentive to develop processes for their orderly administration and adjudication. Sectoral segregation not only breeds incompetence and corruption within its own sphere, but undermines the orderly and rational administration of the remaining customs and trade regimes.

The Indonesian Incentive Program, for example, could be considered to have been so complex and arbitrary that it not only undermined itself, but also undermined the application and enforcement of the normal customs and trade regulation regime in Indonesia. Traders are presumed to act in economically rational manners. That is to say, they will conduct their business in such a way that their profit is maximized and their cost minimized. In Indonesia, with normal customs duties of 200% for vehicles and 100% for parts, but duty rates at half that and less under the Incentive Program, no rational trader would import any automotive product under the normal Customs regime. In such a situation, neither traders nor the Customs authorities gain any experience or knowledge in applying the normal admissibility, tariff classification, and dutiable value rules to goods included in a segregated sector. With many countries employing sectoral segregation, there is no economic or commercial reason for traders to develop expertise in the global standards of tariff classification and valuation. Because sectoral segregation does not necessarily even allow expertise and acquired experience to be applied to more than a single sector in one country, much less applied to standards or methodologies on a global basis, traders have no incentive or reason to conduct their business on anything but an ad hoc basis. A comprehensive customs and trade policy is useless where sectoral segregation exists. This not only adversely affects the trader (who cannot benefit from economies of scale and uniformity of approach), but also weakens the effectiveness of national customs authorities, who suffer similarly from the inability to develop competency and professional expertise in customs and trade fundamentals, primarily due to the myriad regimes they are charged with administering.

### *B. Different Customs and Trade Laws for Different Countries*

The barrier of sectoral segregation aside, a consistent global trade structure cannot be achieved so long as the barriers of unique or apparently unique national customs and regulated trade regimes remain.

Derived from the sovereign right of a nation to control its borders, countries historically wrote their own nomenclatures to describe the goods that crossed their borders and devised their own valuation methodologies to determine how much duty should be paid.<sup>39</sup> The problem for traders is obvious. A good that is classified one way in one country, but classified differently elsewhere leaves the trader little option but to accept without question or argument the classifications assigned by each country. The same holds true for valuation. Although not the focus of this Article, the uniqueness of national customs and trade laws also poses problems for national governments. Although a government may gain some benefit either in duty revenue or in other trade regulation enforcement from a unique classification or valuation methodology, that country's exports will be subject to exactly the same vagaries in other jurisdictions. Adopting common standards, such as those provided by the Uruguay Round Agreements, not only allows traders to benefit from economies of predictability and commonality, but also reduces the arbitrary ability of national authorities to discriminate or retaliate against goods from another country.

In a mythic world where trade flows are mostly bilateral or limited to a handful of markets on a multilateral basis, the differing tariff nomenclatures and valuation methodologies may be manageable for both traders and national customs and trade authorities. Using the classic international economic model of wool from England traded with wine from Portugal, it matters very little that England classifies wine as a spirit and not a grape product, while Portugal values wool based on volume and not weight, because past experience will easily inform all involved in this bilateral trade flow. However, in a globalized trade environment, where England's wool and Portugal's wine are traded in many markets against a wide variety of products, the variances become an opportunity for local customs authorities to classify and value imports as they will, and a disincentive for traders (in response to the authorities' perceived capriciousness) to assist in an accurate and consistent classification or valuation of the goods that they trade throughout the world. With no common standards or definitions, a good can be whatever one wants it to be and of any value. A

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<sup>39</sup> See Peggy Chaplin, *An Introduction to the Harmonized System*, 12 N.C. J. INT'L L. & COM. REG. 417, 432 (1987) (overviewing the spectrum of different tariff nomenclatures and their effect of hampering international trade); see also USITC, PUB. NO. 1400: CONVERSION OF THE TARIFF SCHEDULE OF THE UNITED STATES ANNOTATED INTO THE NOMENCLATURE STRUCTURE OF THE HARMONIZED SYSTEM 8 (1983). See Valuation Agreement, *supra* note 6, at art. 7, ¶ 2 (providing a representative list of the valuation methodologies utilized by various countries).

vicious downward spiral is established. Some traders succumb to the temptation to distort or misstate the information that they are required to report to the governments. Governments, in turn, distrust the accuracy and truth of the information that they receive: a trader's description of the goods it has imported cannot be relied upon; the trader's statement of price paid or cost incurred cannot be trusted. Ultimately, there is no system or standard. Faced with an arbitrary and capricious trading system, either the governments fail to collect the revenues due them or the traders avoid such markets. Neither governments nor traders benefit from unique nomenclatures and valuation methodologies.

Confronted with inconsistent and widely varying rules in different countries that apply to the same product sold by the same trader, it is easy to see why even a trader with knowledge and experience (even, perhaps because of its knowledge and experience in the pre-Uruguay Round trade environment) would be unable or unwilling to develop a comprehensive and consistent trade policy and strategy.

### *C. The Lack of a Meaningful Role for Traders in the Process of Regulating International Trade*

The final and (for traders) most significant barrier to a cohesive global trade environment has been the lack of a meaningful participatory role in the substantive process of international trade regulation. Historically, the trader's sole responsibility has been to truthfully and completely report the facts of the transaction, which generally was discharged by providing a description of the physical nature and quality of the goods, quantity, price paid, and/or costs of acquisition or production.<sup>40</sup> The substantive determinations of admissibility, tariff classification, and valuation have been the exclusive prerogative of regulators—the government authorities charged with administering and enforcing the customs and trade laws of the jurisdiction.<sup>41</sup>

Even in those countries with a more inclusive process at either the administrative or judicial levels, the trader has lacked a meaningful role at perhaps the most fateful point in the customs process: the

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<sup>40</sup> Compare, for example, the current language of 19 U.S.C. §1484 which shifts filing and documentary responsibility to the importer, *Infra* note 44, with the former 19 U.S.C. §1484, which, prior to its amendment under the Customs Modernization Act, provided that: "one of the parties qualifying as 'importer of record' . . . shall file with the appropriate customs officer such other documentation as is necessary to enable such officer to assess properly the duties on the merchandise [and] collect accurate statistics with respect to the merchandise." 19 U.S.C. §1484(a)(1)(B) (amended 1993).

