Preface

The tendency towards a more supranational dimension, global one might say, of trade and, more generally, of economic relationships has not been matched by a global dimension to the law. In most cases, national legal systems are still centred on the exercise of power by sovereign states *uti singuli*, whose relationships are governed by international rules and regulations which, at best, do no more than envisage and regulate incipient attempts at organised coordination, at times constituting no more than approximations to any useful form of integration. And so any harmonisation of the rules and regulations governing individual fields of international relationships or any attempt to simply bring different legislative systems closer together remains an unfulfilled proposition and in any case is of marginal impact as opposed to the dichotomy between national law and international law.

Against this backdrop, the legal system of the European Union constitutes a 'new legal order' of international law, according to the well-known phrase coined by the Court of Justice in 1963 in a judgment dealing precisely with customs duties. At that time, when the imperative to consolidate peace on the European continent was still strongly felt, work began on the creation of a union of states without customs controls and with a common external customs tariff, a perfect customs union, fresh and the first small step in a much more ambitious plan: the customs law of the European Union, which has long been fully harmonised and set down in a Community-wide set of regulations, whose latest version is dated 1st May 2016 and of which this book represents one of the first and most important commentaries in continental literature.

At a time marked by a general reflection and debate between protectionism and globalisation, it is in the rules and mechanisms of customs law that both those immersed in these wide-ranging economic deliberations and entrepreneurs can find the right tools when it comes to taking major decisions.

The merit of this book and its innovative nature resides in its all-round analysis of the international legal doctrine produced by some of the most important specialist studies of the last 20 years, a period of time that has witnessed changes, even profound transformations, in the field of customs law.

Its importance also lies in the in-depth study of the international rules and WTO judgments that have most contributed to a definition of the binding points of reference for the conduct of EU member states and the content of the various rules and mechanisms of customs law, a confirmation of the fundamental importance of the centralised interpretation of regulations. Finally, mention should also be made of the overview of European customs regulations and their important interpretation by the courts, a clear reminder of the decisive role that has always been played by the European Court of Justice in defining common principles and in the theoretical interpretation of the mechanisms of customs law.

The originality of the approach to such an extensive and hence complex body of work resides specifically in the overarching perspective adopted in this examination and analysis of customs regulations, not only in relation to its international dimension but together with its European and national aspects.

The result is an examination of the subject matter on three levels, drawing on the extremely important and relevant contribution made by each of them in terms of the applicability and effectiveness of customs regulations. Ample material for scholars, traders, legislators and judges alike.

Giuseppe Tesauro
Former Advocate General at the European Court of Justice
and President of the Constitutional Court

Foreward

To speak about the work I have the honor to write this preface, I must say that such book initially places the reader at the present and perspective of Customs Law in the global environment in general as well as of the European Union (EU) specifically, which allows to locate us in the reasons for the relevance of the discipline and line of study: the still importance of collecting of taxation, the complexity of globalized production that conveys processes through borders and the international standards harmonization, adding, moreover, currently phenomenon such as the Brexit and protectionist demonstrations, inter alia, of the United States administration.

Immediately it is seen that it is an updated text because it does not only study history and the development of the international and regional *corpus juris*, but it already includes the analysis of recent standards in both fields such as the Trade Facilitation Agreement (TFA) of the World Trade Organization (WTO), in effect as of February 22, 2017 and the Union Customs Code (UCC) in effect as May 1, 2016 and, hence, it deals with the study of novel institutions included in both statutes and many more. It begins with the multilateral legal system, then with the european regional block to which the UCC belongs to and, afterwards, with the EU trade agreements with other blocks and countries and concludes with the analysis of Italian law (Tuld).

In its development, customs taxation themes are presented well organized which allows going through the concatenated analysis of concepts: statutory sources, principles, Customs and its links to passive subjects and the customs representative. It dedicates special chapters to study in detail how the tax customs obligation arises and is extinguished, the elements for its settlement (customs regime, tariff classification, customs value and merchandise origin), the procedures for the verification of compliance, the tax audit and challenging of customs authorities' resolutions through defenses remedies, culminating with the disciplines related with the cooperation between customs requisite for the efficient enforcement of many contemporary actions such as centralized clearance, risk management and fighting against customs offences.

