

The International Convention on the Harmonized Commodity Description and Coding System: Legal Pillar Behind the Harmonized System

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The International Convention on the Harmonized Commodity Description and Coding System (HS Convention) is an international agreement that applies a systematic and manner to describe commodities in global trade. It effectively provides a universal language that communicates trade matters amongst stakeholders. Despite having a significant impact on international trade, little is known about the legal texts of the HS Convention. therefore, therefore examines the architecture of the HS Convention, discusses its objectives, analyses its impact.

Keywords: Coding, Commodities, Customs Cooperation Council, Description, Harmonized, Harmonized System (HS), HS Convention, Nomenclature, Trade facilitation

I INTRODUCTION

The World Customs Organization (WCO) has developed certain international conventions that have influenced global trade.¹ The conventions sponsored or administered by the WCO have consequently become of significance since they contribute towards facilitating trade across borders. These conventions therefore influence the simplification, harmonization, and modernization of international trade procedures. Trade facilitation is increasingly becoming an important subject area, and the implementation of the measures to expedite the movement of goods across borders is attracting some attention. The International Convention on the Harmonized Commodity Description and Coding System (hereafter, HS Convention) represents a milestone achievement in the history of the WCO as it has successfully developed a uniform format of identifying and describing of commodities.

This paper is divided into four broad discussion points. First, it depicts the relationship between the HS Convention, the WCO and the World Trade Organization (WTO), as well as the Vienna Convention on the Law of Treaties, 1969 (hereafter, VCLT). This demonstrates its relevance in the global setting. It then goes on to provide a generalist overview of the Harmonized Commodity Description and

Coding System (hereafter, Harmonized System or HS). Thirdly, the paper analyses the provisions of the legal texts of the HS Convention, which is the legal backbone behind the universal description and classification of goods. Finally, it discusses the impact of the HS Convention. This analysis will bring a clearer understanding of the HS Convention to its stakeholders such as trade experts, trade lawyers, customs administrations, and academia.

2 BACKGROUND OF THE HS CONVENTION

2.1 Linkages With the WCO and the WTO

The WCO and the HS Convention are closely related, and the WCO is closely linked to the WTO. The WCO, whose foundation under the name Customs Cooperation Council (CCC), can be traced back to the early years of the General Agreement on Tariffs and Trade (GATT), has come out to be an effective global organization regarding the movement of goods across borders. The name 'WCO' was adopted in 1994 as a working name of the CCC, which was created as one of the post-World War II institutions that would respond to matters of global trade as was the case with GATT.² The CCC was

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¹ Some of these conventions are: Customs Convention on the ATA carnet for the temporary admission of goods (ATA Convention); International Convention on the simplification and harmonization of Customs procedures, as amended (Revised Kyoto Convention); and International Convention on mutual administrative assistance in Customs matters (Johannesburg Convention).

² WCO, *WCO History in Brief (1952–2023)* 8 (Brussels, WCO 2023).

established almost at the same time with GATT, and historically, this shows some common heritage. The Convention Establishing the Customs Co-operation Council (CCC Convention) was signed in 1950, and formally came into force in 1952. The CCC Convention governs the operations of the WCO, one of whose objectives is to secure cooperation among Customs administrations and to ensure harmonization of Customs procedures in order to promote international trade.³ The WCO is an independent intergovernmental body, and practically, its mission is to enhance the effectiveness and efficiency of Customs administrations.⁴ This shows a nexus between the CCC and GATT, and consequently between the WCO and the WTO. The close relationship between the WCO and the WTO is also evidently implied in the preamble to the CCC Convention when it underscores the need for cooperation between governments on issues relating to international trade.⁵ This trend was also demonstrated in 1994/1995 following the conclusion of the Uruguay Round of negotiations, when GATT the de facto organization, was transformed into the WTO at the same time the CCC was adopting 'WCO' as its operational name.⁶ Thus, one could contend that in terms of global trade, the WTO and the WCO are complementary. This becomes clear when one considers how the conventions of the WCO further the agenda of the WTO.

The Marrakesh Agreement Establishing the WTO refers to the need for the WTO to establish effective cooperation with other intergovernmental organizations that deal with matters related to those of its own.⁷ The need for such practical cooperation is demonstrated by the fact that the WTO, and some of its agreements, share issues of common interests with the WCO as illustrated by, for example, GATT 1994 Articles I, II, V, VIII and X; and the WTO Trade Facilitation Agreement (TFA). An analysis of the operations of Customs shows that it implements or enforces a number of provisions arising from the WTO agreements, for example the TFA. The WTO also uses some of the WCO tools in some of its activities, for example, the HS. As of 1 October 2023, the WCO had a

membership of 185; while the WTO had 164 and with twenty additional countries whose applications for membership were under consideration.⁸ The correlation between the WCO and the WTO comes out when they each claim to handle 98% of world trade.⁹

