EDITORIAL

Forward: The OECD, World Customs Organization, and Member Country Leadership in Combatting Customs & Border Corruption

Corruption at the border is a serious economic and humanitarian issue that affects virtually everyone in every country in every part of the world.[1] It stands in the way of a country's capacity to benefit from the global economy,[2] which is driven by international trade.[3] Customs-related corruption alone delays the processing of imports and exports, increases the costs of doing business and reduces the competitiveness of businesses.[4] It also raises concerns about public safety, national security and international terrorism as drugs and weapons, for example, bypass detection systems and procedures due to the bribery of customs officials.[5] As globalization intensifies and the cross-border movement of goods and services increases, the costs of border corruption will worsen and become even more substantial.[6]

Because international trade involves the cross-border movement of goods and services, customs agencies regulate a large percentage of the value of any national economy, ranging anywhere from 20% to over 100%, depending on the country.[7] For example, in 2019, Canada's exports as a percentage of Gross Domestic Product ('GDP') was 31.6%,[8] and imports as a percentage of GDP was 33.3%.[9] In that same year, Singapore's exports as a percentage of GDP was 173.5%,[10] and imports as a percentage of GDP was 145.6%.[11]

Customs agencies play a critical role at national borders. Their duties include collecting revenue, facilitating trade and protecting the border itself.[12] When customs become compromised by corruption, the public and private sectors, citizens and society at large bear the social and economic costs.[13] Customs-related corruption jeopardizes the safety of citizens by facilitating the importation of illicit goods such as weapons and narcotics,[14] as well as unlicensed products that have circumvented health and safety requirements.[15] It robs the public sector of trade tariffs, which account for a large portion of government revenues – as high as 30% to 50% of total tax revenues for low-income countries.[16] A 2017 study estimated that customs-related corruption costs World Customs Organization members at least US$2 billion in customs revenue each year,[17] a figure that is probably much higher today.

Notes

1 The World Bank, *Enhancing Government Effectiveness and Transparency: The Fight Against Corruption* 123 (Malaysia, The World Bank 2020).

2 *Ibid.*

3 OECD, *Global Trade Without Corruption: Fighting the Hidden Tariff* 11 (Paris, OECD Publishing 2017), http://dx.doi.org/10.1787/9789264279353-en (accessed 16 june 2021).

4 The World Bank *supra* n. 1, at 123.

5 *Ibid.*

6 OECD, *supra* n. 3, at 15.

7 Bryane Michael, *Do Customs Trade Facilitation Programs Help Reduce Customs-Related Corruption?,* 35(1) Int'l J Pub. Administration 81, at 88 (2012).

8 *Exports of Goods and Services (% of GDP) – Canada*, The World Bank (June 16, 2021), https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=CA (accessed 16 june 2021).

9 *Imports of Goods and Services (% of GDP) – Canada*, The World Bank (June 16, 2021), https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?locations=CA (accessed 16 june 2021).

10 *Exports of Goods and Services (% of GDP) – Singapore*, The World Bank (June 16, 2021), https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=SG (accessed 16 june 2021).

11 *Imports of goods and services (% of GDP) – Singapore*, The World Bank (June 16, 2021), https://data.worldbank.org/indicator/NE.IMP.GNFS.ZS?locations=SG (accessed 16 june 2021).

12 The World Bank, *supra* n. 1, at 123.

13 OECD, *supra* n. 3, at 15.

14 The World Bank, *supra* n. 1, at 123.

15 OECD, *supra* n. 3, at 24.

16 The World Bank, *supra* n. 1, at 123.

17 OECD, *supra* n. 3, at 9.

Global Trade and Customs Journal, Volume 16, Issue 9

As for the private sector, customs-related corruption obstructs companies from doing business internationally.[18] It distorts competition by making it difficult for companies to do business without bribing in jurisdictions prone to corruption[19] and limiting market access for companies that refuse to engage in corrupt activities.[20] Customs-related corruption also drives up costs, creating what might be described as an additional 'tax' on companies doing business internationally, representing as much as 5% to 10% of their sales.[21] However, these costs of customs-related corruption are ultimately passed on to consumers, who receive lower quality goods, pay higher prices and tolerate delivery delays.[22]

Customs officials are susceptible to corruption because they work in a setting that incentivizes them to accept or ask for bribes in the performance of their duties. They may be tempted to misuse their control and authority over the flow of persons and goods, which often involves discretionary power, and weak accountability and oversight.[23] Customs officials tend to work in remote posts, geographically dispersed along their country's border, in relatively few numbers with little supervision.[24] Further, high tariffs and complicated regulations may entice companies to bribe customs officials to reduce import costs and speed up transactions.[25] Entities aiming to import illegal goods, such as drugs and weapons, are especially likely to resort to bribery – as well as intimidation and violence – to advance their illegal transactions.[26]

