

# *Navigating the rocky road: customs and trade dispute resolution in Asia Pacific*

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Trade Intelligence Asia Pacific seeks to capture the essence of selected issues that are of particular interest to clients of PwC. Our regional network of customs and international trade consultants routinely gather, analyse and disseminate information and knowledge to our clients. Based on studies as well as meetings and discussions that take place across the region with various trade and customs officials, we consolidate our findings into Trade Intelligence Asia Pacific.

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## *Feature story*

# Navigating the rocky road: customs and trade dispute resolution in Asia Pacific

Around the world tax authorities are continuing to struggle to reach the revenue targets that their governments have set them. At the same time, tax incentives and free trade agreements are pursued vigorously by those same governments, reducing the available tax revenue from the same level of economic activity. No wonder that the average officer will be looking to challenge any economic operator aggressively to try and make up the revenue shortfall.

In Asia, where implementation and interpretation of legislation often tends to be somewhat variable, it is frequently the case that companies find themselves using valuable time and resource “fire fighting” rather than having and spending time to put in place processes and procedures which would help ensure that lengthy customs and trade audits and unnecessary (minor) disputes are avoided in the future. As a starting point to do this, you need to have a clear understanding of customs and trade dispute resolution in Asia Pacific so that limited and valuable customs and trade resources can be targeted at more “troublesome” territories.

Before we begin any discussion regarding dispute resolution and any assessment is made of the different approaches across Asia Pacific, some initial definition of “dispute resolution” in the context of customs and international trade is required. The concept of dispute resolution and what it involves will vary from territory to territory (see below) and ranges from ad-hoc queries at import to customs investigations to allegations of fraud. In essence it is a relatively formalised process that two parties (in this case the Customs Authority and an importer or exporter) will undertake to investigate compliance standards or to settle a contested issue.

Our experience of working with companies in Asia Pacific indicates that typically customs and trade disputes involve improper management of bonded facilities, a discrepancy over customs classification, challenges to customs valuation and dutiability of fees, as well as much more serious allegations of fraudulent activity. The level of impact will clearly vary depending on the type of dispute. However, if not handled correctly, any dispute, no matter how small and insignificant at first, may escalate to a stage where the company no longer can effectively implement damage limitation measures.

This article will not provide a standard overview of dispute resolution processes and penalty regimes around the region. Instead, we have brought together the views and experience of senior customs and trade compliance practitioners from a number of key jurisdictions in the region, each of whom have significant knowledge of dispute resolution in their territory. We asked each of them a number of questions to better understand the different approaches to dispute resolution by the customs authorities and how a company may best handle the process.

Note that their comments are general and not with reference to any specific scenario or fact pattern. They are not intended to be relied upon for any particular real-life case and we strongly recommend that any company dealing with a dispute seeks appropriate professional advice.

### **In your experience why might a company be the target of a customs investigation?**

**Australia:** In all but very serious cases of fraud and criminal activity, formal investigations by the Australian Customs authorities will arise as following an error or series of errors identified during a routine post clearance customs audit. It is companies that are seen as high risk/high tariff that are most frequently audited. Companies operating in Australia generally find that the customs authorities are transparent and upfront when outlining their basis for investigation.

**Thailand:** We find that a company may be the target of a customs investigation for a wide range of incidents of non-compliance or perceived non-compliance. Thai Customs is very concerned to ensure that importers are compliant with customs rules and regulations and will penalise where they see fit. It is also very common in Thailand that audits or investigations may be triggered by whistle-blowing by former employees.

**Japan:** In Japan, customs investigations by Customs are very rare and will only happen for very serious cases such as smuggling activities or importing goods that are strictly prohibited. Much more commonly seen are customs audits, which are more predictable and can be properly prepared for.

**China:** Customs usually will not come in for investigation unless they have some proof or received a tip-off. Initiation of investigation will normally be the result of cases of serious offences such as smuggling. Cases of unhappy employees going to Customs to tip-off on any suspicious activities in the company are very common. Such whistle-blowers may even receive a bonus from Customs.

**India:** Typically, the cases that face investigations are those involving under-declared customs values. In such cases, it is a mandatory procedure for all related parties to go under special investigations with Customs.

### **Is there a typical company profile for targeted investigations or audits?**

**Australia:** Australia Customs has also developed a risk profile database. Those most likely to be deemed high risk? Certainly operators in the footwear, automotive, retail and information technology sector will be near the top. We don't necessarily find that non Australian companies are any more likely to be labelled high risk. Customs recently announced its target areas for 2010/11, customs valuation and incorrect use of GST exemption codes are just some of the priorities. Check out the August edition of Trade Intel for more information!

**Thailand:** Typically we see that the companies with higher risk rating are of course those importing goods with high duty rates such as automobile and alcoholic beverages. Thai customs manage a database of importers which includes a risk profile.

**Japan:** Companies targeted are commonly the ones importing goods with high duties, like food or apparel. Such companies could face customs audits usually once every three years, whereas companies importing goods duty-free have much less chance of being targeted.

**China:** Companies importing wine and spirits have a higher targeting rate. There was a huge crackdown on the wine distributors around two years ago. Another targeted industry is retail due to the high duties involved. Processing trade companies are also at risk since it is unusual to find an operator who hasn't either been negligent or made mistakes.

**India:** The software industry is constantly a targeted industry.

### **What are the typical steps involved in an investigation?**

**Australia:** An investigation will usually follow on from breaches of compliance identified during a customs audit and the case is turned over to the investigative unit within Customs. The company may then be issued with a warrant to allow unrestricted access to documentation. In exceptionally serious cases, Customs will take the company straight to Court. This happened, for example, where an importer was found to be instructing its supplier to issue invoices for half of the value of the goods.

**Thailand:** A company will be notified of an impending customs audit, normally by letter with ten-day notice. However in the case of customs investigation there is no formal notification. A customs officer is empowered to turn up at the company premises with a search warrant and demand to see any documents he wants. We also find that Customs can instigate an investigation at the border. For example, if the customs office does not agree with a declared customs value, the importer will receive a Notice of Assessment and will have thirty days to appeal.

**Japan:** First, Customs will notify the importer that they wish to audit the company. The actual on-site review will typically take place one to two months after the call. We do not see frequent examples of serious investigation arising without an initial customs audit.

**China:** This depends on the nature of the investigation. For an anti-smuggling investigation, Customs will come in without any warning. The customs officers will conduct interviews and review documents. Where deemed necessary, Customs may confiscate documents or computers. The inventory or equipment in question may be sealed by Customs and the company will not have access to those goods. For very serious cases, Customs officers may even detain employees for questioning.

**India:** There is no set procedure as such. The process of requesting information can be very messy and the company may feel rather harassed! For example Customs officers may decide to instigate an inspection just as the work day is ending or even after office hours. We have even seen Customs making personal calls to the senior management.

### What does resolution look like? Is there typically a formal notification of the termination of an investigation?

**Australia:** In most cases a dispute will be settled between the importer and Customs. Usually either any under-declared duties are paid or an agreement is reached on a particular classification. A company may always request a particular issue to be put under a formal internal review process by the customs authorities. Generally Customs will try and avoid litigation. They focus on helping companies to improve their compliance rather than penalising for non-compliance.

**Thailand:** Most importers will settle any dispute directly with Customs rather than going to court. In terms of closing a case, no official letter will be issued to the company stating that the audit or investigation case is closed. Documents taken earlier by the customs officers will however, be returned to the company.

**Japan:** Most companies will settle at customs level. As to the termination, we have seen some cases where Customs notify the company when the audit is completed and settled to satisfaction. But these are very rare cases since Japan Customs has no obligation to do this, even upon request by the importer. Therefore at the end of the audit process a company may not feel that it has any level of comfort as to its compliance levels.

**China:** Cases are normally settled at administrative level. Importers will pay any applicable penalties and Customs will issue a notice of resolution at the end of the investigation. Very seldom are cases taken to the courts.

**India:** Customs will issue a notice indicating the amount of penalties. This could even be in the form of personal penalties. Customs is driven by revenue and as such some companies who do not commit resource at the right level to negotiate with Customs will find it difficult to negotiate a compromise.

### Is there an appeals process of any sorts?

**Australia:** It is very rare for a customs case to get to the courts but as a first step the importer can appeal to the Administrative Appeal Tribunal.

**Thailand:** Yes, importers can appeal against Customs' decisions at the Appeal Case Settlement Division (which is also part of the Legal Affairs Bureau of Customs) or the Board of Appeal. During the appeal process, importers have to set aside a guarantee to Customs. Note that if the results of the appeal are still not in favour of the importer, the penalties are four times the duty shortfall and two times the VAT amount. The appeal process is very long and complicated. Even getting to the Appeal Case Settlement Division can take years.

**Japan:** In some cases, Japan Customs will issue an official disposition. The importer may file a protest against Japan Customs within two months after the disposition. If the protest is denied by Customs, the importer can file an appeal to the Ministry of Finance. It is obligatory to follow the official disposition. Even if an importer wishes to file a protest, any duty shortfalls and penalties stated in the official disposition have to be paid up first. If the protest/appeal is accepted by Customs/Ministry of Finance, the duty shortfalls and penalties will be refunded.