2.2 The HS Convention and the VCLT

Aside from the HS Convention, WCO and WTO, there is also a link between the HS Convention and the VCLT. The VCLT is the set of laws that regulate what an international treaty is, how it is made and brought into force, and how it generally operates.¹⁰ It defines a treaty as:

An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.¹¹

From the definition above, a treaty is therefore a contract which creates binding obligations between states, regardless of whatever term it is called. Treaties can also be extended to include agreements which are entered into under the auspices of international organizations.¹² The definition from the VCLT identifies three key elements of a treaty which are: the principals must be states; the agreement must be in written form; and it must be governed by international law. The name by which a treaty is referred to is not material, and in this regard a convention, such as the HS Convention, is a legally binding agreement between states. The major characteristic of a convention is that it is usually negotiated under the auspices of an international organization.¹³ The HS Convention is therefore an international treaty or agreement although it is designated by another term. The HS Convention uses the term Contracting Party to denote those who have signed and ratified it.¹⁴

Amongst other actions, international agreements can be brought into effect through methods such as signature,

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³ Convention Establishing a Customs Co-operation Council (adopted 15 Dec. 1950, entered into force 4 Nov. 1952) 157 UNTS 129 (hereafter CCC Convention), Art. III.

⁴ WCO, *Discover the WCO*, <https://www.wcoomd.org/en/about-us/what-is-the-wco/discover-the-wco.aspx> (accessed 9 Oct. 2023).

⁵ CCC Convention, *supra* n. 3, preamble.

⁶ J. H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 59 (2d ed., Massachusetts, MIT Press 1997).

⁷ Marrakesh Agreement Establishing the World Trade Organization (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1867 UNTS 154 (hereafter WTO Agreement), Arts III.5 and V.1.

⁸ WCO, *supra* n. 4; WTO, *Members and Observers*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 9 Oct. 2023).

⁹ WCO, *supra* n. 4; WTO, *The WTO*, https://www.wto.org/english/thewto_e/thewto_e.htm (accessed 21 Sep.).

¹⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan. 1980) 1155 UNTS 331 (hereafter VCLT), Preamble.

¹¹ *Ibid.*, Art. 2.1.

¹² Lord McNair, *The Law of Treaties* 4 (Oxford, Clarendon Press 1961).

¹³ R. August, D. Mayer & M. Bixby, *International Business Law, Texts, Cases, and Readings* 6 (5th ed., Upper Saddle River, Pearson Prentice Hall 2009).

¹⁴ The International Convention on the Harmonized Commodity Description and Coding System (adopted 14 Jun. 1983, entered into force 1 Jan. 1988) 1503 UNTS 167 (hereafter HS Convention), Art. 12.

ratification and accession.¹⁵ A major step towards implementation of an international treaty at national level is ratification and this is an international act undertaken at national level in order to give effect to an agreement and is undertaken by a country which participated in the negotiation of an agreement or treaty and has signed the text.¹⁶ The HS Convention was adopted during the 61st/62nd Session of the CCC on 14 June 1983, and after attracting the required ratifications by the Member States, then entered into force on 1 January 1988.¹⁷ As of 16 June 2023, the HS Convention had 161 Contracting Parties together including the European Union, while 212 countries, territories or customs or economic unions applied the HS.¹⁸ In the case of Africa, all the fifty-five African Union Member States were implementing HS, while only fifty-two are the Contracting Parties to the HS Convention. South Sudan, Somalia and Equatorial Guinea are not Contracting Parties of the HS Convention although they implement the HS.

It must be noted that prior to the HS Convention there had been efforts to identify goods through the use of numerical codes. The first was a draft tariff nomenclature developed by the League of Nations in 1931 but whose progress was stalled following the outbreak of World War II.¹⁹ This work was to be pursued later by the European Customs Union who developed the Brussels Tariff Nomenclature of 1950, which was later in 1974, renamed the CCC Nomenclature.²⁰ The HS then came later as the most updated construct that took into account the Standard International Trade Classification (SITC) of the United Nations²¹ together the needs of Customs, statistics, transport and trade facilitation.²²

3 HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM

One of the outputs from the HS Convention is the HS, which is defined by the HS Convention as:

the Nomenclature comprising the headings and sub-headings and their related numerical codes, the Section,

Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System, set out in the Annex to this Convention²³;