<sup>41</sup> *Id.*

moment when the trader's goods cross the border. For many traders, the right to protest or appeal a government's initial decision is as useless, from a purely business efficiency perspective, as having no role at all in the process. With the government making the initial legal determinations, the history of post-entry review, both administrative and judicial, has been largely the technical correctness of these decisions, not an exploration of what the law envisions and allows.<sup>42</sup> The trader has little role, but to attempt to inform the arbiter as to what the correct decision should have been. For traders or for any business interest, this is not the most efficient or expedient way to influence a transaction. The time, cost, and expenditure of other resources to appeal those decisions made by government authorities will too often not seem to be worth the benefit of proving the government wrong.

To compensate for being excluded from the process of making initial legal determinations affecting their goods, traders historically focused on practical ways to reduce the impact of the governmental burden. A primary target has been reducing the time it takes for goods to be cleared and released from Customs.<sup>43</sup> The primary value provided by customs brokers, freight forwarders, and even lawyers to traders heretofore has been the expediencies of compliance; that is those services that reduce the time it takes to obtain release of goods from Customs custody. These service providers, to whom the majority of traders have entrusted all details of moving their goods across borders, fulfill their customer's objectives by knowing the practical details that will expedite Customs clearance, such as the required type and format of documents, electronic transmission of data, and other methods of simplified communication. These services speed

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<sup>42</sup> See discussion of U.S. Customs "presumption of correctness" *infra* notes 120-21 and accompanying text.

<sup>43</sup> In the Customs Modernization Act, Title VI of the NAFTA implementing legislation, Congress authorized the National Customs Automation Program [hereinafter NCAAP] "to establish . . . an automated and electronic system for the processing of commercial imports. For the first time, filing of entry information from a remote location is authorized [as well as] the ability of an importer to file entries and pay duties on a periodic basis." H.R. REP. NO. 103-361 at 246 (1993). Since enactment of the Customs Modernization Act, Customs and the U.S. trade community have paid far more attention to operational reforms, such as "remote filing" and "reconciliation" (periodic filing of entries and accounting for duties owed), than they have to the legal reforms implicit in the new law. It is not at all clear that these efforts have been justified. Congress has refused to fund the new computer systems that are necessary to automate the import process envisioned in the Customs Modernization Act. See *Official: U.S. Won't Pay for Customs Update*, J. OF COM. 1A (Oct. 30, 1998).



up the decisions, but they do not affect the substance of the decision made.

The post-Uruguay Round environment should introduce a balance between the traders and the governmental authorities that has not previously existed. Because government authorities that regulate and enforce international trade transactions have enjoyed for so long such a distinct advantage over the regulated parties, the traders, in their power to make all legally substantive decisions regarding cross-border transactions, they often seem to have become inured to being the sole arbiters of international trade issues. Introducing a balance in the relationship between government regulators and regulated traders, under the aegis of the WTO and the GATT Agreements and implementing national legislation such as the Customs Modernization Act<sup>44</sup> in the United States, will be tantamount to much needed reform in the development and practice of the law of customs and regulated international trade.

### III. THE CUSTOMS AND REGULATED INTERNATIONAL TRADE ENVIRONMENT UNDER THE WTO

The Uruguay Round changed the GATT not so much in substance, as most of the Agreements had been drafted and negotiated prior to the opening of the Uruguay Round,<sup>45</sup> but rather by giving it (at long last) some teeth. As stated above, WTO membership is conditioned on subscription without reservation to, full implementation of, and continued adherence to all terms and conditions of all GATT Agreements.<sup>46</sup> The WTO Dispute Resolution process, established in the Uruguay Round, reinforces this requirement.<sup>47</sup> WTO members can neither abstain from, nor ignore, dispute resolution decisions, as they could under the GATT.<sup>48</sup> If a WTO member either fails to participate in the dispute resolution procedure or fails to comply with the terms of a panel or Dispute Settlement Body decision, the complain-

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<sup>44</sup> The Customs Modernization Act is the popular name for Title VI of the North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103-182 tit. VI, 107 Stat. 2057 (1993) [hereinafter Mod Act].

<sup>45</sup> The Harmonized System was opened for signature in 1983 and became effective in 1988. See Chaplin, *supra* note 39, at 417. The Valuation Agreement, *supra* note 6, began to be negotiated in 1974 and went into effect in 1979.

<sup>46</sup> WTO Agreement, art. XI(1).

<sup>47</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* FINAL TEXTS OF THE GATT URUGUAY ROUND AGREEMENTS 353 (Office of the United States Trade Representative, 1994) [hereinafter "DSU"].

<sup>48</sup> *Id.* at art. 23.

ing WTO member may suspend any concessions or benefits that were extended by the complaining WTO member to the non-complying offending WTO member.<sup>49</sup> This Lockean<sup>50</sup> solution appears to ensure the WTO's continuing life and effectiveness.

While there has been a fair amount of discussion and analysis concerning the Uruguay Round and the WTO as a significant development of public international law, there has been virtually no discussion or debate on the impact of the Uruguay Round or the WTO in the arena of private international law and on private commercial interests, i.e. the traders.<sup>51</sup> In the post-Uruguay Round environment, as the three barriers to global trade are dismantled and WTO members gradually reform their customs and regulated trade laws, traders will find increasing commonality in the substantive fundamentals of trade: admissibility, tariff classification, and valuation. More significantly, traders should expect to have increased responsibility and opportunity in the substantive legal determinations involved in trading goods across international borders. This section discusses how the three trade barriers will be dismantled, the new trading environment created under the WTO, and the traders' place in that new environment.