**China:** For an administrative violation, an importer can appeal after the formal notice is issued by Customs. The appeal will go up to internal review at the higher administration level of Customs.

**India:** After the notice of penalties is issued, the importer can pursue a formal litigation process. The process is quite complex and involves appealing to the Tax Court. A full appeal process could take a lifetime!

### Lastly, can you give some do's and don'ts for a company under investigation?

**Australia:** Try not to allow Customs to go on a "fishing expedition". Know what their powers are and what they are authorised to do under legislation. Never allow Customs to have complete access to company records.

**Thailand:** Don't be a "push over" but do co-operate. Remember that a customs officer with a warrant can, if they see fit, involve the police who will have the authority to make arrests.

**Japan:** Sincerity will always be respected by Customs. Try to work with them in a manner that protects the company's interests but will still be seen as co-operative.

**China:** Always have an upfront discussion with Customs before the formal notice is released but make sure this is done at the right level. Make sure that all relevant parties in the company are on the same page during reviews and interviews. For resolution, it is also good for a company to submit a self-assessment report and an improvement plan.

**India:** Have counsels or experts at the side during the investigation. It is also important that all related people understand the same facts and be on the same page.

The informal responses above demonstrate that the landscape for dispute resolution and the associated processes and procedures vary across the region. At the same time though, there are many similarities in approach and do's and don'ts. All this helps a company to put in place some standardised best practices of how to deal with customs and trade disputes.

A particular feature for many of the territories in Asia Pacific is a lack of explicit and accessible rules and guidelines as to the powers of the customs authorities and commonly applied audit programmes. This makes it challenging for businesses to understand what level of resource is required on the front line to handle customs disputes and audits. For example in Thailand and India there is a real risk that un-briefed and customs savvy employees could seriously jeopardise the company's chances of successfully navigating an audit or dispute. In this regard companies should consider building up some central capability to support front line resource in the case of escalated challenges. Prevention is of course always better than the cure but it is highly unlikely that a company will ever feel 100% secure in its customs compliance standards. As such, companies should invest effort and resource into being prepared to deal with customs authorities with confidence and understand the most effective approach to protecting its interests in each of the territories in which it operates.

# ASEAN

## Amendments to the ASEAN-China FTA (ACFTA) finally in place

ASEAN and China finally signed the much anticipated protocol to amend the ACFTA rules on Operational Certification at the 17<sup>th</sup> ASEAN Summit on 29 October. While the legal text was not made available at the time of press, it was understood to cover the provisions allowing for triangular invoicing and back-to-back Certificate of Origin (CoO) arrangements.

The inclusion of the triangular invoicing provision will give companies the option of issuing its commercial invoices from a third country (including a non-signatory country to the ACFTA) which may be separated from the physical flow of goods as long as the goods qualify and meet the rules of origin (RoO). For the back-to-back CoO arrangements, companies will have the option of hubbing the goods, say in a regional distribution centre in a third country before exporting them to the end country of destination.

ASEAN countries and China have indicated that they will start implementing the amended rule on 1 January 2011. The onus now is on these countries to issue domestic circulars and notifications to effect the implementation.

With the additional eligibility for more complex supply chain and commercial structures, companies that have significant trading/manufacturing operations within ASEAN and China and currently incur significant customs duties should look into these updated rules to assess if they now qualify for ACFTA benefits.

More details of the amendments to the operational certification procedures are expected once the legal text is made available.

## Holistic approach for ASEAN “connectivity”

ASEAN member states have adopted a Masterplan to holistically improve connectivity amongst the region. This “connectivity concept” was first mooted by the ASEAN leaders in 2009 with the vision of the ASEAN region being a transport, information and communications technology (ICT) and tourism hub. The Masterplan on connectivity adopted is intended to greatly boost intra-regional trade, economies of scale and attracting more investments.

The approach to achieve greater connectivity amongst the ASEAN states is three-pronged one: encompassing enhanced physical infrastructure development (physical connectivity), effective institutions, mechanisms and processes (institutional connectivity) and empowered people (people-to-people connectivity).

Out of the three types of connectivity categorised in the Masterplan, institutional connectivity will most likely generate the most immediate interest amongst companies. Institutional connectivity will cover the following:

- Trade liberalisation and facilitation (e.g. the ASEAN Trade in Goods Agreement)
- Investment and services liberalisation and facilitation (e.g. ASEAN Comprehensive Investment Agreement)
- Mutual recognition agreements/arrangements (e.g. Standards and conformance)
- Regional transport agreements
- Cross-border procedures (e.g. ASEAN Single Window, customs integration)
- Capacity building programmes

Specifically for the cross-border physical movements of goods, the Common Effective Preferential Tariff (CEPT) package under the ASEAN FTA (AFTA) has been cited to have low utilisation rates. As the customs duty rates for most products moving between the ASEAN six countries are already zero, with the same targeted for the CLMV countries (Cambodia, Laos, Myanmar and Vietnam ) by 2015, the next phase will be to work towards removing non-tariff barriers such as import licensing requirements and quotas. Inconsistent implementation of the Rules of Origin (RoO) across the different ASEAN member states has also been identified to be an obstacle to higher utilisation of the CEPT and other ASEAN-plus FTAs.

Trade facilitation is another element that is to be reviewed. Customs procedures and practices are not standardised and in practice very divergent. The implementation of the ASEAN Single Window has been delayed due to the widely different development stages of the member states at the national level.

Perhaps a silver lining to the identified obstacles to free trade is that the ASEAN member states are aware of them and have earmarked concrete steps to remove these trade barriers. Some of these steps are highlighted below:

- There will be continuous reviews of the RoO, including the introduction of facilitative processes such as the electronic processing of the Certificate of Origin by 2012 and harmonisation or alignment of national procedures as far as possible by 2015.
- The RoO of the various ASEAN related FTAs with China, South Korea, Japan, India, Australia and New Zealand will be reviewed and aligned where possible by 2015, increasing the ease for companies to comply with and qualify for the RoO.
- The customs procedures, formalities and practices such as design and operation of outward processing, inward processing of all ASEAN member states will be simplified by 2013, with the target of reducing processing costs by 20% by 2013 and by 50% by 2015.

#### **ASEAN FTA (“AFTA”) regional self-certification system pilot phase**

Further to our discussion of the AFTA regional self-certification system in previous issues of *Trade Intelligence*, the ASEAN member states have now officially endorsed the “Work plan towards operations of self-certification”. The work plan stipulates the ASEAN member states to implement an ASEAN self-certification scheme by 2012. In order to ensure smooth implementation of the self-certification system, Brunei, Malaysia and Singapore have commenced a one-year pilot project from 1 November 2010 onwards.

Under this scheme, the primary responsibility of origin certification is carried out by traders/manufacturers who are involved in cross border movement of goods. Under this scheme, certified exporters are allowed to declare that their products have satisfied the various RoO. The declaration will be made by a certified exporter on a commercial invoice or, in the event the invoice is not available to the importer at the time of exportation, on any other commercial document such as billing statements, delivery order, or packing list.



# Export controls

## Hong Kong – Air Transshipment Cargo Exemption Scheme for specified strategic commodities registration for 2011

The Trade and Industry Department (TID) issued a Strategic Trade Controls Circular on 12 October 2010 outlining the air transshipment cargo exemption scheme for specified strategic commodities registration for 2011.

Since 2000, the TID has implemented the Air Transshipment Cargo Exemption Scheme (referred to below as “the Scheme”) for specified strategic commodities to facilitate the air transshipment of those commodities through Hong Kong. Interested and eligible parties may lodge registration applications for the Scheme to enjoy exemptions from licensing requirements for air transshipment cargoes of specified strategic commodities in 2011.

The scope of the Scheme generally covers Schedule 1 commodities listed in the Import and Export (Strategic Commodities) Regulations (Cap. 60, sub. leg. G), except products listed in Schedule 2 to the Regulations, and which are air transshipment cargoes.

Air transshipment cargo is defined in the Import and Export Ordinance, Cap. 60 as *“transshipment cargo that is both imported and consigned for export in an aircraft and which, during the period between its import and export, remains within the cargo transshipment area of the Hong Kong International Airport”*.

Further details with regard to the scope and conditions of exemption can be found in the Circular and its appendices.

For existing registrants, the Certificates of Exemption are valid up to 31 December 2010 and importers and exporters should apply for a renewal for 2011.

It should be noted that this Scheme and its application are separate from the other Transshipment Cargo Exemption Scheme covering pharmaceutical products, reserved commodities and rough diamonds. Controls imposed by other legislations are not affected by the exemption provided by this Scheme.