In addition to these challenges, third parties such as brokers and logistics operators constitute an additional corruption risk. They may develop close relations with customs officials and can easily exploit opportunities to act as facilitators of bribes.[27] Third parties often manage the relationship between customs officials and companies[28] and facilitate international trade by supporting business processes, transactions or exchange of information.[29] In some countries, other corruption opportunities include political interference and familial influence.[30] Based on a study of 427 enforcement actions for foreign bribery offences concluded between February 1999 and June 2014, customs officials were promised, offered or given bribes 11% of the time, making customs officials the top bribery target next to employees of public enterprises.[31] However, customs officials received only 1.14% of total bribes, suggesting that customs-related bribes were more in the nature of 'small facilitation payments'.[32] The study also showed that the purpose of 12% of bribes paid was to obtain customs clearance.[33]

Corruption at the border is such a major obstacle to doing business that several international organizations have produced reports, papers and declarations on the issue.[34] For example, the World Customs Organization's *Revised Arusha Declaration*,[35] the International Monetary Fund's *Practical Measures To Promote Integrity in Customs Administrations* paper[36] and the Organisation for Economic Co-operation and Development's *Integrity in Customs: Taking Stock of Good Practices* report[37] all address corruption in customs and the need for a comprehensive approach to advancing integrity at the border.[38] They identify factors that contribute to integrity within customs agencies[39] but provide less guidance for companies that engage in cross-border trade.

Notes

18 *Ibid.,* at 16.

19 *Ibid.,* at 18.

20 *Ibid.,* at 16.

21 *Ibid.,* at 18.

22 *Ibid.,* at 19.

23 *Ibid.,* at 23.

24 The World Bank, *supra* n. 1, at 123.

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 OECD, *supra* n. 3, at 22.

30 The World Bank, *supra* n. 1, at 124.

31 OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* 8 (Paris, OECD Publishing 2014), https://doi.org/10.1787/9789264226616-en (accessed 16 june 2021).

32 *Ibid.,* at 23.

33 *Ibid.,* at 32.

34 The World Bank, *supra* n. 1, at 125.

35 World Customs Organization, *Revised Arusha Declaration* (Brussels, 2003).

36 James T. Walsh, *Practical Measures to Promote Integrity in Customs Administrations,* in *Changing Customs: Challenges and Strategies for the Reform of Customs Administration* 154 (Michael Keen ed., International Monetary Fund 2003).

37 OECD, *Integrity in Customs: Taking Stock of Good Practices* (Paris, OECD Publishing 2017), http://www.oecd.org/gov/ethics/G20-integrity-in-customs-taking-stock-of-good-practices.pdf (accessed 16 june 2021).

38 The World Bank, *supra* n. 1, at 125.

39 *Ibid.*

Among the international organizations that provide instruments related to border corruption that are useful to companies to minimize their border corruption risk, the Organisation for Economic Co-operation and Development (the 'OECD') has made combating corruption in business one of its main priorities.[40] The OECD has developed around 270 legal instruments, many of which have become international standards for promoting integrity.[41] Relevant instruments include:

– The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the 'Anti-Bribery Convention');

– The *2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (the '2009 Anti-Bribery Recommendation');

– The *2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*; and

– The *2006 Recommendation on Bribery and Officially Supported Export Credits.*

These instruments guide OECD countries seeking to eliminate the giving of bribes by companies within their own jurisdictions to foreign public officials.[42] In particular, the 2009 Anti-Bribery Recommendation advises governments to encourage companies within their jurisdiction to adopt adequate internal controls, ethics and compliance programs or measures to prevent and detect foreign bribery.[43] As companies increasingly implement measures for reducing their bribery risks in international trade, the Anti-Bribery Convention has and continues to play a key preventative role regarding bribery and corruption including at the border.[44]

Companies can also be guided by the OECD's *Guidelines for Multinational Enterprises* (the 'Guidelines'). Although non-binding, the Guidelines, which are continually updated, provide standards for responsible business conduct that forty-four adhering governments, accounting for 85% of foreign direct investment globally, encourage companies within their jurisdictions to observe.[45] For example, the Guidelines urge companies not to offer, promise, give or demand a bribe to obtain or retain business or other improper advantages. They encourage companies to resist the solicitation of bribes and extortion.[46] Additionally, the Guidelines enjoin companies to:

– Develop and adopt internal controls, ethics and compliance programs or measures to prevent and detect bribery.[47]

– Prohibit or discourage the use of small facilitation payments, which are illegal in many countries, and, if small facilitation payments are made, require records of such payments in books and financial records.[48]

– '[E]nsure … properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only'.[49] If 'relevant', companies are advised to have a list of agents engaged in connection with transactions with public bodies and state-owned enterprises and make such list available to competent authorities according to applicable public disclosure requirements.[50]

– Make employees aware of, and ensure that they comply with, company policies and internal controls, ethics and compliance programs or measures against bribery, bribe solicitation and extortion by disseminating such policies, programs or measures and by providing training programs and disciplinary procedures.[51]

– Not make illegal contributions to political parties, candidates for public office or other political organizations, and ensure that any political contributions comply with public disclosure requirements and are reported to senior management.[52]

Notes

40 OECD, *supra* n. 3, at 16.

41 *OECD Work on Anti-corruption and Integrity*, OECD (June 16, 2021), https://www.oecd.org/corruption-integrity/about/ (accessed 16 june 2021).

42 OECD, *OECD Guidelines for Multinational Enterprises* 49 (Paris, OECD Publishing 2011), http://dx.doi.org/10.1787/9789264115415-en (accessed 16 june 2021).

43 *Ibid.*

44 OECD, *supra* n. 3, at 44.

45 *2011 Update of the OECD Guidelines for Multinational Enterprises*, OECD (June 16, 2021), https://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm (accessed 16 june 2021).

46 OECD, *supra* at n. 42, at 47.

47 *Ibid.*

48 *Ibid.,* at 47–48.

49 *Ibid.,* at 48.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

Companies that implement the Guidelines in the mineral,[53] agricultural[54] and garment supply chains,[55] as well as in the extractives[56] and financial sectors,[57] are provided additional practical due diligence guidance from the OECD that taken together can have a significant impact in reducing customs bribery and corruption risk.

Indeed, many OECD instruments and guidelines suggest protocols applicable to customs-related corruption. In its border-specific *Global Trade Without Corruption: Fighting the Hidden Tariff* report, the OECD sets out best practices to promote integrity in cross-border trade. Even though many of these best practices focus on government action, this report makes clear that company compliance is critical in the global fight against bribery and corruption. For example, this report highlights as a corporate best practice to identify, prevent, and mitigate bribery risks in their supply chains, even beyond direct business relationships.[58] In so doing, companies are advised to adopt anti-corruption policies to expose corruption and minimize the risk of its use including at the border.[59]

While international organizations such as the OECD have made laudable efforts to combat corruption at the border, governments, with the support of businesses and citizens in those jurisdictions, bear the ultimate responsibility to issue legislation and enforce its laws in the fight against corruption within their jurisdictions. International organizations can support governments, but there is no 'one-size-fits-all' approach.[60] To understand border corruption more fully, the specific issues, initiatives and laws applicable to each jurisdiction must be examined.

We commend this special edition of the Global Trade and Customs Journal to you, in which lawyers from the United Kingdom, Mexico and Russia, as well as the World Customs Organization, discuss how they are dealing with border corruption, what companies need to know and how companies need to act to minimize the impact of border corruption. To give us a sense of the legal challenges arising in combatting border violations in Africa, also included in this special edition is a tour d'horizon of customs prosecution in Nigeria.

Clifford Sosnow
Email: csosnow@fasken.com
MacNeal Darnley
Email: mdarnley@fasken.com

Notes

[53] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3d ed., Paris, OECD Publishing, 2016), http://dx.doi.org/10.1787/9789264252479-en (accessed 16 june 2021). *See also* OECD, *Practical Actions for Companies to Identify and Address the Worst Forms of Child Labour in Mineral Supply Chains* (2017).

[54] OECD/FAO, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (Paris, OECD Publishing 2016), http://dx.doi.org/10.1787/9789264251052-en (accessed 16 june 2021).

[55] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Secto*r (Paris, OECD Publishing 2018), http://dx.doi.org/10.1787/9789264290587-en (accessed 16 june 2021).

[56] OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (Paris, OECD Publishing 2017), http://dx.doi.org/10.1787/9789264252462-en (accessed 16 june 2021).

[57] OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key Considerations for Banks Implementing the OECD Guidelines for Multinational Enterprises* (2019).

[58] OECD, *supra* n. 3, at 40.

[59] *Ibid.,* at 39.

[60] *Ibid.,* at 47.