### A. Sectoral Segregation Eliminated

A primary objective of the TRIMs Agreement and the Subsidies Code is the elimination of sectoral segregation. TRIMs prohibits conditioning approval and ongoing operating authority of foreign investment projects on certain performance commitments, specifically local content.<sup>52</sup> Similarly, the Subsidies Code prohibits, among other things,

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<sup>49</sup> *Id.* at art. 22.

<sup>50</sup> John Locke in his *Two Treatises on Government* said that there exist two laws: the Law of Society and the Law of Nature. When man breaks the Law of Society, he is ejected into the Law of Nature. *See generally*, JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press, 1988) (1690). The WTO achieves very much the same thing by removing its protective and restraining measures from non-compliant members.

<sup>51</sup> Readily distinct from the fields of direct taxation, international direct taxation in particular, where there is a rich and varied body of literature and numerous fora in which the issues of the day are vigorously debated, there is very little literature that theorizes, identifies, and analyzes issues, or proposes planning opportunities in private customs and regulated trade law. What literature does exist is overwhelmingly declaratory and operationally practical: statements as to what the law and regulations say and what must be done to comply.

<sup>52</sup> *See* TRIMs art. 2; Panel Report, *supra* note 22, at 339 ("The TRIMs Agreement is not concerned with subsidies and internal taxes as such, but rather with local

the waiver or forbearance of revenue (including customs duties) as incentives for achieving certain performance criteria, such as export performance or local content.<sup>53</sup> Where TRIMs prohibits certain absolute conditions on foreign investment,<sup>54</sup> the Subsidies Code prohibits the incentive and condition system of attracting foreign investment.<sup>55</sup> Because WTO members can no longer impose performance requirements as a condition or in exchange for incentives, there should no longer be any reason why certain economic or industrial sectors remain outside the normal national customs and trade regime of the country.

The reintegration of all economic and industrial sectors into the customs and trade regimes of each respective country should result in a reunified domestic legal and regulatory regime governing all imports, exports, and other trade activities. In each country, a widget will be a widget for all purposes. The reunification of the customs and trade laws will ease the administrative burden on the Customs and other trade enforcement authorities. Further, the elimination of multiple and contradictory regulations should lead to a more consistent application of the reunified law. From the traders' perspective, consistent application of the law translates into predictability. Predictability, in turn, arms traders with the ability to plan in advance their cross-border transactions.

Although sectoral segregation will not disappear quickly and it is highly probable that some WTO members may try to avoid this obligation,<sup>56</sup> the Uruguay Round deadlines and the WTO Dispute Resolu-

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content requirements, compliance with which may be encouraged through providing any type of advantage”).

<sup>53</sup> See, Subsidies Agreement, *supra* note 20, at art. 3.1. It should be noted, however, that the Subsidies Agreement does not prohibit reduction or elimination of duties or taxes. In fact, a primary objective of the GATT has been and continues to be the reduction of tariffs worldwide. Under the GATT, no member country may increase their duty rates above the levels committed to in the Uruguay Round. Where a country determines that increased revenues are required by current circumstances, as Thailand, India, and Brazil have recently done, duty surcharges may be imposed, but only on a temporary basis. These surcharges are subject to WTO monitoring and compliance with WTO rules and conditions.

<sup>54</sup> *Id.* at art. 3.; Panel Report, *supra* note 22, at 331-32 (“[T]he SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements . . .”).

<sup>55</sup> See, Subsidies Agreement, *supra* note 20, at art. 3.

<sup>56</sup> After all, for many countries sectoral segregation has become ingrained into their economic structure and policy. In a well publicized case, Canada is currently defending its “Auto Pact” provisions, which give duty preferences and other fiscal

tion process ensure that sectoral segregation eventually will be dismantled entirely. Indonesia's recent experience in the WTO Dispute Settlement process is one of the early examples.

#### A.1. Case Study Part II: Indonesia's National Car Program

In 1996, Indonesia launched the National Car Program<sup>57</sup> that effectively eclipsed the 1993 Incentive Program.<sup>58</sup> The stated goal of the National Car Program was to "build and produce a national car"<sup>59</sup> for the purpose of "improving the nation's self-reliance."<sup>60</sup> Under the Program criteria, the one entity that:

- (1) was "owned by national industrial enterprises or Indonesian corporations, the shares of which are wholly owned by Indonesian citizens,"
- (2) would use "a brand name . . . never [before] registered in Indonesia and owned by Indonesian citizens" and (3) whose product was to be "developed with technology, construction, design, and engineering based on national capability applied by stages"<sup>61</sup>

would be designated the "pioneer" company with the privilege of producing a national car for Indonesia.<sup>62</sup> The first two criteria effectively eliminated most foreign auto makers either already operating in Indonesia or potentially entering it, because few Western corporations would risk having no direct equity stake in a venture, nor would they readily abandon brand names that they have spent significant time and money to develop and establish.<sup>63</sup>

Indonesia awarded PT Timor Putra Nasional (TPN),<sup>64</sup> a joint venture between one of former President Suharto's sons, "Tommy" Suharto and the now bankrupt Kia Motors of Korea as the "Pioneer"

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incentives to companies that have motor vehicle assembly and manufacturing operations in Canada, at the WTO against complaints from Japan and Europe. *Canada Vows to Defend Auto Tariff to WTO*, J. OF COM. 6A (Aug. 24, 1998).

<sup>57</sup> See Panel Report, *supra* note 22, at 9.

<sup>58</sup> See *id.*

<sup>59</sup> *Id.* at 341, citing Decision of the State Minister for the Mobilization of Investment Funds/Chairman of the Capital Investment Coordinating Board, No. 02/SK/1996 (Mar. 5, 1996).