The definition is wide, and it identifies all the elements making the HS such as the numerical codes together with the interpretative rules. The WCO framework of the HS is based on a six-digit numerical code together with standard terms that are used to describe and identify commodities used in international trade. As an example, the six digits numerical codes of Heading 87.03 under Chapter 87 have generally used 'motor vehicle' as the standard descriptive term instead of other possible terms such as 'vehicle', 'automobile' or 'car'. The HS identifies and categorizes commodities into about 6000 groups through the use of six-digit codes which are meticulously catalogued into sections, chapters, headings and subheadings.²⁴ The HS has developed its own common vocabulary to describe and denote goods crossing international borders. Whereas the WCO template of the HS goes up to six digits, countries are at liberty to be more definitive and describe commodities using the numerical codes beyond, for example, using eight or more digits. The use of levels beyond the six-digit is provided for in the HS Convention where it states:

Nothing in this Article shall prevent a Contracting Party from establishing, in its Customs tariff or statistical nomenclatures, subdivisions classifying goods beyond the level of the Harmonized System, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code set out in the Annex to this Convention.²⁵

Such detailed identification is dependent on a number of factors such as a country's trade policy which may wish to isolate or control certain commodities which need specific identification rather than fall under an umbrella of other items. Australia and the United States are examples of countries that use the eight and ten digits respectively.²⁶

It must be noted that in building upon additional digits, the first six digits are universal and standard. As an

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¹⁵ VCLT, Art. 11.

¹⁶ M. Janis, *An Introduction to International Law* 21 (4th ed., New York, Aspen Publishers 2003).

¹⁷ WCO, *The Harmonised System: A Universal Language for International Trade* 10 (Brussels, WCO 2018).

¹⁸ WCO, *List of Contracting Parties to the Harmonised Convention and countries using the HS*, <https://www.wcoomd.org/en/topics/nomenclature/overview/list-of-contracting-parties-to-the-hs-convention-and-countries-using-the-hs.aspx> (accessed 21 Sep. 2023).

¹⁹ WCO, *WCO History in Brief (1952-2023)* 6 (Brussels, WCO 2023).

²⁰ *Ibid.*, 7.

²¹ UN (2008), *Standard International Trade Classification, Revision 4*, <https://unstats.un.org/unsd/trade/sitcrev4.htm> (accessed 9 Sep. 2023).

²² H. Hugo & J. Allende, *The World Customs Organization: Past, Present and Future* 125 (Córdoba, Springer 2022).

²³ HS Convention, *supra* n. 14, Art. 1.

²⁴ WCO, *supra* n. 17.

²⁵ HS Convention, *supra* n. 14, Art. 3.3.

²⁶ C. Weerth, *Structure of Customs Tariffs Worldwide and in the European Community*, 3(6) Global Trade & Customs J. 221–225 (2008).

example, Table 1 below illustrates the classification of Live sheep and goats using the WCO's six-digit classification.

Table 1 An Extract from the WCO's HS 2022 at 6-Digit Level, Illustrating the Coding and Description of Live Sheep and Goats

Heading	HS Code	Description of Commodities
01.04		Live sheep and goats
	0104.10	-Sheep
	0104.20	-Goats

Notes

01 is the first two digits representing the chapter. In this case

Chapter 1 is in respect of Live animals

01.04 is the four digits representing the heading that is general and is in respect of Live sheep and goats.

010410 is the subheading that identifies live sheep.

As the coding steps up to eight digits, additional and more specific products from the heading are identified. Table 2 below illustrates the use of codes exceeding the standard six-digit coding of the WCO HS.

Table 2 An Illustration of Coding and Description under the WCO's HS 2022, Extending Beyond the Basic WCO's Six-Digit Level and Adapted to Eight-Digit Level

Heading	HS Code	Description of Commodities
01.04		Live sheep and goats
	0104.10	-Sheep
	0104.10.10	– Pure-bred breeding sheep
	0104.10.90	–Other

Unlike in Table 1 that ends with 0104.10 for sheep, in this example, the sheep has been further subdivided into 'Breeds' and 'Other'. This could be an indication that the particular country importing or exporting sheep has some interest in the movement of sheep used for breeding.

4 KEY PROVISIONS OF THE HS CONVENTION

The legal texts of the HS Convention consist of three parts, being a Preamble, twenty articles comprised of various provisions and an Annex. This paper will concentrate on the texts of the HS Convention, which is basically its Preamble and the twenty articles.

4.1 Preamble

The Preamble to the HS Convention is critical because it provides a comprehensive overview of the HS Convention's background and desired benefits. Treaties, international agreements, and constitutions customarily start with introductory proclamations in the form of preambles, which explain the backgrounds and objectives of these legal instruments. There have been arguments, especially influenced by US practices, whether preambles serve any purpose or if they are merely ceremonial opening remarks.²⁷ The VCLT makes a pronounces the binding influence of the preamble in interpreting international agreements.²⁸ The relevance of preambles in domestic legislation would however be determined by national laws. In interpreting an international treaty, there is need to recognize its overall aim and purpose while not relying upon any of its provisions in isolation.²⁹ Preambles therefore have high measure of influence when interpreting legal instruments.³⁰ The Preamble of the HS Convention, with all its detail and which makes it the longest provision of the provision, is a component part of the international treaty. It postulates the scope of the agreement and conveys its understanding and application into proper perspective. Aside from providing an overview of the vision of the treaty or the preamble is increasingly being used as a reference in legal interpretation, and the courts are taking that authority into consideration.³¹ In addition, it has been argued that when the meaning of an expression is unclear, the interpretation of international law ought to be guided by the objective and purpose rule.³² A standing example can be drawn from the WTO jurisprudence, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, wherein the Appellate Body drew some guidance from the preamble of the WTO Agreement and was led to rule as follows:

An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the Marrakesh Agreement Establishing the World Trade Organization (the 'WTO Agreement') acknowledges that the rules of trade should be 'in accordance with the objective of sustainable development', and should seek to 'protect and preserve the environment'.³³

It is clear that the contents of a preamble are part of an international agreement and have an impact on the interpretation of legal texts. The preamble to the HS Convention

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²⁷ M. H. Hulme, *Preambles in Treaty Interpretation*, 164(5) U. Pa. L. Rev. 1281–1343 (2016).

²⁸ VCLT, Art. 31:1.

²⁹ McNair, *supra* n. 12, at 380–381.

³⁰ Hulme, *supra* n. 27, at 1299.

³¹ L. Orgad, *The Preamble in Constitutional Interpretation*, 8(4) Int'l J. Const. L. 714, 715 (2018).

³² L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21(3) Eur. J. Int'l L. 681–689 (2010).

³³ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*: Report of the Appellate Body AB/1998/4 (adopted 12 Oct. 1998) WT/DS58/AB/R [12].

is comprehensive and longer than any of the other twenty articles. The preamble to the HS Convention is three pronged. It provides the objectives of the HS Convention while capturing and articulating fundamental issues regarding the convention. In addition, the preamble introduces the HS and it underscores its major functions. The key highlights that can be drawn from the preamble are follows:

4.1.1 Objectives of the HS Convention

The preamble to the HS Convention makes fundamental pronouncements that go beyond introducing the agreement. Apart from announcing why the agreement was necessary it enunciates its objectives and desires. It is therefore important that any evaluation as to whether the HS Convention has succeeded or not, should be made against the intended objectives as listed. This paper has attempted to address this when reviewing the impact that the HS Convention has made. Some of the objectives of the HS Convention, extracted directly from the preamble are as follows³⁴:

- Trade facilitation;
- Assist with the collection, comparison and analysis of statistics in international trade;
- Streamline the description, classification and coding of goods through harmonizing the instruments used to identify commodities;
- To facilitate the standardisation of trade documentation and the transmission of data;
- To ensure use of accurate and comparable data during international trade negotiations;
- A device that can be used for freight tariffs and statistics in the transportation industry;
- A tool that recognizes developments in technology and patterns taking place in trade in order to narrate global trade;

It must be noted that the first given objective of the HS Convention concerns trade facilitation.³⁵ This highlights the convention as a trade facilitation tool for use by the WTO, WCO, traders and related stakeholders.

4.1.2 Other Fundamental Issues Mentioned in the Preamble

In addition to the stated objectives, the preamble to the HS Convention highlights some key issues that are

pertinent to the HS Convention. These offer important background in understanding the HS Convention and its annex, and some of these are:

- The convention was developed under the auspices of the WCO. From this, it follows that Customs has a major influence in both developing the Convention and in interpreting and implementing the legal texts;
- The HS Convention gave birth to the HS, which is an Annex with details of the coding and standardized descriptions that are used in international trade

The foregoing points out that the HS Convention plays a modern and transformative role in global trade, and the objectives further confirm its close association with other agreements of the WCO and the WTO. In an endeavour to ensure that the HS keeps pace with changes with technology and trade patterns, it is updated into versions every five years and the first updated version came into force in 1992 as HS 1992. The last three versions were HS 2012, HS 2017 and HS 2022, and these variations were brought into force in 2012, 2017 and 2022 respectively. These review cycles are to ensure the HS takes into account modern technology which is introducing new commodities and bringing about changing patterns in international trade. As an example of how Contracting Parties respect these updates it must be noted that as of 1 September 2023, a total of 41 out of the 55 African states were already implementing the current HS 2022 having migrated from the previous HS 2017 or earlier versions.³⁶

5 COMMENTARY ON THE ARTICLES

This section analyses the legal texts of the HS Convention per article. It explains their meanings and provides commentaries.

5.1 Article 1: Definitions

This article defines the terms used in the HS Convention. The definitions explain the context in which the words are used in the legal texts. Some of the terms defined in the text are either linked to or share common definitions with the WCO, for example: Council; Convention; Customs tariff nomenclature; and Secretary General. This further affirms the affiliation between the HS Convention, the CCC Convention and the WCO. One of the key terms defined, and which is distinctive to the HS Convention is

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³⁴ WCO, *HS Classification Handbook* (Brussels, WCO 2013) II/3.

