

PROBLEMS OF CUSTOMS LEGAL REGULATION IN INTERNATIONAL TRADE BETWEEN THE EUROPEAN UNION, RUSSIA AND CHINA: ANALYSIS OF LITHUANIAN JUDICIAL PRACTICE SINCE 2010

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Abstract

Purpose – the aim of this article is: (i) to overview the level of the problems and obstacles of international trade between the Republic of Lithuania, as the EU Member State and the BRICS group of countries (Russia, China) according to the case-law of the Republic of Lithuania in disputes relating to customs decisions and actions (for the period from 2010-01-01 to 2015-01-01) and (ii) to present proposals for development of the regulatory regime for import customs duties.

Design/methodology/approach – analysis of relevant issues is based both on theoretical (analysis and synthesis, systematic) and in particular empirical methods (statistical analysis of data, analysis of documents, generalization of professional experience, in particular – practice of the courts of Lithuanian Republic in disputes with customs authorities). The article consists of an introduction, three chapters and conclusions.

Findings – for more than ten years (since 2004) the Republic of Lithuania is a member of EU and is realizing its economic and trade relations with other foreign countries, and regulating customs duties according to the requirements of the EU common foreign trade policy (Common Commercial Policy). After accession to the EU, more than 20 percent of Lithuanian foreign trade consisted of trade transactions with the Russian Federation, which, despite of some fluctuations, had an overall trend to grow (increase) (Bernatonytė, 2011; Slavickienė A., Jatkūnaitė D, 2006). In addition, from 2009 to 2014 Lithuania consistently increased its foreign trade (both imports and exports) with the other country of the rapidly growing economic BRICS region of the world, i.e. China.

On the other hand, the analysis on practical problems of the foreign trade with these particular countries which have arisen in Lithuania since 2010, justifies that most legal problems of customs regulation are caused by legal matters relating to the tariff classification of imported goods (inadequate requirements for the evidence to support appropriate classification of goods), determining of the customs origin of goods and proper application of anti-dumping customs duties (while regulating trade with China), as well as clearly not defined importance of separate individual sources of law in the field of customs which could be binding for the settlement of disputes (e. g. legal significance of documents accepted by World Customs Organization). These customs duties application problems should be solved in the future, in order to develop international trade with the referred BRICS countries.

Research limitations/implications – the analysis is limited to a certain period of time (yrs. 2010 – 2014) and is based on the practice of the Lithuanian Supreme Administrative Court in cases related to the activities of customs and taxation with customs duties in Lithuania. The scope of the research consists of the situations, when the goods from the third countries (BRICS countries – Russia and China) were imported into Republic of Lithuania. Taxation of export operations and specifics of their taxation with customs duties in third countries (Russia and China) were not analyzed in this article.

Practical implications – based on the context of international economic law, the provisions of the EU customs legislation and their application in the practice of courts the article identifies the problems of taxation of international trade with BRICS countries (Russia and China) on the national level (from the perspective of Lithuania). The article also presents opportunities to improve customs duties regulation regime applied to the international trade with Russia and China in the Republic of Lithuania, as a Member State of the European Union and determine what legal measures should be taken to ensure a free, fair and open international terms of trade with these particular countries.

Originality/Value – from a legal point of view, experience of Lithuania's integration into the EU since 2004 and the related general legal issues (e.g. such as prospects of legal regulation of customs policy after the entry to the EU) was immediately dealt with a variety of authors (Radžiukynas, 2005; Raišutis, 2005; Povilauskienė, 2006; Slavickienė, Jatkūnaite; 2006 and others). However, the literature and the national legal doctrine in the last five years (yrs. 2010 – 2014) almost completely lacks the studies directed to legal regulation of foreign trade in Lithuania after the entry to the EU (unlike the studies related to the implementation of the EU common international trade policy and Common Customs Tariff in general). Issues related to the legal regulation of foreign trade in the modern global economy (*inter alia* customs regulatory issues and challenges) and the related transformations of legal system of the Republic of Lithuania are not consistent, as comprehensive and scientific work in this area remains only fragmentary (for example, Lithuanian case law (cases of customs disputes) is generally not analyzed and none of their summaries or generalizations was prepared and presented to the public and community of legal practitioners and scholars.

In this respect, the article provides new insights on this area of legal regulation and on the basis of national courts practice in customs cases since 2010 evaluates international trade regulation system between the Lithuanian Republic as the Member State of the EU and BRICS countries (Russia, China) and describes what customs regulatory instruments should be to ensure attractive trade regime with these foreign partners.

Keywords: international trade, customs law, BRICS countries, international trade agreements, Common Trade Policy.

Research type: research paper

Introduction

The fundamental objective of the global development in modern era, which is targeted, by both the international community and individual countries consists of an efforts to form a favorable environment for the development of the society and its welfare, which would guarantee equal social and economic conditions for sustainable development and growth. On the other hand, the changes and developments of social relations in

modern world is characterized by processes of globalization as an exclusive contemporary feature of modern social and economic systems (Hirst, Thompson, 1992; Jusčius, 2006), which means that the global geo-dispersed activities are linked to the complex entity and are becoming interdependent. Thus, sustainable development, economic growth and development objectives of each individual state takes place under conditions of globalization, while one of the most important and the most dynamic global economy globalization factors remains international trade. These Researchers dealing with these social processes consider that in the current circumstances, no country can achieve economic growth without being present actively in international trade (Laurinavičius, 2014).