<sup>60</sup> *Id.* at 341, citing Presidential Decree No. 42 (June 4, 1996) (Concerning the Production of National Automobiles).

<sup>61</sup> *Id.* at 10, citing Minister of Industry and Trade Decree No. 31/MPP/SK/2/1996.

<sup>62</sup> See *id.*

<sup>63</sup> Conclusions based on the author's professional experience.

<sup>64</sup> See Panel Report, *supra* note 22, at 12.

company.<sup>65</sup> Assuming satisfaction of the performance conditions (which, as with all such programs, necessarily follows the extension of certain benefits, such as duty free imports of parts and material), TPN was allowed to import parts and material necessary to assemble the vehicles duty free.<sup>66</sup> In addition, the luxury tax would be waived.<sup>67</sup> In fact, the only requirement that TPN satisfied was branding the car sold in Indonesia as the "Timor."<sup>68</sup> The vehicle itself was none other than the Kia "Sephia."<sup>69</sup> With a few strokes of the pen to the authorizing decrees, TPN was allowed to have the Timor/Sephia produced at Kia's factory in Korea and exported, fully assembled, to Indonesia, where it was imported "free of duty and luxury tax!"<sup>70</sup>

Japan, the European Union, and the United States all filed complaints with the WTO, alleging that the National Car Program violated Articles I and III of the GATT, the TRIMs, and the Subsidies Code.<sup>71</sup> The WTO heard a consolidated complaint after bilateral consultations failed with all three countries and Indonesia had exhausted its one-time veto against establishing a Dispute Resolution Panel.<sup>72</sup> The WTO Panel ruled against Indonesia.<sup>73</sup>

The Panel ruled that both the automotive decrees of 1993-1995 and the National Car Program violated TRIMs because of the local content requirement.<sup>74</sup> Although all three complainants alleged that the National Car Program also violated Article III of the GATT, the Panel concluded that, for reasons of judicial economy, it did not need to reach that issue since its finding that the National Car Program violated TRIMs effectively satisfied the complaints.<sup>75</sup>

Unfortunately for those interested in seeing how truly effective the WTO will be on hotly contested issues, the economic crisis in Asia, of which Indonesia has been one of the most prominent victims, the resultant downfall of the Suharto regime and family, and Kia's

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<sup>65</sup> *See id.*

<sup>66</sup> *See id.* at 11.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 12.

<sup>70</sup> *See* Panel Report, *supra* note 22, at 13.

<sup>71</sup> *See id.* at 1 (Japan); *see id.* (EU); *see id.* (U.S.).

<sup>72</sup> *See id.* at 2.

<sup>73</sup> *See id.* at 401.

<sup>74</sup> *See id.*

<sup>75</sup> *See* Panel Report, *supra* note 22, at 346.

bankruptcy overshadowed and effectively upstaged the WTO decision. In a last-ditch attempt to forestall the proceedings, Indonesia notified the WTO panel that the National Car Program had been canceled because of the Asian economic crisis.<sup>76</sup> Nevertheless, in a tribute to integrity of process, the Panel decided to proceed and issue a report and recommendation to the Dispute Settlement Board (DSB) on the grounds that the Panel Report and findings would be relevant in the implementation phase of the Dispute, should that become necessary.<sup>77</sup>

The significance of the Panel Report goes far beyond Indonesia's treatment of the automotive industry. It is an articulate and comprehensive statement demonstrating how sectoral segregation violates WTO rules and the actual scope and applicability of the GATT Agreements. For example, the Panel concluded that TRIMs applies to any investment-related measure, not just measures relating to foreign investment.<sup>78</sup> Moreover, the Panel ruled, since TRIMs prohibits absolutely local content requirements, the nature of any benefit or incentive granted in exchange for local content is irrelevant.<sup>79</sup> The Panel Report will serve as valuable precedent for determining whether any segregated sectors violate a country's WTO commitments and obligations.

### *B. Harmonization of Standards of Classification and Valuation*

The elimination of sectoral segregation is a critical step toward the harmonization and reunification of national customs and trade regulatory regimes. A comprehensive global trade structure will continue to be elusive, however, as long as the customs and trade laws of each country remain unique unto themselves. To overcome this challenge, national customs and trade authorities must refresh themselves with the fundamentals of importing: admissibility, classification, and valuation, with particular emphasis on the latter two. Specifically, the International Convention on the Harmonized Commodity Description and Coding System,<sup>80</sup> commonly known as the Harmonized System (HS),<sup>81</sup> to which all WTO members are signatories, is the global stan-

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<sup>76</sup> See *id.* at 15.

<sup>77</sup> See *id.* at 326.

<sup>78</sup> See *id.* at 339.

<sup>79</sup> See *id.*

<sup>80</sup> See International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, Hein's No. KAV 2260 [hereinafter HS].

<sup>81</sup> *Id.*

dard for tariff classification.<sup>82</sup> Article VII of the GATT, commonly referred to as the "Valuation Code,"<sup>83</sup> is the global standard for determining dutiable value. As these two standards become more widely adopted into national legislation by WTO members, and perhaps more important, put into practice among WTO member authorities, the inefficiencies and weaknesses of nationally unique customs laws will disappear.

The use of a common nomenclature has not been a significant issue as most countries have used the HS or its predecessor, the Brussels Nomenclature<sup>84</sup> for some time. What has become of increasing concern, however, is the lack of a common approach to classification among the governmental authorities of the global trading community. That every country uses the same terminology is of little consequence if the terms used mean different things in different countries.<sup>85</sup> The most important elements of the HS are the General Rules of Interpretation (GRIs), which set forth guidelines for how classification decisions are to be made,<sup>86</sup> and the Section and Chapter Notes, which establish rules of classification for the commodity groupings and subgroupings in the HS.<sup>87</sup> The GRIs and the Notes should be regarded as keys to the HS code. They decipher the assigned commodity codes and they guide the user to the correct heading for a particular commodity. Of equal importance are the supporting materials: (1) the Explanatory Notes, which are the official commentary to the HS, explaining by illustrative example and explanation what is to be classified where;<sup>88</sup> (2) the Commentary by the Technical Committee, a series of opinions on specific classification issues written by a committee of classification experts (all Customs officials) from HS signatory

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<sup>82</sup> See Edwin A. Vermulst, *EC Customs Classification Rules: Should Ice Cream Melt?*, 15 MICH. J. INT'L L. 1241, 1245 (Summer 1994), citing CUSTOMS COOPERATION COUNCIL, INTRODUCING THE INTERNATIONAL CONVENTION ON THE HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM 25 (1989).

