

**A case study of the Customs Administrative Penalty Provision as contained in the
Customs & Excise Act, No.91 of 1964 of South Africa, and
a comparison of the South African regime with selected foreign Customs Penalty Regimes**

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UNIVERSITY OF CAPE TOWN

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DECLARATION

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Josua Levendal

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GLOSSARY OF TERMS

AMPS - Administrative Monetary Penalty System

CBSA – Canada Border Security Agency

CCC – Community Customs Code

EU – European Union

EEC – European Economic Community

MCC – Modern Customs Code

UCC – Union Customs Code

GATT - General Agreement on Tariffs and Trade

LDC – Least Developed Country

MPD - Master Penalty Document

SACU – Southern African Customs Union

SADC – Southern African Development Community

SARS – South African Revenue Service

TRALAC – Trade Law Centre

UNISA – University of South Africa

US – United States

WCO – World Customs Organization

WTO – World Trade Organization

Abstract

The world of international trade has evolved over the centuries and, with this process of evolution, unique challenges have emerged over time. International trade, in essence, involves the movement of goods and services across borders; it is conducted mainly by private firms rather than governments. The suggested role of government is to create an environment that allows for efficient international trade. Such an environment is manifested in the provision of an adequate physical infrastructure and a transparent regulatory environment. Today, an organisation such as the World Trade Organization (WTO), whose members direct the vast bulk of international trade, plays an active role in advancing the agenda of a rules-based international trade regime. This same organization also provides, on an ongoing basis, initiatives directed to improving the facilitation of trade internationally. Examples of trade facilitation initiatives are the recent Bali-Agreement (The Trade Facilitation Agreement, 2013), signed by WTO members in 2013 in Bali, and the Revised Kyoto Convention of the World Customs Organization (WCO) which has, as its objective, the elimination of barriers to efficient international trade.

This dissertation focuses on customs penalty regime as utilised by South Africa. The South African regime is compared with certain foreign and international customs penalty regimes (in this case, Canada, the United States of America and the European Union). The study further explores the appeal system available to transgressors of these regimes. The penalty – and appeal regimes is further analysed against recommendations and prescripts in international agreements to which these countries are parties, specifically the WTO Bali Agreement and the WCO Revised Kyoto Convention. A practical and transparent customs penalty regime will obviously support the agenda to improve trade facilitation, a situation that is desired by traders throughout the globe.

From a South African perspective, it was found that the current customs penalty regime is rather complex and may not, therefore, effectively improve compliance with customs legislation. It would appear that the introduction of the Tax Administration Act No. 28 of 2011 in October 2012 in South Africa also resulted in a 'duopolistic' system of penalty and appeal processes within SARS, given that this Act relates to the enforcement of the customs laws. The examination of the foreign customs penalty regimes showed systems that appear to be very practical, especially from the perspective of enforcement by a customs officer, compared with those regimes that are legalistic and that make the work of the customs officer potentially very complicated. For example, from a practical point of view and in line with the requirements of the Revised Kyoto Convention, the Administrative Monetary Penalty System applied by customs authorities in Canada appears to be considerably better than the regimes applied by the other countries under discussion in this dissertation. The European Union is also moving towards implementing a similar system (i.e. similar to Canada's system) but, to date, has failed to keep its system as practical as it could be. The system utilised by the United States, on the other hand, is rather legalistic, and involves issues such as negligence, gross negligence and fraud to be proven before a customs contravention can be shown to have occurred.

In the fast-paced environment of contemporary international trade penalty regimes that are easily enforceable by customs officers and effectively deal with customs breaches are needed. It is submitted that this is best addressed in a broad administrative penalty system based on the legal requirement of strict liability, that is, regardless of fault. Serious transgressions must be dealt with by specialised units in the relevant criminal justice system and should not be the responsibility of the ordinary customs officer. In the South African context as well as beyond its borders in the region and even the continent, the discussion around customs penalty regimes is not receiving the attention it deserves. This does not auger well for the agenda of trade facilitation.

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Chapter 1 - Introduction

The collection of taxes is one of the world's oldest professions, as we can see when we read the Bible itself. Over the centuries, tax collection has evolved into a sophisticated system on which governments rely to protect their domestic economy and to collect revenue. Alongside this system global trade systems have developed on which countries rely to regulate international trade. At the heart of each country's trade system, which allows for the flow of goods across international borders, is the customs administration, staffed by what is commonly known as the customs official. An integral part of the job of a customs officer is to ensure compliance with the particular country's domestic customs legislation and to enforce this legislation where breaches occur by meting out penalties and/or confiscating the implicated goods.

In his book on the history of customs and tariffs, Asakura (2003) notes that the earliest confirmed existence of organised customs occurred during the time of the Egyptian Pharaohs. It is well documented that, during the period of classical Greece, a single rate of duty was applicable to all goods and was calculated as a percentage of the value of the goods (*ad valorem*). It is also a well-known fact that, under the Roman Empire, the activities associated with customs administration were already properly organised. Indeed, one of the most significant contributions to modern customs, by the Roman Empire, was the development of the customs tariff. This allowed for the collection of different rates of duties depending on the type of goods. The first listing of goods with different rates of duty was discovered in the oasis city of Palmyra in the Syrian desert, and dates to 18 April 137 A.D. Today, we have the Harmonised System administered by the World Customs Organization (WCO), which consists of 97 chapters that cover all commodities with their respective tariff codes (Asakura, 2003). In fact, to this day, tariffs still form the backbone of the international system in terms of which countries trade with each other.

A particular interest of this work is the development of the customs enforcement regime over time. In this regard, Asakura (2003) highlights an ancient Indian text known as the *Laws of Manu*. This text lists, for example, customs transgressions such as trading outside of regulated times and the making of false statements, both of which were punishable with a fine eight times the value of the duty evaded. Interestingly, this is a penalty principle that is still widely used today.

If we now move forward in time to the early 20th century, it is clear that trade had become very complex in the intervening centuries. Indeed, this state of complexity was regarded, by many, as an indirect consequence of protection used by the various countries and one which, overall, was having a negative effect on lawful trade. The role of customs formalities in international trade had to be simplified in order to regulate international trade to the benefit of all concerned. A forerunner to establishing an entity that would regulate international trade came in the form of the General Agreement on Tariffs and Trade commonly referred to as GATT, of 1947. Following the Uruguay Round of trade negotiations, a deal (the Marrakesh Agreement) was struck in 1994 that led, in 1995, to the establishment of the World Trade Organization (WTO).

The result was a rules-based international trading system that provided much needed certainty and freer trading conditions (Asakura, 2003). A substantial part of this international trade regime is today concretised in the concept of “trade facilitation”, customs penalty regimes are but one aspect. The focus of this dissertation is to examine how these penalty regimes are implemented in the broader field of trade facilitation. Given that South Africa is a member of the WTO and WCO, it will also be worthwhile assessing to what extent South Africa complies with its international obligations. In the *Progress Office Machine* case, much was made at paragraph 11 of the fact that our domestic legislation must be in line with our established international legal obligations (*Progress Office Machines CC v SARS and Others*, 2007). This was later again confirmed in the *Glenister* case at paragraph 97, where the “special place of international law” in our law was reiterated as required by the South African Constitution in sections 231 – 233 (*Glenister v President of the RSA and Others*, 2011).

The introduction of the Tax Administration Act, No. 28 of 2011 (“TA Act”) in October 2012 prompted me, as a former customs official and currently as a customs legal advisor, to revisit the provisions that govern administrative penalties in the Customs and Excise Act, No. 91 of 1964 (“the Customs and Excise Act”). This was encouraged by the fact that, as one of its main purposes, the new TA Act sought to rationalise – in one piece of legislation – all administrative matters relating to all legislation administered by the South African Revenue Services (“SARS”). It is my observation that customs officials find the current administrative penalty regime, as prescribed by section 91 of the Customs and Excise Act, cumbersome to administer. This section of the Act does not act as an effective deterrent for customs breaches, as will be explained in paragraph 2.3 below. It is therefore surprising that, with the implementation of the TA Act, the Customs and Excise Act was excluded from its application as it could have assisted greatly in standardising the appeals regime, at least for the benefit of the SARS and taxpayers at large. Instead, and as part of its modernising efforts, SARS has for the past few years started to re-write the customs legislative regime, culminating in the adoption of the new Customs Control Act, No. 31 of 2014 (“Customs Control Act”) and the Customs Duty Act, No. 30 of 2014 (“Customs Duty Act”). These Acts have not yet been promulgated and will be discussed below in an effort to see what new customs penalty regime is on the horizon for South Africa.

A further focus of this study will therefore be to assess the penalty regime structure as provided for in the new TA Act as it pertains to the Value Added Tax Act, No. 89 of 1991 (“VAT Act”) specifically. This regime will be compared with the penalty regime in the current Customs and Excise Act, and with the Customs Control Act and Customs Duty Act. This, in turn, will be contrasted with a study of selected foreign customs and excise penalty regimes structures (those of Canada, the United States of America and the European Union) with a view to identifying similarities and differences in relation to the South African customs penalty regime.

The research focus is exploratory in nature. Very little material is locally available that deals with the matter discussed here. An additional objective of this dissertation is to add resource value to this field of study by explaining the current penalty regime as well as the proposed penalty regime in the new Customs Control Act

and Customs Duty Act. This will be compared with the TA Act and selected foreign customs penalty regimes. It is hoped that, from this relatively new conversation, issues will emerge that can be utilised when considering new penalty regimes in our region.

Chapter 2 – Aim and objective of the study

This study seeks to evaluate the SARS customs penalty regime in its current form under the Customs and Excise Act of 1964 in the light of new legislative developments; this regime will then be compared with a selection of customs penalty regimes that operate internationally. This evaluation and comparison will be done by a description, analysis and comparison of the relevant, primary domestic legal instruments with a selection of foreign and international primary legal instruments.

The starting point of this dissertation is section 91 of the Customs and Excise Act, because it is this section of the Act that authorises the imposition of a so-called administrative penalty if any provision of the Act is breached. Section 91 has an interesting “twist” to it in that it makes the payment of the penalty voluntary: transgressors can elect to be dealt with administratively (i.e. by paying the penalty) or they may choose not to pay the penalty and thus open themselves up to possible criminal prosecution. However, criminal prosecution is not preferred by the SARS owing to the lack of internal capacity and the limited resources available to the National Prosecuting Authority (which would have to deal with a potentially high volume of cases). It is also logical that SARS will not choose to criminally prosecute each and every transgression simply because of the numbers involved as well as the varying levels of seriousness of the transgressions. In the light of this, the question arises: in dealing with customs contraventions, is SARS utilising the most effective legal scheme?

The introduction of the TA Act in October 2012 added a new dimension to the customs penalty regime in the way the Act regulates the administration of all tax Acts for which SARS is responsible. One of the main objectives of the TA Act is to streamline all administrative matters relating to these tax Acts, of which the imposition of penalties and the administrative appeal process are two elements. In 2012, SARS decided not to make the TA Act applicable to the Customs and Excise Act; this decision may have resulted in a missed opportunity to synchronise the penalty and appeal regimes within SARS for all legislation administered by this authority. This dissertation therefore aims to highlight the current dissimilar approaches to the imposition of penalties and the handling of administrative appeals between two divisions within the one organisation, namely, SARS.

A further aim of this study is to determine whether there are any lessons to be learnt internationally from other customs authorities that could lead to the improvement of South Africa’s domestic penalty regime. To this end, three international regimes have been chosen, including Canada, given the influence of Canada’s constitution and jurisprudence on the development of the new South African democratic order (during the 1990s and ever since). The two other regimes chosen are that of the European Union, which was developed but not yet implemented and that of the United States of America. America was chosen due to its historically dominant role in international trade, although this domination is now being rivalled by countries such as China and the economic block of the European Union.

Since this is a qualitative study, the research criteria will be supported by the fact that:

- a) the concepts dealt with in this study relating to customs penalty regimes can be transferred from the South African context to the regional, continental and international spheres because of the universality of the concepts involved (transferability);
- b) the information or data that will be used is readily available and if analysed by any other scholar the outcomes are likely to be similar (dependability);
- c) the study has a clear audit trail of the process applied and information analysed (confirmability); and
- d) various sources of information were used to improve the credibility of the outcomes of this study (authenticity).

