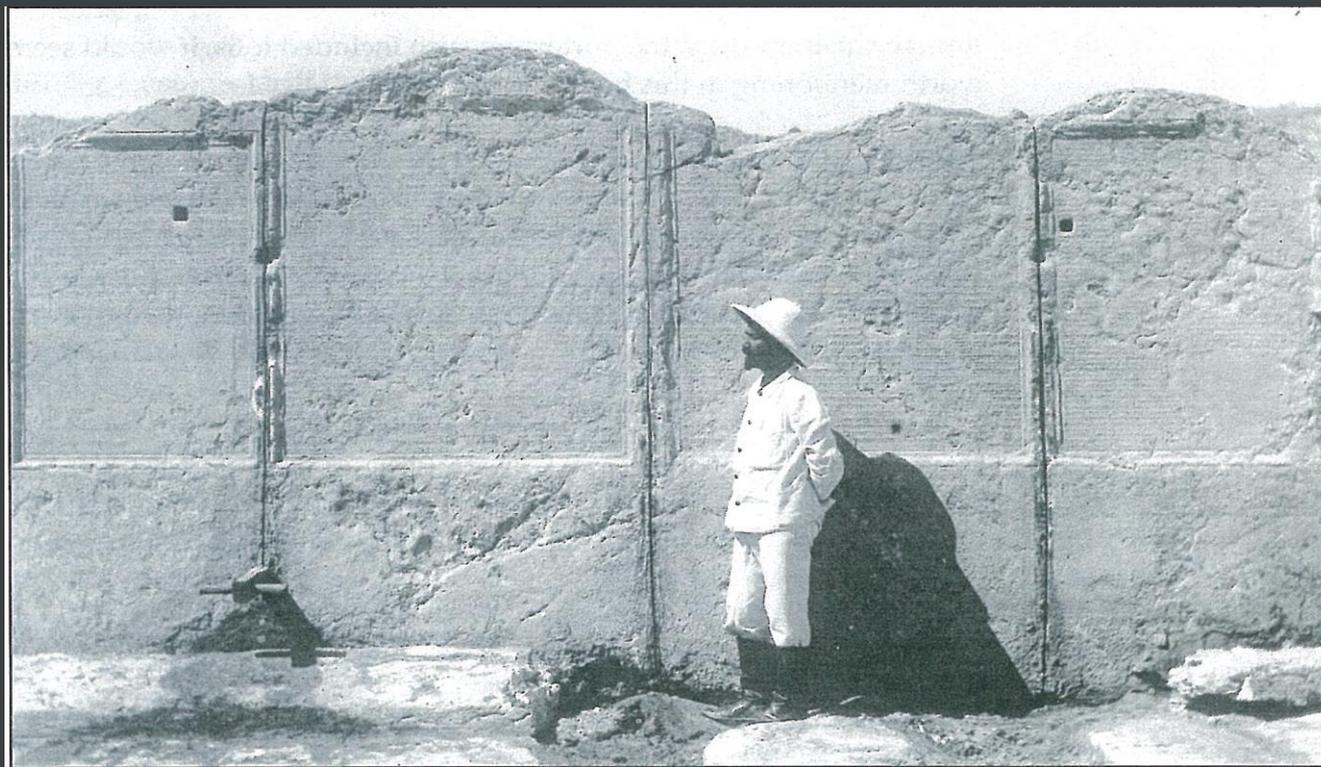


The Adjudication of Customs' Tariff Classification Disputes – Lessons from Australia and Canada

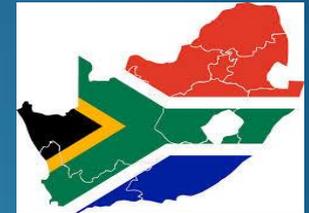
(Riël Franzsen and Theo Colesky)

Presented by Theo Colesky

9 September 2015

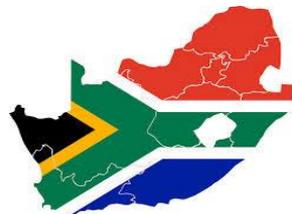


The customs tariff of Palmyra. (Asakura 2002)



Background

- ▶ Customs responsibilities include collection of duties
- ▶ Tariff classification to determine duty rates
- ▶ Tariff classification is technical, subject to national law and international obligations
- ▶ South Africa incurs specific international obligations as member of the WCO
- ▶ WCO's Harmonized System Convention
- ▶ Implementation and application result in different interpretations, and subsequently disputes are common



Objectives

- ▶ Determine dispute resolution in South Africa, specifically pertaining to customs tariff classification
- ▶ Compare the South African provisions and practices with those in Australia and Canada
- ▶ Recommend improvements to dispute resolution



Tariff classification

- ▶ “The attempt to distinguish manufactured goods from raw material would alone be a herculean task, since no two people can be found to agree on classifying such important articles as chemicals, leather, iron of many kinds, petroleum, yarns, and printing paper.” (Bateman 1885)
- ▶ The WCO, customs administrations and courts in South Africa, Australia and Canada agree on complexity
- ▶ The Canadian Federal Court of Appeal stated that
“...the Customs Tariff, law as it may be, is nonetheless a law of a very technical nature. It is legislation of such a specialized nature and expressed in terms that have so little to do with traditional legislation that for all practical purposes the Court is being asked to give legal meaning to technical words that are well beyond its customary mandate.”