<sup>83</sup> See Valuation Agreement, *supra* note 6.

<sup>84</sup> Convention on Nomenclature for the Classification of Goods in Customs Tariffs, done December 15, 1950, 347 U.N.T.S. 127 (1950) [hereinafter Brussels Nomenclature].

<sup>85</sup> See Vermulst, *supra* note 82 for discussion and commentary by a European Customs practitioner of how the European Union has used "creative interpretations" of tariff classifications to avoid GATT commitments.

<sup>86</sup> See HS, *supra* note 80, General Rules of Interpretation.

<sup>87</sup> See HS, *supra* note 80, GRI 1.

<sup>88</sup> Customs Cooperation Council, Explanatory Notes to the Harmonized System.

countries;<sup>89</sup> and (3) the Compendium of Classification Opinions, which is a collection of classification rulings issued by various HS subscribing national customs authorities.<sup>90</sup> The aggregate provides a comprehensive system for national customs authorities to use in tariff classification. Ultimately, traders should expect to encounter only minor deviations or insignificant conceptual differences in the tariff classification of their goods in every country in which they trade.

The HS is not immune to either grossly varying interpretation or outright manipulation by even the most technically competent of customs authorities. The U.S. classification of drilled wood studs by the U.S. Customs Service is a good example. Soft wood lumber from Canada has been subject to a Countervailing Duty (CVD) order in the United States since 1992.<sup>91</sup> “Pre-drilled” studs, which are building studs with a hole drilled at one end to allow installation of electrical wiring or plumbing, were initially thought to be within the scope of the Order.<sup>92</sup> While tariff headings are used as references to assist Customs in determining what goods are subject to dumping or countervailing orders, tariff headings are not binding in dumping or coun-

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<sup>89</sup> *WCO Technical Committees* (visited Nov. 28, 1998) <<http://www.wcoomd.org/frmpublic.htm>>.

<sup>90</sup> The inclusion of these national rulings in the Compendium signifies the Technical Committee’s approval of the approach and methodology taken by issuing national customs authority. This resource will be increasingly important, particularly for traders, as they become more involved in the substantive process of classification. To be able not only to cite to a reference source as authority for a particular classification, but to be able to say that another Customs jurisdiction has actually applied the classification often should be persuasive to even a skeptical Customs official. *Id.*

<sup>91</sup> Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber from Canada, 57 Fed. Reg. 22,570 (1992).

<sup>92</sup> Revocation of Ruling Letter Relating to Tariff Classification of Drilled Softwood Studs, Customs Bulletin and Decisions, vol. 32, no. 26 (Jul. 1, 1998), available at 1998 WL 388359 (Customs). Classification of the drilled studs under HTS heading 4407, which provides for “wood, sawn or chipped lengthwise,” would have been included in the scope of the CVD order, while classification under HTS heading 4418, which provides for, among other things, “builder’s joinery and carpentry of wood” would not have been within the scope of the CVD order. *Id.* at 7-8.



tervailing duty cases.<sup>93</sup> It is the description of the commodity in the final order that is binding.<sup>94</sup>

On the ground that the Order description of the softwood lumber within the scope of the Order was not precise enough to clearly include pre-drilled studs within the Order, importers requested a ruling from the U.S. Customs Service, as the government agency with delegated competency to make tariff classification decisions, that drilled studs should be classified under HTS 4418.90.4040 as "builder's joinery and carpentry of wood."<sup>95</sup> An affirmative ruling would have excluded these drilled studs from the scope of the CVD order.<sup>96</sup> Realizing the sensitivity of their decision, U.S. Customs consulted with their counterparts in several countries, including Japan and Australia.<sup>97</sup> These authorities agreed that the pre-drilled studs were properly classified as other building materials and U.S. Customs issued a ruling to that effect.<sup>98</sup> However, the domestic industry association that had obtained the CVD order strongly objected to the ruling, claiming that it circumvented both the CVD order and an agreement reached between Canada and the United States for implementing the Order.<sup>99</sup> In June 1998, U.S. Customs revoked the original ruling and issued a second ruling that the drilled studs were classified under HTS 4407.10.0015, which placed these Articles back within the scope of the Softwood from Canada CVD order.<sup>100</sup>

The second ruling can be justified under the HS GRIs, Notes, and supporting materials. However, the consensus reached by U.S. Cus-

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<sup>93</sup> See Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber from Canada, 57 Fed. Reg. at 22,570-4 ("although the HTS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding remains dispositive").

<sup>94</sup> *Id.*

<sup>95</sup> See New York Ruling Letter B81564 (Feb. 18, 1997), available in WL 335949 (Customs).

<sup>96</sup> Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber from Canada, 57 Fed. Reg. at 22,570.

<sup>97</sup> This is based on an unattributable conversation in Oct. 1997 between the author and a U.S. Customs official who was involved in this matter.

<sup>98</sup> See Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber from Canada, 57 Fed. Reg. at 22,570.

<sup>99</sup> *Court Suit Expected Over Lumber Ruling*, J. OF COM. 3A (Jun. 26, 1998).