As indicated above, the information sources mainly consist of primary legislation, manuals and directives. The focus is on the prescribed penalty regimes and on the administrative appeal remedies available to alleged transgressors of selected countries. The main sources of information were the following:

a) Domestic legislation:

The Constitution of South Africa of 1996
The Promotion of Administrative Justice Act, No.3 of 2000
The Customs and Excise Act, No.91 of 1964
The Customs Control Act, No.31 of 2014
The Customs Duty Act, No.43 of 2014
The Tax Administration Act, No.28 of 2011
The Value Added Tax Act, No.89 of 1991

b) Foreign legislation:

Canada: Canadian Customs Act 1986.
The United States of America: USA Tariff Act of 1930.

c) Other:

European Union: Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions (COM2013 884 final) Brussels, Switzerland

d) International agreements:

World Trade Organization: The Trade Facilitation Agreement of 2014
World Customs Organization: Revised Kyoto Convention

e) Regional Agreements

Southern African Development Community: The SADC Protocol on Trade

Southern African Customs Union: The SACU Agreement

In order to support the dependability of this comparative study, it was essential to use primary sources, since these sources best reveal the structures which form the subject of this study. The study was further supported by policy documents, available independent writings, and relevant court rulings.

The body of the dissertation consists of four main chapters, each of which addresses a specific research subject:

Chapter 3 – Literature Review and Analysis

This chapter provides a review of the literature consulted on the relevant subject matter; this literature covered international and domestic legislation. Literature that provided insight into the chosen foreign customs penalty regimes was also consulted.

Chapter 4 – Results of the Study

In this chapter, the researcher analyses the results of the study in order to clarify the issues involved.

Chapters 5 and 6 – Discussion and Conclusion

In chapter 5, the findings of the research are discussed and in chapter 6 recommendations are made regarding the research findings and shortcomings identified by the research.

Chapter 3 – Literature Review and Analysis

Given the nature of the sources consulted, it was considered correct to provide a more comprehensive picture of what the respective sources offer rather than fragment the discussion. On the topic of this work, that is, customs administrative penalties, there is a dearth of academic literature. The standard work on the history of customs and tariffs by Hironori Asakura offers interesting historical and some comparative insights (Asakura, 2003). There are also, globally, plenty of official documents on customs penalty regimes (in electronic format). The literature review and analysis are therefore confined to the systems covered by this research.

3.1 International Context

At an international level, various systems have been developed by the WTO and WCO to promote the standardisation of various aspects of trade facilitation, including enforcement methods and customs penalty regime frameworks. These international legal instruments therefore merit specific attention.

3.1.1 WTO –the Bali Agreement

In December 2013, in Bali, WTO members reached an important milestone by concluding the Trade Facilitation Agreement. The preamble of the Agreement sets out a clear vision, which is, firstly, to improve the movement, release and clearance of goods, including goods in transit. Secondly, the aim of the Agreement is to provide support to, especially, least-developed countries (LDCs) and, thirdly, the Agreement aims to promote cooperation amongst WTO members on issues of trade facilitation and customs compliance (The Trade Facilitation Agreement, 2013).

This Agreement emphasises the accessibility of information and requires, in Article 1.1 (g) and (h), its members to publish information on penalty provisions for breaches of import, export or transit formalities and to publish information on appeal procedures. The availability of this information, it is suggested, will assist traders in being aware of what specifically constitutes a breach of a particular customs law and, if the traders find themselves in breach of such laws, an understanding of the remedies available to them. Articles 1.2 and 1.3 are, furthermore, very specific in terms of information platforms that must be utilised to improve accessibility (e.g. the internet and enquiry points at customs offices).

Article 4 specifies the minimum requirements for appeal or review procedures where a customs administrative decision is meted out to a trader. Footnote 4 on page 5 of the Agreement defines an administrative decision as *“a decision with a legal effect that affects rights and obligations of a specific person in an individual case. It shall be understood that an administrative decision in this Article covers an administrative action within the meaning of Article X of the GATT 1994 or failure to take an administrative action or decision as provided for in a Member's domestic law and legal system. For addressing such failure, Members may maintain an alternative administrative mechanism or judicial recourse to direct the customs authority to promptly issue an*

administrative decision in place of the right to appeal or review ..."(The Trade Facilitation Agreement, 2013, p.5). In short, Article 4 requires that, where an administrative decision has been taken, the trader must have the option of an internal administrative appeal or review process. This process must of course be administered by officials who were not party to the original decision in order to promote independent decision-making. If such an internal process is not available, the option of judicial appeal or review must be available to the trader. This is surprising because the speedier and more cost effective option of an internal administrative appeal or review should have been stipulated as a prerequisite instead of an option between internal appeal or review and judicial appeal or review.

In the context of this work, the specific mention of penalties in Article 6.3 and the requirements proposed in relation to these penalties are of particular importance. Article 6 goes under the heading of "*General Disciplines on Fees and Charges Imposed on or in Connection with Importation and Exportation*". Article 6.3.1 defines "penalties" to mean "*those imposed by a Member's customs administration for a breach of the Member's customs law, regulation, or procedural requirement*" (The Trade Facilitation Agreement, 2013, p.7).The underlying fundamental principles governing penalties propogated in the Agreement include the following:

- they are only to be imposed on those who committed the breach
- specific circumstances must be considered in arriving at a penalty which should "fit the crime"
- measures must be in place to ensure segregation of duties to avoid conflict between the assessment of penalties and the collection thereof
- reasons must be provided for the penalty assessment citing the applicable law contravened and how the decision on the penalty amount was reached
- voluntary disclosures of breaches must be considered as a mitigating factor where appropriate (The Trade Facilitation Agreement, 2013, p.7)

The above requirements resemble much which is already prescribed in South African administrative law and will be discussed in more detail below.

After some initial disagreement between certain countries regarding particular aspects of the Trade Facilitation Agreement, consensus was finally reached towards the end of 2014 and a decision was taken to insert the new Agreement into Annex 1A of the WTO Agreement. This now paves the way for the entering into force of this Agreement once two-thirds of WTO members have finalised their respective domestic ratification processes.

3.1.2 WCO – the Revised Kyoto Convention

The International Convention on the Simplification and Harmonization of Customs Procedures ("Kyoto Convention") was revised in 1999 and came into force in February 2006. As with The Trade Facilitation

Agreement, the Convention has, as its main objective, the provision of predictability and efficiency in the international trade arena. Contracting parties, of which South Africa is one, are bound by the rules set out in the Convention. The provision of easily accessible processes of administrative and judicial review is one such requirement, and this will be discussed in more detail below.

To understand the Revised Kyoto Convention it is important to first explain its structure as set out in Article 4.

The convention consists mainly of:

- a) the General Annexes and
- b) the Specific Annexes

The annexes are further divided into chapters which consist of definitions, standards, transitional standards, recommended practices and guidelines. (Revised Kyoto Convention, 1999).

In the General Annexes that apply to all contracting parties, the Convention provides, *inter alia*, for the following standards concerning decisions made by a customs authority, standards that are relevant to this dissertation:

- When a decision is made that adversely affects a trader, reasons must be provided as well as an indication of the right to appeal such a decision (Standard 9.8 in the General Annex (chapter 9)).
- National legislation must provide for an initial appeal to the customs authority. This indicates that an internal appeal process must be provided for (Standard 10.4 in the General Annex (chapter 10)).
- When the internal appeal is unsuccessful, provision must be made for a further appeal to a body independent of the customs authority (Standard 10.5 in the general annex (chapter 10)), and
- When standards 10.4 and 10.5 had been exhausted, the appellant will have the right to judicial appeal or review (Standard 10.6 in the general annex (chapter 10)).

In the Specific Annexes (compliance with which is optional, if a contracting party has not adopted a Specific Annex), chapter H deals specifically with offences and provides clear guidelines to customs regimes regarding the administration of customs offences. The definitions section sets an interesting tone by introducing terms or concepts such as "administrative settlement of a customs offence" and "compromise settlement". These concepts indicate an avenue designed to speedily resolve customs contraventions, either by means of settlement or compromise settlement. Settlement is done via a customs ruling, while a compromise settlement is done via an agreement subject to the fulfilment of certain conditions by those in breach of a customs legal provision (Revised Kyoto Convention, 1999).

Specific Annex H is fairly extensive and consists of some 27 standards and recommended practices *in toto* under the following headings, practices which must be provided for in a country's domestic legislation:

Field of application

National legislation must clearly indicate the chain of liability as it relates to customs procedures (standard 3) and specify the period of liability by indicating when it starts and when it ends (standard 4). This suggests that customs offences can only be investigated within a specified period of time, where after the liability in terms of undetected breaches will cease.

Investigation and establishment of customs offences

The powers of customs officers must be spelled out clearly to avoid abuse (standard 5), especially as these relate to the searching of persons (standard 6). The searching of premises must be controlled and be subject to certain legal requirements (chapter 7) and, where breaches are discovered, all relevant administrative law requirements must be adhered to in the communication to the suspected transgressor (standard 8).

Procedure to be followed when a customs offence is discovered

Legislation should be clear on the procedures to be followed when a breach has been discovered, as well as the possible consequences for the transgressor (standard 9). Particulars of customs breaches should be clearly set out, as well as the implications of such breaches for the transgressor (recommended practice 10).

Seizure or detention of the goods or means of transport

Goods and/or means of transport must only be seized by customs if they are liable to forfeiture or required in further legal proceedings (standard 11). Only those goods in a consignment directly implicated in an offence may be detained or seized (standard 12). Some type of notice must be provided to the owner of the goods indicating the description of the goods, the reason for detention or seizure, and the nature of the transgression (standard 13).

Further recommended practices relating to the seizure or detention of the goods or means of transport include:

- Release of goods against security if possible (standard14).
- Means of transport should be released if not specially adapted for concealment and not required as evidence (standard15).
- Means of transport should only be forfeited to the state if the owner had knowledge of the offence or did not take adequate precautions (standard16); and
- If the item in question does not consist of perishable goods, or if the item is not impractical for customs to store, then such goods should not be disposed of unless proper procedures have been followed (standard17).

Detention of persons

Clear guidelines must be specified when dealing with the detention of persons (standard 18).

Administrative settlement of customs offences

As soon as a customs breach has been discovered, processes should be initiated to speedily settle the matter administratively by providing the terms of the settlement and the appeal processes available to the alleged transgressor (standard 19). Minor offences in relation to goods (recommended practice 20), or minor offences committed by travellers (recommended practice 21) should be dealt with there and then by the relevant office.

Requirement 22 is of particular importance as far as practicality and transparency are concerned. This requirement specifies that categories of offences, including the specific administrative penalty, should be published. The level of seriousness of the offence and the history of the transgressor must always be in proportion to the penalty amount (standard 23). When imposing penalties, factors to be considered include the steps that were taken by the transgressor (standard 24), as well as consequences linked to *force majeure* (standard 25). Where a matter has been settled which involves detained or seized goods, such goods must be returned to the trader if not already forfeited or abandoned to the state (standard 26).

Right of appeal

An alleged transgressor must have the right to appeal to a body independent of customs unless the parties have entered into a compromise settlement (standard 27).

3.1.3 The SADC Protocol on Trade

South Africa is also a member of the Southern African Development Community and of the SADC Protocol on Trade ("the Trade Protocol"), which was signed in Maseru in 1996 and amended in Windhoek in August 2000.

The Trade Protocol has attached to it various annexes dealing with, *inter alia*, rules of origin, customs cooperation, trade documentation and procedures, transit trade and transit facilities, as well as trade development. Closer scrutiny of the Trade Protocol and its annexes indicates no reference or strategy concerning the issue of customs offences, penalties or appeal procedures.

3.1.4 The SACU Agreement

In Southern Africa we have the oldest customs union in the world, the Southern African Customs Union ("SACU"), which came into existence in 1910. Current Members are Botswana, Namibia, South Africa, Swaziland and Lesotho. As a customs union, these Members have a common external tariff regime and no customs duties apply to intra union trade (SACU Agreement, 2002, Article 18.1). As in the SADC Trade Protocol, the SACU Agreement contains no reference to a recommended standard on customs offences, penalties or appeal procedures.

3.2 Overview of South Africa's domestic legislative framework

It is clear from the provisions of the WTO Trade Facilitation Agreement (2013) and the Revised Kyoto Convention (2000) that Member states are expected to create a trade environment that is predictable and fair, since this environment relates to the imposition of penalties for the breach of customs laws and regulations. Unfortunately, the SADC Trade Protocol and the SACU Agreement place little emphasis on the administration of customs breaches, which does not bode well for trade facilitation in the region.

It is important to examine the legislative framework within which the administration of customs breaches must operate in South Africa, with specific reference to the Constitution of 1996 (because all legislation must be aligned to the legal principles contained in the Constitution).