Furthermore, in parallel with the economic and political integration processes on the regional level and the formation of free trade and the single market policies on a regional scale, led to the establishment of the European Union (hereinafter – „EU“). Currently EU comprises of the states belonging to the single European market in which the free movement of goods and services is ensured, and the common foreign trade policy (*Common Commercial Policy*) is implemented under the requirements of the EU law. Since 1 May 2004, Lithuanian Republic joined the EU and took over all the EU contractual relations with third countries and international organizations. In this way, the Republic of Lithuania also joined the European Union’s common trade policy area, where, from a legal point of view, foreign trade is regulated uniformly.

In this respect, it should be noted that in the global economy particularly high importance plays the EU international trade with "The New Leading Powers" - Russia, China and India¹. Many authors analyzing economic and legal relations between those concerned states (e.g. Leal-Arcas, 2011; Bernatonytė, 2011) point out this factor. This tendency is observed due to the fact that that China for many years, remains one of the EU's biggest trading partner, while trade with Russia and India in the recent years have had a tendency to grow, while the economies of these countries were strengthening. Besides Russia remained a major importer of energy resources to the EU and eventually the Republic of Lithuania. The search for new export markets in recent years has also lead to the strengthening of trade cooperation with India. In addition, the scientific economics literature, which presents analysis of the economic potential of these countries and their rate of growth, has emphasized that Russia, China and India in 2050 will fall between the four largest (dominant) economies in the world. At present, the above area of these states occupies 25 percent of total surface of the Earth, and more than 40 percent of the Earth's population are living in them (O'Neill *et. al.*, 2007; Leal-Arcas, 2009; Leal-Arcas, 2011). For these objective economic reasons, very rapidly evolving relations between EU and Russia, China as well as India in the field of international trade (Hurell, 2007) characterized the start of the XXI century.

A similar co-operation is very important to the Republic of Lithuania, as an EU member, because after the accession to the EU, more than 20 percent of its foreign trade consisted trade with the Russian Federation, which, in spite of some fluctuations, the

¹ These countries also belong to the geopolitical group of **BRICS** countries (Brazil, Russia, India, China, South Africa)

overall trend was to grow (increase) (Bernatonytė, 2011; Slavickienė A., Jatkūnaitė D, 2006). On the other hand, foreign trade (in particular – exports of goods) remained one of the main factors which increased an economic growth (recovery) in the Republic of Lithuania and the EU after the global economic crisis of the World, which began in 2007-2008 (Bernatonytė 2011; Laurinavičius, 2014). In this context, the search for new markets and expansion of trade (exports) relations with China and India became essential in order to diversify the structure of the economy and avoid dependence on potentially unstable existing trade partners in Eastern countries (Russia). Regarding this it is important to note that classical and the most common one-sided form of international trade regulation are customs (customs duties), which, as emphasized in the works of individual legal scholars (see. e.g. Thuronyi, 2003; Schmitthoff, 2006), has a unique meaning and impact on international trade. Importance of customs duties to the regulation of international trade is explained by the fact that under the conditions of globalization it is essential to remove existing trade barriers (Bethlehem, *et al.*, 2009).

For these reasons, it is essential to evaluate the legal problems which arise in the regulation of international trade with Russia, China and India (especially using tariff regulatory measures, that is customs duties) and what are the regulatory status of these trade relations and its prospects in international levels (international economic law), and at the national level as well (in the national economic law of the concerned countries). In this respect, such questions as whether an existing trade regulation system ensures the status of the EU as an attractive foreign trade partner and what regulatory instruments (customs duty rules and tariffs) should be used by the EU to ensure cooperation with these countries in promoting of an international trade can be treated as an object of a separate legal research (Leal-Arcas, 2011, p. 16).

It should be noted that although Russia, China and India are the members of the World Trade Organization and active trade partners with the EU (*inter alia*, the Republic of Lithuania), the importance of legal regulation of international trade processes is not examined on a national level, with the exception of insights provided by foreign authors (e.g. Leal-Arcas, 2011). Accordingly, in this context, the importance of implementation of customs law and customs duties remains a subject of research in the EU and the Republic of Lithuania following the integration of business into the global markets and creating legal conditions for the development of international trade with the new economic powers of the World (“*New Leading Powers*”), such as Russia, India and China.

General problems and tendencies of regulation of the international trade with Lithuanian Republic, Russia and China and their reflections in Lithuanian judicial practice

The most important factor to the changes in international trade and its development was renunciation of various restrictions provided by the national law. After the Second World War, countries of the world have signed many agreements on liberalization of international trade and the most astounding achievement was the establishment of the

World Trade Organization (furthermore – „WTO“) in 1995. These changes lead to the transformation of the local markets in individual states and has caused the disappearance of many national legal regulatory mechanisms which created barriers to international trade, as well as formed a special supranational branch of public law governing international trade - international economic law (Herdegen, 2013).