<sup>100</sup> *Id.*; see Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber from Canada, 57 Fed. Reg. at 22,570. Customs revocation was affirmed by U.S. Court of International Trade in *American Bayridge Corp. v. United States*, Ct. Int'l Trade, no. 98-08-02682, slip op. 98-166 (Dec. 16, 1998).

toms with its international colleagues strongly suggests that the original classification was either the correct result or, at the very least, the result that most other Customs authorities would have reached under normal circumstances. Moreover, the reversal by U.S. Customs of its original ruling casts the United States in a particularly bad light in the international Customs arena as it was U.S. Customs that initiated the consultation in the first place.

Subscription and adherence to both the Valuation Code and the Valuation Agreement is a condition and obligation of WTO membership.<sup>101</sup> The Valuation Agreement prescribes a restrictive list of methodologies to determine dutiable value<sup>102</sup> and a strict hierarchy for applying those methodologies.<sup>103</sup> It also explicitly prohibits certain valuation methodologies.<sup>104</sup> Because it has been so carefully drafted and structured, there is little room for misunderstanding or misinterpreting the basic elements of dutiable value under the Valuation Code.

For those relatively few points in the Valuation Code where either there is a degree of ambiguity or the specificity of the language does not go far enough,<sup>105</sup> a body of supporting materials, analogous to those supporting the HS, are available. The Valuation Code mandates a Technical Committee, composed of governmental delegates from WTO member countries, which drafts interpretive notes and opinions to be used by the valuation branches of national customs authorities.<sup>106</sup> In addition, there is a Compendium of Valuation Opinions, a collection of valuation rulings and opinions from various countries that apply the Valuation Code.<sup>107</sup> Inclusion in the Valuation Compendium connotes the Technical Committee's approval that a national customs authority's valuation ruling conforms with and properly explicates the Valuation Code. Thus it serves as a handbook both for national customs authorities with less experience on the issues and for traders.<sup>108</sup>

A very significant part of the Valuation Code for traders is Article 11, which requires that all national implementing legislation pro-

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<sup>101</sup> See WTO Agreement, art. XI(1).

<sup>102</sup> See Valuation Agreement, *supra* note 6, at art. 7.

<sup>103</sup> See *id.*, General Introductory Commentary.

<sup>104</sup> See *id.* at art. 7(2).

<sup>105</sup> E.g., the deductibility from dutiable value of "commissions." See *id.* at art. 8 1(a)(i) or the exact definition of "assist." *Id.* at art. 8(1)(b).

<sup>106</sup> See *id.* at art. 18(2).

<sup>107</sup> Customs Cooperation Council, Customs Valuation (2<sup>nd</sup> ed., 1997).

<sup>108</sup> *Id.*

vide a process for appealing valuation determinations.<sup>109</sup> Although providing an administrative appeal is optional, judicial review is mandatory.<sup>110</sup> Furthermore, for whatever appellate review is provided, the decisions of the body or bodies must be provided to the appellant in writing, along with notification of any further rights, if any.<sup>111</sup> Although the Valuation Code does not require that the trader be provided a role in the initial valuation determination, it does assure, at least, a meaningful role for the trader in the review of the decision. Although not completely satisfactory from the perspective of business efficiencies, it is a significant improvement over no substantive role at all.

This right, however, also imposes a big responsibility on the trader in the sense that in order to make a meaningful appeal, the trader must understand the law of the Valuation Code. The Valuation Code's restrictions of applicable valuation methodologies and the exact sequence of the methodologies are to be applied to traders as they are to the Customs authorities. Thus, for a trader to make a successful appeal, a thorough understanding of the legal substance of the Valuation Code is an essential pre-requisite.

While this may seem obvious in other contexts, involvement in the law of customs and regulated international trade in all countries is new for traders. The weight of past experience in most jurisdictions, where traders have been subject to the decisions, reasonable or arbitrary, of the local Customs authorities, cannot be underestimated. The Valuation Code and Agreement, perhaps more than the HS because of the express provision of the right to appeal in the Valuation Agreement, gives all traders throughout the WTO constituency a tool that, prior to the Uruguay Round, they had available only on a very limited basis.

The HS and the Valuation Agreement together provide a comprehensive system for tariff classification and duty valuation, supported by extensive explanatory and precedential materials for both national customs authorities and traders. With these two global standards, national uniqueness of fundamental customs principles should become a thing of the past. The HS and Valuation Agreement provide the means for consolidating and simplifying national customs and trade regulatory regimes, as well as providing the opportunity to develop knowledge in the principles and rules of classification and valuation. For

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<sup>109</sup> See Valuation Agreement, *supra* note 6, at art. 11.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

traders, the HS and Valuation Agreement will introduce a degree of predictability and certainty in their trading of goods that has never before been experienced by them.

#### IV. A MEANINGFUL ROLE FOR TRADERS IN THE SUBSTANTIVE PROCESSES OF REGULATED INTERNATIONAL TRADE EMERGES

The final barrier to an effective global trade structure has been the lack of a meaningful role for traders in the substantive legal process applied to goods that cross international borders, i.e., the customs process. Traders will define "meaningful" as the opportunity to legally reduce the amount of customs duties and other import-related taxes that are paid as well as to minimize the administrative and operational burden imposed by customs and trade regulation. As suggested above, the right to appeal, in the few circumstances where that right is afforded, is not meaningful enough. Business efficiency and effectiveness in international trade demand that traders have some role in all aspects of the legal determinations that are made on goods crossing international borders. Traders must have the right, and responsibility, to participate in the initial determinations of admissibility, classification, and valuation, as well as the right to appeal each of these determinations. This Article suggests that the Uruguay Round and the WTO structure have created the opening for the establishment of those rights. A few jurisdictions, including the United States, have begun to allow traders this meaningful role in the customs process. The challenge is to spread this opportunity to all WTO members.