³⁵ HS Convention, *supra* n. 14, Preamble.

³⁶ Those not yet implementing HS 2022 are: Cabo Verde, Central African Republic, Republic of the Congo, Cote d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Mauritania, Mozambique, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Sierra Leone, Somalia and South Sudan. This data was obtained from a survey conducted during a workshop organised by the WCO on the HS in Jul. 2023, held in Mombasa, Kenya.

'Harmonized Commodity Description and Coding System' which is defined as:

the Nomenclature comprising the headings and sub-headings and their related numerical codes, the Section, Chapter and Subheading Notes and the General Rules for the interpretation of the Harmonized System, set out in the Annex to this Convention;

The HS is arranged into ninety-six chapters which are further grouped into twenty-one broad sections, such as: section I in respect of Live Animals and Animal Products; section II covering Vegetable Products; section V for Mineral Products; and section XI for Textile and Textile Articles. As discussed in section 2.3, and illustrated in Tables 1 and 2, the HS coding involves a numbering system that incorporates the chapter, heading and sub-heading. A core component of the HS which comes out in the definition is the fact that these numerical codes are accompanied by notes and general rules that govern their interpretation. Whenever stakeholders classify goods, such process must therefore be in line with the guidance found in the explanatory notes and general rules.

5.2 Article 2: Annex

Article 2 introduces the Annex to the HS Convention, which is the HS, and which forms an integral part of the HS Convention. The Annex is the actual listing of commodities, complete with the standardized format of description and the coding. As per the definition, the HS includes the sections and chapters together with the notes and rules that guide its interpretation. The HS Convention is different from the HS in that the former is the agreement with its texts while the latter is a schedule listing the commodity descriptions and the coding.

5.3 Article 3: Obligations of Contracting Parties

Article 3 outlines the obligations of the Contracting Parties regarding the implementation of the HS Convention. The language used makes it mandatory for the Contracting Parties to comply with the customs and statistical nomenclatures set in the HS. Such conditions are necessary in order to make the harmonization of commodity description and coding a practical tool.

5.4 Articles 4 and 5: The HS and Developing Countries

The two articles offer special differential treatment in respect of 'developing country Contracting Party'. The WCO does not however define what a developing country is, resulting in it applying the definitions used by other organizations such as the International Monetary Fund or the WTO.³⁷ While Article 4, subject to given conditions, provides for some partial application of the HS, Article 5 deals with issues of technical assistance by the developed country Contracting Parties to the developing countries. These provisions are in line with the general thrust of WCO, as stated in its 2022 to 2025 Strategic Plan, and whose activities involve fostering cooperation among Customs administrations through for example, capacity building and mutual assistance within its membership.³⁸

5.5 Article 6: The HS Committee

This article stipulates the nature and composition of the HS Committee. The committee plays a crucial role in the implementation of the provisions of the HS Convention. The HS Committee is composed of representatives from each of the Contracting Parties and it shall meet at least twice a year. The HS Committee elects its own Chair and Vice-Chair. It can invite representatives of intergovernmental or other international organizations as observers. These invited stakeholders have contributed towards ensuring that the HS remains useful and relevant, and that it meets the needs and expectations of the broader Customs and trade community.³⁹ Though both Articles 6 and 7 are silent on who the HS Committee reports to, Article 8.1 infers that it reports to the Council which is comprised of Heads of Customs. The HS Committee works under the direction of the Council to which it makes its recommendations.⁴⁰

5.6 Article 7: Functions of the HS

The functions of the HS Committee are detailed in Article 7. The activities listed show that the HS Committee is highly technical, and it represents the engine room driving all the expert work pertaining to the HS such as: the coding of goods, developing appropriate description of commodities, dealing with disputes and many others. Article 7 as read with Article 6 indicates that the HS Committee is an expert group whose function

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³⁷ C. Weerth, *Globally Uniform Harmonized System Nomenclature? Waivers for Developing Countries and Membership Development: Situation 2017*, 7(1) Cust. Sci. J. 50–62 (2017).

³⁸ WCO, *Strategic Plan: Goals*, <https://www.wcoomd.org/en/about-us/what-is-the-wco/strategic-plan/goals.aspx> (accessed 14 Sep. 2023).

³⁹ WCO, *supra* n. 17.

⁴⁰ The mandate of the HS Committee as a body that operates under the direction of Council is illustrated in the HS Convention, e.g., in Arts 6.6, 7, 8.1, 8.3, and 8.4. These provisions use terms to the effect that it drafts, proposes and recommends, showing that final decisions do not rest with the HS Committee.

includes the classification itself, developing Explanatory Notes, compiling classification opinions, and proposing amendments to the HS Convention. The core of the HS work is handled by this committee which also advises the Council. In view of its operations which involve a wide array of commodities, it must be appreciated why the HS Committee must engage with other relevant international organization such as the Food and Agriculture Organization of the United Nations (UN).

