# CUSTOMS CLEARANCE IN THE MULTILATERAL TRADING SYSTEM AND ASEAN*

*Jeremy I. Gatdula***

## I. INTRODUCTION

The cumbersome and confusing procedures of clearing goods from customs jurisdictions have impeded the smooth cross-border flow of goods for a long time. This has resulted in undue time delays and costs for producers, traders, and consumers alike. Documentation and bureaucratic procedures may differ from country to country, and are sometimes aggravated by redundancies and a lack of coordination between concerned government agencies.

The availability of information technology apparently had minimal impact, as only a handful of customs administrations have fully set in place a risk-free digital interface devoid of human intervention that expedites the screening and release of products. All these has brought about inefficiencies and tedious requirements that discourage enterprises from trading, thus limiting the acquisition of economic trade gains despite the tariff reductions that have already been realized in the past few years.

Moreover, the recent spate of terrorist activities around the world has compelled the customs administrations of several countries to tighten security requirements by installing precautionary bureaucratic layers to ensure that contraband or terrorist paraphernalia do not infiltrate their borders. Although meant to serve a critical purpose, these measures have nonetheless posed as trade barriers to legitimate traders and manufacturers.

---

* *Cite as* Jeremy Gatdula, *Customs Clearance in the Multilateral Trading System and ASEAN*, 79 PHIL. L.J. 280, (page cited) (2004).

** Philippine Trading Leader, Worldtrade Management Services, PriceWaterhouseCoopers. Specializes in international trade issues, particularly those relating to the WTO Agreements, free trade agreements, and trade remedies. B.Sc. Management, San Beda (1991). Ll.B., Arellano University (1995). Ll.Mi, Cambridge (2000). Legal counsel, WTO/AFTA/APEC Advisory Commission, Office of the President (2000-2002). Advisor to the Philippine delegation to the WTO Cancun Ministerial Conference (2003). Chair, Committee on Tariffs, Philippine Chamber of Commerce and Industry (2004).

The wastage of time and resources that result from these manifestations of bureaucratic red tape are significant. Oftentimes, the duties paid for by a company are already surpassed by administrative costs of just getting the goods out of customs jurisdiction.[1] This is clearly indicative of the fact that red tape poses more of a hindrance and discouragement for enterprises to conduct trade than tariff barriers (which have gone down dramatically in the past decades).

The redundancies and unwieldy documentation procedures have been well noted by the United Nations Conference on Trade and Development (UNCTAD), which has been quoted as saying:

> [T]he average customs transaction involves 20-30 different parties, 40 documents, 200 data elements (30 of which are repeated at least 30 times) and the re-keying of 60-70% of all data at least once.[2]

Notably, reference could also be made to a study by the Asia-Pacific Economic Cooperation (APEC) which stated that if only trade facilitation programs are properly implemented, approximate aggregate gains of 0.26 percent of real gross domestic product (GDP) and import price savings of 1-2% would be realized among developing members of APEC.[3]

Cognizant of these realities, governments and companies the world over have since begun moving towards establishing an international framework for uniform and streamlined customs procedures. The purpose of this paper is to provide the reader with a brief survey of the initiatives currently being undertaken at the multilateral and regional levels to reduce customs clearance times, and to establish a universal set of standards and best practices in simplifying customs procedures.

## A. WORLD TRADE ORGANIZATION

Significantly, the issue of trade facilitation is already within the scope of the World Trade Organization (WTO), as seen from the provisions of the *Agreements on Customs Valuation, Pre-shipment Inspection, Rules of Origin, Import*

---

[1] World Trade Organization (hereinafter "WTO"), Cancun Ministerial 2003 Briefing Notes: Trade Facilitation, ¶ 1-5 *at* http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief10_e.htm (Nov. 2, 2004).

[2] *Id.*, ¶ 2.

[3] *Id.*.

*Licensing, Sanitary and Phytosanitary Measures, Technical Barriers to Trade*, and the *General Agreement on Tariffs and Trade* (GATT).[4]

More particularly, the commitment of all WTO member states to streamline procedures, documentation and customs are formalized under article VIII.1 of the GATT, which states that:

> (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
>
> (b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).
>
> (c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

In adherence to the above statements, several multilateral initiatives have been formed, all for the purpose of simplifying and harmonizing customs formalities. Two of such, the *Kyoto Convention* and the *International Chambers of Commerce Customs Guidelines*, will be discussed later on.