3.2.1 The Constitution of South Africa of 1996

In terms of section 2 of the Constitution, law or conduct which is incompatible with the Constitution is invalid. This section further requires that the obligations imposed by the Constitution must be fulfilled. Chapter 2 of the Constitution contains a highly praised bill of fundamental rights. The protected rights go beyond classical rights and freedoms to include a number of socio-economic rights and other rights not usually found in a bill of rights: the right to information and the right to administrative justice are examples of the latter (Constitution, sections 32 and 33) (Currie & de Waal, *The Bill of Rights Handbook*, 2005)

Section 33 contains the fundamental right to just administrative action. The corollary of this right is a duty on the part of the state to act in the required manner and to provide reasons for prejudicial administrative actions. Section 33 stipulates very clearly what "just administrative action" entails and the requirements to be met: action that is lawful, reasonable and procedurally fair. It makes it clear that reasons must be provided where an administrative action affects someone's rights.

Section 33 of the Constitution further requires national legislation by Parliament to provide for three matters: the first is review of administrative action by a court or tribunal; the second is place the state under a duty to give full effect to all aspects of the right to just administrative action; and the third is to promote efficient state administration.

The right to "just administrative action" is supported by other rights in the Bill of Rights such as section 34, which stipulates that disputes be settled by a court of law or, *where appropriate, another independent and impartial tribunal or forum*. The right to "just administrative action" is also supported by section 32, which allows for access to information held by the state, and section 38, which allows for the enforcement of these rights (Hoexter, 2012). The rights conferred on natural or juristic persons as they relate to decisions taken by government that affect them directly are comprehensive and therefore require executive action which is

transparent and sensitive to such rights. Reference should also be made to section 195 of the Constitution, which contains an extensive set of basic values and principles governing public administration. These principles are often overlooked in debates about the state of executive action in South Africa.

The national legislation that gives practical effect to Article 33 of the Constitution is the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA").

3.2.2 The Promotion of Administrative Justice Act no.3 of 2000

The preamble of PAJA sets out its clear purpose in support of section 33 of the Constitution, viz.:

- to promote efficient administration and good governance,
- to create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, and
- to give effect to the right of just administrative action.

The key concept, upon which PAJA turns, is "administrative action". PAJA defines "administrative action" in section 1 as any decision taken, or any failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of an empowering provision, and which adversely affects the rights of any person while having a direct, external legal effect. The meting out of administrative penalties and adverse assessments of tax of a trader by SARS will clearly fall within this definition of administrative action.

Section 3(2) of the PAJA requires that the administrative action must be procedurally fair and the process must include the following elements:

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) reasonable opportunity to make representations;
- (c) clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.

In terms of section 5, written reasons for an administrative action may be requested within 90 days after the person became aware of the action, if no reasons have yet been provided. Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action in terms of section 6. These two provisions provide a clear set of rules and framework with which administrative action taken by government officials must comply, and the remedies available to the affected person or entity.

As an organ of state, the SARS must adhere to the principles of just administrative action as contained in PAJA. This implies that the customs laws administered by SARS must comply with the spirit of just administrative action as prescribed in section 33 of the Constitution. The aforementioned principle should then easily support the agenda of trade facilitation as enumerated above in conjunction with the guidelines contained in the Revised Kyoto Convention and the intentions of the Bali Agreement. It is evident that the South African legal system supports transparent and effective government action in terms of section 33 of the Constitution and in terms of PAJA more specifically, which bodes well for international trade.

In order to ensure fair administration of matters pertaining to international trade, discretionary powers should not be unlimited. Hoexter (2012) distinguishes between three groups of administrative powers:

1) Express or implied – express powers are required to support the actions of officials as provided for clearly in legislation whilst implied powers will generally be a consequence of an express power.

2) Discretionary or mechanical – discretionary powers are evident in wording such as “may”, which indicates that the official has a choice (whereas mechanical powers leaves no real choice to the official). Burns (2013) also indicates that officials generally have a “*free choice within the limits set by the law*” when they exercise discretionary powers. In this study it is argued that the limits set by the law must always be respected if the customs penalty regime is to be fair and transparent.

3) Mandatory or directory – as the wording indicates, the legislative requirement(s) is peremptory in nature.

In the *Dawood v Minister of Home Affairs* case, the court observed that discretionary powers are essential in any legal system. This case dealt with the granting of immigration permits which are considered by officials of the Department of Home Affairs based on the specific circumstances of the applicant(s). Although discretionary powers cannot be omitted totally in any legal system, the *Dawood* case and the comments of the judge (in paragraph 53) indicate the extent of the care required to avoid abuse of the granted power (*Dawood and Another v The Minister of Home Affairs and Others*, 2000(3)). In the environment of international trade, where traders require that matters be concluded quickly, and where there is a need for predictability and certainty, a clear penalty system (as found in the Canadian customs regime and discussed below) is obviously the preferred option.

3.2.3 Tax Administration Act, No.28 of 2011

The Tax Administration Act, No.28 of 2011 (the “TA Act”), was promulgated on 1 August 2012. The main function of this Act is to consolidate the administration aspect of all Acts administered by SARS, with the exclusion of the Customs and Excise Act. Despite the exclusion, the TA Act remains important from a Customs

point of view since it sets the benchmark within SARS as to how certain matters are to be dealt with administratively. The Customs Division within SARS is linked to the TA Act through the collection of Value Added Tax ("VAT") on imported goods. The question therefore arises: are customs officers obliged to apply two sets of rules to a specific import transaction as a result of a possible unintended dualistic approach to administrative appeals and the imposition of penalties within SARS? This issue will be clarified below in the discussion on customs-related administrative appeals and the imposition of a penalties regime.

The focus in this section will be on chapter 9 of the TA Act, which deals with dispute resolution, and chapter 15, which deals with administrative non-compliance penalties and the rules governing this as published in *Government Gazette* no. 37819 of 11 July 2014. The TA Act makes provision for various steps and remedies where a taxpayer does not agree with an assessment or decision imposed by SARS:

Step 1 – Objection (section 104): – the aggrieved taxpayer can lodge an objection first, this is not yet an appeal.

Step 2 – Appeal (section 107): – an appellant has now three possible avenues open where he/she does not agree with the outcome of the objection process. The option taken will depend on the appellant's choice of dispute-resolving channel or the amount involved. In the appeal application, the appellant can indicate that he/she opts that the matter be dealt with through the alternative dispute resolution ("ADR") process (section 107(5)). SARS must, however, agree to this selection. The second option is to refer the matter to the Tax Board (tax in dispute is less than R200 000), and the third option is to refer the matter to the Tax Court (tax in dispute is in excess of R200 000). The Tax Board is presided over by an attorney or advocate (section 110(1)(a)) while the Tax Court is presided over by a judge of the High Court of South Africa (section 118(1)(a)).

Step 3 – *De novo hearing*: if the appellant or SARS is dissatisfied with the Tax Board's decision, the matter may be referred to the Tax Court for a *de novo* hearing (section 115(1)). The decision of the Tax Court can be appealed to the provincial division of the High Court or to the Supreme Court of Appeal under specific conditions (section 133(2)). An appellant has therefore at least two opportunities to raise his/her case administratively before having to go to an external judicial appeal or review.

As mentioned earlier, even though the Customs and Excise Act is excluded at this stage from the operation of the TA Act, customs officers are still required to apply the TA Act in part as they collect VAT, which is covered by the TA Act. For this reason it is also prudent to consider how penalties related to VAT are administered and to consider the accessible remedies (as provided for in chapter 15 of the TA Act).

In terms of section 213 of the TA Act, a percentage-based penalty must be imposed where an underpayment of tax has occurred. This percentage is prescribed in the relevant tax Act (e.g. VAT Act) and will be calculated against the amount underpaid to SARS. In the case of a VAT underpayment, the percentage will be 10%, as

prescribed in section 39(4) of the VAT Act. The TA Act prescribes the procedure for imposing the penalty as well as the remedies available to the transgressor. As far as remedies are concerned, the following scheme is prescribed:

Step 1 – Request remittance of the penalty (section 215): this not an appeal.

The TA Act provides for the factors to be considered when deciding to remit a penalty in part or not in accordance with sections 217(3) and 218. Section 217(3) provides for three factors to be considered for nominal or first incidence breaches, viz. (i) a first incidence of non-compliance or if the amount involved is less than R2000.00; (ii) reasonable grounds for the breach to exist; and (iii) the breach has been remedied. Section 218(2) provides for the factors that must be present (one or more to be present) to consider remittance in part or in whole:

- (a) a natural or human-made disaster;
- (b) a civil disturbance or disruption in services;
- (c) a serious illness or accident;
- (d) serious emotional or mental distress;
- (e) any of the following acts by SARS:
 - (i) a capturing error;
 - (ii) a processing delay;
 - (iii) provision of incorrect information in an official publication or media release issued by the Commissioner;
 - (iv) delay in providing information to any person; or
 - (v) failure by SARS to provide sufficient time for an adequate response to a request for information by SARS;
- (f) serious financial hardship, such as—
 - (i) in the case of an individual, lack of basic living requirements; or
 - (ii) in the case of a business, an immediate danger that the continuity of business operations and the continued employment of its employees are jeopardised; or
- (g) any other circumstance of analogous seriousness.

Step 2 –Objection and Appeal (section 220): If the taxpayer is not satisfied with the outcome of the request of remittance, he/she can utilise the objection and appeal process as described above and provided for in chapter 9 of the TA Act. Where a VAT penalty was imposed by SARS, a taxpayer has therefore at least three opportunities to raise his/her case administratively before having to go to external judicial appeal or review.

The appeal and penalty process in the TA Act will be considered below and be compared with the process available where a customs penalty is applied in terms of the Customs and Excise Act.

3.3 South Africa's customs legislative framework

3.3.1 The Customs and Excise Act, No.91 of 1964

The Customs and Excise Act was enacted in 1964 long before South Africa's new democratic constitutional state came into being in 1994. The 1964 Act may therefore be open to constitutional challenges on many aspects, a point that was evident in the Constitutional Court case of *Gaertner v SARS* adjudicated in late 2013 (*Gaertner and Others v Minister of Finance and Others*, 2013). Now that the parliamentary legislative process is complete, in the near future, three new Acts will be promulgated that will replace this pre-1994 piece of legislation. These three Acts will be discussed below.

At the centre of the penalty regime in the current Act is section 91, which reads as follows:

Section 91 administrative penalties. (1) (a) If any person—

(i) has contravened any provision of this Act or failed to comply with any such provision with which it was his duty to comply; and

(ii) agrees to abide by the Commissioner's decision; and

(iii) deposits with the Commissioner such sum as the Commissioner may require of him but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question or makes such arrangements or complies with such conditions with regard to securing the payment of such sum as the Commissioner may require, the Commissioner may, after such enquiry as he deems necessary, determine the matter summarily and may, without legal proceedings, order forfeiture by way of penalty of the whole or any part of the amount so deposited or secured.

(b) Anything done for the purposes of paragraph (a) by an agent generally or specially authorized thereto by any person shall be deemed to have been duly done by that person in terms of that paragraph. (2).

(3) Subject to the provisions of subsection (4) of section sixty-two, the imposition of a penalty under subsection (1) shall not be regarded as a conviction in respect of a criminal offence, but no prosecution for the relevant offence shall thereafter be competent.

(4) Nothing in this section shall in any way affect liability to forfeiture of goods or payment of duty or other charges thereon.

Looking at the above provision holistically, it appears to be a rather involved process. The easy part implies that, if any provision of the Act is contravened, SARS can impose a section 91 administrative penalty (section 91(1)(a)(i)). The transgressor must then indicate to SARS whether he/she is willing to accept this process (section 91(1)(a)(ii)). This choice must then be indicated by the transgressor by him or her paying an amount upfront (section 91(1)(a)(iii)) and by utilising a form called a DA70 (Application to make a provisional payment). At this stage, the penalty is not yet confirmed and the payment is only regarded as an amount in lieu of a possible penalty. The Commissioner must then hold an enquiry to decide whether the whole or part of the amount deposited by the transgressor must be forfeited as a penalty. Only after this "enquiry" has been concluded is an amount now confirmed as a penalty.

No clear guidelines are available to the transgressor to indicate the possible penalty amount due for the specific breach as required in standard 9 of the Revised Kyoto Convention. Furthermore, in terms of section 91(3), if the transgressor chose the above option, SARS will not be entitled to embark on any criminal proceedings against the transgressor as “*no prosecution for the relevant offence shall thereafter be competent*”. However, the payment of a section 91 penalty will not neutralise the right of SARS to take the goods involved in the transgression by way of forfeiture or to absolve the transgressor from paying any outstanding duty due or charges incurred relating to the goods in question (section 91(4)).