All in all, the route proposed by the table of contents is achieved in the path of the works to its end, which shall also surely be appreciated by students as well as the customs practitioner in need of useful tools and the expert writers of the matter.

The concepts of the work are substantial regarding amount and magnitude and surely the reader will notice them, but I will only make comments on some of them that I have considered of uttermost interest, but I am certain that I have left behind many others which perhaps are of greater relevant and transcendence.

Among the issues that I consider relevant of the UCC that the work analyzes accurately is the elimination of the distinction between destinations and customs regimes, that the European legislator has motivated for simplifying and facilitating purposes, but it seems that always their doctrinal grounds were not sufficient to uphold that the owner or interested party "*destined*" the merchandise for the legal consequences established for several *de jure* and *de facto* situations, such as the abandonment or destruction thereof. In the same magnitude, is the elimination of the adjective "*economic*" for regimes that now are referred to as "special" to distinguish them from those that pay import duties and taxes, such as the inward processing, temporary admission, transit and many more.

International experience shows that lowest is the economic development of the countries (LDC) higher is the repertoire of customs regimes they have, whilst, in developed countries, such as the United States, practically there are no customs regimes. The 1973 International Convention on the Simplification and Harmonization of Customs Procedures, revised in 1999, (RKC) drawn under the sponsorship of the World Customs Organization (WCO) collected and described several of them in a general Annex and in ten of specific annexes. Therefore, it is coherent that the EU approach its customs rules to their level of development by simplifying their customs operations.

With this provision is modernized the European customs legal framework of such magnitude as had not been done, for example, in France, since the 1687 Customs Ordinances of Luis XIV. This change will give rise to long and intensive discussions within not only European but also world-wide customs doctrine, as do all actions that break paradigms. I must say, on the other hand, that I have also seen that in other countries are legislating "new" codes and customs laws that are born old, supported on walking sticks of those XVII century ordinances to regulate the digital trade of merchandise and services, electronic means of transports and payments, among regional blocks and in an environment of great liberty and mobility of companies, individuals, capitals and technology, that modified in an essential manner how international trade was done.

Thus, it is paramount to examine and analyze the UCC, such as this work achieved in a sufficient and simple manner, since it studies each of the customs regimes, showing the use of each of them and clearly pointing out the difference between the entry to free practice and the import from consumption, which is

highly relevant for the European reader, but also for the experts of other regions of the world where said free practice regime is unknown.

Following the European tradition of considering a customs obligation as a *pay* obligation instead a *passage* obligation, the nature of the customs obligation provided for by the UCC is such of a tax obligation consisting on the payment of money for the execution of a taxable event, that is described as the introduction of a foreign good into the economic circuit of the UE.

Consequently, the book explains in depth the elements of the tax' legality: Subject, object, taxable base, rate or tariff and time of payment. Regarding the subject, it clearly describes the matters related with the taxpayer and its relationship with customs, its representation, the fundamental or essential link not only for the tax obligation but also for risk management, statistics and security and control actions that is: the customs declaration.

It is worth pointing out here that legal and illegal international trade is differentiated by the presence or not of a customs declaration. The individual or company that has decided to lodge before customs a declaration of goods is full proof that its will was to choose the way of legal trade, a *bona fidei* presumption that will govern its relationships with customs authorities.

Regarding the object, this book analyzes the international and regional guidelines for tariff classification of merchandise, bearing in mind that the same are identified and decoded by an international treaty (Harmonized System) that contains the six mandatory general rules for said purposes. Relate the taxable base, likewise, it delivers an accurate but simple exposition of its international statutes, such as article seventh of the 1994 General Agreement on Tariffs and Trade, contained in Exhibit 1A of the Agreement established by the WTO. Regarding the rate or tariff, it is a fact that currently the import of merchandise has as much rates as origin of the same, a consequence of free trade agreements and other forms of economic integration set forth under article XXIV of the 1994 GATT. The work commented is careful in this matter by treating it with the necessary detail and applies the principles that govern international treaties for preferential and non-preferential treatments.

The work advises, in a promptly and timely fashion, that the UCC has not created a unitary discipline regarding the customs administrative procedure and a sole customs authority, therefore, there are major issues that must be regulated by domestic legal statutes, among which are found the issues related with the cooperation between member countries within the EU, vital for a centralized clearance, risk management, single authorization and even for tax audit purposes.