From the terms of reference of the HS Committee, it is the most important body in developing, interpretation and improving the HS. It therefore requires a high level of technical expertise in order for it to effectively discharge its role. It should be noted that the HS Committee can establish its own sub-committees or expert working groups.

5.7 Article 8: Role of the WCO Council on Issues Pertaining to the HS

As discussed above, the Council is the highest organ of the WCO and it is comprised of representatives from Customs administrations.⁴¹ The CCC Convention does not specifically identify the heads of customs as Council members, but it is explicit in its presentation that it is the highest organ that drives the CCC.⁴² Practically, and throughout its history, the Council is mostly made up of the Heads of Customs. As discussed under Articles 6 and 7 the HS Committee reports to Council. The Council is charged with considering and deciding on all issues placed before it by the HS Committee. Some of these issues pertain to Explanatory Notes and Classification Opinions. It is also mandated with the examining proposals for the amendment of the HS Convention. In addition to this oversight role over the HS Convention, it is also responsible for preparations of draft Conventions and amendments and to recommend their adoption by interested Governments.⁴³

5.8 Article 9: Rates of Customs Duty

The pronouncement in Article 9 shows that neither the WCO nor the HS Convention would have an influence over how Contracting Parties allocate the rates of customs

duties to the tariff lines or the commodity codes. The determination of the applicable rates of customs duties in respect of tariff lines and the commodities is sovereign to the Contracting Parties and is not determined by the HS Convention nor the HS. This then emphasizes the role of the HS Convention in the classification of goods and developing a standard way of describing commodities as it proclaims:

Desiring to reduce the expense incurred by redescribing, reclassifying and recoding goods as they move from one classification system to another in the course of international trade and to facilitate the standardization of trade documentation and the transmission of data⁴⁴

It will be noted that the emphasis is on describing, classifying and coding goods. A standardized or harmonized practice of doing this would therefore facilitate international trade.

5.9 Article 10: Settlement of Disputes

The HS Convention stipulates three-layer stages of resolving disputes between the Contracting Parties. The first stage is that disputes regarding the interpretation and implementation of the HS Convention should at first be resolved through negotiations by the contesting parties, failure of which the matter should be referred to the HS Committee for its consideration and recommendations. If these two stages do not resolve the matter, it will then be referred to the Council. A panel of over 160 Contracting Parties is not ideal in resolving technical disputes and the danger is that such a forum would take long to deliberate over such matters.⁴⁵ The positive aspect of this avenue is that the participants both in the HS Committee and in Council are professionals and chances are that there would be decorum in resolving matters and assuming that such technical disputes would not be exposed to lobbying and politicking. As global trade expands, the WCO should consider establishing smaller, quasi-judicial and independent panels of three or five members as practised at the WTO.⁴⁶ The panel system as employed by the WTO has clear rules on its composition, securing its independence and the procedures to be followed in resolving disputes and subsequent submission to plenary.

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⁴¹ CCC Convention, *supra* n. 3, Art. II.a.

⁴² As examples, refer to *ibid.*, Arts VII and XI.

⁴³ *Ibid.*, Art. III.c.

⁴⁴ HS Convention, *supra* n. 14, Preamble.

⁴⁵ HS Committee would be made up of Contracting Parties whereas Council would be made up of the members of the WCO. As at 16 Jun. 2023, the HS Convention had 161 Contracting Parties. Refer to, <https://www.wcoomd.org/en/topics/nomenclature/overview/list-of-contracting-parties-to-the-hs-convention-and-countries-using-the-hs.aspx> (accessed 23 Sep. 2023).

⁴⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 UNTS 401, 33 ILM 1226, Art. 8.

5.10 Articles 11 and 12: Contracting Parties

Articles 11 and 12 deal with the eligibility and process of becoming a Contracting Parties. Article 11 defines the persons who qualify to be a Contracting Parties. These have been categorized into three broad groups, that is: Member States of the WCO; Customs and Economic Unions subject to certain conditions; and any other state as invited by the Secretary General of the WCO and subject to the direction of the WCO Council. The underlying fact is that to be a party to the HS Convention is an issue privy to countries, either as individual or when organized into either Customs Unions or Economic Unions. International organizations cannot be members except in their capacities as Customs Unions or Economic Unions, as is the case with the European Union.

Article 12 deals with procedures that must be followed to be a Contracting Party. This will be through ratification or accession, and in both instances, the instruments of ratification should be deposited with the Secretary General of the WCO.