Thus, in theory, if goods to the value of R100 000.00 are the subject matter of a customs transgression the following penalties could be imposed:

- a) a section 91 penalty (calculated as a percentage of the duty not paid);
- b) payment of duties and VAT and possible interest on outstanding duty and VAT;
- c) if the goods are missing, a section 88(2) amount equal to the customs value of the goods; or
- d) if the goods are available, possible forfeiture of the goods to the state – goods can then be “bought” back from the state in terms of section 93 at a rate of between 0% to 100% of the customs value of the goods.

Calling for penalties must, of course, follow proper PAJA prescribed procedures simply so that the process is procedurally fair.

From the discussion above, it is evident that the section 91 process is intricate. This fact of intricacy may well mean that the process is prone to procedural deficiencies. Section 91 cannot be read in isolation and must at least be read together with sections 87, 88 and 4(8A). Section 4(8A) empowers customs officers to detain (stop) goods for inspection upon entering South Africa before the goods reaches the client, whereas sections 88(1)(a) and 88(1)(c) empowers SARS to detain and seize goods wherever they are found within the South African borders. Section 87 provides that, if it is found that any provisions of the Customs and Excise Act has indeed been contravened, the goods involved in that transaction and the means of transport can be seized and forfeited to the state.

If criminal prosecution is contemplated by SARS, the courts are guided by sections 78 to 84 regarding the type of contravention and the sentence and fine that can be meted out on conviction. Offences not expressly mentioned (section 78) can carry a fine of up to R8000.00 or treble the value of the goods, whichever is the greater, and a term of imprisonment not exceeding two years. The most serious offences (section 84), on the other hand, can carry a fine of up to R40 000.00 or treble the value of the goods, whichever is the greater, and a term of imprisonment not exceeding 10 years. These monetary criminal sanctions must also be considered when customs officers determine a section 91 administrative penalty, since such penalty amount may not exceed the maximum fine limit (section 91(1)(a)(iii)) that a court of law can impose.

As far as the remedies available are concerned, the following scheme is provided for in chapter XA and the prescribed rules (Rules 77A to H) to the Customs and Excise Act:

Step 1 - Appeal

In terms of Rule 77H.04, a trader may appeal against a customs officer's decision to an appeal committee authorised in the rules. Rule 77H.08 makes provision for various appeal committees, depending on where the decision was taken in the Customs Division, the amount involved, and the nature of the matter in question. These appeal committees can be listed as follows:

(i) Branch Office Appeal Committee (Rule 77H.09) – the collective amount to which the appeal relates does not exceed R5 million (also referred to as the “Internal Administrative Appeal Committee”).

(ii) Regional Office Appeal Committee (Rule 77H.10)– the collective amount in respect of the appeal does not exceed R8 million.

(iii) Customs Operations Appeal Committee (Rule 77H.11) – may decide against a decision of an officer employed within the Customs Operations Unit or the excise unit, where the collective amount in respect of any such appeal does not exceed R10 million.

(iv) Enforcement and Risk Appeal Committee (Rule 77H.12) – may decide an appeal against a decision of any officer acting under the control or direction of the General Manager: Enforcement and Risk.

(v) Customs National Appeal Committee (Rule 77H.13) – may decide any appeal–

(a) against a decision of the Head: Customs Operations Unit,

(b) against a decision of the Head of Excise Product and Process,

(c) against a decision of an officer employed within the tariff or valuation division in Head Office,

(d) against a decision of the General Manager: Enforcement and Risk,

(e) where the collective amount to which the appeal relates exceeds R10 million, or

(f) any such other appeal as the Commissioner may direct.

All the above mentioned committees are appeal bodies of first instance and the appellant has therefore just one opportunity to an administrative appeal.

Step 2 – Alternative Dispute Resolution (ADR)

If the trader is not satisfied with the outcome of the appeal committee, he/she may refer the matter for ADR. Again, if the trader is not satisfied with the outcome of the ADR, the next option is judicial review or appeal. Where the matter involves a customs decision, the trader therefore has recourse to two internal administrative forums.

3.3.2 The Customs Control Act, No.31 of 2014

During the past five years, SARS, and specifically the Customs Division, has embarked on a major modernisation process in order to become a more effective trade facilitator, more conscious of risk, and in order to comply more fully with international obligations. As the Customs and Excise Act, No.91 of 1964, is a relatively old piece of legislation, the need was identified to rewrite it to be more constitutionally compliant, easier to read, and so that it incorporated all international obligations required in a modern customs administration. The result of this exercise was, during the latter part of 2013, the introduction in Parliament of three Customs Bills that subsequently became the following Acts:

- a) the Customs Control Act, No.45 of 2013 ("Control Act");
- b) the Customs Duty Act, No.43 of 2013 ("Duty Act") and
- c) the Customs and Excise Amendment Bill, No.44 of 2013 (which is, in effect, the remainder of the 1964 Act)

The President of South Africa assented to the Customs Control Act on 23 July 2014 (Government Gazette no.37862, 2014) and the Customs Duty Act on 10 July 2014 (Government Gazette no.37821, 2014). At the time of writing neither of these Acts was yet effective; however, their likely impact needs to be assessed.

What is immediately striking about the Customs Control Act is its immense size of 41 chapters (compared with 12 chapters of the 1964 Act) and 944 sections (the 1964 Act contained only 122). For the purpose of this work, chapter 39 (administrative penalties) and chapter 40 (judicial matters) will specifically be considered.

Section 874 of the Control Act introduces five types of administrative penalties, viz.:

- (a) fixed amount penalties;
- (b) prosecution avoidance penalties;
- (c) termination of seizure penalties;
- (d) withdrawal of confiscation penalties and
- (e) missing goods penalties.

Depending on the circumstances of the breach, there are three possible consequences for the transgressor as enumerated in section 875:

- (a) if it is non-prosecutable breach, a fixed amount penalty will be issued or
- (b) if a prosecutable breach, a prosecution avoidance penalty can be issued or a charge can be laid for the institution of criminal proceedings for the breach.

A distinction is made between non-prosecutable breaches which results in a fixed amount penalty (set out in the table below), and a prosecutable breach that creates two possibilities. To avoid prosecution one can pay a penalty or else criminal proceedings can be instituted. The prosecution avoidance penalty appears to be similar to the current section 91 optional penalty provided for in the Customs and Excise Act. A list of non-prosecutable breaches must still be published in a government gazette.

Section 876(2) provides for the four broad categories of non-prosecutable breaches and their penalty amounts; these have been significantly (50%) reduced compared with the penalty amounts that first appeared in the Customs Control Bill before it became an Act.

Fixed amount penalties for non-prosecutable breaches

| Category of breach | Amount of penalty |
|---------------------------|--------------------------|
| Category A | Maximum of R2500 |
| Category B | R5000 |
| Category C | R7500 |
| Category D | R10 000 |

Section 877 further stipulates the procedure for imposing a fixed amount penalty and introduces a new concept of a written warning for Category A breaches as an alternative to a fixed amount penalty. For the purpose of section 876(3), the warning must be regarded as a fixed amount penalty as far as recording purposes are concerned.

It appears that, when considering imposing a prosecution avoidance penalty, the officers need only to rely on a type of database of transgressions and not necessarily take into consideration the brevity of the breach. This exercise involves merely considering the number of previous breaches by a specific client. Section 878(2) provides for the circumstances where the prosecution avoidance penalty cannot be applied.

These circumstances are set out below in tabular form.

| | Disqualification criterion |
|-------------------|--|
| Scenario 1 | On two separate occasions paid a prosecution avoidance penalty for a Category 1 offence and - within a period of five years from the date of payment of the penalty on the first occasion again becomes liable to prosecution for a Category 1 offence. |
| Scenario 2 | On three separate occasions paid a prosecution avoidance penalty for a Category 2 offence and - within a period of five years from the date of payment of the penalty on the first occasion again becomes liable to prosecution for a Category 2 offence. |
| Scenario 3 | On three separate occasions paid a prosecution avoidance penalty for any offence in terms of this Act and - within a period of five years from the date of payment of the penalty on the first occasion again becomes liable to prosecution for an offence in terms of this Act. |

For the above system to be successful, it will require an effective and up-to-date database of all breaches that have occurred for each client.

Section 879 deals with the procedure for imposing prosecution avoidance penalties for a prosecutable breach. Here SARS offers the transgressor an opportunity to avoid criminal prosecution by paying the prosecution avoidance penalty before or on a predetermined date. These penalties may not exceed the maximum fine a court may impose upon conviction and they indemnify the transgressor against prosecution. This is a similar regime to the current section 91 penalty process of the Customs and Excise Act.

Sections 881 and 882 deal further with penalties that can be imposed on the termination of seizure of goods (penalty not to exceed the customs value of the goods), withdrawal of confiscation of goods (penalty not to exceed the customs value of the goods) and on goods that are missing at the time the breach was discovered (penalty equal to the customs value of the goods). These provisions are similar to the current sections 93 and 88(2) of the Customs and Excise Act.

Chapter 37 of the Control Act deals with the reconsideration of decisions made by a customs officer and dispute resolution. Section 825 makes it clear that the option is available for internal administrative reconsideration of decisions and possible settlement of disputes. Decisions may be confirmed, altered or repealed by the Commissioner of SARS, the official who took the decision, by the supervisor of the official who took the decision, or on request by the aggrieved party (section 826(a)). Section 826(b) further provides that a decision can be reconsidered when an appeal is lodged and, in terms of section 826(c), there exists possible settlement of a dispute; this involves a three-step process (sections 826(a) to (c)) regarding the internal reconsideration of a decision. Section 827(b) also adds the alternative dispute resolution option.

Part 3 of chapter 37 of the Control Act provides for administrative appeals. In general, an aggrieved person can address an appeal to the Commissioner of SARS or the official in charge of the office where the customs officer took the impugned decision (section 839(1)). Section 841(2) stipulates that appeals must be submitted electronically. A matter may only be referred for ADR if the applicant is unsuccessful in the administrative appeal provided for in part 3 of chapter 37 (section 848(1)). The Commissioner of SARS may also initiate the ADR process on own initiative (section 849), and settle disputes where it would be to the best advantage of the state in terms of part 5 of chapter 37.

An interesting new concept added to South Africa's customs law is that of "voluntary disclosure relief", which has been available for some time now to other taxes administered by SARS. In essence, this allows traders the opportunity to voluntarily disclose underpayment in duties with the possibility of no subsequent levying of administrative penalties or criminal prosecution (section 864).

Chapter 40 deals with judicial matters and is relevant during criminal proceedings initiated in the event of serious transgressions of this legislation. It makes the distinction between Category 1 (section 887) and Category 2 (section 888) offences, depending on the brevity of the transgression. Possible fines (sections 890 and 892) can range from R500 000 to R1 000 000 and/or imprisonment from three to five years, depending on the category of transgression.

3.3.3 The Customs Duty Act, No.30 of 2014

When the Customs Duty Act enters into force, the legal provisions relating to the imposition, assessment, payment and recovery of customs duties on goods imported or exported from the Republic will be provided for in a separate piece of legislation. Currently, we have only one piece of legislation dealing with customs and excise matters and the payment of duties. In the future, there will be three pieces of legislation dealing with matters that are currently dealt with in a single piece of legislation.

The Customs Duty Act also has chapters dealing with administrative penalties and judicial matters. For the purpose of this Act, three types of penalties in terms of section 199 apply:

- (a) a fixed amount penalty - in the case of a non-prosecutable breach;
- (b) a fixed percentage penalty – in the case of a non-prosecutable breach consisting of the non- or late payment of duty or interest on duty; and
- (c) a prosecution avoidance penalty – in the case of a prosecutable breach. When these penalties will be applied is provided for in section 200: in terms of section 201, a list of four categories of non-prosecutable breaches must be published in a government gazette as set out below.

| Category of breach | Amount of penalty |
|--------------------|-------------------|
| Category A | R5000 |
| Category B | R10 000 |
| Category C | R15 000 |
| Category D | R20 000 |

It is interesting to note that the above penalties for non-prosecutable breaches constitute a 100% increase on the penalties per category for non-prosecutable breaches as provided for in section 876(2) of the Control Act.

In terms of section 203, a fixed percentage penalty will be imposed in the event of failure to pay what is due to the Commissioner of SARS on or before a specified date. This will be a percentage (10%) of the amount that was not paid or underpaid. Chapter 12 deals with judicial matters and is similar in essentials to chapter 40 of the Customs Control Act.