At present, the international regulatory framework of the customs duties in WTO Member States consists of the General Agreement on Tariffs and Trade (GATT 1994) and the accessories to the Treaty establishing the WTO - Agreement on customs valuation of goods and Agreement on customs origin of goods. These international treaties were ratified by the Seimas of the Republic of Lithuania on 24th of April 2001, by Law No. IX-292¹ and, respectively are an integral part of the legal system of the Republic of Lithuania. In addition, the EU Council, in decision 94/800/EC adopted on 22th of December, 1994, decided to approve the Agreement establishing the WTO and its Annexes to the Agreement (Art. 1, para. 1). In accordance with the Treaty on the Functioning of the EU (Art. 216, para. 2) international agreements concluded by the EU are binding on the EU institutions and the Member States. Therefore, the WTO Agreements, which were approved in the Decision 94/800/EC, also constitutes an integral part of the system of EU law (see also ECJ decision in Case C-431/05 *Merck Genéricos - Produtos Farmacêuticos*, para. 31 and the case-law cited in it). Besides over 200 countries of the World (as well as the EU) are part of the Harmonized Commodity Description and Coding System Convention, also known as the Harmonized System (furthermore – “HS”) of tariff nomenclature which is an internationally standardized system of names and numbers to classify traded goods².

Thus, we can conclude that the determination of origin of goods, customs valuation and tariff classification for customs duty purposes are the most important legal elements for the assessment of customs duties. All these elements have a strong international character and are directly regulated by international law (international treaties). On the other hand, the scientific literature emphasizes that globalization of economic and international trade does not mean that there is no national government responsibility for implementation of certain international trade provisions (Laurinavičius, 2014). States may comply with the international agreements to regulate the areas of the economy according to the circumstances defined in international economic law and to create favorable conditions for the partner countries to access the national market, that is to remove tariff and non-tariff obstacles to free trade, or, conversely, to identify and apply legal restrictions of international trade.

The Republic of Lithuania is a Member State of WTO (since 2001) and its main agreements on the regulation of international trade. Besides after the entry to EU since 2004 Lithuania started to apply the EU law on regulation of customs (Community Customs Code and its Implementing provisions) as well as unilateral and bilateral

¹ Official Gazette, 2001-05-31, No. 46-1619

² The contracting parties are obliged to base their customs tariff schedules on the HS nomenclature, see Official Gazette, 2003, No.: 61 -2772

preferential EU tariff agreements with third countries (Povilauskienė, 2006). Accession to the EU and becoming part of the EU Customs Union simplified and accelerated transportation and trade with the EU countries, the need for expanded freight forwarding services, especially to serve the transportation to the Eastern countries of CIS (Commonwealth of Independent States), created new business opportunities for operators of customs warehouses, free zones, import and export terminals, as well as increased export volumes in general (Slavickienė A., Jatkūnaitė D., 2006). However accession to the EU and the fact that EU law became an integral part of the national customs law has created a number of legal disputes concerning the fact which legal regulations shall prevail as the main basis of regulation of customs relationships¹.

It should be emphasized that in the last five years (2010 – 2014) major foreign trade partners of the Republic of Lithuania (based on the analysis of third countries - non-EU Member States, - since the foreign trade with them is taxed by customs) remained separate countries of the BRICS region, i. e. Russia and China. The volume of imports from Russia amounted to more than EUR 5 000 000 in 2010 and in 2014, as well as more than 7 000 000 EUR from 2011 to 2013, while imports from China rose steadily from 430 435 EUR in 2010 to 666 292 EUR in 2014 and the exports has grown steadily in all this period)². These trends are reflected in the specific court cases concerning taxation of goods imports from these countries (total number of court cases with customs authorities during the reporting period consisted of 64 cases settled in the Supreme Administrative Court of Lithuania³). The data displayed in the diagram below leads to the conclusion that among these cases proceedings for the taxation of imported goods in Russia made a dominating part and during the reporting period amounted to more than two thirds of all cases.

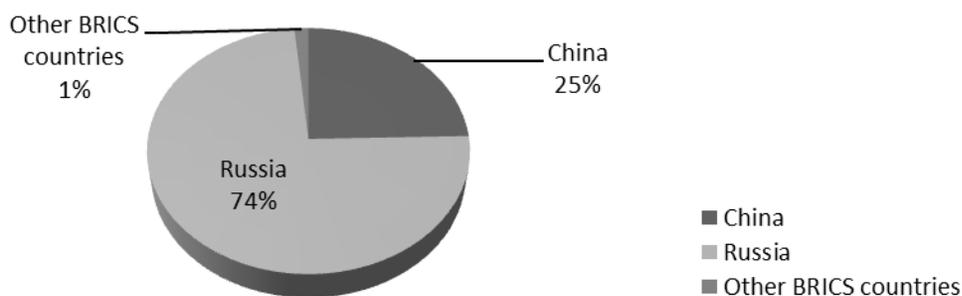


Figure 1. The structure of customs judicial cases in Lithuania regarding trade with BRICS countries