South Africa

▶ Dispute resolution

- Internal Administrative Appeal
- Alternative Dispute Resolution
- SARS Service Monitoring Office
- Office of the Tax Ombud
- Boards and Specialised Courts
- Courts (Magistrates Court, High Court, Supreme Court of Appeal, and the Constitutional Court)

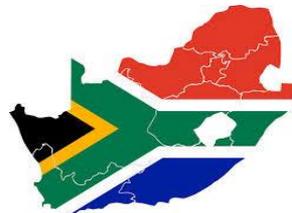
▶ Technical Customs disputes

- Rulings are available, but not published
- Internal Administrative Appeal – Technical Committees
- Alternative Dispute Resolution
- Superior Courts (High Court, Supreme Court of Appeal, and the Constitutional Court)



South Africa – Conclusions

- ▶ Technicality of classification disputes recognised, rightly dealt with by specialised committees
- ▶ Perception of Customs being prosecutor and judge
 - Customs will identify a possible incorrect classification, make a ruling, demand underpayments, impose penalties, and decide on the appeal
 - This happens at different levels, but all decision makers remain Customs officers
 - SARS Service Monitoring Office
- ▶ Office of the Tax Ombud – exclude customs matters
- ▶ Boards, Tribunals, and Specialised Courts – exclude technical customs matters
- ▶ Independent decision beyond Customs – Courts



Australia

- ▶ **Dispute resolution (including technical disputes)**
 - Rulings are available, but not published
 - Internal appeals
 - Specialised Tribunal – Administrative Appeals Tribunal
 - Courts (Federal Court, Full Federal Court, and High Court)
- ▶ **Administrative Appeals Tribunal**
 - Established in 1976
 - President, deputy presidents, senior members, and members
 - President must be a judge of the Federal Court of Australia
 - Other members come from a wide range of backgrounds – may be judges, lawyers, or persons with relevant knowledge or skills
 - Independent of the customs administration
 - Review decisions – fair, economical, informal, quick, and just
 - Not bound by rules of evidence – cases are presented as deemed fit
 - Not bound by decisions of higher courts



Australia – Conclusions

- ▶ Provides internal dispute resolution mechanisms
- ▶ Specialised tribunal
 - Final administrative decision, subject to an appeal on a question of law
 - Tribunal makes factual findings while the courts decide on matters of law
 - Courts rely on the facts and findings made by the Tribunal
 - Only in exceptional circumstances not the final decision
 - Courts will not set aside the Tribunal's decision simply because of an error in law in the reasoning process
 - Decisions are only set aside if it affected the outcome in a material way, i.e. if the wrong approach to construction is followed
 - Decisions are transparent
- ▶ Conflicting decisions by Customs, Tribunal and courts confirm technicality



Canada

- ▶ Dispute resolution (including technical disputes)
 - Rulings are available with full reasons and may be published, transparent
 - Internally – disputes through notice or review
 - Externally – expert tribunal – Canadian International Trade Tribunal or courts (Federal Court of Appeal and Supreme Court)
- ▶ Canadian International Trade Tribunal
 - Dates back to 1969, merged in 1988
 - Chairperson and members
 - Members are from varying educational backgrounds with relevant experience
 - Independent of the customs administration
 - Hearings are conducted informally, expeditiously, and fairly
 - Court of record similar to superior court – but not as formal as a court
 - Not only adjudicative, it also inquires and investigates matters
 - Provides advice in tariff, trade, commercial, and economic matters to Government
 - Not bound to its previous decisions, only that of courts



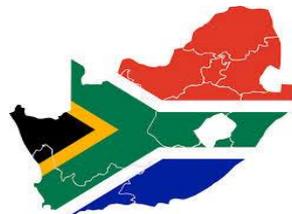
Canada – Conclusions

- ▶ Provides internal dispute resolution mechanisms
- ▶ Specialised tribunal
 - Final administrative decision, subject to an appeal on a question of law
 - Courts will only interfere with a decision that is clearly wrong, not being able to withstand a somewhat probing examination
 - Standard of review is reasonableness – applicants should show that the Tribunal’s decision was unreasonable, i.e. by adopting an interpretation of words not reasonably supported by legislation
 - Decisions are invaluable in understanding the interpretation and application
- ▶ Conflicting decisions by Customs, Tribunal and courts confirm technicality



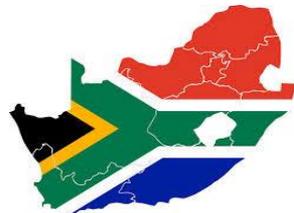
Overall conclusions

- ▶ Technical disputes are regular occurrences
 - South Africa – Internally or in courts
 - Australia and Canada – Internally, tribunals or courts
- ▶ Internal appeals have serious limitations, necessitating a faster, less formal and less expensive solution
- ▶ An independent tribunal is highly commended as a relief mechanism between Customs and courts
- ▶ Tribunal decisions are delivered by experts
 - Exposed to technical issues on a regular basis, objective and without pressure of revenue considerations
 - Transparent and held in high esteem by the courts
- ▶ Differences between the two tribunals (members, jurisdiction, accessibility, costs, procedures, timeframes, rulings, functions, etc.) illustrate the alternatives available to establish



Recommendations

- ▶ An independent and expert tribunal should be established to adjudicate technical customs matters, such as tariff classification
- ▶ Alternatively, extend the mandate of the Tax Court
- ▶ Either option will be a positive step in the highly technical area of customs
 - Positively address dispute resolution
 - Reduce litigation cost and time
 - Result in transparency
 - Lead to more accurate tariff classification
 - Improved trade facilitation





Thank you