3.4 Selected international and foreign customs penalty regimes

Since part of this work consists of a comparative study of customs penalty regimes, what follows below is an overview of certain other dispensations. The European Union's regime, in which 28 states are involved, will be discussed as one such example. As a regional system, its relevance for the Tripartite Free Trade Area negotiations currently underway (involving countries of SADC, COMESA and the EAC) will be investigated. The USA regime will be discussed because of its historical dominance in the western world, and the Canadian regime because of the Canadian influence on the writing of South Africa's 1996 Constitution.

3.4.1 The European Union

The European Union (EU) is the world's biggest single market or customs union, consisting of 28 countries and a well-established legal framework. The EU accounts for about 7% of the world's population and, in terms of

world trade, generate about 20% of international exports and imports. To add further perspective, in terms of global imports (in 2011), the EU accounted for about 16.4%, the United States for 15.5% and China for 11.9% (The Economy, 2011)

For this customs union to function effectively, the national customs laws of the member states had to be consolidated into one customs law for the EU. With regard to its legal framework, the customs regimes of the member states were first integrated in the Community Customs Code (CCC) in terms of Council Regulation (EEC), No. 2913/92 of 12 October 1992. In terms of the Charter of Fundamental Rights of the European Union, it was also recognised that, in addition to the right to appeal, traders must be allowed an opportunity to be heard before an adverse decision is taken against them (Council Regulation (EEC) No 2913/92 of 12 October 1992, 2008). Chapter 2 of the CCC provides for the rights and obligations of persons with regard to customs legislation. Article 21 of the CCC lays down the principles of penalties and places this prerogative with the individual member states. The principles encapsulated in the CCC include the following:

- penalties must be proportionate and dissuasive;
- administrative penalties may take the form of a pecuniary charge or a settlement to avoid criminal prosecution; and
- the cancellation, suspension or amendment of any authorisation held.

Article 23 of the CCC provides for the right of appeal in two steps:

- before the relevant customs authority; and
- thereafter to a higher body, which could be a judicial authority or a specialised body.

It must be added at this stage that the CCC does not contain any provisions for penalties for the breach of European customs law and that this enforcement prerogative (administrative or criminal) still lies with the individual member states. Plans are afoot to harmonise this aspect at a union level (see discussion below).

During the late 2000s, the EU recognised the need to revise the CCC to incorporate new international obligations and, in particular, the phenomenon of electronic commerce. The Modernised Customs Code (MCC) had as its objective *inter alia* the following (Regulation (EC) No 450/2008 of the European Parliament and of the Council, 2008):

- the facilitation of trade and the fight against fraud by using “simple, rapid and standard customs procedures and processes”,

The provisions in the MCC relating to the application of penalties and the appeals procedure did not change from those contained in the CCC. In 2012, the EU further decided to rename the MCC to the Union Customs Code (UCC) to provide for further modernisation efforts that are envisaged to become law in May 2016 (Regulation (EC) No.952 of the European Council, 2013).

As stated above, although the EU customs legislation is fully harmonised in a single piece of legislation, the enforcement of customs breaches has, until now, been the national prerogative of its 28 members. Not unexpectedly, this has manifested itself in a varied approach to identical breaches (in the 28 countries), a fact which does not bode well for traders and the consistent administration of customs breaches in a customs union. The European Commission has therefore proposed a framework to synchronise customs infringements and align the 28 national sets of related sanctions.

This process involves, firstly, an assessment of the 28 regimes and, secondly, a list of actions and/or omissions that will be considered as infringements of the Union's customs rules, as well as a framework for imposing sanctions when these occur. The *EU Commission Staff Working Document Impact Assessment* (Brussels, 13.12.2013 SWD (2013) 514 final) sets out the findings after looking at the 28 countries' individual regimes and making recommendations towards harmonising these regimes. Certain private stakeholders were also invited to be involved in this project and all customs administrations of member states participated. The assessment identifies the following four implications for the EU as a result of the non-harmonisation of its customs transgression regime:

- i) The EU's international obligations: for example, Article X:3(a) of GATT 1994, requires of each contracting party to administer in a uniform, impartial and reasonable manner all its laws.
- ii) The management of the customs union: for example, the same customs breach has different legal consequences in the union member states; some member states have both criminal and administrative sanctions, while some only has criminal sanctions. In some member states, liability occurs when a customs breach occurs, while other member states require intent, negligence or elements of careless or reckless behaviour to be present for liability to occur. Finally, time limits to initiate and impose a customs sanction vary between one and 30 years. Concerns are also raised about the negative influence of these differences on the collection of customs debt and its impact on the Union's, as well as member states', budgets.
- iii) The implementation of other EU policies: for example, the customs regime also influences other functions of government such as agriculture, intellectual property rights, prohibited and restricted goods, etc., because if problematic goods find their way into home consumption, it will be difficult to remedy the situation. Another consequence of this non-harmonised system is that it might lead to trade distortion, by which is meant that companies will choose to operate in a country where customs sanctions are less stringent.
- iv) Levelling the playing field for economic operators: the advent of the approved economic operator regime also created the following dilemma: the different rules of member countries mean that an entity will be approved or disqualified from the system in one country, but not in another, simply due to the different customs penalty regimes in existence (Commission Staff Working Document Impact Assessment SWD(2013) 514 final, 2013).

A proposal on the preferred way forward for the EU is contained in the EU directive (COM (2013) 884 final), also dated 13 December 2013. Various options were considered and, ultimately, the preferred option was one of introducing a uniform non-criminal system and leaving criminal prosecution to the individual member states within the framework of their existing criminal law regimes. From a practical point of view, this decision will manifest itself in a list of customs contraventions according to three levels of conduct and liability, viz: (i) strict liability; (ii) committed with negligence; and (iii) committed with intent (Directive of the European Parliament and of Council on the Union legal framework for customs infringements and sanctions COM(2013) 884 final, 2013).

In introducing the actual proposed directive, EU directive COM (2013) 884 suggest the following:

- The list of customs contraventions includes a column indicating the possible pecuniary fine depending on the brevity of the transgression. The different levels of fines advance the principle of proportionality. What is noteworthy here is the definitions attached to the behaviours mentioned above:
 - i) Strict liability: does not require an element of fault and traders are required to comply with these regulations without fail – therefore failure to comply with these specified requirements will result in an automatic penalty;
 - ii) Committed with negligence: the subjective element (negligence) needs to be established for liability to arise; and
 - iii) Committed with intent: intent needs to be established for liability to arise.

It was also suggested that any person intentionally assisting with the breach of customs legislation should be held liable for a customs contravention.

- Proceedings relating to a customs breach can only be instituted for a period of four years from the date the infringement was committed, and the enforcement of a sanction is to be limited to three years.
- While criminal proceedings are underway, administrative proceedings should be suspended: the continuation of administrative proceedings should be in strict compliance with the *ne bis in idem* principle (legal doctrine to the effect that no legal action can be instituted twice for the same cause of action).

The 21 articles of EU directive COM (2013) 884 will be briefly summarised to complete the picture of the proposed EU customs enforcement regime:

Article 1 identifies the scope of the directive as being the Union's framework of customs infringements and the sanctions attached to these infringements.

Article 2 requires member states to provide for sanctions in their domestic legislation identical to that provided in the EU directive.

Article 3 lists customs contraventions in terms of which “strict liability” will apply, in other words, no element of fault will be considered as these contraventions will automatically elicit an administrative penalty. These contraventions include:

- a) failure to declare information accurately and completely on original declarations
- b) failure to ensure the accuracy and completeness of supporting documents
- c) failure to submit an entry summary declaration as required by law
- d) failure of an economic operator to keep documents and information as specified by law
- e) removal of goods from customs supervision without permission from customs
- f) similar to (e)
- g) failure to convey goods as specified by customs
- h) failure to bring goods directly into a free zone as required
- i) failure to provide documents for a customs procedure as required
- j) failure to re-export goods within the required time limit
- k) failure to have the necessary documents at hand when a customs declaration is made
- l) failure to lodge a supplementary declaration at the right place and within the required time
- m) removal or destruction of customs markings without prior permission being granted
- n) failure to discharge a customs procedure when required and within the specified time
- o) failure to export defective goods within the required time limit
- p) construction of a building in a free zone without customs authorisation
- q) non-payment of import- or export duties within the required time limit

Article 4 provides for customs contraventions which member states must prove were committed with negligence (in order to be applicable). These contraventions include:

- a) failure of the economic operator to place non-union goods temporarily imported under a customs procedure or to re-export them within the required time limit
- b) failure to comply with all customs formalities required
- c) failure to comply with the obligations specified in a customs decision
- d) failure to inform customs after a decision was given of factors arising that might influence the continuation of that decision
- e) failure by an economic operator to present goods to customs as required
- f) failure of holder of a Union transit procedure to present goods to customs as required
- g) failure by an economic operator to present goods brought into a free zone to customs as required

- h) failure by an economic operator to present goods to customs being taken out of the Union on exit as required
- i) unloading of goods from means of transport without permission from customs as required
- j) storage of goods in warehouses without the permission of customs as required
- k) not complying with warehouse obligations as required

Article 5 provides for customs contraventions which member states must prove were committed with intention (in order to be applicable). These contraventions include:

- a) providing customs with false information or documents
- b) the use of false statements to obtain a customs authorisation
- c) import or export of goods into and out of the Union without presenting them to customs as required
- d) failure of a holder of a decision by customs to comply with obligations contained therein
- e) failure of a holder of a decision by customs to inform customs of factors arising that might influence the continuation of that decision
- f) processing of goods in a customs warehouse without obtaining the necessary permission from customs
- g) acquiring or in possession of goods involved in a customs infringement

Article 6 provides that Union members must take the necessary measures to ensure that inciting or aiding and abetting an act or omission that results in the contravention of customs legislation is treated as a customs infringement. Where a contravention has occurred due to an error on the side of customs, such contravention will not be regarded as a customs infringement (Article 7). Provision is also made for holding legal entities accountable for infringements in certain circumstances (Article 8). Articles 9 to 11 provide for the following penalties to be applied for the breach of items listed in Articles 3 to 6:

| Category of Infringement | Penalty |
|--|--|
| a) Strict liability infringements (Article 3): | <ul style="list-style-type: none"> • penalty of 1-5% of the value of the goods • penalty of €150 to €7500 where the infringement does not involve goods |
| b) Negligence infringements (Article 4): | <ul style="list-style-type: none"> • penalty of up to 15% of the value of the goods • penalty of up to €22 500 where the infringement does not involve goods |
| c) Intent infringements (Article 5 & 6): | <ul style="list-style-type: none"> • penalty of up to 30% of the value of the goods • penalty of up to €45 000 where the infringement does not involve goods |

Article 12 stipulates factors that must be considered when customs determines the level of sanction that must be applied within a specific category of infringement (e.g. the amount of the evaded duty, previous infringements, level of cooperation from transgressor, etc.).

Customs is precluded from initiating enforcement proceeding after four years starting from the date of the alleged infringement (Article 13). Administrative proceedings must be suspended when criminal proceedings are instituted for the same infringement and against the same entity or person. When the criminal proceedings are finalised, the administrative proceedings must also cease (Article 14). Article 15 deals with the jurisdiction of member states while Article 16 prescribes cooperation between members. Article 17 provides for the temporary detention of goods while a possible customs contravention is being investigated. The remainder of the articles (18 to 21) deal with administrative matters relating to the entry into force and transposition of the directive.

3.4.2 The United States of America

The second example of a foreign customs penalty regime is the one of United States of America (the USA). Its inclusion is justified because of the historically dominant role played by the USA in the international trade arena. That said, the USA's dominance has declined over time and is now under challenge by countries such as China and the European Union. The focus of this study is America's domestic penalty regime as mainly set out in the Tariff Act of 1930 ("the Tariff Act") as amended (Tariff Act , 1930).

Section 592 of the Tariff Act provides for civil penalties under the heading of penalties for fraud, gross negligence and negligence (the definitions of the respective terms are provided below). This classification helps to determine the test to be applied when officers have to decide on the appropriate penalties in the case of breaches of America's customs law. Section 592(a)(1) prohibits the non-payment of duty either partially or in whole whether by way of fraud, gross negligence or negligence. Unlawful actions include false documents, false statements, omissions of a material nature, and any assistance provided in committing these unlawful actions. Clerical errors are not regarded as unlawful actions unless they form part of an established pattern.

Section 592(b)(1)(A) further describes the procedure to be followed when a suspected breach has occurred. The relevant officer will first issue a letter of intent to raise a penalty (pre-penalty notice) to the alleged transgressor. This letter of intent is comprehensive and must include the following details:

- a description of the goods
- details of the customs clearance document submitted to enter the goods into the USA

- specific legal provisions and regulations allegedly transgressed
- the facts that constitute the alleged transgression
- whether the alleged transgression is the result of fraud, gross negligence or negligence
- the potential revenue prejudice as well as the anticipated monetary penalty and
- an invitation to make written and/or oral representation as to why the proposed monetary penalty should not be confirmed

The letter of intent will not be issued if the transgression relates to a non-commercial transaction or the proposed penalty amount is USD1000 or less.