### B. KYOTO CONVENTION

In 1974, concrete multilateral steps in the direction of fulfilling the above described objectives were made in Tokyo, Japan when the *International Convention for the Simplification and Harmonization of Customs Procedures* (otherwise known as the Kyoto Convention) was drafted and ratified by a number of countries. The text of the said Convention was revised later in 2000 to incorporate changes that would make it more adaptable to development in information and communications technologies (ICT). Generally, the Convention was envisaged to form the basis for a customs model that adheres to the standards of predictability, transparency, legal processes, the use of information technology and modern business

[4] Multilateral Agreements in Trade in Goods (Annex 1A, Marrakesh Agreement Establishing the World Trade Organization), Apr. 15, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/06-gatt.doc.

techniques (namely, risk management, pre-arrival information, post-entry audit, etc.).[5] The revised Convention heavily provides for the use of electronic means to declare or clear importations, 24/7 customs hours of operations, and the implementation of appropriate risk management procedures (such as the selectivity screen). As of the middle of 2002, ten countries have already acceded to the revised Convention.

The Kyoto Convention specifies standards and recommendations which shall serve as guiding principles to which contacting states should align their legislation and administrative policies. As for the section on customs clearance, the Kyoto Convention enumerates seven focus areas for simplification and harmonization, of which the following five are most pertinent to this paper: accomplishment of the goods declaration, special procedures for authorized persons, conduct of physical or documentary examinations, commission of errors, and the release of the goods.[6] In each focus area are detailed sets of best practices which have been agreed upon as the proper way forward in eliminating red tape and creating an environment more conducive to international trade.

### C. ICC GUIDELINES

The International Chambers of Commerce (ICC) has, in like manner, articulated a number of detailed and methodical guidelines pertinent to the ideal functioning of modern customs administrations. The ICC guidelines were first published in 1997 but have since been revised in 2003.

As far as the expedition of clearance times is concerned, the ICC guidelines draw heavily on the Kyoto Convention (which it discusses in Guideline 7), probing deeper into the finer details of inbound, transit, and outbound clearance. Akin to the Kyoto Convention, it stresses the application of modern information technology and electronic facilities. Notable guidelines that directly address the issue of streamlining customs procedures and improving clearance time are particularly those on (1) selective examination and automated risk management, (2) non-intrusive inspection, and (3) post-entry procedures.

---

[5] World Customs Organization, *Implementing the revised WCO Kyoto Convention, at* http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/kyoto/kyoto revised uk.pdf (Nov. 2, 2004).

[6] The remaining two pertain to responsibilities of a declarant and abandonment of goods.

### D. ASEAN

Although not all ASEAN countries have acceded to the Kyoto Convention of 2000, it is important to consider that ASEAN member states (in pursuit of the 2020 Vision) signed the *ASEAN Agreement on Customs* in March 1997.[7] Article 6(2) stipulates that:

> Simplification and harmonisation of Customs procedures in ASEAN shall conform with the standards and recommended practices in the Kyoto Convention, as amended, under the auspices of the Customs Cooperation Council (CCC) or WCO.

This in effect implies that ASEAN member states have likewise issued their commitment to abide by the provisions and standards prescribed by the Kyoto Convention, with particular emphasis on those pertaining to customs clearance. The end objective for ASEAN therefore is to fully comply with the recommended best practices in the Kyoto Convention.

ASEAN has, in connection with the above, implemented a number of trade facilitation initiatives to lessen customs clearance times and facilitate documentation. In 1997, ASEAN member states signed the *ASEAN Customs Vision 2020* and it is worth noting that the first three technical elements specified therein all pertain to trade facilitation:

> FURTHER AGREED that to realize our Vision we shall collectively develop administrative and technical areas on customs so as to strengthen our administrations on a regional basis. In each of these areas, we shall initiate the following elements with their corresponding objectives:
>
> *Procedures for Goods in Transit and Temporary Admission:* to simplify and harmonise these procedures and requirements on a regional basis;
>
> i. *Automation*: to ensure maximum use of state-of-the-art information technology to assist in the efficient performance of all international trade and customs functions and activities. Such systems should comply with UNEDIFACT to enhance linkage;
>
> ii. *Cargo Processing:* to promote facilitation, simplicity and uniformity for the processing of cargo. Targets will be formulated for the time release of goods, benchmarks and performance standards to be reviewed and met continuously. To develop activities which account for the assurance that only those procedures that

[7] Mar. 1, 1997, *available at* http://www.aseansec.org/1905.htm.