¹ Cases No. A²⁶¹-939/2008, A²⁶¹-1303/2012, A⁵⁷⁵-298/2011, A⁸-24/2007 of the Supreme Administrative Court of Lithuania

² M6050309: Eksportas ir importas. Požymiai: Kombinuotoji nomenklatūra (8-ių ženklų), valstybė, metai [interactive]. Lietuvos Respublikos Statistikos departamentas [accessed 2015-02-16]. <<http://db1.stat.gov.lt/statbank/SelectVarVal/Define.asp?Maintable=M6050309&PLanguage=0>>.

³ The Supreme Administrative Court of Lithuania is the highest national judicial authority which is empowered to deal with tax and customs disputes

At the same time, it should be noted that the number of cases regarding the taxation of goods imported from Russia with customs duties in the main part of the reporting period (2010 - 2013 yrs.) was constantly growing (increasing), with the exception of 2014 when the number of all recorded cases has sharply decreased. Meanwhile, the number of cases related to the taxation of goods imported from China with customs duties remained quite stable during all the reporting period.

The statistical leads to the conclusion that the foreign trade of the Republic of Lithuania (except for the trade of EU countries as a members of Common Customs Tariff area) is dominated by trade with individual BRICS countries (i. e. Russia, China). This is directly reflected in the court cases with national customs authorities on taxation of imported goods. In comparison, another third (non-EU) country which has a relatively high trading volume with Lithuania is (e.g. imports of goods from US increased from 181 972 EUR in 2010 to 319 515 EUR in 2014¹). This appropriately lead to a fewer number of recorded court cases (37 cases in the Supreme Administrative Court of Lithuania during the reporting period compared with 64 recorded cases related to the taxation of foreign trade with the BRICS countries).

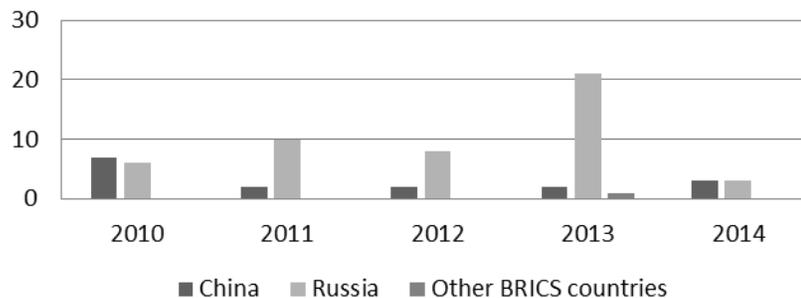


Figure 2. The number of customs judicial cases in Lithuania regarding trade with BRICS countries

International trade of Lithuania with other third countries, which recorded higher foreign trade volumes (e. g. Norway) during the reporting period (yrs. 2010 - 2014) was not reflected in cases related to customs matters. This may be due to the relatively small volume of trade, such as import volumes from the Kingdom of Norway amounted from 59 669 EUR in 2010 to 120 015 EUR in 2014². During this period, the Supreme Administrative Court of Lithuania examined only 3 cases for the taxation of goods imported from Norway.

This means that during the period, which was analysed, from the legal point of view the most problems and disputes in the Republic of Lithuania were related specifically to

¹ 23. *M6050309: Eksportas ir importas. Požymiai: Kombinuotoji nomenklatūra (8-ių ženklų), valstybė, metai [interactive]. Lietuvos Respublikos Statistikos departamentas* [accessed 2015-02-16].

<<http://db1.stat.govlt/statbank/SelectVarVal/Define.asp?Maintable=M6050309&PLanguage=0>>.

² Op. cit.

levying of customs duties on import operations from the particular BRICS countries - Russia and China. The cases and proceedings relating to the importation of goods from Russia has dominated during all the period of review. A more detailed analysis of cases (referring to the particular country) was carried out using the INFOLEX system¹, including the time limitations (yrs. 2010 – 2014) and using relevant case law classification categories used by the Supreme Administrative Court of Lithuania (cases related to customs activity, classification number 10).

Problems of customs legal regulation in international trade between the Lithuanian Republic and Russia: analysis of judicial practice

It should be noted that from 2012 and onwards Russia is a member of the WTO², and accordingly the regulation of international trade and its taxation is based on multilateral legal regulatory system. According to this system cooperation with Russia in the WTO framework is organized in accordance with the legislation adopted by the WTO (the main WTO agreements, such as GATT), which liberalizes international trade, as well as application of customs duties. Other legal regulatory mechanisms for customs duties, such as application of unilateral preferential (preferential) trade treatment in accordance with the General System of Preferences (unilateral customs tariff concessions applied by the EU), had previously been used with respect to Russia but is no longer applicable since 1 January, 2014³.