In terms of section 592(b)(2) the officer will, after the receipt of representations and due consideration thereof, issue one of two possible determinations, namely:

- a determination to the effect that no transgression has occurred or
- a determination in the form of a written penalty claim, including all the details as required by section 592(b) to the effect that a transgression has occurred. The determination must *inter alia* include the findings of fact and the conclusions of law related thereto.

The potential penalties that could be called for are provided for in section 592(c) as follows:

| Behaviour | Penalty |
|---------------------|---|
| 1. Fraud | An amount not exceeding the value of the goods. |
| 2. Gross negligence | An amount that is (i) the lesser of the value of the goods or four times the duties the US was or may have been prejudiced, or (ii) 40% of the value of the goods where the transgression did not affect the duties payable. |
| 3. Negligence | An amount that is (i) the lesser of the value of the goods or double the duties the US was or may have been prejudiced, or (ii) 20% of the value of the goods where the transgression did not affect the duties payable. |
| 4. Prior disclosure | <p>If the person discloses a transgression before customs has embarked on a investigation, or the person was not aware that customs has embarked on an investigation, the following will apply:</p> <ul style="list-style-type: none"> • Goods will not be seized. • The monetary penalty will not exceed: <ul style="list-style-type: none"> (i) where fraud was involved, 100% of the duties the USA was or may have been prejudiced, as well as the payment of the unpaid duties within 30 days of disclosure or 10% of the value of the goods where the assessment did not affect the duties payable; (ii) where gross negligence or negligence was involved, interest is payable on the duties the USA was or may have been prejudiced. |

It is important to note the definitions ascribed to the above behaviours (degrees of culpability) in the USA

Customs Regulations (2014):

a) Negligence: *“A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation”.*

b) Gross negligence: *“A violation is deemed to be grossly negligent if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute”.*

c) Fraud: *“A violation is determined to be fraudulent if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence”* (Customs Regulations, 2014).

What is of concern at this stage is the fact that the determination of the degree of culpability (which, in my opinion, is a technical legality that even trained legal experts sometimes struggle to determine) is left entirely to the customs officer.

Goods may be seized (section 592(c)(4)) in the following circumstances:

- where a contravention has occurred
- transgressor is insolvent
- transgressor is beyond the jurisdiction of the USA
- to protect the revenue of the USA
- the goods are prohibited or restricted in the USA

The goods will be forfeited to the USA unless a penalty is paid within a specified period. Before the goods are forfeited, a notice must be issued to indicate the reasons for the forfeiture. Section 618 makes provision for the remission or mitigation of penalties and forfeiture incurred under the Tariff Act.

3.4.3 Canada

The third foreign customs penalty regime chosen for this study is that of Canada, mainly because the development and subsequent interpretation of South Africa's "new" democratic constitution was distinctly influenced by the Canadian constitution and jurisprudence (Currie & De Waal, *The New Constitutional and Administrative Law*, 2001).

The Canada Customs Act consists of 169 sections that cover approximately 180 pages, which makes it a relatively compact Act to work with (Canada Customs Act R.S.C, c. 1 (2nd Supp.), 1985). The main focus in this work will again be the enforcement provisions and the dispute resolution mechanism in the Canada Customs Act.

Section 109.1 of the Canada Customs Act is very clear when it stipulates that, where any provisions of this Act is contravened, it will potentially solicit an administrative penalty of up to CAD25000. Section 109.3 further prescribes the format in which penalties must be called for and specifies that:

- It must be done via a written assessment.
- An assessment can be called for in addition to the seizure of the goods.
- If the correct (usual) form of an assessment is not complied with but the substance is not affected, that assessment will still be valid.

The penalty called for will be payable immediately upon service of the assessment (section 109.4), and interest will accrue against the unpaid penalty until it is paid in full (section 109.5). If the penalty is paid within 30 days after the notice was served, no interest will be charged (section 109.5(2)).

Section 110 empowers officers to seize goods as well as the object of conveyance (truck, etc.) where, on reasonable grounds, they believe any provisions of the Canada Customs Act to have been contravened. It also empowers them to seize any goods that will assist as evidence in the prosecution of the contravention and requires that notice must be given of the seizure.

Sections 153 to 159 provide for actions or omissions that are specifically prohibited and regarded as offences that are punishable by a fine or imprisonment or both. These acts or omissions include the following:

- false statements and evasion of duties
- hindering an officer in the performance of his/her duties
- incorrect description of goods in customs documents
- possession of blank documents that can be used in the importation process
- opening and unpacking of goods where customs authorisation is required

The maximum fine that can be imposed, depending on the contravention, can be up to CAD500 000 or imprisonment of up to five years, or both a fine and imprisonment depending on the contravention (section 160).

As far as objections and appeals are concerned, section 97.48 provides that a person who receives an assessment may object to the assessment within 90 days from the issue date of the assessment. The relevant facts and reasons must be set out in the prescribed objection forms as they relate to the basis for the objection. If the person who lodged the objection is not happy with the outcome, he/she may lodge an appeal to the Tax Court of Canada within 90 days of receiving the outcome of the objection (section 97.49). Sections 97.5 and 97.51 allow for the condonation of the late filing of an objection or appeal on application.

Apart from the legislative framework discussed above, what is significant about the Canadian customs regime is the Administrative Monetary Penalty System (AMPS), which has been used by the Canada Border Services Agency (CBSA) since 2002. The AMPS sets out the pecuniary penalties for the breach of provisions of the Canada Customs Act. Following a review of the system in 2009, CBSA Memorandum D22-1-1 of 21 April 2010 was issued. The Memorandum declares that the AMPS is a sanctions regime for the issuing of administrative penalties in the event of the breach of customs legislation. It contains a comprehensive list of contraventions and has, as one of its aims, a reduction in the seizure and forfeiture of goods as an enforcement tool in favour of an administrative penalty regime to deal with breaches of law.

When a breach is encountered, the relevant legislative provision is identified and entered into the AMPS system, which then generates a penalty assessment; this makes the process fairly mechanical and limits inaccuracies (Administrative Monetary Penalty System Memorandum D22-1-1, 2010).

Some of the recommendations in the 2010 Memorandum provide us with an insight into what the AMPS is trying to achieve, including the following:

- a move away from penalties as a percentage of the value of the goods towards flat rate monetary penalties;
- determining penalties amounts according to the level of risk;
- reinstating regional penalty review committees to ensure consistent and correct application of penalties; and
- grouping of contraventions according to like themes (Administrative Monetary Penalty System Memorandum D22-1-1, 2010).

An important point to note is the shift away from seizing goods towards issuing a penalty to the person involved in the breach. This makes the collection of penalties more effective in the civil law sphere.

The main tool that supports the AMPS is the Master Penalty Document (MPD) (Administrative Monetary Penalty System Memorandum D22-1-1, 2010). This document lists the possible contraventions, with their penalties, legislative and regulation references and guidelines for their application. What is of note also is that the MPD is available on the CBSA's website, which makes the whole process very transparent. The system is progressive in nature in that second or third transgressions elicit progressively higher penalties for the same transgression. Only one penalty will be applied for a contravention, even where that contravention consisted of multiple "sub" contraventions.

A history of contraventions for each client is kept for a period of six years. When a penalty is issued, customs can also seize the goods, but in very specific circumstances (such as prohibited and restricted goods, e.g., alcohol and drugs). In serious cases, criminal prosecution can also be instituted over and above the administrative penalty issued and the seizure of goods. The non-payment of a penalty constitutes a debt and thus will be subject to the usual civil law debt collection regime (Administrative Monetary Penalty System Memorandum D22-1-1, 2010).

Memorandum D22-1-1 (2010) further explains internal administrative remedies available to traders who do not agree with a penalty assessment. There are two options available:

a) a request for correction within 30 days after a seizure, assessment or demand

A designated officer may cancel or reduce a penalty when an error was made on a penalty assessment. If the request for correction is refused, the trader can request an administrative review of that decision as discussed below.

b) a request for redress within 90 days after date of seizure or service of a notice

When a trader disputes a penalty assessment he/she can request a ministerial review of the decision. This review process is managed within the CBSA.

In concluding this discussion of the Canadian customs penalty regime, it must be mentioned that the MPD provides extensive guidance to customs officers and is further augmented by an index where breaches are categorised for easy utilisation. The following extracts from the (a) MPD and (b) Index illustrate this point:

(a) MPD

| No. | Legislation | Regulation | Contravention | Penalty Condition | Penalty Basis |
|------|---------------------------|--|--|---|-----------------------------|
| C001 | <i>Customs Act 2(1.3)</i> | | Person failed to keep electronic records in an electronically readable format for the prescribed period. | 1st - \$150 2nd - \$225 3rd + - \$450 | Per Verification |
| C039 | | <i>Transportation of Goods Regulations 4(1)(a)</i> | Person transporting goods within Canada that have been imported but have not been released failed to report, as a result of an accident or other unforeseen event, a damaged or broken seal. | 1st - \$500 2nd - \$750 3rd + - \$1,500 | Per Container or Conveyance |

(CBSA Master Penalty Document, 2014)

(b) Index

| No. | Short Description |
|------|--|
| | Forms |
| C008 | Carrier failed to use bar code for cargo control number or in the case of a CSA shipment, the required data element. |
| C371 | Carrier used incorrect carrier code. |
| C005 | Person failed to provide true, accurate and complete information. |
| C031 | Person failed to report to an officer prohibited, controlled or regulated goods in their possession. |
| C348 | Person provided false information. |
| | MARKING OF GOODS |
| C377 | Person failed to mark the goods in the appropriate method and manner. |
| | MOVEMENT AND STORAGE OF GOODS |
| C033 | Person moved, removed, or caused to be moved goods that have been reported but not released, without CBSA authorization. |
| | ORIGIN OF GOODS |
| C152 | Person failed to furnish prove of origin. |

(Index to *Master Penalty Document*, 2014)

Instead of working with an Act which customs officers are not necessarily trained for, the officer can merely consult the MPD by looking up the contravention that fits the particular scenario. This will immediately provide him or her with the corresponding legal provisions, the penalty to be imposed, and the basis on which the penalty must be imposed. This process is further subjected to a quality control measure in the form of the regional penalty review committees.

Chapter 4 – Results of the study

The focus of this work is a study of the customs administrative penalty provisions in the South African Customs and Excise Act, No. 91 of 1964, and its successors. This work includes a comparison of the South African system with certain foreign customs penalty regimes (the European Union, the United States of America, and Canada). However, a study of penalty regimes is incomplete if it does not consider the administrative appeal remedies available to alleged transgressors. The introduction of the Tax Administration Act in October 2012 also added a unique dimension to how customs is administered in South Africa, given that the collection of internal taxes and the management of our borders falls within the mandate of one entity, namely, SARS. All these issues were covered in this work, and what follows is a summary of the results.

4.1 The international and foreign context

All the countries discussed here are members of the WTO and the WCO. They are therefore obliged to subscribe to the WTO regime and to their obligations as members of the WCO. Although the Trade Facilitation Agreement (2013) is not yet in force, this Agreement is a good indication of the direction the international trading community wants trade facilitation to take.

The Trade Facilitation Agreement (2013) places a great deal of emphasis, in Article 1, on transparency regarding customs matters, and especially transparency concerning the penalty regimes relating to customs infringements. Information must be easily accessible and a responsibility is placed on administrations to actively educate traders on these issues. An examination of the SARS website reveals that it contains no significant information on the South African customs penalty regime. In contrast, countries such as Canada and the USA have extensive information available on their websites concerning their customs penalty regimes. Article 4 of the Bali Agreement further suggests that administrations must provide for an internal administrative appeal platform, failing which traders will have the option of judicial review. It is surprising that an internal appeal was not incorporated as a minimum requirement, taking into consideration the costly and time-consuming nature of judicial review and appeals. All the countries discussed in this work were found to have some form of internal administrative appeal platform.

The countries under discussion are signatories to the Revised Kyoto Convention (1999) and are at least bound by the General Annex. Chapters 9 and 10 of the General Annex prescribe the minimum standards required of administrations in respect of any decisions they make. According to these standards, administrations must:

- provide reasons (standard 9.8)
- provide for internal administrative appeal (standard 10.4)
- provide for further appeal to an independent body (standard 10.5)

- provide for the right to judicial appeal or review (standard 10.6)

When comparing the above appeal structure to what is envisaged in the Trade Facilitation Agreement (2013), it would appear that responsibility to provide for internal remedies is watered down in the Trade Facilitation Agreement.