The Customs Modernization Act in the United States (the "Mod Act"), enacted in December, 1993 as part of the NAFTA,<sup>112</sup> is a good example of the new substantive legal role in the customs process that has been afforded traders. Under the Mod Act, the burden for making initial determinations as to the admissibility, classification, and valuation of goods imported into the United States has been shifted from U.S. Customs to the importer.<sup>113</sup> This shift in burden, while clearly imposing a serious responsibility on the importer, also creates an opportunity for the trader to exert a significant degree of control over the customs treatment, in terms of duties paid and the compliance burden imposed on the trader's goods. Moreover, the importer's

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<sup>112</sup> See Mod Act, *supra* note 44.

<sup>113</sup> 19 U.S.C. §1484 (1998) (as amended under the Customs Modernization Act). "[O]ne of the parties qualifying as "importer of record" . . . shall, using reasonable care . . . complete the entry by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise . . ." 19 U.S.C. §1484(a)(1)(B) (1998).

new responsibilities under the Mod Act introduce some measure of balance in the relationship between the trader and Customs that before this has not been present.

The importer's sole responsibility prior to the Mod Act was to accurately and completely report the facts of the transaction. Customs made both the initial and final determinations of admissibility, classification, and valuation. Under the Mod Act, however, the importer not only must know and declare the facts of the transaction, but also understand the legal relevance of those facts to the transaction, and make legal determinations of admissibility, classification, and valuation.<sup>114</sup> Customs is responsible for the final determinations,<sup>115</sup> although the importer has the right to administrative and judicial appeal for all issues.<sup>116</sup>

The express intent of Congress in passing the Mod Act was to relieve Customs' work load by putting their enforcement responsibility on a post hoc, audit basis, similar to that of the Internal Revenue Service.<sup>117</sup> A byproduct of the Mod Act, however, was an almost revolutionary restructuring of the legal relationship between Customs and importers in the United States. The Mod Act requires importers to know and understand the law. Their initial import entry determinations will reflect their understanding. But, as with almost any statute anywhere, the law is not a bright line list of instructions for importers. Therefore, the importer's initial entry determinations actually will reflect the importer's interpretation of what the law requires and allows. Customs' responsibility in making its final determinations regarding the importer's transaction will be to review the correctness and rea-

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<sup>114</sup> *Id.* See also *supra* note 43, at 102: "In meeting reasonable care, the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of compliance . . . consulting [customs brokers, attorneys, experts] who have experience and knowledge of customs laws, regulations, and procedures" *Id.*

<sup>115</sup> *Id.* at 637: "Under the new provision [ §1484], the importer will have responsibility when providing the initial classification and appraisal. In the view of the Committee, it is essential that this "shared responsibility" assure that at a minimum "reasonable care" is used in discharging those activities for which the importer has responsibility . . . furnishing information sufficient to allow Customs to fix the final classification and appraisal of merchandise." H.R. REP. NO. 103-361, *supra* note 43, at 136 .

<sup>116</sup> See 19 U.S.C. §1514 (administrative protest) and 19 U.S.C. §1618 (right to judicial review of Customs decisions).

<sup>117</sup> See H.R. REP. NO. 103-361, *supra* note 43, at 106: "[t]he primary purpose of the [Mod Act] is to streamline and automate the commercial operations of the U.S. Customs Service."

sonableness of the importer's initial determinations,<sup>118</sup> not just to apply the facts supplied by the importer to Customs' interpretation of the law. Implicit under the Mod Act is the principle that Customs cannot reject an importer's entry simply because Customs does not agree with the importer's initial determinations. Instead, Customs must determine whether the importer's determinations were allowed by the law and, in those instances where Customs determines that they were not, whether the importer's actions were reasonable.

The Mod Act's reform of the relationship between importer and Customs will extend to judicial review. Rather than deciding whether Customs properly applied the law to the importer's facts, the Court now will have to determine whether the law allows the importer to do what it did. The "presumption of correctness" standard should all but disappear,<sup>119</sup> because the issue will be the proper interpretation and application of the law, not whether the importer accurately and truthfully disclosed all of the facts and whether Customs' application of the law to those facts was correct. Although the right of judicial review for both importers and Customs has existed for some time in the United States, the Mod Act effectively puts the Court in a new position: final arbiter in a debate between the importer and Customs.

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<sup>118</sup> "Correctness" refers to the "conduct, management and operation" by Customs officers of the customs laws and a presumption that such officers have "acted rightly" in carrying out their official duties. *Arthur v. Unkart*, 96 U.S. 118, 122 (1877). "Reasonableness" concerns whether the importer that makes a mistake can be penalized for the mistake. Under the standard of "reasonable care," an importer may make a mistake, but cannot be penalized for that mistake if the actions of the importer that led to the mistake were reasonable. 19 U.S.C. §1592, as amended. Thus, in the post-Customs Modernization Act environment, Customs must make two basic determinations for each transaction: whether the importer's initial determinations were correct and, if not, whether the importer's actions were reasonable.

<sup>119</sup> The U.S. Supreme Court is currently deciding a Customs case in which the "presumption of correctness" will be reviewed. *United States v. Haggard Apparel Co., cert. granted*, 141 L. Ed. 2d. 16 (1998). This standard which is cited by Customs as the basis for demanding judicial deference to administrative expertise has, in the author's opinion, been much weaker for longer than Customs will acknowledge. The presumption is nothing more than an evidentiary burden placed upon the party who challenges Customs determinations. *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1486 (CAFC 1997). Indeed, it is well established that where there is no factual dispute, Customs' presumption is "irrelevant." *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (CAFC 1997). It is notable that it is the Customs Service that appealed the *Haggard* decision; however, the Supreme Court's interest may well be nothing more than a desire to make clear the limitations on the amount of deference to which Customs is entitled, something that has been known to the courts and the trade community for some time.