> contribute to effective implementation of customs control is utilised; to separate the process of goods release from process of revenue collection, accounting and statistical reporting to expedite customs clearance; to establish pre-arrival processing of transactions; to use advanced risk assessment, profiling and selectivity techniques to identify risk consignments for physical examination.[8]

The relevant focus areas for customs clearance as stated in the Kyoto Convention are discussed succinctly below, with some brief references to the present state of compliance that ASEAN has thus far attained where applicable.

## II. CUSTOMS CLEARANCE

This section refers to specific issues encountered throughout the general process of importation, the best practices recommended by multilateral convention, and the state of play within ASEAN, with special emphasis on the case of the Philippines.

### A. LODGMENT OF GOODS DECLARATION

As regards the lodgment of goods declaration, GATT article VIII.1.c expresses the need for documentation processes to be toned down to its essentials:

> (*c*) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.

The WTO still recognizes however that there are still certain redundancies to be ideally addressed through the more extensive usage of electronic documentation, which apparently is still far short of optimal utilization. According to a discussion on trade facilitation by the WTO:

> Documentation requirements often lack transparency and are vastly duplicative in many places, a problem often compounded by a lack of cooperation between traders and official agencies. Despite advances

---

[8] ASEAN Customs Vision 2020: Customs for Business *at* http://www.aseansec.org/economic/customs/custmain.htm (Nov. 2, 2004).

in information technology, automatic data submission is still not commonplace.[9]

The Kyoto Convention specifically prescribes a uniform set of forms[10] that the declarant should fill out the United Nations layout key (for manual declarations) and the Customs Cooperation Council recommendations on information technology (for electronic declarations).[11] It even allows for some latitude, giving the declarant the option to lodge incomplete entries for as long as certain conditions are met.

The Kyoto Convention requires that only a minimal amount of documentation and carbon copies should accompany the original goods declaration when it is lodged.[12] For the sake of expedience, Customs should, under unilaterally set conditions, still allow goods declarations with incomplete supporting documents to be lodged while setting a grace period within which the declarant must complete the submissions.[13] Translations of documents, on the other hand, will only be required if the information is explicitly required for lodgment, registration and verification.

In addition, the Kyoto Convention also requires that lodgments of the goods declaration be permitted in any designated Customs offices within hours expressly assigned by Customs.[14] The declarant should be allowed to request for time extensions in lodging the goods declaration, which if Customs deems reasonable, could be granted.

---

[9] WTO, Doha WTO Ministerial 2001 Briefing Notes: Trade Facilitation *at* http://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief15_e.htm (Nov. 2, 2004).

[10] *See* Chapter 3.11 of the Revised Kyoto Convention General Annex (hereinafter "Kyoto Convention Annex") *at* http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/Kyoto_New/Content/content.html (Nov. 2, 2004).

[11] The Kyoto Convention considers this mode of lodgement mandatory as Chapter 3.21 states that "The Customs shall permit the lodging of the Goods declaration by electronic means."

[12] This is similarly mandatory under Chapter 3.18.

[13] According to Chapter 3.16, "In support of the Goods declaration the Customs shall require only those documents necessary to permit control of the operation and to ensure that all requirements relating to the application of Customs law have been complied with."

[14] The prescribed time, according to Chapter 3.23 shall be "sufficient to enable the declarant to complete the Goods declaration and to obtain the supporting documents required."

The Kyoto Convention states likewise that certain amendments may be allowed to be incorporated into a goods declaration that has already been logged, for as long as a request is received before the declaration is checked and, as the case warrants, before an examination of the goods is conducted.[15] However, Customs may still practice some latitude to allow amendments to the goods declaration even if checks and examinations have commenced for reasons they deem valid.

It is also provided for in the Kyoto Convention that the checking of the goods declaration should begin immediately or as soon as possible after its registration. In checking the goods declaration, the Kyoto Convention advises customs administrations to do so only in so far as to make sure that customs laws are complied with.

On the point of simplifying documentation through electronic processes, an allusion can be made to case of the Philippines, in particular as a reference point for ASEAN. Notably, the country's electronic facilities were first installed in 1995, and have not been upgraded ever since. According to the World Economic Forum (WEF), which chose the Philippines in 2002 as a pilot country to stage the Customs Modernization program of its Trade Enhancement Initiative, Philippine customs was characterized by "fragmented processes and unreliable technology."[16]

### B. SPECIAL PROCEDURES FOR QUALIFIED TRADERS

The WTO has yet to directly make formal mention of preferential and expedited clearance systems, however it must be noted that the said practice is an innovation that works well within the parameters set by the abovequoted article VIII.1.c of the GATT.