## Hong Kong – permit requirement for 2011 and report on past activities in 2010 under Chemical Weapon (Convention) Ordinance, Cap. 578

Hong Kong’s TID issued a Strategic Trade Controls Circular specifying the permit and report requirement for Scheduled Chemicals and Unscheduled Discrete Organic Chemicals (“UDOCs”) under Chemical Weapon (Convention) Ordinance, Cap. 578 (“the Ordinance”) on 28 October 2010.

This Circular:

- reminds facilities of the permit requirement under the Ordinance and, where applicable, to lodge applications for permits for 2011 by **26 November 2010**, and
- requests facilities to complete and return a reply slip to the TID by **17 December 2010** to indicate whether they were engaged in activities involving Scheduled Chemicals and/or UDOCs under the Ordinance during 2010 and, where applicable and upon further request by the TID, to provide final and full details of such activities by **7 January 2010**.

The Ordinance came into operation on 18 June 2004. The purpose of the Ordinance is to enable the Chemical Weapons Convention (“the Convention”), an international treaty that aims to prohibit the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, to be fully implemented in Hong Kong.

The Ordinance imposes a permit requirement and specifies the circumstances under which a permit to operate a facility is required. In brief, an operator of a facility engaged in specified activities involving Scheduled Chemicals in quantities over the respective thresholds is required to obtain a permit from the TID. Further, it also requires operators subject to the permit requirement and the notification requirement to make annual declarations to the TID.

## Malaysia – latest development on Strategic Trade Act (STA) 2010

To date, the Regulations and secondary legislation to the STA have not been published. Malaysia’s Ministry of International Trade and Industry (MITI) had earlier anticipated a release of these Regulations implementing the Strategic Trade Act 2010 latest by October 2010.

On 12 October 2010, MITI held a formal launch event for the Strategic Trade Act (STA) online registration system. The International Trade and Industry Minister Datuk Seri Mustapa Mohamed highlighted that Malaysia will implement the STA 2010 on 11 July 2011.

MITI expects the implementation would impact about 5,000 companies covering a total of 1,569 products.

To support the move, a number of multinational companies have agreed to be among the first to register to fulfil Malaysia's export control compliance requirement.

The government is introducing a trial run of an electronic licensing system from 1 October 2010 to April 2011 before implementing the Act on 1 July 2011.

MITI has appointed Dagang Net, the existing electronic commerce service provider supporting many permit issuing government agencies including Customs, as the official service provider for the STA online registration services for application and approval of export licenses.

Registration fee for one-time user is RM500, which is waived for existing Dagang Net users. Small and medium enterprises are eligible for discounted registration fee at RM200. There is also an annual assess fee of RM200. A variable charge of RM5 applies for each approved transaction.

### **Tightening regulation of goods for export and re-export to Iran and North Korea**

#### ***Singapore – prohibition of imports, exports and transshipments of goods from/to the Democratic People's Republic of Korea (North Korea) and Iran***

Singapore Customs have issued a new circular on the prohibition of imports, exports and goods in transit from and into the Democratic People's Republic of Korea (DPRK) and Iran.

These prohibitions took effect 1 November 2010 and are set out in line with the United Nations Security Council (UNSC) Resolutions, and apply as follows:

#### **North Korea:**

- Prohibited imports include any arms or related materials
- Prohibited exports and goods-in-transit:
  - any arms or related material, except for small arms and light weapons
  - luxury items such as cigars, wines and spirits, perfumes and cosmetics, plasma televisions, luxury cars and motorboats, precious jewellery, musical instruments, amongst others

- Prohibited imports, exports and goods-in-transit include any items, materials, equipment, goods and technology related to nuclear programmes, ballistic missile programmes and other weapons of mass destruction programmes set out by the United Nations Security Council.

#### **Iran:**

- Prohibited imports include any arms or related materials as well as items, materials, equipments, goods and technologies related to nuclear programmes, ballistic missile programmes and other weapons of mass destruction programmes set out by the United Nations Security Council.
- Prohibited exports and goods-in-transit include
  - any items, materials, equipment, goods and technology which could contribute to enrichment-related, reprocessing or heavy-water-related activities or to the development of nuclear weapon delivery systems as set out by the UNSC
  - arms as defined for the purpose of the United Nations Register of Conventional Arms

Any person failing to comply with these imposed prohibitions shall be guilty of an offence and liable for a fine or imprisonment for a term not exceeding three years or both.

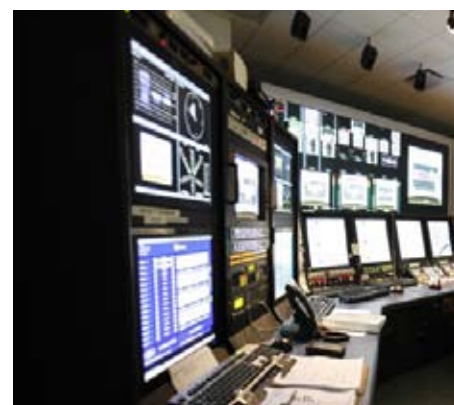
#### ***Taiwan – proposed amendment to the Sensitive Commodity List for re/export of goods to Iran and North Korea***

On 24 September 2010, Taiwan's Bureau of Foreign Trade (BOFT) proposed amendments to the Sensitive Commodity List involving the re/export of goods to North Korea and Iran.

Specifically, for certain Harmonized System (HS) codes, the export regulation "S01" has been applied or eliminated to tighten or loosen the export restriction depending on the nature of the particular HS code.

Export regulation "S01" states that exporters whom export/re-export goods of the Sensitive Commodity List to North Korea and Iran shall file an application for strategic high-tech commodities export permit to the BOFT or a government authority (agency) appointed by the Ministry of Economic Affairs.

The proposed amendments were implemented on 1 October, 2010.



The following HS codes are affected by the change.

No.	HS Code	Goods description	Export regulation S01
1	8486.10.00.20-1	Grinding, polishing and lapping machines for processing of semiconductor wafers	Applicable
2	8486.20.00.20-9	Machines for semiconductor wafers processing by removal of material, by laser or other light or photo beam	Applicable
3	8486.20.00.31-6	Machine-tools for dry-etching patterns on semiconductor materials	Applicable
4	8486.20.00.32-5	Spraying appliances for etching, stripping or cleaning semiconductor wafers	Applicable
5	8486.20.00.33-4	Apparatus for wet etching, developing, stripping or cleaning semiconductor wafers	Applicable
6	8486.20.00.61-9	Step and repeat aligners for semiconductor wafers	Applicable
7	8486.20.00.62-8	Scanning aligners for semiconductor wafers	Applicable
8	8486.20.00.63-7	Electron beam direct writers to produce patterns on semiconductor wafer	Applicable
9	8486.20.00.69-1	Other apparatus for the projection or drawing of circuit patterns on sensitised semiconductor materials	Applicable
10	8486.20.00.80-6	Apparatus for rapid heating of oxidation, diffusion, annealing of semiconductor wafers	Applicable
11	8486.40.00.20-5	Focused ion beam milling machines to repair masks and reticles for patterns on semiconductor devices	Applicable
12	8525.50.00.90-0	Other transmission apparatus for radio-broadcasting or television	No longer applicable
13	9005.80.19.00-9	Other optical telescopes	No longer applicable
14	9031.80.00.20-4	Electron beam microscopes fitted with equipment specifically designed for the handling and transport of semiconductor wafers or reticles	Applicable

# FTA focus

## Negotiations concluded

Malaysia – India CECA	30 August 2010
Japan – India CEPA	25 October 2010

## Agreements signed

EU – South Korea FTA	6 October 2010
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## Agreements entered into force

Serbia – Turkey FTA	1 September 2010
China – Taiwan ECFA	12 September 2010
ASEAN – India FTA (implementation by Indonesia)	1 October 2010

### Australia – Malaysia FTA negotiation progress

The eighth round of the Australia – Malaysia Free Trade Agreement (FTA) negotiations was concluded on 22 October 2010 in Canberra, Australia. The negotiations for the FTA began in 2005 and were paused so that both countries to focus on the negotiations for the ASEAN – Australia - New Zealand FTA (AANZFTA).

With the implementation of the AANZFTA early this year, both Australia and Malaysia have agreed that the bilateral Australia – Malaysia FTA will build upon the existing AANZFTA. Current obstacles that need to be overcome in the negotiations include concessions in the services and manufacturing sectors. Nevertheless, both countries are confident that the negotiations will be concluded by mid-2011.

### Hong Kong – New Zealand Closer Economic Partnership Agreement

The Hong Kong – New Zealand Closer Economic Partnership Agreement (CEPA) was signed on 29 March 2010, and is expected to come into force in January 2011. This is subjected to the completion of all necessary internal procedures of both member parties.

In view of this, the Trade and Industry Department (TID) released a Circular on 22 October 2010 outlining the rules of origin, document requirements, record keeping requirements and other relevant issues for exporting goods originating in Hong Kong to New Zealand under the Hong Kong – New Zealand CEPA.