Specific Annex H to the Revised Kyoto Convention clearly provides the standard which customs administrations must aspire to when it comes to customs offences. This standard includes:

- specifying the period of liability (standard 4)
- spelling out clearly the powers of customs officers especially where they concern the search of persons and premises (standard 6 & 7)
- the fact that customs breaches and the possible consequences (penalties) must be upfront and accessible (standard 9, 10& 22)
- that goods must only be seized if liable to forfeiture and/or required in legal proceedings (standard 11)
- that the means of transport must only be seized where the owner had knowledge of the offence or did not take adequate precautions (standard 16)

The fact that the SADC Protocol (2000) and the SACU agreement (2002) pay no specific attention to standardising the legal principles applicable to customs penalty regimes in the Southern African region is a concern. This issue needs to be taken seriously if regional trade is to be facilitated.

The following international standards or requirements form the minimum basis of a rules-based penalty system and can be summarised as follows:

| Customs penalty regime requirements: | Proposed standard |
|--------------------------------------|--|
| Penalty assessment | <ul style="list-style-type: none"> • published penalty regime inclusive of possible monetary penalties • educational campaigns • provide reasons for decision plus legal provisions allegedly transgressed • seizure of goods and means of transport only in limited circumstances |
| Remedies | <ul style="list-style-type: none"> • advise on remedies available • allow for at least one option to an internal administrative appeal |

4.2 The South African scenario

4.2.1 The penalty regime

In general terms, section 91 of the Customs and Excise Act determines that if any provision of the Act is breached, a penalty can be imposed. However, in reality, doing this is not a simple matter because, read in its totality, the provision is based on a complex system before a penalty can be meted out. This state of affairs brings with it the risk that, after all the administrative procedures have been completed, an obvious transgression can come to nothing because the transgressor will still have the option of whether or not to pay the penalty. When analysed carefully, section 91 reveals the following:

| Section 91 process: | Legal Provision |
|--|--------------------------------|
| <u>Stage 1:</u> Contravention detected | Section 91(1)(i) |
| <u>Stage 2:</u> Transgressor must agree/indicate beforehand that he/she will abide by any decision regarding the penalty amount | Section 91(1)(ii) |
| <u>Stage 3:</u> Transgressor deposits the amount called for (or provides security) as decided in (2) above by SARS | Section 91(1)(iii) |
| <u>Stage 4:</u> Commissioner holds an enquiry and determines the final amount to be confirmed as a penalty. This amount may be the whole or part of the amount that was deposited in stage 3. | Section 91(1)(iii) |
| <u>Implications:</u> If the penalty is paid, no criminal prosecution will be competent thereafter. Goods may still be forfeited and unpaid duties or other charges must be paid. | Section 91(3) Section 91(4) |

Theoretically, then, when a transgressor elects not to pay a penalty, it can be argued that SARS loses its dissuasive powers, which makes the above penalty system, in many instances, ineffective. It is also clear that the above system is unnecessarily complicated, which could also contribute to a penalty system being ineffective.

As indicated above, nor is there a published penalty regime which includes reference to possible monetary penalties currently available on the SARS website. However, from case law it would appear that SARS customs officers have access to an internal penalty guideline which they must consult before deciding on an appropriate penalty (The Commissioner of SARS v Formalito (Pty)Ltd, 2005). Section 91(1)(iii) provides some

indication of the maximum penalty that could be raised, but its scope is so wide that this section is of little practical assistance. However, in terms of international and administrative law, as far as the standards discussed above are concerned, this non-availability of a published penalty regime falls short of such standards. Canada and the USA have such published regimes and the EU is at an advanced stage of implementing a comparable system. An avenue open to transgressors of the South African system is an application for access to information under the Promotion of Access to Information Act of 2000, but gaining such access may prove to be a cumbersome, time-consuming process which, in the face of a recalcitrant administration, may well end up in court.

There is an indication that the new Customs Control Act will change the current section 91 process in some way. As we have seen, section 874 of the Control Act introduces five (5) types of administrative penalties:

- (a) fixed amount penalties;
- (b) prosecution avoidance penalties;
- (c) termination of seizure penalties;
- (d) withdrawal of confiscation penalties; and
- (e) missing goods penalties.

Section 875 can be regarded as the general breach provision. This section provides that the breach of any provision can result in the meting out of what is called a penalty for a non-prosecutable breach, or a penalty for a prosecutable breach, depending on the circumstances. In line with international practice, section 876(1)(a) now requires that the responsible minister must publish a list of non-prosecutable breaches for the sake of transparency.

Also in line with international practice considered in this work is section 876(2), which gives an indication of the possible penalty that may be imposed depending on the circumstances. Three categories are listed, along with the applicable penalty for each category, and there is also an element of progressive increases in any penalty. In other words, and according to section 876(3), a penalty can be doubled or tripled if the same breach is committed within a period of three years. This system of progressive increases is also comparable to that already practised by Canada and the USA and that proposed for the EU.

Looking at the five types of administrative penalties, two issues stand out. First, the prosecution avoidance penalty appears to be similar, if not exactly the same, as the current section 91 penalty as far as its usefulness is concerned. This may lead to the same inefficiencies as encountered with the section 91 provision referred to above. On the other hand, it would appear that the four-step penalty imposition process of the current section 91, discussed above, will be done away with and should eliminate unnecessary administration.

Furthermore, serious criminal acts must be and can be dealt with within the scope of the criminal justice system and such transgressors should not be provided with the option of a prosecution avoidance penalty. Secondly, in line with practices discussed in this work, there should only be one penalty per transgression. The proposed termination of the seizure penalty, the withdrawal of confiscation penalty and the missing goods penalty, lend themselves to a practice where the penalty (or, in this case, the penalties) meted out do not fit the crime and may therefore become totally disproportionate.

In the execution of their daily tasks, South African customs officers are confronted with other legislation administered by SARS in the form of the VAT Act and the TA Act. Section 7 of the VAT Act requires customs officers to collect VAT on all importations. The penalty regime as it relates to VAT is now governed by the TA Act, which also governs all other tax acts administered by SARS, excluding the Customs and Excise Act. It makes administrative sense to consolidate all administrative matters relating to the tax acts administered by SARS into one piece of legislation and in a single system in order to promote uniformity, legal transparency and certainty. The fact that the Customs and Excise Act was excluded from the application of the TA Act does not, therefore, make sense, whatever the reason proffered for its current exclusion. The consequence of this exclusion now appears to result in a situation where the customs officer needs to operate within a “duopolistic” system, two systems that, at present, do not speak to each other.

Section 213 of the TA Act requires that, whenever there is a non-payment or under-payment of tax (e.g. VAT) when it was required to be paid by the particular tax act, a percentage-based penalty as prescribed by the relevant tax act must be imposed (for the late payment). Section 39 of the VAT Act currently prescribes this percentage to be 10% of the amount not paid or under-paid. This appears to be an example of the application of strict liability. This is not the end of the matter, though: as section 222 requires that, in addition to the section 213 penalty, an understatement penalty is also to be imposed. Understatement is defined in section 221 of the TA Act as “any prejudice to SARS or the fiscus in respect of a tax period ...” Section 223 provides for an understatement percentage penalty table that must be utilised by officers in determining the appropriate understatement penalty. This creates the risk of a practice of disproportionate penalties, besides the fact that the complexity of the system will inevitably lead to an inconsistent application of the law.

From the above it is clear that the customs officer is currently potentially confronted with two penalty systems when dealing with breaches of the Customs and Excise Act.

4.2.2 The appeal regime

In terms of chapter XA of the Customs and Excise Act any standard case will have at least two opportunities to be considered should the alleged transgressor not agree with the decision of the customs officer. After a letter

of assessment has been issued the trader will have 30 days from the date of issuance to lodge an appeal in terms of the rules to the Act. If the trader is not in agreement with the outcome of the appeal, he/she can lodge a request for alternative dispute resolution. An alternative dispute resolution is not a further appeal, but merely an attempt to resolve the matter administratively before potentially proceeding to judicial review or appeal. The aforementioned remedies are in line with international obligations as well as the practices of the countries discussed in this work, with the exception of minor differences that will be discussed in more details below.

However, here too the customs officer operates potentially in a duopolistic system because, concerning collecting penalties on VAT, the TA Act prescribes a different system of remedies available to the trader. Chapter 9 of the TA Act describes a different system of dispute resolution, depicted in table form below, a system that does not apply to the Customs Division of SARS.

| Dispute resolution process in terms of the TA Act | Legal provision |
|--|--|
| <u>Step 1:</u> <ul style="list-style-type: none"> • Objection against assessment or decision | Section 104 |
| <u>Step 2:</u> <ul style="list-style-type: none"> • Appeal against the outcome of the objection • Depending on the amount involved or the issues at stake the matter will be referred to the Tax Board (chaired by an attorney or advocate) or the Tax Court (presided over by a judge). • By mutual agreement SARS and the taxpayer may try to resolve the matter by way of alternative dispute resolution – the appeal will be kept in abeyance during this step. | Section 107 Sections 107(5)&144 |
| <u>Step 3:</u> <ul style="list-style-type: none"> • If SARS or the taxpayer does not agree with the outcome of the Tax Board, they can refer the matter to the Tax Court who will hear the matter <i>de novo</i>. • The Tax Courts is a court of record. • An appeal of a decision of the Tax Court must be placed before a full bench of the Provincial Division of the High Court of South Africa. | Section 115 Section 133(2) |

In addition to the above process, part E of chapter 15 also allows for a remittance of penalty process – arguably before an objection is lodged in terms of section 104. This, coupled with the process set out in the table above, creates an evolved process of remedies available to taxpayers not currently available or applicable to transgressors of the Customs and Excise Act. The question therefore arises why SARS, as a single organisation, has allowed such diverse systems to be applicable to transgressors of the tax laws of one

country. A speculative take on this question may suggest that a decision was taken that the Customs Division was not ready to deal with a new legislative regime and that the new Customs Acts would address this "duopolistic" state of affairs.

4.3 The selected international scenario

4.3.1 The penalty regime

European Union

The Community Customs Code (Council Regulation (EEC) No 2913/92 of 12 October 1992) provides the legislative platform for all customs matters applicable to all 28 members of the EU with the exception of enforcement matters, which still reside with individual member states. Plans are at an advanced stage to provide for a union customs enforcement legislative framework that will be applicable to all 28 member states. This proposed framework is contained in the EU directive COM (2013) 884 and is intended to put in place the following regime:

a) Format

A list of contraventions with possible pecuniary penalties at different levels which will be based on the brevity of the transgression and the rate of recurrence.

b) Applicable test that will determine liability

i) Strict liability: does not require an element of fault and traders are required to comply with these regulations without fail – in other words, no element of fault will be considered as these contraventions will automatically elicit an administrative penalty.

ii) Committed with negligence: negligence needs to be established for liability to arise.

iii) Committed with intent: the subjective element (intent) needs to be established for liability to arise.

iv) Any person intentionally assisting with the breach of customs legislation will also be held liable for a customs contravention.

c) Liability period

Four (4) years from the date of infringement.

d) Penalty amount

A percentage of the value of the goods or, where no goods are involved, a prescribed penalty amount.

Unites States of America

Section 592 of the Tariff Act (Tariff Act , 1930) sets out the customs legislative framework which, as augmented by various official publications, help traders to understand the system.

a) Format

Compliance with the Tariff Act is required and no list of contraventions with possible pecuniary penalties exists to assist customs officers and traders.

b) Test applicable that will determine liability:

i) Negligence – failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances.

ii) Gross negligence – an act or acts (of commission or omission) done with actual knowledge of, or reckless disregard for, the relevant facts and with lack of concern to or disregard for the obligations under the Tariff Act.

iii) Fraud – occurs when a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally, as established by clear and convincing evidence(Customs Regulations, 2014).

c) Liability period

Five (5) years from the date of infringement.

d) Penalty amount

An amount not exceeding the domestic value of the goods or the amount of duties payable (four- or two times the duties).

Canada

Canada has a well-developed customs administrative penalty regime in the form of the Administrative Monetary Penalty System (AMPS) (Administrative Monetary Penalty System Memorandum D22-1-1, 2010).

a) Format

The AMPS lists the possible contraventions, with the applicable penalty, legislative and regulation reference and guidelines for its application.

b) Applicable test that will determine liability

Any failure to comply with customs related legislation (strict liability).

c) Liability period

Six (6) years from the date of infringement.

d) Penalty amount

Flat rate monetary penalties are issued on a progressive system informed by rate of occurrence and brevity of transgression.