The work covers up to the particularities of verification of compliance and claims from authorities for due amounts and the operator's right to oppose legal remedies against the same.

Lastly, it encompasses the study of customs sanctions, which, even though it is reserved to domestic sovereignty, the work does not ignore that they are subject

to the general principles established in article VIII of the GATT1994, the recent provisions of the TFA and the standards of the RKC, basically consisting on such sanction being proportional to the relevance of the infraction and only necessary to disallow undue conducts. Moreover, the work informs us of the draft directive 2013/432 of the European Commission, whereby this issue becomes regulated at European level, establishing which conducts shall be deemed as objective, imprudent or malicious and which would be the applicable level of sanctions, conveying upon the Union a uniformity that avoids logistic and trade distortions between the different ports, as happens to date.

But also, article 42 of the UCC is already becoming approaches to justice when it establishes that sanctions must be effective, proportional and dissuasive, which, even though it comes from resolutions of the European Court, nevertheless, its elevation to community standard level will generate an additional drive in protecting the due process and proportionality for customs statutes.

For all the above, I can assure that this work of Dr. Sara Armella, distinguished member of the International Customs Law Academy, will substantially contribute to the knowledge and application of Customs Law in university, trade, customs, professional and jurisdictional forums of the international community.

Andres Rohde Ponce

Chairman of the International Customs Law Academy

Introduction

The movement of goods, borders and charges are all aspects that characterise a form of taxation, the customs duty, which differs widely, both in terms of time and territory.

Customs duties are one of the oldest forms of taxation and have always possessed one common characteristic: their association with crossing a border, even an urban border, the manifestation of the sovereignty of a country or a city state.

The awareness of the need to regulate commerce on an international scale arose at the beginning of the twentieth century, when a decision was taken by countries to draw up legislation, plans and agreements, aimed at identifying common principles and rules governing international trade.

In the 1990s, the transformation of the GATT into the WTO represented a profound change with far-reaching political and economic implications and marked the beginning of international customs law – a body of legislation made up of the rules contained in various treaties adopted at the WTO, the regulatory framework governing all the main aspects of substantive customs law.

At the same time, Europe saw the creation of the customs union, completely doing away with internal borders. 1994 marks the entry into force of the Community Customs Code, the first codification of all the essential aspects of European customs law.

The current customs regulations, the Union Customs Code (UCC), came into force on 1st May 2016, finally superseding the Community Customs Code and the related implementing provisions previously in force. This new code represents a significant step towards the closer integration of the European Union's international commercial policies and towards a more coordinated and uniform application of customs regulations in EU member states.

The UCC contains a comprehensive system of legal rules and mechanisms and draws its inspiration from the desire to give the EU customs system, which had previously relied on doctrinal interpretations and on interpretation, for the most part, by the European Court of Justice, a general and uniform character.

The development by the European Court of Justice of many of the general principles of European customs law, now incorporated into the new UCC (the lawfulness of the procedure governing administrative decisions, the right of defence and the right to be heard, the proportionality of penalties) make the new body of regulations an especially effective instrument for defending the rights of economic operators.

When I began studying the numerous articles on the new Union Customs Code and the related regulations, the new arrangements envisaged therein and the dearth of specialised European literature on this subject matter, I realised the importance of the dissemination and discussion of ideas on matters of such fundamental importance for the fields of economics and law.

Now, in the wake of Brexit and the new directions in US and Chinese policy, it is all the more important to familiarise ourselves and discuss the meaning and evolution of customs duties, the rules governing them and the emerging standoff between neo-protectionism and globalisation and between multilateralism and regionalism.

This is also the reason why in writing this book, I have sought to go beyond a conventional description of these mechanisms and rules, extending its scope to take in current international customs law. Not only rules but also a discussion of worldwide legal doctrine in this area and the rulings delivered at the WTO.

In fact, in the absence of this broader reference framework, it would be impossible to comprehend the evolution and current state of EU customs law, which lies at the heart of this work.

I would like to express my thanks and gratitude to my first teacher and dear professor, Victor Uckmar, whose passion for international taxation spurred me to embark upon the study of customs law. I would also like to thank those who have helped me compile this book, even during the difficult task of locating sources, in particular Elena Fraternali and Lucia Mannarino for their patience in reading this work.

This book is dedicated to my daughter, Maria Sole.

Sara Armella