Key areas outlined in the Circular include:

- Rules of Origin requirement for wholly obtained or produced goods and regional value content for non-wholly obtained or produced products
- Accumulation
- Minimal operations and processes
- De minimis
- Direct consignment
- Treatment of packing materials and containers
- Accessories, spare parts, tools and instructional or information material
- Indirect materials
- Identical and interchangeable materials
- Declaration of origin and exceptions
- Records maintenance and verification of origin
- Origin marking and labelling requirements
- Other relevant issues

Details of the above requirements as well as other details in relation to the CEPA are available from the Hong Kong – New Zealand CEP Agreement dedicated webpage on the TID website.

### India – Japan CEPA concluded

A joint declaration was made by the leaders of Japan and India on the conclusion of the Comprehensive Economic Partnership Agreement (CEPA) between Japan and India. The negotiation for the CEPA was concluded on 25 October 2010, after 14 rounds of negotiations stretching almost four years.

The negotiated agreement includes chapters on trade in goods, investment, and trade in services. It also covers the topics of movement of natural persons, intellectual property rights protection and competition. For tariff reductions, Japan will cut 90% of tariffs on exports from India while India will cut 97% of tariffs on Japanese products within the next 10 years.

The CEPA will be signed at the earliest at Ministerial level, upon completion of necessary formalities on both sides.

Separately, a civilian nuclear agreement that would allow Japan to export its nuclear technology to India is sought by India and negotiations were launched in June this year.

### **India – Malaysia Comprehensive Economic Cooperation Agreement (CECA) concluded**

Malaysia and India concluded the negotiations on the Malaysia – India Comprehensive Economic Cooperation Agreement (CECA) on 27 October 2010. Negotiation began in February 2008 but was put on hold after two rounds as countries focused on the negotiations for the ASEAN – India Free Trade Agreement (AIFTA).

The Malaysia – India CECA has a wider scope and coverage compared to the ASEAN – India FTA. More tariff concessions have been made and the number tariff lines in the AIFTA exclusion lists have been reduced under the MICECA. Timelines to reduction or elimination of tariffs have also been reduced compared to the AIFTA. The CECA also covers other areas including trade in services and investment.

An agreement was signed to confirm the conclusion of negotiations and set the timelines for implementing the Malaysia – India CECA. The CECA is expected to be signed by 31 January 2011 by both countries and to enter into force by 1 July 2011.

### **Korea – Colombia FTA negotiation progress**

The fourth round of the Korea – Colombia FTA negotiations concluded on 8 October 2010 in Cali, Colombia. This negotiating round lasted for five days and much progress was made.

Three additional chapters including customs, government procurement and temporary entry for business persons were agreed upon. On the area of market access for goods, both sides expressed their views in the revised offers which were exchanged last September. Korea had requested to expand the market access on industrial goods including automobiles and electronic and electrical goods while Colombia had requested for better market access on agricultural products.

The two countries will exchange additional request lists in November and further negotiate offers in December this year. The venue and date of the next round of negotiations has yet to be fixed and will be decided through diplomatic channels.

### **Korea – EU FTA signed**

The European Union (EU) and South Korea signed an FTA on 6 October 2010 during the EU – South Korea Summit in Brussels. The negotiations for the EU – South Korea FTA were launched in May 2007. It is the first FTA the EU has ever concluded with an Asian country. It is also the most ambitious trade coverage ever achieved by the EU.

Under the agreement, South Korea and the EU will eliminate 98.7% of duties for both industrial and agricultural products within 5 years from the entry into force. The FTA will eliminate 1.6 billion Euros worth of Korean import duties annually and the EU will eliminate around 1.1 billion Euros of import duties.

The date of provisional implementation of the FTA has been set to be 1 July 2011. This is provided the European Parliament will give its consent to the FTA, and the Regulation of the European Parliament and of the Council implementing the bilateral safeguard clause of the EU – South Korea FTA is in place. EU Member States will also have to ratify the agreement according to their own laws and procedures.

### **Malaysia and EU begin FTA talks**

Malaysia and the EU jointly announced the formal commencement of negotiation for an FTA on 5 October 2010 at the sidelines of the 8th Asia Europe Meeting (ASEM) Summit in Brussels.

The FTA negotiations will focus on four main areas – market access for goods and services, investment, trade facilitation issues and economic cooperation. In the area of trade in goods, discussions are expected to lead to progressive reduction and elimination of tariff and non-tariff barriers. Both parties have expressed their intention to a reasonable ambitious outcome and limit exclusions to the minimum, if any.

The EU accounted for 10.8% of Malaysia's total exports last year. An FTA will boost confidence in investors and further enhance Malaysia's national competitiveness.

The first round of talks is proposed to be held later this year.

## Malaysia joins the Trans-Pacific Partnership Agreement negotiations

All four existing Parties (Brunei, Chile, New Zealand and Singapore) and four other negotiating members (Australia, Peru, US, Vietnam) of the Trans-Pacific Partnership (TPP) have unanimously agreed to include Malaysia as a full negotiating member of the TPP negotiations. This enables Malaysia to be involved in the on-going TPP Third Round negotiations in Brunei. Malaysia is the ninth member of TPP.

Malaysia has taken this opportunity to step towards deeper economic integration within the Asia Pacific region, participating in the dialogues that largely cover:

- Trade in goods
- Rules of Origin
- Customs Cooperation
- Trade Remedies
- Sanitary and Phytosanitary Measures
- Technical Barriers to Trade Government Procurement
- Competition Policy
- Intellectual Property
- Trade in Services
- Investment
- Intellectual Property
- Labour
- Environment

Further information is available from the Ministry of International Trade and Industry (MITI) website:  
[www.miti.gov.my](http://www.miti.gov.my)



## Vietnam and Russia begin FTA negotiations

The joint working group for the Vietnam – Russia FTA had their first meeting in Hanoi on 11 October 2010. Through this agreement and gaining Vietnam as a strategic partner, Russia is looking to restore its influence in Asia and gain access to the ASEAN market.

Two-way trade between Vietnam and Russia is estimated to reach USD 3 billion in 2011. A successful negotiation on an FTA will further promote trade between the two markets. Vietnam can push for exports of agricultural, seafood and garment products to Russia while Russia can push for exports of oil and gas, atomic energy and automobile to Vietnam.

The scope of negotiations will cover the issues of customs barriers, trade in services, investment and intellectual property. Leaders of both sides are looking to sign an FTA in the near future to promote bilateral trade.

# Country reports

## Australia

### Asbestos detection in imported goods

The Australian Customs and Border Protection Service ('Customs') has recently detected asbestos in a wide range of imported goods intended for use in Australia's resource exploration and development industries. The importation in Australia of asbestos or goods containing asbestos without an appropriate permit is prohibited.

Asbestos has been detected in a wide range of goods used in heavy industry including gaskets, jointing materials in flues, furnaces, ducts, pipe spools, flash vessels, valves, heating equipment and pressurised hoses. Asbestos has also been detected in packaging materials for these goods.

Customs is actively targeting imported goods at risk of asbestos contamination, it is therefore timely that importers ensure that their goods are asbestos-free and can demonstrate this if required. Certification by overseas manufacturers or suppliers stipulating that the imported goods are asbestos-free is not always reliable when determining whether the goods comply with Australian law. Customs accept independent inspection and certification of goods by qualified occupational hygienists (before the goods are exported) as reliable evidence.

Failure to demonstrate imported goods are asbestos-free can result in the suspect goods being detained at the border and seized as a prohibited import.

### Excise Equivalent Goods (EEGs) administration responsibility change

From 1 July 2010, the responsibility for the administration of EEGs that are warehoused has been delegated from Customs to the Australian Taxation Office (ATO). EEGs are imported alcohol, tobacco and fuel that, if produced or manufactured in Australia, would be subject to excise duty.

As a result, owners/importers of EEGs will now report to the ATO regarding weekly/periodic settlement, movement permissions, and remissions of duty. In its new role the ATO will also be responsible for managing risk and carrying out compliance activities associated with warehoused EEGs.



# China

## Regulation on customs affairs guarantee of PRC issued

In order to comply with Article 70 of Customs Law of China and improve the efficiency of clearance, the State Council issued the Regulation on Customs Affairs Guarantee or “**State Council Order [2010] No.581**” on 1 September 2010 which will be implemented from 1 January 2011.

A summary of the Regulation is listed as follows:

- The Customs-related guarantee may be applied in the following three situations:
  - Application for release of cargo in advance of customs clearance
  - Application for special Customs issues (e.g. temporary import/export, rent, repair, etc.)
  - Customs administration that has not been completed (e.g. guarantee requirements for relevant employees who intend to leave for overseas before a finalised offence is determined by Customs, etc.)
- Provision of the following two types of facilities:
  - Exemption of guarantee under certain conditions
  - A package of guarantee policy with respect to multiple-time guarantee applications for the same type of issues taking place within a certain time period
- Clarifies that under the following two situations, the Customs-related guarantee is not applicable:
  - The imports/exports are subjected to certain restriction provision, such as licensing requirement
  - The original goods in question would be deemed as evidence and confiscated
- The following other provisions are covered in the Regulation:
  - The ceiling amount for each type of guarantee
  - The procedure for acceptance, alteration, refund of guarantee and the procedure for handling cases where guaranteed property and privilege is insufficient

The Regulation also provides importers/exporters with the specific rule basis for guarantees, especially exemption of guarantee, a package of guarantee, and non-application of guarantee, compared with the practice in the past.