The Kyoto Convention recommends that certain trading entities who meet criteria set by Customs, those with impeccable compliance records, and those with adequate records management systems be authorized or granted expedited clearance privileges such as: clearance upon provision of minimum identification information, clearance of goods even at

[15] *See* Kyoto Convention Annex, chap. 3.27.

[16] WORLD ECONOMIC FORUM TRADE ENHANCEMENT INITIATIVE, REPUBLIC OF THE PHILIPPINES: CUSTOMS MODERNIZATION BLUEPRINT PHASE ONE, FINAL REPORT 17 (Apr. 2003).

the declarant's premises, and allowing a single goods declaration to cover all imports or exports for a single declarant.[17]

Accordingly, one of the more notable achievements in ASEAN countries is the implementation of expedited clearance systems for duly accredited importers, which have significantly reduced clearance times from several days in the past down to just a matter of hours. This system conforms with par. 32, chapter 3 of the Kyoto Convention which provides for special clearance procedures for duly authorized personnel. Special eligibility criteria are set by Customs, and qualified companies will be allowed to clear their goods with only the most minimal of customs formalities. These have been adopted and implemented as the so-called "gold card system" in Indonesia, the "Super Green Lane" in the Philippines, and the "Single Window" in Singapore. These systems and criteria, however, are still continuously being reengineered and remodeled, based on experiences. In the Philippines, just recently, the Super Green Lane fees were significantly reduced[18] to encourage broader participation and more extensive usage.

Similar facilities have been requested by air express industries in the region for which the perks of pre-clearance, consolidations of low value consignment, and a 24/7 customs operation are owed to the unique nature and demands of their businesses. Members of the APEC Sub-Committee on Customs Clearance Procedure (APEC-SCCP) have agreed to adopt seven specific principles for streamlining customs procedures in the air express industry namely:

> (1) establish a *de minimis* value;
> (2) implement informal/consolidated clearance for low-value shipments;
> (3) adopt risk assessment and management;
> (4) separate the release for delivery from final submission of goods declaration and payment of duties;
> (5) establish a bond or debit system to collect duty payment;
> (6) maintain Customs hour of operations to suit industry needs; and
> (7) categorization of shipments for expedited clearance and release.[19]

---

[17] *See* Kyoto Convention Annex, chap. 3.32.

[18] Customs Adm. Order No. 6-2003.

[19] Hoe Wah Cheng, *The Role of Contributions of the Express Industry*, (Dec. 13-14, 2001) *at* http://www.us-asean.org/ctc/thai_customs_workshop/fedex.ppt. The paper was

The Philippines accordingly, has implemented CMO 18-2002 and 37-2002, which address the above concerns for the air express industry.

### C. PHYSICAL EXAMINATION

While an *Agreement in Trade Facilitation* may be underway under the WTO, it is worthy to note that an *Agreement on Pre-shipment Inspection* (PSI) has already been promulgated before, which already emphasized the necessity of avoiding delays to streamline clearance times and improve overall efficiency in conducting physical examinations (at least prior to shipment). According to a summary of the Agreement on PSI:

> The agreement recognizes that GATT principles and obligations apply to the activities of preshipment inspection agencies mandated by governments. The obligations placed on PSI-user governments include non-discrimination, transparency, protection of confidential business information, avoidance of unreasonable delay, the use of specific guidelines for conducting price verification and the avoidance of conflicts of interest by the PSI agencies.[20]

The essence of this statement is carried over to the Kyoto Agreement, which applies it more observably on physical examinations upon importation. If the case merits the physical examination of the goods, the Kyoto Convention requires that the examination be conducted as soon as possible after the registration of the goods declaration. In this connection, shipments of live animals, perishable goods, and other items deemed urgent by Customs, according to the Kyoto Convention, should be prioritized in scheduling examinations. If experts are called in to conduct inspections as well, such inspections must be coordinated and enforced simultaneously with that of Customs. A declarant's request to be present or to be represented at the examination of goods should be granted, unless exceptional circumstances are determined. Customs may also, if it sees fit, oblige the declarant to appear or be represented during the examination to provide any assistance to meet the objectives of the examination.[21]

---

presented at the "International Customs Best Practices in Transition to E-Commerce," held in Bangkok, Thailand.