5.11 Article 13: Entry into Force

VCLT explains that each treaty defines its own requirements for entry into force. Accordingly, it reads:

A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.⁴⁷

The general trend is that entry into force is based on a required number of members who must have ratified such an international treaty.⁴⁸ Article 13 of the HS Convention requires a minimum of 17 States or Customs or Economic Unions to have signed without reservations of ratification or to have deposited their instruments of ratification. The HS Convention therefore entered into force on 1 January 1988 after the requirements were met. It must be noted that the response for ratification to enable entry into force of the convention was overwhelming. Well before 1 January 1988, the number of Contracting Parties who had ratified it had reached 29 and these were comprised of 14 countries and the European Economic Community and was thus far in excess of the stipulated number for the HS Convention to enter into force.⁴⁹

5.12 Article 14: Application by Dependent Territories

Article 15 has provisions clarifying how territories falling under other States shall be treated. Any state that is a

Contracting Party may declare that the HS Convention shall extend to the territories that fall under it.

5.13 Article 15: Denunciation

A Contracting Party may decide to withdraw from a treaty unilaterally. The HS Convention stipulates that a Contracting Party wishing to withdraw shall submit an instrument of denunciation to the Secretary General. The denunciation take effect one year after receipt of the instrument of denunciation unless the instrument specifies a longer period. In terms of Article 19.c of the HS Convention, the Secretary General to notify all interested parties of the denunciation.

5.14 Articles 16: Amendment Procedures

These provisions deal with the procedures that must be followed when amending the HS Convention. The mandate to propose amendments is designated to the Council and the Contracting Parties.

5.15 Articles 17: Rights of Contracting Parties

Article 17 deals with the rights of the Contracting Parties to the HS. They have a right to participate in the HS Committee and Council meetings.

5.16 Articles 18: Reservations

These provisions make it clear that reservations to the HS Convention are not allowed. A Contracting Party may therefore not consent to those provisions which are considered beneficial and reject other provision of the HS Convention.

5.17 Articles 19: Notifications by the Secretary General

This article identifies and lists all those provisions of the HS Convention that requires notification to interested parties. Some of the identified areas are: details of signatures, ratifications and accessions to the convention; suggested amendments to the convention; and the amendments accepted together with the date of their entry into force. The Secretary General of the WCO shall be responsible for communicating the notifications.

Notes

⁴⁷ VCLT, Art. 24.1.

⁴⁸ P. Malanczuk, *Akehurst's Modern Introduction to International Law* 134–135 (7th ed., New York, Routledge 2002).

⁴⁹ GATT, Committee on Tariff Concessions, Minutes of the Meeting of the Committee held on 2 October 1987, Document TAR/M/25 of 16 Nov. 1987, para. 2, which gives status as of 22 Sep. 1987, https://www.wto.org/gatt_docs/English/SULPDF/91320206.pdf (accessed 26 Jul. 2023).

5.18 Article 20 Registration With the United Nations

The charter of the United Nations requires every international agreement to be registered with the UN and it reads⁵⁰:

Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

The significance of the HS Convention therefore comes out prominently in that it is an international agreement that is recognized by the UN. The requirement to register under the charter of the UN strengthens the position of the treaty as a free and unrestricted agreement. It strengthens its force and gives it credibility as international law. Once registered, it will be published in the United Nations Treaty Series (UNTS) as a public document.

6 IMPACT OF THE HS CONVENTION

With the HS Convention having been in force since 1988, the question to pose is if it has any impact and whether it has met its intended objectives? As noted in section 4.1.1, these objectives are varied, with trade facilitation being the first mentioned, and therefore considered as prime. The WTO and the WCO share a common goal and interpretation that trade facilitation involves the simplification, modernization and harmonization of import and export procedures.⁵¹ The WCO, through the Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures (hereafter, the Revised Kyoto Convention or RKC) also has the same approach that trade facilitation is achieved through simplification, modernization and harmonization while underscoring the need to make Customs procedures more uniform.⁵² The RKC is a compendium of over 600 simplified standards negotiated and adopted by Customs administrations under the auspices of the WCO.⁵³ The synergies between the WTO and the WCO are cemented when considering that one of the roles of the WCO, through the RKC, is to harmonize, streamline and modernize global Customs procedures.⁵⁴ In all respects, the HS has simplified, modernized and harmonized customs and

trade procedures, thus making it a trade facilitation tool. The HS Convention has therefore achieved in facilitating trade. In addition, it has had an impact that goes beyond Customs and is used as a means to collate statistics and transporters use it as well in their tariffs. The HS Convention has significantly made an impact on international trade. The fact that the HS is used by 200 countries as a means of describing and coding goods is a major success and impact to global trade.