On the other hand, although since 2008 a question was raised (and negotiations were organized) on a bilateral regulation of trade relations between the EU and Russia (signing of EU-Russia bilateral trade agreement, creating a common economic space), such agreement has not yet been adopted and bilateral free trade relations with Russia were not formed (Marcehti, Roy, 2008). At the same time it should be noted that the authors which from the comparative aspect explore EU trade relations with the Russian Federation using tariff regulation methods (customs duties) and non-tariff measures (see. e. g. Leal-Arcas, 2011) note that this relationship is characterized by certain problematic nature which prevents free trade. This *inter alia* is associated specifically with the application of unilateral trade restrictions, banning the import of individual products⁴ and the application of export duties, which Russia uses to tax certain types of goods (e.g. raw materials) which are exported from Russia to the EU.

¹ INFOLEX.PRAKTIKA. *Teismų apžvalgos, konsultacijos, nutarimai, sprendimai, nutartys* [interactive]. [accessed 2015-02-15]. <<http://www.infolex.lt/praktika/>>

² *Understanding the WTO: The Organization* [interactive]. [accessed 2015-02-15] <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>

³ *Revised EU trade scheme to help developing countries applies on 1 January 2014* [interactive]. European Commission Memo, 2013. [accessed 2015-02-16]. <http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf>

⁴ A hot topic remains the example of the ban imposed by Russian Federation to import food products from EU countries for one year since 2014-08-08, see for example [accessed 2015-02-14] <<http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/>>

Thus, the taxation of the goods imported from Russian Federation to the EU and the Republic of Lithuania from 2012 and onwards in particular, is governed by the WTO agreements on customs value of goods and the determination of rules for establishing of customs origin of goods. The tariff classification of imported goods is also based on HS nomenclature (HS system), as it is defined in the HS Convention, to which EU and the Russian Federation both are the parties. It should be noted that the practical application of the key factors associated with the taxation of imports of goods (the tariff classification, determination of origin and value of the goods) mainly creates the problems related to the correct tariff classification of goods imported from Russia to the EU (9 cases registered during the reporting period), as well as for the determination of customs value of goods (4 cases). Meanwhile, the determination of customs origin of imported goods was not challenged in any of the sample cases. On the other hand, it can also be noted that the Russian Federation's accession to the WTO since 2012 did not reduce the number of disputes (cases) arising, and it may be explained by the fact that many conflicts with customs authorities started in the previous tax periods before reaching the Supreme Administrative Court of Lithuania.

Table 1. The types of customs judicial cases in Lithuania regarding trade with Russia

Years	Cases regarding tariff classification of goods	Cases regarding customs origin of goods	Cases regarding customs value of goods	Other cases regarding breaches of customs clearance procedures
2010	2	-	1	3
2011	-	-	2	8
2012	4	-	1	3
2013	3	-	-	18
2014	-	-	-	3
Total number of cases	9	-	4	35

As can be seen from the table above, quite high number of cases during the reporting period (72 percent, i. e. 35 out of 48 cases) were not related to any of the particular categories described above and accordingly they were generalized as other cases regarding breaches of customs clearance procedures.

This factual and legal situation can be explained by the fact that the Republic of Lithuania has a direct external border with the Russian Federation and thus deals with the problem of smuggling as various goods (tobacco, fuel products and so on.) are illegally transported to the Republic of Lithuania and the EU customs territory from Russia. Accordingly, the majority of these customs cases consisted of proceedings in which conditions for recognition of persons as customs office debtors were analyzed and

questions of their dismissal from the applied economic sanctions (fines, penalties) were raised:

Table 2. Judicial cases in Lithuania related to illegally imported goods from Russia

Years	Cases regarding illegally imported goods to the EU customs territory (smuggling cases)
2010	1
2011	6
2012	2
2013	7
2014	3
Total number of cases regarding illegally imported goods	19 (From the total number of 35 cases regarding breaches of customs clearance procedures)

As the object of this study is the trade operations carried out legally, the smuggling cases involving the application of legal liability for illegal goods brought into the EU, will not be addressed in detail.

Analyzing other cases related to taxation of goods imported to the Republic of Lithuania from the Russian Federation features, as it was already mentioned, special attention should be given to the cases concerning the tariff classification of goods. It should be noted that the legal issues raised in this group of cases can be divided into several categories. In particular, one part of cases are cases regarding the status of conclusions on tariff classification of goods, provided by the national customs authorities of the Republic of Lithuania (the Customs Laboratory), their legal importance and value as an evidence (in judicial and pre-trial proceedings). In these cases (administrative cases A¹⁴³-1891/2013, A¹⁴³-1290/2012¹) the Court took the position that in order to contest a conclusion on the tariff classification of the goods in particular HS position, which was provided by the competent national authorities, the taxpayer must submit a special evidence based on laboratory examination and the use of special knowledge that could refute the validity of the conclusions of the customs authorities. No other evidence related to tariff classification of goods provided by the taxpayer is considered as not relevant and not valid. This practice limits the rights of the taxpayer (importer of the goods) and is

¹ The Supreme Administrative Court of Lithuania, 26 November 2013 ruling of the board of judges in the administrative case UAB “Agerona” v Customs Department under the Ministry of Finance (case No. A¹⁴³-1891/2013); 28 February 2012 ruling of the board of judges in the administrative case UAB “Elevita” v Customs Department under the Ministry of Finance (case No. A¹⁴³-1290/2012);

debatable, since in other cases of tax disputes no types of evidence are considered as having a *prima facie* power¹.