[20] WTO, Legal Texts: the WTO agreements ("Agreement on Preshipment Inspection"), *at* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#g1Agreement (last visited Nov. 2, 2004).

[21] *See* Kyoto Convention Annex, chap. 3.33 to 37.

Certain customs administrations in ASEAN may not be privileged enough to have an extensive amount of technical expertise to validly determine the proper classification and valuation of imported products. To remedy this, such customs administrations have, in some cases, sought the participation of external experts to conduct inspections and provide an expert's recommendation pertinent to valuation and classification. Some have perceived this as added bureaucracy, most especially if the reports of the experts are deemed as a requisite prior to the clearing of goods.

In the case of the Philippines, a memorandum of understanding (MOU) is currently in effect forging a partnership between Customs and the Philippine Chamber of Commerce and Industry (PCCI). Under the said MOU, which was formalized by a memorandum order,[22] duly accredited industry commodity experts will provide technical assistance and expertise to Customs personnel by issuing recommendations on matters of quantity, quality, classification, and valuation. Still, conformity with the Kyoto Convention is generally maintained with this setup because the guidelines require the experts to obtain samples under the supervision of the relevant Customs personnel (during examinations) and issue their recommendations within a few hours at most.

The ICC recommends the application of automated risk management and selectivity systems, which keep comprehensive profiles of all importers, targets high risk shipments, and picks out containers for physical and documentary examinations.

> In other countries Customs rely on the deterrent effects of thorough examinations on the basis of random choices, sometimes as a standard practice, sometimes as an interim expedient when moving from comprehensive 'inspection' to selectivity based on automated risk-management.[23]

These systems have already been adopted to a certain extent within ASEAN. A Green Lane System for Common Effective Preferential Tariff (CEPT) products was agreed upon by ASEAN member states in 1996, which was meant to accord preferential clearance procedures for all ASEAN Free Trade Area (AFTA)-originating products. Implementation of the Green Lane

---

[22] Customs Adm. Order No. 9-1999.

[23] International Chamber of Commerce (hereinafter "ICC"), Explanatory Notes, ("Guideline 14"), *at* http://www.iccwbo.org/home/statements_rules/statements/2003/introduction.asp#1 (last visited Nov. 2, 2004).

has been varied, however, but common guidelines are complied with, as the ASEAN Secretariat states:

> At present, the Green Lane systems of ASEAN member Countries differ. However, all these systems have the following common elements:
>
> (a) it involves random checking/examination of CEPT products; and/or
>
> (b) the creation of a special lane/counter for consignments of CEPT products.[24]

In the case of the Philippines, a selectivity screen system has been implemented that sorts out importations and relegates them to either of three lanes: Red, Yellow, and Green. High-risk importations which were hit by the selectivity screen are relegated to the Red Lane for physical examinations. Medium-risk shipments are coursed through the Yellow lane, which would necessitate documentary inspections. Lastly, low-risk shipments are routed to the Green Lane where only the minimal customs formalities are performed prior to clearance.

The non-intrusive inspections referred to earlier are means employed to double-check the contents of a pallet or container assuredly and at the least amount of time without disturbing the contents of the shipment. Conducting such inspections would require the assistance of heavy-duty high-tech equipment and highly trained personnel and canines.

> Where inspection of the consignment itself is eventually deemed necessary, it is generally beneficial if this can be achieved by x-ray, sniffer dogs or other methods that have no damaging effects on the goods, packing or means of transport.[25]

Again, since some Customs administrations in the ASEAN region are not equipped with X-ray machines and other sophisticated detector devices, inspections and physical examinations in some parts remain rather intrusive. However, negotiations for grant and loan packages to finance such are in the pipeline for individual ASEAN governments.

---

[24] Ass'n of Southeast Asian Nations (hereinafter "ASEAN"), *Expediting Customs Clearance under AFTA: The Green Lane System for CEPT Products*, *at* http://www.aseansec.org/10095.htm (last visited Nov. 2, 2004).

[25] ICC, *supra* note 23 ("Guideline 17").

### D. SAMPLING

The WTO has no direct reference as to how sampling must be conducted, although a reading of the abovementioned article VIII.1.c of the GATT, which commits all contracting parties to simplify their procedures and clearance times, minimal sampling, and transparency in doing so are well provided for in the latter's provisions.