## Formalities on VAT refund for imported equipment under loan Programme of foreign government and international financial organisation

The “**GAC Announcement [2010] No. 61**” was based on Caiguanshui [2009] No. 63. Issued and coming into effect on 19 September 2010, the Announcement provides the formalities to obtain refund of the import VAT that was collected.

## Explanatory notes on subheadings of China tariff book (2010 Edition)

“**GAC Announcement [2010] No. 62**” was issued on 20 September 2010 on the Explanatory Notes to subheadings of China Tariff Book (2010 Edition). This came into effect on 1 October 2010. This announcement acts as one of the legal basis for tariff classification in China.

The previous Announcements including GAC Announcements [2003] No.35, [2005] No. 30, [2006] No. 51, [2009] No. 86 regarding Explanatory Notes on subheadings of China Tariff Book have been abolished.

## Additional items of catalogue of prohibited commodities under processing trade

“**MOFCOM and GAC Announcement [2010] No.63**” was issued on 28 September 2010 and came into effect on 1 November 2010.

To meet the requirement of energy conservation and emission reduction, 44 10-digit HS codes have been added into the “processing trade prohibited catalogue”. Under processing trade, some of these items are prohibited from being exported, while some are prohibited from being both imported and exported.

Companies engaged in or planning to undertake processing trade should check the coverage of the products scope with this updated catalogue.

# Indonesia

## Mandatory label to be written in Bahasa

The Indonesian Ministry of Trade requires producers (manufacturing companies) or importers to register the labels on products being sold in the Indonesian market. This requirement is based on Ministry of Trade Regulation **No. 22/M-DAG/PER/5/2010**, the amendment to Ministry of Trade regulation No. 62/M-DAG/PER/12/2009 on the obligation to put labels on goods.

This regulation obliges the producer and importer to put labels written in Bahasa on products such as electronics, construction materials, automotive spare parts and other items to be distributed in the Indonesian market. The labels require prior approval from the Director General of Domestic Trade. Regarding the application process, the importer should send in a sample of a label that will be applied to the products prior importation. The label should be attached to the goods prior to importation into Indonesia.

This regulation was issued on 21 May 2010 and became effective on 1 October 2010 (as Customs Circular Letter No.S-856/BC/2010) for new production goods and import products. However, for products that are already being distributed in the market, Ministry of Trade will be supplying an adjustment to this regulation, which will be effective from March 2012.

We advise producers and importers to study this regulation carefully and comply with this labelling requirement to avoid product distribution risk. This applies especially for imported goods, considering that certain goods classified above without labels will be not be allowed to be distributed in the Indonesian market.

## Approval for a manufacturing company to import finished goods

In relation to Importer Identification Number (API) regulation governing that an importer is required to have only one type of API (either API-U for trading or API-P for manufacturing) for their import activities with effect from 1 January 2011, an issue was raised by the business community regarding companies who have both manufacturing and trading businesses.

In response, the Ministry of Trade issued regulation **No. 39/M-DAG/PER/10/2010** dated 4 October 2010 allowing a manufacturer who holds API-P to also import finished goods for its trading business provided that its business license supports both manufacturing and trading businesses. However, the manufacturer must obtain such approval from the Director General of Foreign Trade. Further, it must also submit a quarterly import realisation report to the said Director General.

## Provisions on import of iron and steel will be extended

Ministry of Trade regulation **No. 08/M-DAG/PER/2/2009** was issued to amend regulation No. 21/M-DAG/PER/6/2009 on the import of iron and steel which was slated to expire on 31 December 2010. With this new regulation, the Ministry of Trade is planning to extend the effective period and revise it so as to reduce illegal importation of iron and steel more effectively.

The new regulation was issued to help Indonesian steel and iron manufacturers develop their business in the domestic market. The regulation governs that the import of iron and steel products is only possible for importers who obtain an Importer Producer license (IP) or Registered Importer license (IT) for iron or steel from the Director General of Foreign Trade. In addition, every shipment of imports should be verified by an Independent Surveyor at the exporting country.

New regulations:

- **154/PMK.03/2010**: Ministry of Finance regulation on Article 22 – Income tax collection that is related to delivery of payment for goods and other business activities, including import activities. The regulation letter was issued and became effective on 31 August 2010.
- **160/PMK.04/2010**: Ministry of Finance regulation about customs value for calculating import duties. The regulation letter was issued on 1 September 2010 and became effective on 31 October 2010.
- **P-38/BC/2010**: Director General of Customs and Excise regulation about customs valuation consultation mechanism. The regulation was issued and became effective on 1 October 2010.
- **P-40/BC/2010**: Director General of Customs and Excise regulation about customs valuation database. The regulation was issued and became effective on 1 October 2010.

# Japan

## Results of post-import audit published

Japan Customs has recently published the results of its post-import audit investigations for fiscal year 2009 (July 2009 to 31 June 2010). 6,204 companies were audited during this period and the results are as follows:

- About 70% out of 4,356 companies audited were found to have under-declared the value of their imports. The total under-declared value reached JPY198 billion and the amount of customs penalties levied reached JPY14.5 billion.
- The top industries found to make up the majority (52.2%) of the under-declared duties include
  - electrical machinery and appliances
  - food preparations
  - machinery
  - knitted and woven apparel

Some reasons cited for the under-declaration of value include non-declaration of assists or raw materials provided free to the exporter and the under-declaration of the freight fees between the exporting and the importing port.

Companies operating in Japan, particularly in the above industries listed should review their current practices to make sure they are in compliance with Japan customs requirements.

## Challenges to Commissionaire structures

Due to the revision in late 2007 of Administrative Instruction 4(1)1 to the Japan Customs Tariff Law, Japan Customs (“JC”) has been gradually changing its attitude toward Commissionaire structures. Specifically, because the revised Administrative Instruction states that an “import transaction is usually conducted between a person located in an exporting (or a third) country and a person located in Japan”, JC has come to consider that there exists no “import transaction” in a Commissionaire structure, as the vendor and the buyer (Principal) would both be based outside of Japan.

Consequently, JC have started to insist that importers determine their customs value using a deductive value method, allowing only the Commissionaire’s commission, reimbursable expenses and customs duties to be deducted from the onward resale price in Japan. In other words, expenses and profit attributable to the Principal are not deductible.



JC has not provided any specific legal basis for their approach, nor – we understand – are they open to accept an identical or similar method for customs valuation, or a computed value method, even if supporting documents for such valuation methods are submitted by importers.

It can be argued that this approach violates GATT Valuation Rules Article 1 Paragraph 1, which defines the “import” transaction as the “sale for export to the country of importation”, which is clearly the transaction between Principal and vendors under a Commissionaire structure. In addition, WCO Commentary 22.1.13. indicates that although “the buyer of the goods sold for export to the country of importation would normally be located in the country of importation [...] this assumption would not apply if there was no buyer in the country of importation”. This also suggests that an “Import transaction” can be conducted between parties that are both located in foreign countries.

Nevertheless, JC’s approach is significantly reducing the attractiveness of a Commissionaire structure from a customs perspective. Depending on precise commercial characteristics and overall business considerations, companies may want to consider changes to their transaction structure to minimize their customs duty exposure.

# Malaysia

## Budget 2011 – A closer look at customs duties reduction

### *Duty-free imports for over 300 tariff lines!*

Effective 4pm, 15 October 2010, import duty rates for over 300 tariff lines have dropped from between 5% and 30% to 0%. The range of products with reduction of duties include broadly:

- talcum powder and shampoo
- suit-cases, handbags and leather belts
- suits, jackets and blazers
- trousers, skirts and shorts
- blouses and shirts
- undergarments and pyjamas
- jerseys and cardigans
- a variety of garments
- blankets, linens, curtains and bedspreads
- non-leather footwear
- headgear and hats
- jewellery
- golf balls

The complete list with tariff codes is available at:  
[www.treasury.gov.my/pdf/budget/appendices11.pdf](http://www.treasury.gov.my/pdf/budget/appendices11.pdf)

### *Do I still need “Item 174 Exemption” or Preferential Certificate of Origin?*

With this development, some will wonder whether importers still need to rely on the “luxury/branded” goods exemption (available under item 174 of the Customs Duties (Exemption) Order 1988) since this provision only provides exemption to licensed traders and to goods with FOB value of RM200 or more per unit.

Other importers who are paying import duties at preferential rates under FTAs may also start reconsidering the need for obtaining preferential certificate of origin (e.g. Form D under ASEAN Trade in Goods Agreement or Form E under ASEAN-China FTA, amongst others) to save duty costs.