A number of legal issues were related to the application of international law, in particular, the HS Convention and its interpretations (HS Explanatory Notes (HSEs) containing the explanations of tariff classification rules). In this respect, it may be noted that the analysis of practice of the Lithuanian Supreme Administrative Court in cases concerning the application of these legal documents was not consistent and haven't formulated clear precedents defining legal significance and legal status of HSEs. In particular, in the administrative case A⁵⁷⁵-1238/2012² on the question of tariff classification of imported food products to the EU customs territory for and assignment of appropriate customs tariff the Court granted the priority to the EU provisions defining the status of the disputed goods (Commission Regulation No. 948/2009)³. That is, in this case, though the HSEs gave another description of the goods, the Court has not applied the HSEs, but instead, followed the rules defined in the EU law. On the other hand, in another case (administrative case No. A²⁶¹-1408/2010⁴), the Court stated simply that the classification of imported goods must be based on the HSEs and the product definition provided in them. Therefore, it can be stated that this case highlights the problem of national law, that status of HSEs is not explicitly defined. In some cases, the Court finds that it is necessary to follow requirements of HSEs in order to classify goods correctly, but in other situations it recognizes that either way EU law has a priority, clearly not revealing the relationship between these sources of law. The problem of application of HSEs as a source of law is further complicated by the fact that the relevant version of HSEs has not yet been translated into Lithuanian language and is not freely available to the public / taxpayers (there is only access to the customs officers and only in the foreign languages).

Problems of binding sources of law which are applicable in customs matters was further developed in cases concerning the determination of the customs value of goods, imported from Russian Federation (in particular, it should be noted that in administrative case No. A⁴⁴²-709/2013⁵ Lithuanian Supreme Administrative has pointed out that the determination of the customs value of the goods must be directly based on the sources of international law, i. e. WTO agreement on customs valuation rules, which, as the Court has declared, is an integral part of the Lithuanian legal system. According to the practice of the Court, which was formulated in this case, other international sources of law (such as the documents and recommendations provided by World Customs

¹ *Lietuvos vyriausiojo administracinio teismo praktikos, taikant mokesčių administravimą reglamentuojančias teisės normas, apibendrinimas, II dalis*, 82.1.3 ir 85 punktai [interactive]. Vilnius: Lietuvos vyriausiasis administracinis teismas, 2012. <www.lvat.lt/download/1095/22_apibendrinimas.pdf> [accessed 2015-02-17];

² The Supreme Administrative Court of Lithuania, 3 February 2012 ruling of the board of judges in the administrative case UAB “Juraila” v Customs Department under the Ministry of Finance (case No. A⁵⁷⁵-1238/2012)

³ OJ L 287

⁴ The Supreme Administrative Court of Lithuania, 4 October 2010 ruling of the board of judges in the administrative case UAB “Energetikos tiekimo bazė” v Customs Department under the Ministry of Finance (case No. A²⁶¹-1408/2010)

⁵ The Supreme Administrative Court of Lithuania, 5 March 2013 ruling of the board of judges in the administrative case UAB “Fortera” v Customs Department under the Ministry of Finance (case No. A⁴⁴²-709/2013)

Organization (WCO)) have a binding legal effect in customs cases, even though they doesn't have an official status of international treaties. For example, WCO Guidelines for National assessment database as a risk assessment tool, should be taken into account in settling customs disputes regarding valuation of goods.

To summarize the foregoing, it can be stated that legal problems, which were related to the taxation of imported goods from Russia during the reporting period was characterized by the problems of tariff classification of goods. The main factor influencing international trade remained not properly regulated status of conclusions on classification of goods provided by national customs authorities (Customs Laboratory) and uncertain status of HSEs in the national law system.

Problems of customs legal regulation in international trade between the Lithuanian Republic and China: analysis of judicial practice

Bilateral economic relations between EU (*inter alia*, the Republic of Lithuania) and China are based on the EC - China Trade and Cooperation Agreement (signed in 1985). This agreement does not constitute a preferential trade regime and doesn't set preferential customs duties. Therefore, as a members of the WTO EU and China carries out bilateral trade in accordance with the Most Favoured Nation (MFN) principle which means that countries cannot normally discriminate between their trading partners. During the reporting period (yrs. 2010 – 2014) the EU has also applied to China unilateral preferences (preferential customs duties) for some products using the Generalised System of Preferences (GSP; however these incentives was abolished from 1 January, 2015¹). The GSP system provides that import duties from developing countries are reduced or removed, but the benefits do not apply to certain highly competitive imports of goods (most of goods imported from China fell into this category).