The Kyoto Convention, further expounding on article VIII of the GATT, limits the practice of sampling solely to instances deemed necessary by Customs to determine the tariff classification and/or the value of the declared goods, or to apply the relevant provisions of national laws. Moreover, samples taken of the shipment should be as small as possible, and only sufficient enough for the tests and examinations to continue.[26]

This problem may be absent or less frequent in the more developed ASEAN member states. However, in the less developed ones, it has been reported that the acquisition of samples from containers are often besmirched with incidences of subtle looting – in spite of customs regulations forbidding such. People unauthorized to witness the inspection are said to participate in the activity to procure "samples" in unreasonable quantities ostensibly too much for testing.

### E. ERRORS

On the matter of sanctions to be imposed on minor errors and discrepancies as a shipment and its accompanying documents undergo customs formalities, GATT article VIII.3 states that:

> No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.

The abovequoted is duly fleshed out in the Kyoto Convention. If errors or discrepancies in the particulars of the declaration are spotted, the Kyoto Convention makes it clear that punitive penalties should only be reserved for occasions where fraudulent intent and gross negligence has been determined. For errors that are clearly unintentional, some tolerance

[26] *See* Kyoto Convention Annex, chap. 3.38.

must be practiced by Customs, which may impose sanctions only for purposes of discouraging the repetition of such errors.[27]

Similarly, the ICC Guidelines echo the above and recommends that errors not committed in bad faith be tolerated and dealt with reasonably. Guideline No. 19 specifically states that:

> In most legal systems he [trader] has to use due diligence in ensuring that this is as accurate as possible, but, where he takes on, for general convenience, a quasi-agency role by making a declaration entry, most customs, while requiring payment of the relevant duty and taxes, in the event of the principal's default, will relieve a carrier, acting, in this way, in good faith, from penalties levied for willful misstatements.[28]

In ASEAN (and for Vietnam in particular), the said Guidelines have been likewise taken up extensively, and efforts are continuing to strike that balance of discipline and correction while not harming the flow of trade. According to a research paper submitted by Vietnam during an ASEAN Customs reform forum:

> Such an approach requires the continued development of a culture within GDC [General Department of Customs] which seeks to achieve compliance through co-operation and understanding rather than simply to penalise all errors regardless of their intent. This does not mean that smuggling or deliberate acts of fraud should not be sought out or punished. As changes in relationships develop the legitimate trade will come to be less confrontational in its approach to customs compliance and more willing to assist in identifying those in their community who are determined to flout the law.[29]

### F. RELEASE OF GOODS

Again, this particular section needs to be read in accordance with GATT article VIII.1.c, which provides for a simplification of customs formalities and procedures. Implicitly, the said article calls for an expedited clearance of goods.

The Kyoto Convention follows this lead and particularly states that the goods shall be immediately released once Customs makes a final

---

[27] *See* Kyoto Convention Annex, chap. 3.39.

[28] ICC, *supra* note 23 ("Guideline 3").

[29] BUREAU OF THE NATIONAL COMMITTEE FOR ASEAN, UNDP-FUNDED RESEARCH REPORT NO. 6 VIE/95/015, CUSTOMS REFORM AND ASEAN (Nov. 1997), *at* http://www.undp.org.vn/projects/vie95015/inter/intrep6.rtf.

determination that no offense has been found, all documentation requirements have been completed, all permits have been acquired, and any duties and taxes have been paid for. If samples are taken for expert advice and testing, the goods must be released before the results. This is so for as long as the security checks are in place to ensure the collection of any additional assessments.[30]

If an offense is indeed detected, the Kyoto Convention holds that goods should be cleared even before administrative and legal proceedings are completed, provided that the assessed duties and taxes are paid for, and none of the goods are the subject of confiscation or forfeiture or to be used as evidence.

In conformity with the above, the Philippines has fine-tuned its administrative policies[31] that enable importers to tentatively release their shipments under cash bonds, amidst contestations, and pending test results. The procedure is simplistically described as follows:

> In case of an appropriate protest (VCRC) case where the importer refuses to pay the new applicable rates, the shipment may qualify for tentative release upon payment of the taxes and duties previously declared and posting of a cash bond to cover the tariff deferential. BOC noted, however, that the tentative release must be accompanied by a clearance from the Customs Commissioner. The district collector will be responsible for the processing of tentative release papers.[32]

### G. POST-CLEARANCE AUDIT

The WTO does not specifically make mention of Post Clearance Audit. However, the said practice is again well within the bounds of article VIII.1.c of the GATT. Thus, any measure that would entail moving the jurisdiction of Customs beyond the ports and into the very offices of the companies engaged in trade to verify their records, for the end purpose of facilitating the clearance of cargo, still falls within the above commitment of contracting parties.