Our observations are:

- Import duty for almost all goods covered under “item 174” exemption are now at 0%, except garments falling under HS 6113.00 000 made up of knitted or crocheted fabrics of heading 59.03, 59.06 or 59.07 as well as garments falling under HS 62.10 made up of fabrics of heading 56.02; 56.03, 59.06 or 59.07
- Therefore it appears that specifically for the above two categories of garments “item 174” exemption is still relevant in particular for licensed traders and where FOB value per unit is RM200 or more
- If the conditions of “item 174” cannot be met, than claiming of FTA duty concessions is still useful to reduce duty costs on these garments

### *What do I need to watch out for?*

While this is good news for importers in the trade, one can expect Customs to scrutinise more closely how importers classify their products. Classification is not a matter of picking and choosing what appears to be right. It is about having solid analysis backed up by precedents, governed by the six (6) General Rules of Interpretation (GRI) with references to Heading Notes, Sections Notes and where relevant, Interpretative Aids issued World Customs Organisation.

Proper product classification has also led us to the abolishment of sales tax on cell phones, as well as the cessation of sales tax exemption for goods classifiable under HS8517.62 590.

### *Good news for cell phones but bad news for portable data transmitter*

Effective 4pm, 15 October 2010, the following now forms a part of column (3) (description of goods), Schedule A, Chapter 85 of the Sales Tax (Exemption) Order 2008.

### **“- Telephone sets, including telephones for cellular networks or for other wireless networks:**

**-- Telephone for cellular network or for other wireless networks”**

The corresponding column (2) (Heading/Subheading) states: “8517.12 000”. This means cell phones (or mobile phones as some call them) are exempted from the 10% sales tax.

However, at the same time “subheading 8517.62 590 and the particulars relating to the subheading” are deleted.

Before the amendment on 15 October 2010, the law looked like this:

(2) Heading/Subheading	(3) Description of goods
85.17	Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28.
8517.62	Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus:
300	Apparatus for carrier-current line systems or for digital line systems
	Other transmission apparatus incorporating reception apparatus
520	transceivers (amateur radio) capable of operating in amateur frequency bands
	other (Wireless PDA (personal digital assistant) with GSM (global system mobile)

So what does the removal of the last item mean? First we look at how the sales tax exemption order works:

Section 4(1) of the Sales Tax (Exemption) Order 2008 provides that the classification of goods specified in the Order must comply with the Rules of Interpretation in the Customs Duties Order 2007.

Section 4(2) then provides that for the purpose of Schedule A –

(a) *only goods described in column (3) shown against the tariff heading in column (2) shall be exempted. Other goods, though might be classified under the same tariff headings but which are not specified, shall not be exempted.*

(b) *where the description of goods in column (3) are shown in general against the tariff headings in column (2), the exemption shall apply to all such goods as classified within that tariff heading.*

So it means previously not ALL goods classified under HS 8517.62 590 were actually exempted from sales tax. If you find this confusing, don't worry – it no longer matters what variations of HS 8517.62 590 that were entitled to sales tax exemption because with this removal, ALL goods classified under this tariff line will be subjected to 10% with immediate effect.

If you are still confused about the types of goods that are affected, the easiest way is to find some examples of these goods. A quick browse through Customs Authority's classification rulings database shows at least three (3) such products:

- Handheld/portable data collector / barcode reader (laser scanner) with wireless communication capabilities
- A maritime GPS enabled survivor locating device that automatically transmit distress calls and tracking data
- A handheld device described as electricity/water meter reader/ barcode scanner equipped with Bluetooth and WIFI transmission and reception function

The above impacts the goods imported into Malaysia. As such, steps should be taken to classify the products correctly, and pay the right amount of tax.

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# Singapore

## TradeNet declaration for import GST deferment scheme

The new Import GST Deferment Scheme (IGDS) announced during the 2010 Budget Statement by the Minister of Finance took effect 1 October 2010, allowing approved GST-registered businesses to defer their import GST payments payable at the point of importation until their monthly GST return is due.

In view of the implementation, Singapore Customs released a circular regarding the permit application to be submitted for IGDS shipment. The different types of permit applications include customs permits for:

- the import of non-dutiable goods with GST deferment
- the import of dutiable goods with duty payable and GST deferment
- import of dutiable goods with duty exempted and GST deferment

Registered IGDS importers who wish to engage TradeNet declaring agents to submit the permit application on their behalf are required to authorise their declaring agents through the Inland Revenue Authority of Singapore (IRAS), which is the administrator of the scheme.

## Change in permit condition 'A5'

Previously, import permits with the condition A5 required the declaring agent of the permit to submit the original copy of the endorsed permit to Singapore Customs within four working days from the date of delivery of the goods.

From 1 October 2010, the A5 condition was changed. Henceforth, endorsed permits with the A5 condition will need to be submitted only upon request by the Singapore Customs. A letter of request may be issued and failure to submit the endorsed copy of the permit by the stipulated date in the letter of request may lead to enforcement action.

## GST guide on imports released by IRAS

The Inland Revenue Authority of Singapore (IRAS) released a new e-guide on Import Goods and service Tax (GST) in September 2010. The guide provides basic information on GST matters relating to importation of goods, including GST reporting requirements, procedures and various GST suspension schemes available in Singapore. There is also a section relating to agents importing goods on behalf of an overseas company and the responsibilities of the agent.

# Taiwan

## Proposed guidelines on temporary rules of origin under Economic Cooperation Framework Agreement (ECFA)

On 26 October 2010, Taiwan's Bureau of Foreign Trade (BOFT) held an information session explaining the proposed guidelines on preferential rules of origin applicable to goods in the Early Harvest List (EHL) under the ECFA between Taiwan and mainland China. The guidelines on preferential rules of origin are expected to take effect on 1 January 2011.

The key guidelines on the preferential rules of origin outlined in the information session include the following:

- **Issuing party of CoO:** The BOFT may entrust other institutions, foundations, industrial organisations, business organisations or farmer associations, fishermen associations, provincial agricultural cooperatives, agricultural products and marketing associations to issue CoOs.
- **Retention of records relating to CoO for five years:** According to the ECFA, the manufacturer or exporter should retain records relating to the CoO for a minimum of three years from the CoO's date of issue. However, in practice and according to Taiwan's Customs Law, customs authorities in Taiwan request that import/export related documents be retained for five years. Records may include direct or indirect documents relating to the purchase, cost, price, payment of raw materials and/or exported finished products.
- **Verification of country of origin on goods listed in EHL:** Customs authorities in the importing country may use the following methods to verify the country of origin on goods listed in the EHL:
  - requesting the importer to provide further supporting information within a set time period
  - sending a written request to the exporter, manufacturer, or issuing party of CoO from the exporting country to provide assistance relating to the good's country of origin
  - upon request, if the parties mentioned above do not provide information or written verification results within the requested period, the customs authorities in the country of import can refuse applying preferential duty rates to the goods in question
- **When to apply for ECFA CoO:** ECFA CoOs should be obtained prior to export declaration of goods, as opposed to general CoOs which may be obtained after the exported goods are released from the port.
- **Validity of ECFA CoO:** The ECFA CoOs are valid for a year.
- **Content of ECAF CoO:** The ECFA CoO application form should be completed including details of the manufacturer, importer, and exporter. The exporter, whether a domestic or foreign company, must be a registered company in Taiwan with a government uniform invoice (GUI) number, signifying that foreign companies must have a GUI number to apply for a CoO in Taiwan. In addition, ECFA CoO applicants must also obtain an account number from BOFT. The CoO application package should include the following documents:
  - CoO application form
  - Commercial invoice or transaction documents
  - Previous signed copy of CoO (where applicable)
  - Declaration forms
- **Issue of third-party invoicing:** The general guidelines on ECFA's rules of origin do not currently mention the applicability of preferential duty treatment on goods under third party/country invoicing or triangular trade. For example, when the goods are exported directly from mainland China or Taiwan, but re-invoiced in a third-country, say Hong Kong, Singapore, or the US, it may potentially be difficult for the customs authorities in the importing country to verify the accuracy of the import declaration of goods and CoO issued from the exporting country.



# Thailand

## New duty refund possibilities?

Depending on the country of origin, goods imported into Thailand may be subject to various duty rates: a “Most Favoured Nation” (MFN) duty rate, a WTO concession rate, or a duty rate based on a preferential FTA. Importers need to choose what duty rate they apply upon importation and explicitly mention this in the import declaration.

In case the importer is not clear as to which duty to apply upon importation, the importer can decide to declare the goods based on a higher import duty rate and reserve the right to request for a refund of duties paid in excess in case at a later stage he can demonstrate that he was entitled to a lower duty rate, e.g. in the situation where an importer does not claim an FTA duty rate pending the issue of a relevant CoO.

This refund possibility is based on Section 10 (5) of the Customs Act which provides that in event that the importer has reserved the right to claim the refund of excess in duties at the time of importation, or where the competent official should have known that duties were paid in excess, the importer would be able to get a refund within two years from the date of importation.