In a Mod Act trade environment, the magnitude of the importer's responsibility and opportunity should not be underestimated. Of equal magnitude is the challenge for customs and regulated international trade lawyers to appropriately counsel their trader clients. In discharging their statutory obligations, traders must demonstrate an understanding of what the law requires. In discharging their responsibility to their owners (shareholders and investors), traders must demonstrate an understanding of what the law allows. Expert legal counsel will be indispensable to the trader. The new international trade environment is one in which the law will continually evolve fed by the dynamics of the efforts by both importer and Customs to keep their relationship balanced. Customs and trade counsel will not only help the law to evolve constructively, but will also help the trader keep its share of balance: legal compliance and commercial effectiveness.

Traders should regard the Mod Act environment in the United States as a prototype for the customs environments that will emerge in WTO countries throughout the world.<sup>120</sup> Traders must expect that they will be assigned a substantive role in the legal determination aspects of the customs process in every jurisdiction in which they conduct business. The responsibility and opportunity should be relatively the same everywhere. The trader that begins to adapt its knowledge and experience of the U.S. Mod Act environment to its global operations will have a tremendous advantage over others.

Even if there were no Mod Act or WTO, traders would have little option in the current world of international trade but to "globalize" their customs and regulated international trade operations. The principles of "common," applying the same processes and policies everywhere possible, and "lean," doing the most with the least, mandate that traders maximize the efficiency and cost-effectiveness of their trade business. An ad hoc, country-by-country approach to customs is no longer tolerable from a business perspective, regardless of the status of national customs regulatory regimes.

Fortunately, the Uruguay Round, WTO environment encourages in effect traders to globalize their customs and trade activities. The Mod Act is WTO-compliant national customs legislation. Therefore, traders can apply the positions and strategies that they have employed

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<sup>120</sup> In fact, the United States was neither the first to reform its customs laws in this way nor is it the only one currently implementing such measures. The European Union has placed a responsibility on importers for initial entry decisions since at least 1992. See generally Brussels Nomenclature, *supra* note 84. One of the announced purposes of the recent Customs reforms in Mexico was to place increased responsibility upon importers. See generally Mexico: Trade Barriers, *supra* note 6.

in the United States to other WTO jurisdictions with a great deal of certainty and confidence. The deviations and differences should only be minor. Further, the imprimatur of WTO conformity allows the trader to take positions in another jurisdiction without first getting approval from the local Customs authorities. If a trader knows that a particular position or practice is valid in one WTO jurisdiction, so long as it is covered by one of the GATT Agreements or by WTO rule or policy, the trader must be able to assume that the position or practice is valid in another WTO jurisdiction.

This will have enormous value to traders because it will reduce the uncertainty and cost in global customs and trade operations. Where there is conflict, the trader should have the opportunity to resolve those differences through administrative or judicial review in either jurisdiction. Reliance, however, on the materials and precedents of the WTO or World Customs Organization (WCO) committees should expedite the issue resolution process. All of this is predicated on the trader having a solid grasp of the legal bases for the practices and strategies that it employs.

## V. CONCLUSION

The Uruguay Round created an environment in which a global body of customs and trade law is developing. In particular, the Uruguay Round ensured the ultimate harmonization of the overall customs process and the fundamental determinations that are made for all goods crossing an international border: admissibility, classification, and valuation. WTO membership and the underlying GATT Agreements establish clear parameters within which all WTO members must operate. These parameters restrict the ability to deviate from the global standards. For those countries that do attempt to avoid WTO obligations, peer pressure from other WTO members, the Dispute Resolution process, and ultimately banishment from membership from the WTO and its attendant benefits should be sufficient to deter most potential rogues.<sup>121</sup>

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<sup>121</sup> An additional development that is on the periphery of this discussion, but nevertheless a very strong influence is the decreasing tolerance for incompetence and corruption among national enforcement authorities, including Customs. U.S. traders have been restricted from participating in or facilitating corruption by the Foreign Corrupt Practices Act since 1979. 15 U.S.C. §§ 78dd-1 et seq. Recently, the international community took a major step against the toleration of corruption in the OECD Convention Against Bribery and Corruption. The 35 major industrialized countries that comprise the OECD have committed themselves to enacting legislation that prohibits their nationals from participating in or allowing themselves to be



For traders the opportunities of predictability, uniformity, and efficiencies should outweigh the cost and burden of increased responsibility. Although traders will have to develop a minimum understanding and facility in the legal aspects of customs and regulated international trade law, they will benefit from the ability to develop common, globally applicable positions and strategies. Not only will a widget be a widget everywhere the trader trades, but a purchasing commission will be deductible from dutiable value in all jurisdictions. The sooner traders implement common, knowledgeable customs and regulated international trade programs, the sooner they will realize its benefits.

The three great barriers to a true global trade system will be dismantled and replaced by a harmonized WTO environment. The only question is how soon? Even this question can be answered by the trader. Just as it has been the trader who brings new goods to new markets, so it will be the post-Uruguay Round trader that will bring the new law and standards to new jurisdictions. An evolving and vital global body of customs and trade law will emerge as the balanced relationship between traders and customs authorities becomes established in all WTO jurisdictions. Competent customs and regulated international trade counsel, who must follow their trader clients wherever they go, will be a critical element to this overall equation.

The Uruguay Round laid out all of the necessary elements for a global trade system. Now, it is for the players—customs authorities, the judiciaries, traders, and counsel—to make the system work.

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involved in corrupt practices in their international conduct of business. *See, e.g., Meeting of the Council at Ministerial Level* ¶ 38 (OECD News Release May 27, 1997) (visited on Nov. 28, 1998) <<http://www.oecd.org>> (document search). The purpose of these laws is to kill the perpetuation of bribery and corruption by depriving the private sector of realizing its supposed benefits.

Where traders can be criminally prosecuted in their home jurisdictions for engaging in corrupt practices abroad, or, at least, cannot take advantage of corrupt practices by taking tax deductions for bribes paid, it is expected that the foreign authorities will be forced to abandon their demands for bribes and the like.