The ICC operationalizes that abovementioned provision and specifies certain criteria which Customs administrations may use to discern

---

[30] *See* Kyoto Convention Annex, chap. 3.40-3.43.

[31] *See* Rep. Act No. 1937, § 2313 (1957).

[32] Portcalls, *Industry News: BOC issues rules on import duty modification*, Mar. 10, 2004, *at* http://portcalls.com/news3_10_04.html.

which companies can be cleared of their shipments, for post-clearance audit after, and those which pose too high a risk and must therefore be examined at the ports. Hence, in Guideline No. 19, it states:

> No customs service will extend post-entry facilities to a trader without careful consideration of all relevant requirements. These will, normally, include:
>
> (a) An automated recording and data processing system, in the hands of the declarant, which has been audited by customs for performance and security;
> (b) A satisfactory compliance record and profile;
> (c) A volume/value threshold which will justify the expense to customs of administering the requisite controls;
> (d) Appropriate guarantee or direct debit payment arrangements.[33]

Certain ASEAN governments, such as the Philippines,[34] have already legislated Post-Entry Audit laws to rise to the challenge. An ASEAN Task Force headed by Indonesia, on the other hand, is currently in the process of drafting a Post-Clearance Audit Manual to be used and applied uniformly within the region. The draft was endorsed during the 11th Meeting of the ASEAN Directors-General of Customs[35] held in Bangkok in July 2003. The nature and purpose of the guidelines are as follows:

> [The] development and application of ASEAN guidelines for Customs post-clearance audit based on best practices to ensure:
> (a) max. revenue yield;
> (b) full compliance with import/export regulations; and
> (c) min. interference/cost to legitimate trade.[36]

Accordingly, Philippine Customs has already formed post-entry audit teams to manage the task of verifying customs compliance outside the ports, to comply with the provisions of Rep. Act No. 9135.

---

[33] ICC, *supra* note 23 ("Guideline 19").

[34] *See* Rep. Act No. 9135 (2001).

[35] *Highlights of the Eleventh Meeting of the ASEAN Directors-General of Customs*, Bangkok, Thailand (8-10 July 2003), *at* http://www.customs.go.kr/hp/homepage/eng/down/Highlights.pdf (last visited Nov. 2, 2004).

[36] Customs Post Clearance Audit, *at* http://www.aseansec.org/14333.htm (last visited Nov. 2, 2004).

## III. TOPICAL ISSUES

Other than what has already been discussed above, new developments are regularly taking place, involving the simplification and harmonization of procedures which would necessarily redound to consequences on customs clearance times as well. Among these more recent developments are the *ASEAN Harmonized Tariff Nomenclature* (AHTN), the 2003 *ASEAN Customs Valuation Guide*, and the *New Rules of Origin*.

### A. AHTN

One recent development at the front of trade facilitation is the implementation of the AHTN. Beginning 2004, a common tariff book reference is to be used for the classification of all products traded within ASEAN. Having but a single tariff book until 8th to 10th digit level and set of explanatory notes to refer to in relation to tariff classification, the uniform tariff code would facilitate the process of intra-ASEAN trade and eliminate the former confusion that arises when comparing national subheadings.

### B. CUSTOMS VALUATION GUIDE

Other than the harmonization of customs formalities and clearance procedures, ASEAN is also presently striving for the harmonization of duty and tax assessment practices and procedures, with the release of the ASEAN Customs Valuation Guide. This was also made to ensure that customs valuation regimes within the region would adopt more progressively the WTO Valuation Agreement.

### C. RULES OF ORIGIN

Rules of Origin also have an integral part to play in trade facilitation, since it must be made a point that the administrative costs of certifying a product must always be lower that than the prospective duty savings that a company can realize with the application of the preferential rate. Last year, the ASEAN Task Force on the Rules of Origin (ROO) released the New ASEAN Rules of Origin, which serves as a guide to determine the last point of "substantial transformation" based on the ASEAN or non-ASEAN value content of an imported product. The said rules prescribed new formulas for the calculation of ASEAN content using the indirect method, and adopted new verification methods for the procurement of Form Ds such as "third party invoicing." It is worthy to note that the first chapter in Specific Annex "A" of the Kyoto Convention is dedicated to the simplification and harmonization of Rules of Origin. Since the ROO used by the ASEAN is based on an *ad valorem* percentage rule, the Kyoto Convention articulates the following:

> Where the substantial transformation criterion is expressed in terms of the ad valorem percentage rule, the values to be taken into consideration should be:
>
> (a) for the materials imported, the dutiable value at importation or, in the case of materials of undetermined origin, the first ascertainable price paid for them in the territory of the country in which manufacture took place; and
>
> (b) for the goods produced, either the ex-works price or the price at exportation, according to the provisions of national legislation.[37]

Despite the release of the New Rules of Origin, the ASEAN Task Force on the ROO still continues to meet regularly to discuss ways and means to further refine and improve the mechanisms used in determining the criteria, documentation requirements, and verification procedures for a product to be able to gain access to the CEPT. This bodes well for a general compliance with Specific Annex K of the Kyoto Convention.

## IV. CONCLUSION AND IMPLICATIONS TO EAST ASIA INTEGRATION

Trade facilitation and customs clearance times are set to become the next frontier in future trade negotiations after tariff rate reductions. As far as ASEAN is concerned, several obstacles still have to hurdled, primary of which are the wide divergences in the practice of customs administration between its member states as aggravated by economic gaps. These differences form a substantial portion of the very same problems (coupled with cultural differences) that act as impediments to ASEAN's attainment of its long term goal of regional integration. Definitely, in terms of intra-ASEAN trade alone, much work remains to be done if ambitions of a single economic unit are expected to emerge soon from the 10-country region.

However, the pace of international trade is apparently not set to wane anytime soon, and extra-ASEAN markets and trade opportunities would beckon the ratification of trade partnership ties with ASEAN's other Asian neighbors Japan, China, and Korea. Almost certainly, these packages, to be negotiated on a country-to-country or country-to-region basis, would

---

[37] Specific Annex K, chap. 1, ¶ 5 *at* http://www.wcoomd.org/ie/En/Topics_Issues/FacilitationCustomsProcedures/Kyoto_New/Content/content.html.

include trade facilitation among a host of other topics. Therefore, the current overall status of compliance that ASEAN countries now have with the multilateral recommendations may be a significant determinant of that country's bargaining power over others in securing mutually favorable trade agreements with the rest of East Asia.

Notably, East Asia is slowly following ASEAN's lead in establishing regional trading arrangements. Proposals have been broached regarding the creation of an East Asia Free Trade Area (EAFTA), which will encompass ASEAN member states. As early as now, it has already been made clear that the EAFTA will be envisaged to extend beyond tariff reductions and will focus on the functional areas of trade facilitation, as Pengiran Mashor Pengiran Ahmad, Deputy Secretary-General of the ASEAN Secretariat, once said in a speech he delivered in Korea in 2003 on the prospect of establishing an East Asia Community:

> The EAFTA should not only involve elimination of tariff and non-tariff barriers. Over and above these, trade facilitation, including harmonization of standards, simplification and harmonization of customs procedures, protection of intellectual property rights are all necessary to form an integrated business environment in the East Asian region. An integrated business environment in the region would not also be complete if the areas of services, investment, finance, movement of people, among others, are not adequately addressed.[38]

It is generally known that product complementarity exists between ASEAN member countries and East Asia, the latter being more specialized in high-tech, high value-added products highly demanded in ASEAN, and the former a very viable investment location offering unique sets of skills to East Asia. However, it must be well taken note of that a certain complementarity between the two regions likewise exists in terms of the knowledge and experiences both regions can share as regards the formation of closer economic ties.

ASEAN and the East Asian region have definitely learned and continue to learn a great deal about each other. The complexity of ASEAN regional interaction and its long record of dialogues within and without the region on the topic of trade facilitation and customs clearance may provide

---

[38] ASEAN Secretariat Deputy Secretary-General Pengiran Mashor Pengiran Ahmad, Keynote Speech at a forum entitled "ASEAN Plus Three – Perspectives of Regional Integration in East Asia and the Lessons from Europe," Nov. 30 – Dec. 1, 2003, *at* http://www.aseansec.org/15655.htm. The forum was held in Seoul, Korea.

East Asia with key insights as to how they would pursue future integration plans. On the other hand, East Asia's experience in implementing customs clearance at a higher level of technology and sophistication may provide functional models that ASEAN may adopt and further develop. At the end, when the missing pieces fall into place and minute eccentricities are sorted out, it would be far from unlikely that a more united and cohesive Southeast and East Asia economic unit would come into being.

- o0o -