4.3.2 The remedy regime

European Union

Article 23 of the CCC provides for a right of appeal in two steps, the one before the relevant customs authority, and the other thereafter to a higher body (which could be a judicial authority or a specialised body).

Unites States of America

Under section 618 of the Tariff Act, the trader can request the mitigation or remittance of the amount of the penalty issued. Section 592(e) provides for judicial review where the matter will be decided *de novo*. The burden of proof regarding the violation lies with the state.

Canada

Section 97.48 of the Canada Customs Act provides that a person who received an assessment may object to the assessment within 90 days from the issue date of the assessment. If the trader who lodged the objection does not agree with the outcome, he/she may lodge an appeal to the Tax Court of Canada within 90 days of receiving the outcome of the objection (section 97.49). Sections 97.5 and 97.51 allow for the condonation of the late filing of an objection or appeal on application.

Chapter 5 – Discussion

To reiterate: this work focuses on a comparison of the customs penalty regimes in South Africa and certain other countries. It was found that South African administrative penalty provisions, as set out in the Customs and Excise Act, the new Customs Control Act and the Tax Administration Act, showed similarities with and, to a lesser extent, dissimilarities with those regimes of other countries. These similarities and dissimilarities will be discussed further below. The following table provides an overview of certain aspects of the comparison:

| | | South Africa | | | European Union | Canada | United States |
|----------------|------------------|--|---|--------------------------------------|--|--|--|
| | | Customs and Excise Act | Control Act | TA Act | | | |
| Penalty Regime | Format | As per Customs Act - no public guidelines | List of Contraventions + Category of Penalties | As per Act specified 10% penalty | List of Contraventions + Pecuniary Penalties | List of Contraventions + Pecuniary Penalties | As per Tariff Act – no public guidelines |
| | Liability | Common contravention of legislation | Contravention of legislation | Contravention of legislation | Strict Liability Negligence Intent Abetting | Contravention of legislation | Negligence Gross Negligence Fraud |
| | Liability period | 2 years | 3 years | 3 years | 4 years | 6 years | 5 years |
| | Penalty amount | Percentage of amount not paid or underpaid or percentage of the value of the goods | Specified penalty amount as per category | 10% of amount not paid or underpaid | Specified penalty amount or a percentage of the value of the goods | Flat rate monetary penalty specific to breach - levels as per rate of occurrence | Amount not exceeding value of goods or equal to duties (two or four times) |
| Remedy Regime | Internal steps | Administrative Appeal ADR | Reconsideration Administrative Appeal ADR | Objection Appeal/ADR Tax Court | Appeal Appeal to special body | Objection Appeal to Tax Court | Request for mitigation or remission |

The table above clearly shows that, as far as the format of the penalty regime is concerned, two out of the three foreign regimes have chosen to augment their primary legislative provisions with a publicised penalty guideline. This is in line with requirement 9 of Special Annex H of the Revised Kyoto Convention (1999). The AMPS system of Canada and the proposed EU list of contraventions (EU directive COM (2013) 884) are examples of such a penalty guideline; both these guidelines are available to external parties, which is in line with the principle of transparency and effectiveness. At present, neither South Africa nor the USA has such a system and it is up to the customs officer to decide on an appropriate penalty rather than using a published guideline. South Africa is in the process of planning to introduce a list of non-prosecutable offences with penalty categories, in accordance with section 876 of the Control Act of 2014. From a practical point of view, this is a step in the right direction, and one that is in line with international obligations. This type of system should make the work of the customs officer easier as far as the determination of the appropriate penalty is concerned. It also provides traders with clarity about the consequences of breaching the relevant customs legislation.

When considering the three pieces of South African legislation in the above table, it is clear that an administrative penalty will be meted out when a mere transgression (action or omission) of the relevant legislation occurs. This is also true of Canadian customs legislation. Legislation in the EU and USA also requires an evaluation of the behaviour that caused the transgression, to see if the behaviour was aggravated by, in the case of the EU, negligence or intent and, in the case of the USA, negligence, gross negligence or fraud. The degree of behaviour will then determine what level of administrative penalty will be meted out or, alternatively, whether the transgression meets the criteria for criminal prosecution. From a practical point of view and from personal experience, it is submitted that it is unrealistic to expect a customs officer to detect the contravention and also to establish whether the transgression was, for example, committed with intent or with an element of gross negligence. These two standards form an integral part of a criminal or civil case where a delictual claim has to be argued by highly trained attorneys. To expect this level of judgement from a customs officer on a daily basis is totally unreasonable.

This is why, in the case of customs legislation, the principle of strict liability would be a more practical option, since failure to adhere to customs legislation would automatically elicit an administrative penalty. More serious breaches will, obviously, be subject to criminal prosecution. The proposed EU penalty regime suggests, in Article 3 of EU directive (COM 2013) 884, a list of contraventions that will automatically elicit an administrative penalty. This concept, combined with an extensive list of transgressions as found in the Canadian APMS document, is the most practical solution for customs administrations today. The basis for this argument is quite simple: such an approach will inform both traders and customs officers what constitutes a

transgression and the monetary penalty for each transgression. The focus will also be on the transgression rather than on the goods (unless the goods fall into the category of prohibited or restricted goods, dangerous goods or are smuggled goods which – will then render them liable for seizure). What this also suggests is that goods should not be detained for each and every investigation, since this will have dire economic consequences for the business concerned and, progressively, for the economy as a whole. Nothing prevents a customs administration from administratively, criminally or, in terms of civil law, prosecuting a legal entity or individual after a *prima facie* case has been established; in none of these cases does the customs administration have to hold on to the goods themselves.

It is further argued that the current South African customs penalty regime, with its main component being section 91 of the Customs and Excise Act, cannot be an effective deterrent for potential transgressors owing to its voluntary or non-binding character. The TA Act, with its strict liability (in the form of section 213), which strongly resonates with the Canadian customs penalty model, constitutes a much better model as far as penalties are concerned. The proposed penalty regime in the Control Act that will eventually replace the Customs and Excise Act is a welcome start, but is unnecessarily complex in that it suggests five types of administrative penalties. As argued above, the focus should be on the transgression and not the goods, unless the transgression falls within a certain category of transgression. Termination of seizure penalties, withdrawal of confiscation penalties and missing goods penalties are pointless if the goods can be released at a later stage against the payment of a ransom amount. The same argument will apply to the prosecution avoidance penalty. If a transgression is serious enough, it should be criminally prosecuted; other transgressions that do not fall in this category must be punished with an administrative penalty which, if not paid, will constitute a debt to the state.

In terms of determining the monetary value of penalties, all the regimes studied use some form of calculation method. It is suggested that, where an amount was underpaid or not paid, that the penalty should be a fixed percentage of the amount underpaid or not paid, as currently applied in the TA Act and suggested in the proposed EU regime. All other breaches where no potential monetary prejudice is at stake must elicit a specified penalty (flat rate) on a progressive scale based on the number of breaches for the same transgression. This system has been operating in Canada for a number of years and is now written into South Africa's Control Act, as well as the proposed EU penalty regime. The attractiveness of this system is that it can be applied consistently and easily by customs officers; it is also a transparent system for both customs and traders alike.

As stated earlier, it is surprising that the Trade Facilitation Agreement of 2013 left a door open to administrations concerning the availability of an internal administrative appeal mechanism. Article 4 of the Agreement provides that, where such internal avenue is not available, recourse must be had to judicial review or appeal. It is submitted that this section should have been more prescriptive in nature, setting an internal

administrative appeal mechanism as a requirement. This argument is put forward in view of the prohibitive cost of litigation and the uncertain timeframes surrounding litigation. The Revised Kyoto Convention, in standard 9.8 in the General Annex, is more forthright here and states that national legislation must provide for an initial appeal to the relevant customs administration. It goes even further in standard 10.5 (also in the General Annex) and states that provision must be made for a further appeal to a body independent of the customs administration (not judicial appeal or review), where the applicant is not satisfied with the outcome of the internal administrative appeal.

All the countries discussed in this work provide for at least a two-level internal review and/or appeal process, except the USA, which has a one-level internal process that can be followed by a judicial process. The current South African customs scenario relating to appeals appears to have a "duopolistic" character, given that one customs breach can potentially elicit two channels of appeal. This is because an import declaration can potentially contain a duty component as well as a VAT component payable to SARS in one transaction. If there is a non-payment or under-payment of duty and VAT in one transaction, this involves not only the Customs and Excise Act, but also the VAT Act and, from 1 October 2012, also the TA Act.

What the above means, in practical terms, is that if the trader elects to appeal a penalty imposed in terms of the Customs and Excise Act (related to duty) and to a penalty imposed in terms of the TA Act (related to VAT), he/ she will have two appeal channels: this is because the Customs and Excise Act prescribes one process and the TA Act another. It is suggested that the solution to this conundrum would be to make the TA Act applicable to customs and excise legislation in terms of administrative penalties. The appeal process contained in the TA Act is more sophisticated than that prescribed in the Customs and Excise Act and also complies more closely with international customs obligations. The appeal process contained in the TA Act makes provision for:

- i) internal objection
- ii) internal appeal/ADR
- iii) appeal to an independent body (Tax Board/Tax Court).

When the above remedies have been exhausted, the trader has the option of further judicial review or appeal. There is no reason why the more evolved appeal process prescribed in the TA Act cannot be made applicable to matters emanating from the Customs and Excise Act or future customs legislation.

Chapter 6 – Conclusion

What is evident, going back to the days of the *Laws of Manu* (Asakura, 2003), which contained the earliest list we have of a customs penalty regime, is that the fundamental nature of customs law enforcement has not changed, in essence, over the centuries. We are still grappling with the question of which system leads to the most effective compliance and enforcement regime. The organising of international trade through institutions such as the WTO and WCO has greatly helped us to move towards a clear, rules-based international trading system, one that creates certainty and stability and that contributes to the advancement of trade facilitation.

The aim of this work was to analyse and compare various penalty regime systems in an effort to ascertain whether the respective systems would improve or worsen trade facilitation.

In terms of international best practices, the author of this dissertation believes that the Canadian Administrative Monetary Penalty System (AMPS) provides us with the best guidance. Its extensive list of contraventions, together with the legislative reference and penalty suggestions, meets the requirements of transparency and certainty as prescribed in international instruments such as the Revised Kyoto Convention and, subsequently, the Bali Agreement.

The proposed EU penalty regime as contained in EU Directive 883 (2013) is similar in most respect to Canada's AMPS, but with the difference that the EU system proposes various categories of liability instead of sticking to "strict liability", and it is the latter which, I believe, is the most effective. International trade is, by its very nature, fast-moving; as such, it requires simple but effective penalties for those who transgress customs legislation. A system that provides for a list of breaches with the related monetary penalty based on the principle of strict liability is best suited to international trade.

As it stands, the current South African scenario is over-complex and not geared towards effectively addressing breaches via an administrative penalty system. This is partly due to the absence of the principle of strict liability in the system: as has been made clear throughout this work, section 91 of the Customs and Excise Act is worded such that it leaves transgressors with a choice. The current situation is further complicated by the non-existence of a single penalty and appeal regime dealing with the different taxes within SARS. The current situation means that the rules pertaining to customs duty are provided for in the Customs and Excise Act while, for VAT, another set of rules apply (those contained in the TA Act). More work will have to be done to synchronise these discordant legal issues. It is suggested that there already exists a good legislative framework in the TA Act that must be utilised and expanded to include customs and excise legislation.

The new customs legislation also appears to be moving towards a more practical and effective penalty regime. The introduction of fixed amount penalties follows the Canadian model, and this new legislation will be based on the principle of strict liability. How extensive this fixed amount penalty list is will determine the success of the new system.

This list will also go far in terms of compliance with international obligations such as transparency and certainty, which is not the case with SARS's current customs penalty regime. The current customs appeal system complies with international obligations, although challenges exist in view of the fact that more than one system is currently available for one customs transaction where both customs duty and VAT apply. As mentioned before, the appeal system contained in the TA Act is an international benchmark which should be expanded to include the customs environment.

The implications for South Africa are quite clear if the current penalty system is not transformed: it will perpetuate an ineffective law enforcement regime. This is exacerbated by the fact that, within SARS, more than one penalty and appeal system is found, one for customs and another for other taxes such as VAT and income tax. Research possibilities therefore exist in the South African context to develop a more effective administrative penalty system. Further research could include a comparison of the administrative penalty regimes of any number of members of the WTO and the WCO. Based even on the very limited comparative survey in this work, one should not be surprised to find that the differences are in the details rather than in principle.

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