Recently, there have been several cases where importers had declared goods based on the MFN rate and at a later stage realised that the WTO concession rate for these goods was actually lower. Although these importers did not reserve the right to claim a refund of excess paid duties upon importation, they had filed a refund claim for the ‘excess’ paid duties.

Although Thai Customs considered that the refund was not possible as the importers did not explicitly reserve their rights to claim a refund upon importations in accordance with the Customs Act, they recognized that the goods were coming from WTO member countries, therefore the goods should in principle be eligible for the WTO concession rate.

As such, these cases were referred to the Council of State (an independent advisory body to the Thai Government) for an opinion. In September 2010, the Council of State issued its ruling. According to the Council of State, the importers had the right to claim a refund of excess duties paid. Even though the importers did not reserve the right to claim a refund upon importation, Section 10 (5) also provides that in case the competent Official should have known that the duties were paid in excess, the importer has the right to claim a refund.

As the WTO concessions rates are published in the Official Gazette in Thailand, according to the Council of State, Customs should have known that the WTO concession rates were lower than the MFN rates that were declared by the importers. Therefore, as long as the importers can demonstrate that the goods originated from WTO countries (e.g. by means of invoice or bill of lading as ‘proof of origin’), they should have the right to claim the excess duties paid.

Although rulings from the Council of State are not legally binding, based on a Cabinet Resolution, authorities should honour the opinion of the Council of State. As such, importers who have imported their products into Thailand based on the MFN rates, may potentially be able to get a refund of excess duties paid (for a period of two years) if the WTO concession rates for their products were actually lower at that time. Given the ruling of the Council of State, the refund claim is possible even where the importer has not explicitly reserved the right to claim a refund at a later stage.

## Board of Investment (BOI) Law may override Customs Law

On 13 October 2010, the Central Tax Court of Thailand ruled on a long disputed issue of whether the loss from one or more Board of Investment (BOI) projects must be offset against the profits of other BOI projects. The BOI had always taken the view that each BOI project is to be accounted for individually whereas the Revenue Department required taxpayers to combine the profit and losses of different projects.

The Central Tax Court ruled that the Investment Promotion Act (IPA), the legislation under which the BOI privileges are issued, is a ‘specific law’ applicable to tax payers with BOI privileges. Hence, according to the Court, the IPA overrides the Revenue Code which is considered as a ‘general law’ applicable to all taxpayers. As a result, the tax assessment by the Revenue Department was not permitted under the law.

Although this ruling is related to direct taxes, from a customs perspective, this ruling could be interesting as well. According to Section 40 of the Customs Act in conjunction with Section 10 of the Customs Tariff Decree, Customs authorities are responsible for enforcing BOI privileges related to the import and export of goods as provided for under the IPA. Any breaches of these BOI privileges may lead to challenges from Thai Customs.

This ruling from the Central Tax Court could be interpreted in a way that in case of differences in interpretation between the BOI and Customs (e.g. with respect to the application of certain duty exemptions) and the interpretation of the BOI is more favourable for the importer, the IPA would override the Customs Act and therefore the BOI's view should be followed. As such, companies which are currently being challenged on certain BOI privileges by Customs should consider whether it is worthwhile to refer to this ruling and/or bring their case forward to the BOI to get their view.

### Exemption of import duty on automotive parts

The Ministry of Finance has announced the exemption of import duty under notification dated on 13 October 2010 (No.18) which took effect on 19 October 2010. According to the notification, the import of certain automotive parts under tariff headings 8413, 8504, 8507, 8536, 8544, and 8708 for assembling or manufacturing Hybrid Electric Vehicles (HEV) with piston displacement not exceeding 3,000 cubic centimeters under heading 8703 will be exempted from the payment of duty for a period of three years from 19 October 2010.

The above import duty exemption can be claimed by legal entities who carry out their own assembling, manufacturing of automotive vehicles or motor vehicles or import the parts as cited above for their own usage only. In addition, the importer must submit the production formula for each model, i.e. the external cabin appearance, transmission system and capacity of engine.

If the duty exempted imported automotive parts have not been used in the production process within one year from the date of importation, the importer would need to send the remaining parts out of Thailand or pay import duty to Customs.

Furthermore, scrap or disposal parts need to be destroyed or exported out of Thailand. If the importer fails to do so, those items will become dutiable.



# Vietnam

## Significant increase in import tariff rates for certain products

On 9 September 2010, the Ministry of Finance (MoF) released Circular 133/2010/TT-BTC providing for changes in the tariff rates for certain products which came into effect on 24 October 2010. Some importers will be impacted as a result of the significant increase in the tariff rates applied to certain products classified under the following headings:

Heading	Description	Old MFN rate	New MFN rate
02.08	Other meat and edible meat offal, fresh, chilled or frozen	10	14
07.03	Onions, shallots, garlic, leeks and other alliaceous vegetables, fresh or chilled	15	20
08.05	Citrus fruit, fresh or dried	30	40
16.02	Other prepared or preserved meat, meat offal or blood	31 – 34	37 – 40
18.06	Chocolate and other food preparations containing cocoa	17 – 20	18 – 24
19.02	Pasta, whether or not cooked or stuffed (with meat or other substances) or otherwise prepared	34	38
19.04	Prepared foods obtained by the swelling or roasting of cereals or cereal products	31	34
20.02	Tomatoes prepared or preserved otherwise than by vinegar or acetic acid	30	34
20.05	Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen	25 – 31	27 – 32
20.08	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar	25	27
20.09	Fruit juices (including grape must) and vegetable juices, unfermented.	25	29 – 37
33.05	Preparations for use on the hair	20	24
39.26	Other articles of plastics and articles of other materials of headings 39.01 to 39.14	15	17
65.06	Other headgear, whether or not lined or trimmed	10	20
73.21	Stoves, ranges, grates, cookers, barbecues, braziers, gas-rings, plate warmers	17 – 24	18 – 27
76.15	Table, kitchen or other household articles and parts thereof, of aluminium; pot scourers and scouring or polishing pads	27	30
82.11	Knives with cutting blade, serrated or not	3	5
82.12	Razors and razor blades	17	20
83.02	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows	23	25
84.15	Air conditioning machines, comprising a motor-driven fan and elements for changing the temperature and humidity	25	27
84.18	Refrigerators, freezers and other refrigerating or freezing equipment, electric or other	30	40
85.08	Vacuum cleaners	20	31
85.19	Sound recording or reproducing apparatus	27	29
85.23	Discs, tapes, solid-state non-volatile storage devices, “smart cards” and other media for the recording of sound	15	25
85.25	Transmission apparatus for radio-broadcasting or television	12	15
94.01	Seats (other than those of heading 94.02), whether or not convertible into beds, and parts thereof	27	29
94.03	Brooms, brushes, hand-operated mechanical floor sweepers, not motorised	27	29

For a full detailed list of amended preferential tariff rates, refer to Circular 133/2010/TT-BTC.

## Reinforcement of the price management of imported milk products

The General Department of Customs (GDC) has released Official Letter **5627/TCHQ-TXNK** on 24 September 2010 to reinforce the price management of imported milk products as a result of recent price increases. The Official Letter took effect on 25 September 2010.

According to the Official Letter, milk products are now under the special management of Customs. As such, the GDC will conduct a post-clearance audit on companies in cases where the declared prices of milk products are greater by 10 percent or more compared to other identical goods.

## Update to the list of machinery, equipment, raw materials and supplies that can be produced in Vietnam

The Ministry of Industry and Trade (MoIT) issued Decision **4872/QD-BCT** dated 20 September 2010, providing a supplement to the list of machinery, equipment, raw materials and supplies that can be produced in Vietnam. The Decision came into effect on 20 September 2010.

The list is as follows:

Classification code	Description	Detailed technical description
7303.00.10	Tubes, and spare parts of cast iron (grey cast iron, ductile cast iron)	Of diameter measuring from 100 mm to 800 mm according to ISO 2531:1998
7614	Cables (A, AC, ACSR, TK for electro-transmission lines)	Of circular cross-section up to 750 mm <sup>2</sup>
8433.51.00	Combine harvester-threshers	Of cutting width of up to 2.2 m, with an engine capacity of up to 90 CV
8504.23.29	Electrical transformers	For voltage of up to 500 KV, with a capacity of up to 450 MVA
8504.21/8504.22	Transformers	three-phase, with a capacity of up to 1000 KVA
8504.21/8504.22	Intermediary transformers	three-phase, with a capacity of up to 10,000 KVA
8535.30	Isolating switches	For a voltage of up to 220 KV
8535.30	Additional charge switches	For a voltage of up to 35 KV
8537.20	Controlling – measuring – protecting voltage cabinets	For a transformer station of up to 500 KV
8537.20	Cabinets for medium-voltage circuit breakers	For a voltage of up to 35 KV
8701.10.11	Hand-held tractors	With a capacity not exceeding 22.5 kw
8701.20.10	Tractors	Of a cylinder capacity of less than 1,100 cc
[Note: not provided by MoIT]	Transformer station	For a voltage of up to 35 KV, with a capacity of up to 4,000 KVA

It is important to note that the MoIT did not provide a classification code for the last product in the list. As such, importers may consider seeking an official opinion from MoIT and GDC before importing such products.