As we note in the case of trade with China, the main problem of legal regulation of customs duties which was raised in court disputes in Lithuania, as the EU Member State, was issues related to tariff classification of goods (same trend has been observed in the analysis of cases on trade with Russia) (see table 3).

In these cases, the Lithuanian Supreme Administrative Court has repeatedly drawn attention to the fact that the classification of goods must be based essentially only on official conclusions of national authorities, i. e. Customs Laboratory². Moreover, in these cases, the Court emphasized the need to rely on the provisions (interpretations) of HSEs for the tariff classification of goods, while in other cases (e.g. in cases concerning the taxation of trade with Russia, see administrative case No. A²⁶¹-1408/2010) it was emphasized that priority in this case must be granted to the EU legislation.

¹ *Revised EU trade scheme to help developing countries applies on 1 January 2014* [interactive]. European Commission Memo, 2013. [accessed 2015-02-16]. <http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf>

² See administrative cases No. A¹⁴³-71/2013 and A¹⁴³-925/2010

Table 3. The types of customs judicial cases in Lithuania regarding trade with China

Years	Cases regarding tariff classification of goods	Cases regarding customs origin of goods	Cases regarding customs value of goods	Other case regarding breaches of customs clearance procedures
2010	2	-	3	2
2011	-	1	-	1
2012	2	-	-	-
2013	1	-	-	1
2014	-	2	-	1
Total number of cases	5	3	3	5

Many disputes during the reporting period were related to the determination of customs origin and customs valuation. From the analysis of the cases related to the determination of the customs value, it can be observed that one of the main questions in these cases was the legal status of certain sources of law. For example, in the administrative case No. A⁵⁷⁵-1340/2010¹ Supreme Administrative Court of Lithuania has made it clear that the determination of the customs value of imported goods can not only rely on the WTO agreements and international treaties (conventions), but also must be based on the decisions and recommendations taken by the WTO, for example, the decisions of its committees (e. g. Technical Committee for Customs Valuation) which formulated the rules for determining the customs value of goods. It is necessary to draw attention to the fact that a similar conclusion on application of legal acts which belong to the category of „soft-law" category has been formulated in the case No. A⁴⁴²-709/2013 (on the customs valuation of goods imported from Russia). In these cases the Court made a conclusion that both the WTO and WCO „soft-law“ documents - the guidelines, recommendations and decisions of these institutions – shall be defined as the source of law in disputes relating to the determination of the customs value.

As a separate category of cases involving imports of goods from China to the Republic of Lithuania, it is necessary to mention the cases concerning the customs origin of goods, i. e. disputes, which addressed the question whether the imported product can be recognized as a subject to China’s customs origin, and therefore it is a subject to the relevant import customs duty rate. Usually this kind of disputes were raised in cases of anti-dumping duties. It should be emphasized that EU has applied anti-dumping duties to the certain categories of goods imported from China (e.g. silicon products). In one of the cases,² the taxpayer argued that these products have been processed in other countries

¹ The Supreme Administrative Court of Lithuania, 27 October 2010 ruling of the board of judges in the administrative case UAB “Autolėva” v Customs Department under the Ministry of Finance (case No. A⁵⁷⁵-1340/2010)

² The Supreme Administrative Court of Lithuania, 30 April 2014 ruling of the board of judges in the administrative case UAB “Žalvaris” v Customs Department under the Ministry of Finance (case No. A²⁶¹-144/2014)

(not in China) and have gained their customs origin. In accordance with the EU Customs Code (Article 24) the processing (manufacturing) of goods provide them with the customs origin of certain state were this processing (manufacturing) was carried out if the manufactured goods were provided with specific properties and composition, which they did not have prior to their processing. However, the Supreme Administrative Court of Lithuania, in interpreting the legality of anti-dumping duty hereby imposed on imports of silicon products, acknowledged that the duty to prove the following features must be imposed on the national customs authorities. This means that these institutions must prove the legality of the anti-dumping duties, which are applicable and therefore prove the connection between the origin of the imported goods and their processing in another country. Meanwhile, the taxpayer is only sufficient to prove the mere existence of business operations, which are useful to him. Thus, the Court defended the rights and interests of taxpayers (importers of goods) and substantially restricted the conditions for the application of anti-dumping duty on goods of Chinese origin as well as noted that the customs authorities cannot hinder international trade formally collecting evidence on the customs origin of goods.

The Supreme Administrative Court of Lithuania in other cases, such as case No. A⁴⁴⁴-2863/2011¹ also questioned legitimacy of anti-dumping duties on goods of Chinese customs origin. In this case, the taxpayer raised the issue of the protection of its legitimate expectations and the breach of the principle of legal certainty in a particular situation in which anti-dumping duty rate for the imported goods has been raised dozens of times (compared to the rate of anti-dumping duty applied to the goods at the time of their acquisitions). The taxpayer argued that he could not foresee these changes and prepare for them (there was no period (*vacatio legis*) to prepare for these changes of customs duties). The Court, in assessing these circumstances, drew attention to the fact that in the same year (2008) when the goods were acquired in China, the European Commission initiated an anti-dumping investigation. This fact allowed the operators (importers) to assess the risk that the anti-dumping duty will be established and will enter into force. Supreme Administrative Court of Lithuania noted that a prudent and diligent taxpayer have a duty to assess the risk of changes in import taxes and to inquire in advance for the information about applicable tariff measures. Thus, it can be stated that the increases and introductions of anti-dumping customs duties are recognized by the Court as legal may lead to the emergence of additional tax obligations, if the person concerned had a reasonable opportunity to assess the risks of changes in customs duties.