The great achievement of the HS Convention must be realized in the context that the WCO has devised a standard way of describing goods and has classified commodities into sections, chapters and headings using numerical codes. In doing so it has done an immense task by managing a delicate balance amongst the needs of various stakeholders such as: Customs administrations, trade negotiators, importers and exporters, transporters; and those involved in compiling statistics at various levels. The HS also harmonizes descriptions of commodities at global level after taking into account the diverse product lines different goods globally together with the various languages, cultures and religions that exist. In addition to the given objectives drawn directly from the preamble of the HS Convention, the impact of the HS is evident when considered that it has become a multipurpose trade tool that is to meet the objectives listed in section xxx above. The HS is used for various purposes, which include⁵⁵:

- As a base for allocating rates of customs duties based on the tariff lines or codes;
- As a mechanism for identifying goods and determining the rules of origin;
- For the identification of local goods and the collection of internal taxes;
- As a basis for global trade negotiations (for example tariff offers and rules of origin);
- For the monitoring of controlled goods (for example narcotics, chemical weapons, and endangered species).

The HS is a direct product of the HS Convention, and it is being used by the global business community. Customs administrators and those involved in international trade use it 24/7. This achievement was noted by Michel Danet, then Secretary General of the WCO (1999 to 2008), who reviewed the achievements and wrote:

Notes

⁵⁰ Charter of the United Nations, 24 Oct. 1945, 1 UNTS XVI, Art. 102.

⁵¹ WTO, *Trade Facilitation*, www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 19 Sep. 2023).

⁵² Protocol of Amendment to the International Convention on the Simplification and Harmonization of Customs Procedures (adopted 26 Jun. 1999, entered into force 3 Feb. 2006) 2370 UNTS 27, Preamble.

⁵³ WCO, *The Revised Kyoto Convention*, https://www.wcoomd.org/en/topics/facilitation/instrument-and_tools/conventions/pf_revised_kyoto_conv.aspx (accessed 19 Sep. 2023).

⁵⁴ CCC Convention, *supra* n. 3, Preamble; RKC, Preamble.

⁵⁵ WCO, *supra* n. 34.

The WCO has made a major contribution to this story by developing the Harmonized Commodity Description and Coding System (HS), which today provides the accepted global framework for classifying goods traded internationally. If the WCO were a composer, then the HS would be regarded as one of its greatest symphonies!⁵⁶

In 2018, some thirty years after the HS Convention entered into force, Kunio Mikuriya, who had then succeeded Michel Danet as Secretary General of the WCO, evaluated the HS and commented:

It is one of the WCO's flagship instruments. One can even say that it is the backbone of the WCO. Being a nomenclature of transportable goods, it has become over the years a universal language for identifying and coding merchandise being traded internationally, with almost all the world's economies using it as a basis for their Customs tariffs and for the collection of trade statistics.⁵⁷

The above statements show that the HS Convention, as an international agreement, is a source of national and regional economic law that has a greater impact on international trade than is recognized. The HS is a flagship invention of the WCO that provides a unifying structure to assist persons involved in trade with navigating the complexities of trade across borders, more so in the light of the rapid pace of change in technology and trade patterns.⁵⁸

The effective and correct use of the HS improves international trade by harmonizing trade procedures and interpretation of relevant instruments, not only for Customs

but also for other stakeholders. All these factors indicate that the HS is a vital weapon for promoting and implementing fiscal and trade regulations. This has a ripple effect in that its usage contributes towards an open and predictable business environment that encourages investment. The HS has therefore been of significance in international trade and international law.

6 CONCLUSION

This paper has shown that the HS Convention is an international agreement which was developed under the auspices of the WCO. The author considers that the HS Convention together with its HS represent the WCO's most successful legal tools that binds members and even non-members of both the WCO and the WTO. The legal texts of the HS Convention promote collaboration through a shared common understanding of issues outlined in the international agreement. One of the most notable outputs of the HS Convention is the HS, which amongst others, has become a well-grounded tool that provides consistent classification for traded commodities. The system of classification has become a useful instrument to for processing trade data, the allocation of tariff rates and negotiations in international trade. The positive impact of the HS is evident from the fact that 212 countries or territories or customs/economic unions utilize it to facilitate the movement of goods across borders. It has gone beyond usage by Contracting Parties only, in that even countries not party to the HS Convention have adopted the system of classification.

Notes

⁵⁶ H. Asakura, *World History of the Customs and Tariffs* 9 (Brussels, WCO 2003).

⁵⁷ K. Mikuriya, *The Harmonized System, 30 years old and still going strong!*, (18)9 WCO News (2018).

⁵⁸ WCO, *Highlights of the WCO Global Conference on the Future of the Harmonized System* (2019), <https://www.wcoomd.org/en/media/newsroom/2019/may/highlights-of-the-wco-global-conference-on-the-future-of-the-harmonized-system.aspx> (accessed 3 Oct. 2023).