In Vietnam, companies that invest in areas that are deemed social-economically difficult, in sectors that are “encouraged”, will be eligible for import duty exemption of imported machinery and equipment used as fixed assets. However, those machinery and equipment must not be produced in Vietnam.

### **Denial of CoO form Es under ASEAN-China FTA with the overleaf notes printed in Chinese**

According to Official Letter 4992/TCHQ-GSQL issued by the GDC on 28 August 2010, any CoO form E under the ASEAN-China FTA (ACFTA) that has overleaf notes printed in Chinese issued from 1 April 2010 will not be accepted by Vietnamese customs. Thus, importers will not be eligible to enjoy the ACFTA preferential tariff rates when importing goods accompanied by such CoO form Es into Vietnam.

### **Iron ore and concentrates, including roasted iron pyrites now attract a higher preferential tariff rate**

According to Circular 147/2010/TT-BTC issued by the MoF on 24 September 2010, the preferential tariff rate for importing iron ore and concentrates, including roasted iron pyrites (under heading 26.01), into Vietnam has significantly increased from 0% to 30%.

**The new preferential tariff rate will be effective from 8 November 2010.**

### **New customs tariff to be effective on 1 January 2011**

The MoF will be issuing a new customs tariff for the year 2011, replacing the current tariff order, which has been effective since 1 January 2010 under Circular 216/2009/TT-BTC.

In accordance with WTO commitments, the Vietnamese government is changing the import duty rates for a total of 1,083 HS codes in the customs tariff, the majority of which will be decreased. 10 HS codes will enjoy lower export duty rates. However, there are 4 HS codes classified under coal that will bear higher export duty rates.

The MoF has published the draft customs tariff on its official website to collect opinions from companies and relevant authorities.



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# Around the world

## Updates on WTO disputes

### US claims win in WTO challenge of trade remedy rules

According to a press release issued by the Office of the United States Trade Representative (USTR), the WTO has agreed with the US on most of the issues raised in a Chinese challenge of the US trade remedy rules.

In its challenge dating back to September 2008, China argued that the anti-dumping (AD) and countervailing (CV) duties the US applied against Chinese circular welded pipe, new pneumatic off-the-road tires, light-walled rectangular pipe and tube and laminated woven sacks violated the rules set out by the WTO. However, the WTO dispute settlement body reached the conclusion that the AD and CV duties imposed by the US are within its rights as China is regarded as a non-market economy. Accordingly, the WTO ruled in favour of the US on a vast majority of the claims, including the following:

- the use of the non-market economy methodology in the imposition of both AD and CV duties on goods imported from China
- the determination that certain Chinese state-owned enterprises and state-owned commercial banks (SOCBs) are public bodies that provide subsidies
- the finding that lending by SOCBs in the off-road tires investigation was specific
- the decision not to perform a pass-through analysis of subsidies or to offset the positive and negative amounts of subsidies found regarding the off-road tire investigation
- the choice of benchmarks to calculate the benefit from government-provided land-use rights in China in the woven sacks and off-road tires investigations
- the choice of interest rate benchmarks to calculate the benefit from loans from SOCB's in the pipe, woven sacks and off-road tires investigations

On certain issues however, the WTO was in favour of China. For example, the WTO ruled against the claims that the determination that government land-use rights are subsidy specific to a particular region as well as the use of "facts available" to determine certain costs due to alleged shortcomings in the information provided by the Chinese respondents, a method which tend to generally lead to higher AD and CV duty rates.

### DS414: China – countervailing and anti-dumping duties on grain oriented flat-rolled electrical steel from the US

On 15 September 2010, the US requested consultations with China regarding measures imposing countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel (GOES).

The US claimed that China's imposition of CV and AD duties on GOES imports from the US, based on a notice published by the Ministry of Commerce of the People's Republic of China, are inconsistent with regard to the rules and measures set out by the SCM Agreement, Anti-Dumping Agreement and the GATT 1994.

China on the other hand argued that the CV duties are rightly imposed against the subsidies granted by the US on provisions of the American Recovery and Reinvestment Act of 2009 and the State government procurement laws.

### DS414: Canada – certain measures affecting the renewable energy generation sector

On 13 September 2010, Japan requested consultations with Canada regarding Canada's measures relating to domestic content requirements in the feed-in tariff (FIT) programme.

Japan claimed that the measures set out by Canada appeared to be laws, regulations or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of equipment for renewable energy generation facilities that would accord less favourable treatment to imported equipment compared to products of Canadian origin, which is inconsistent with the obligations applicable for Canada as per the GATT 1994.

In addition, Japan believed a subsidy is granted as financial contribution or a form of income or price support, which allegedly would be a prohibited subsidy of the SCM agreement, as it appears to be provided upon the use of equipment of renewable energy generation facilities produced in Canada as opposed to imported goods from countries such as Japan.

After the file complaint was made, both the US and the EU requested to join the consultation. Subsequently, Canada informed the Dispute Settlement Body (DSB) that they had accepted the requests from the US and the EU to participate in the consultation.

# European Union

## Updates to EU GSP origin rules

The Origin Committee in Brussels finally voted on the proposed GSP origin rules on 21 September 2010. 25 member states voted in favour of the proposals and two abstained, which must have been a huge relief to the Commission. This means that the following changes to the EU GSP rules will enter into force on 1 January 2011:

- Revised product-specific rules of origin for many goods exported on or after 1 January 2011. In many sectors the product-specific rules have been simplified. For example, in several chapters, fewer goods are subject to heading-specific rules and the general Chapter rule applies to more products than under the current rules. The percentage of non-originating materials permitted has increased for many products, i.e. reducing the value-added requirement. Simpler alternative rules have been introduced for some products. For many products, the rule has not changed but has, for some reason, been re-worded, which may be a little confusing for certain goods
- Significant relaxation to the product-specific rules for certain products from designated least developed countries (LDCs). It is hoped that these changes will increase the LDC's opportunities to use GSP, which is currently restricted to relatively few sectors
- Possibility for member countries of the ASEAN and SAARC regional groupings to apply to cumulate origin between the two groups
- Possibility for GSP beneficiaries to apply to cumulate origin with countries that have FTAs with the EU
- Increase in the general tolerance from 10% to 15% (15% by weight for a range of agricultural products)
- Replacement of the direct transport rule with a non-manipulation requirement

In addition, the ability of GSP beneficiary countries to cumulate origin with Norway, Switzerland and Turkey will enter into force as soon as possible after 1 January 2011. However, this requires these three countries to adopt the new EU GSP rules of origin and it is very unlikely that this will happen in time for 1 January 2011.

Finally, the replacement of GSP Forms A with statements of origin issued by registered exporters and the introduction of the Registered Exporter

(REX) system will enter into force on 1 January 2017. Countries that cannot meet the 1 January 2017 deadline will have until 1 January 2020 to introduce the REX system and to replace GSP Forms A.

There are a lot of changes yet very little time to implement these changes to systems. There is also widespread concern with the time constraint in training beneficiary countries under the new rules. Certainly, by our experience, exporters in the beneficiary countries are either not aware of the new rules, or lack sound interpretations of them.

Therefore, importers should ensure that suppliers understand the rules, particularly in the least developed countries (LDCs), such as Bangladesh and Cambodia, for which the new rules for garments, for example, are significantly relaxed.

The new rules may not have gone as far as many member states would have wanted them to. However conversely, they might go further than many others' expectation. The new rules represent a missed opportunity for some products, only to simplify some unnecessarily complicated rules and to remove certain anomalies. Although we do not expect the Commission to revisit the GSP rules any time soon, there is definitely more work still to be done.

## Amendments to EU Tariff and Statistical Nomenclature

The EU has published the latest version of its Combined Nomenclature in Official Journal L284 on 29 October 2010 as Commission Regulation (EC) N° 861/2010. The new combined nomenclature will formally enter into force on 1 January 2011.

More information can be found on the Official Journal of the EU at:

<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:284:SOM:EN:HTML>

### **New import and export declaration compliance requirements from 1 January 2011**

From 1 January 2011 customs authorities in all 27 Member States of the EU will require importers to lodge an Entry Summary Declaration(ENS). This is used for risk analyses purposes. The ENS will usually be lodged electronically through the “Import Control System” (ICS) to the customs office of first entry into the EU. Depending on the mode of transport, there are different time limits for submitting the ENS.

Depending on the situation and applied delivery terms, data necessary to create and submit the ENS may need to be provided to the EU declarant by exporters based in Asia.

### **Other articles in October’s EU Customs Communique:**

- Judgment of the ECJ concerning the value of goods for customs purposes ‘Delivered Duty Paid’
- Update on the abolition of import duties on monitors, set-top boxes and multifunctional printers in the EU
- Developments regarding Binding Tariff Information
- Classification update
- Barriers lifted for meat importation to Turkey until the end of the year



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