In other individual cases on the taxation of goods which were imported from China and determining of their customs origin the Supreme Administrative Court of Lithuania has addressed the issue what kind of evidence (documents) issued by People's Republic of China can be used to determine the origin of goods. The Court has formulated a rule² that the origin of the goods is proved by all the official state documents issued in relevant

¹ The Supreme Administrative Court of Lithuania, 11 July 2011 ruling of the board of judges in the administrative case UAB “Irvista” v Customs Department under the Ministry of Finance (case No. A⁴⁴⁴-2863/2011)

² The Supreme Administrative Court of Lithuania, 20 January 2011 ruling of the board of judges in the administrative case UAB “Urvilavila” v Customs Department under the Ministry of Finance (case No. A⁴⁴²-220/2011)

state, no matter whether it was issued by the central or regional authorities. In this particular case it has been disputed whether the document provided by regional authority of People's Republic of China (Tianjin Entry - Exit Inspection and Quarantine Bureau), has a status of official evidence as a primary inquiry was sent to the general customs authorities of the People's Republic of China. However, the Court made it clear that the mere fact that the response was prepared by any of official authorities in the People's Republic of China (no matter if it was regional or central authorities) is sufficient to recognize it as an evidence proving a customs origin of goods¹.

Summarizing this case law during the reporting period (yrs. 2010-2014), it can be stated that the development of international trade with China was hindered by some legal problems (obstacles): firstly, properly not adjusted status of conclusions of national authorities – Customs Laboratory – on the tariff classification of goods, secondly, sudden changes in customs regulations related to the application of anti-dumping customs duties (for individual products, e.g. silicon) and incorrect identification of the customs origin of goods when the application of these rules was limited only to gathering formal evidence by customs authorities, thus creating an obstacles to the international trade.

Conclusions

For more than ten years (since 2004) the Republic of Lithuania is a member of EU and is realizing its economic and trade relations with other foreign countries, as well as regulating customs duties according to the requirements of the EU common foreign trade policy (Common Commercial Policy). After accession to the EU, more than 20 percent of Lithuanian foreign trade consisted of trade transactions with the Russian Federation, which, despite of some fluctuations, had an overall trend to grow (increase). In addition, from 2009 to 2014 Lithuania consistently increased its foreign trade (both imports and exports) with the other country of the rapidly growing economic BRICS region of the world, i.e. China.

On the other hand, the analysis on practical problems of the foreign trade with these particular countries which have arisen in Lithuania since 2010 (analysis of the judicial practice of the Supreme Administrative Court of Lithuania), justifies that most legal problems of customs regulation existed in these particular areas: 1) the tariff classification of imported goods (absence of clear requirements for the evidence provided to support appropriate classification of goods, since the decisions of courts are solely based on the conclusions provided by the national authorities (Customs Laboratory) and the taxpayers does not have the possibility to provide alternative evidence); 2) determining of the customs origin of goods and proper application of anti-dumping customs duties (while regulating trade with China); 3) importance of separate individual sources of law, which could be binding for the settlement of disputes in the field of

¹ See also administrative case No. A⁵⁷⁵-1340/10

customs regulations, is clearly not defined (e.g. problem of legal importance and application of documents accepted by World Customs Organization, such as HSEs).

These customs duties application problems should be solved in the future, in order to develop international trade with the referred BRICS countries and to create the foreign trade regulation system, which ensures the status of the EU and Lithuania as an attractive partner of foreign trade. An analysis leads to the conclusion that recommendations for improving the current legal framework in Lithuania would be the following. Firstly, the national legislation of the Republic of Lithuania should include official certification procedures for the independent laboratories (non-governmental institutions / agencies), authorized to carry out the researches for the purpose of the classification of imported goods. It must also include the provisions, that research results of such institutions are recognized as the official documents, which has a probative value in the tax dispute procedures with the customs authorities. Secondly, in accordance with the relevant case law, the burden of proof to justify the customs origin of the goods, in cases, when non-preferential (anti-dumping) customs duties are applied, is attributable to the customs authorities. This principle should be directly and clearly reflected and established in the Lithuanian Law on Customs defining the powers of national customs authorities, which are performing checks on the origin of goods (Article 61 of the Law). Thirdly, since the uniform international interpretations used for tariff classification of goods (i.e. Harmonized System Explanatory Notes/HSEs) are recognized and regarded as a source of law in the national judicial practice, they must be officially translated into the Lithuanian language and released to the public, in order to make them freely available to the taxpayers, participating in international trade transactions.

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