

CUSTOMS AND TRADE FACILITATION

*Presented by
Mr. Mark Gillin
Head of Customs Working Group*

The General Department of Vietnam Customs (“GDVC”) has been preparing Decrees and Circulars, that will provide detailed regulations to implement the revised Customs Law of 2014,¹ which will go into effect on January 1, 2015.

During September and October 2014, the GDVC has organized consultations on a number of key implementing Decrees and Circulars, including the Decree implementing the revised Customs Law of 2014, Circulars on classification, valuation, authorized economic operators, Export Processing Zone (“EPZ”) and Enterprise Processing Export (“EPE”) operations, import processing procedures, etc.

The Customs Law of 2014 and implementing Decrees and Circulars are designed to implement common elements of the WTO Trade Facilitation Agreement (TFA), the Trans-Pacific Partnership (TPP) Chapter on Customs Administration and Trade Facilitation, the Vietnam-EU Free Trade Agreement, and the ASEAN Economic Community 2015.

Those common elements include: National Single Window (TFA Section I, Article 10.4), Advance Rulings (Section I, Article 3), Authorized Operators (Section I, Article 7.7), Export Processing Enterprises and Export Processing Zones (Section I, Article 9), Public Notice and Opportunity for Comment (Section I, Articles 1 and 2), and National Committee on Trade Facilitation (Section III, Article 2).

Implementing these common commitments would simplify customs and other import/export procedures (Ministry of Health, Ministry of Industry & Trade, Ministry of Agriculture and Rural Development, etc.), speed up Vietnam’s supply chains and increase competitiveness, reduce costs by 5% to 15%, reduce corruption, allow SMEs in Vietnam greater opportunities to participate in international trade. At present, about 66% of Vietnam’s exports comes from FDI factories, and the local content of the exports is very low.

Recommendations

The following are some key areas of focus for improving customs administration and trade facilitation:

1. NATIONAL SINGLE WINDOW

Vietnam should put priority and resources, including external technical assistance, on implementing the National Single Window for overcoming all of the uncoordinated import and export licensing, registration and other administrative requirements of various ministries and agencies. GDVC is the lead agency but, according to the World Bank, Customs import processing takes only 28% of the average of 21 days now required for clearance. The problem is that imported goods often require some other registration, certificate or license from another Ministry or “specialized inspection”, and agencies other than GDVC still use time consuming one-by-one administrative application procedures to issue documents that are mandatory for import or export.

The new customs law and draft implementing Decree provide that other ministries and state agencies are to “cooperate” with GDVC on a Single Window, but, absent external support and technical assistance from the private sector, in cooperation with development assistance, the

¹ <http://www.customs.gov.vn/Lists/VanBanPhapLuat/Attachments/7655/LHQ2014.pdf>

Single Window could be more complicated than the new e-Customs system and Vietnam will fall behind other countries in implementation and competitiveness.

2. ADVANCE RULINGS

GDVC should set up workable procedures that companies and traders can use for getting **Advance Rulings** on a timely basis to provide more certainty for business strategic planning.

The draft National Decree provides for advance customs rulings that are called “predeterminations” on customs tariff HS classification of goods, on origin of goods and on customs valuation of goods in Articles 32 and 33. These provide for such advance rulings to “automatically expire” in three years. This does not coincide with the five-year period of required customs recordkeeping or liability for additional duties, taxes or customs penalties. It is recommended that, if there must be a time limit for validity of a customs ruling, it should be aligned with the requirements for recordkeeping and liabilities for additional duties, taxes and penalties.

In addition, there is an overly broad requirement that importers or exporters who have received such rulings must notify GDVC of “any change” within 10 days, which is an unrealistic time frame for such notifications. “Any change” may allow customs officers to refuse to honor such rulings as binding in a significant number of cases, rendering the value of such rulings questionable in terms of providing predictability for businesses and traders. It is recommended these elements of the advance customs rulings provisions be revised.

Advance customs rulings are to be issued within either 30 days, or 60 days (depending on complexity) of the date of receipt by GVDC of a “complete dossier.” This “complete dossier” requirement will be specified in a separate Circular (regulation) that can be problematic and burdensome. The current customs regulation (Circular 128²) requires copies of purchase and sale contracts and proof of payment that renders such rulings to no longer be “advance.” These appear to have been removed from the new draft Circular however; such requirements have a way of “reappearing” in the final regulation. It is recommended that the draft regulations be monitored to avoid this.

3. AUTHORIZED OPERATOR

The current approach to **Authorized Operator** designation of privileged customs status for companies is too restrictive, involving USD 150 million in turnover for imports and USD 50 million for exports to qualify. This discriminates against SME’s which goes against an express provision in the WTO TFA.³

Authorized Operators, termed “AEO’s” or Authorized Economic Operators are a requirement of the WTO TFA and other agreements. Articles 9 through 12 of the draft prescribe conditions for companies to qualify for this status as “customs priority regime” companies. There is a potentially contentious issue involving eligibility conditions contained in Article 10.

The early draft limited such status to companies that had a turnover of USD 100 million and were “import/export companies.” We recommend that this turnover requirement be eliminated or greatly reduced because, it may violate or conflict with provisions in the WTO TFA that call for such programs to be implemented in ways that do not discriminate arbitrarily between economic operators and, that do not discriminate against SME’s. Under the currently proposed

² Circular 128/2013/TT-BTC dated September 10, 2013 on customs procedures, customs supervision and inspection; export tax, import tax, and administration of tax on exported goods and imported goods

³ TFA, Section I, Article 7.7.2 “ ... the specified criteria to qualify as an authorized operator shall be related to compliance, or the risk of non-compliance, with requirements specified in a Member’s laws, regulations, or procedures, ... such criteria shall not ... restrict the participation of small and medium-sized enterprises.”

criteria, even some of the world's leading express courier companies would not qualify and that, in practice, all logistics forwarders, customs brokerage firms and other parties with key roles in international supply chains would be precluded.

There are only 24 such "customs priority regime" companies in Vietnam at this time and all are multinational giants

The current version of the draft National Decree contains in Article 10 the following qualification conditions:

- An import/export enterprise having a turnover of US \$100 million per year;
- An enterprise exporting made in Vietnam goods with a turnover from US \$ 40 million;
- An enterprise importing/exporting agricultural or aqua-cultural goods produced or raised in Vietnam with a turnover from US \$ 30 million;
- Customs brokerage services providers who file at least 20,000 customs documents per year.

These changes are still too exclusionary and preclude companies like transportation, warehousing and supplier firms involved with supply chain security from being eligible for the program.

These conditions would appear to be against national interest in providing facilitation to SME's, which are said to constitute 97% of Vietnamese firms. They also appear to hamper a policy to favor investment in new "supporting industries" that will be important for making Vietnamese goods eligible for TPP trade benefits.

As a result, it is recommended that new and objective criteria for eligibility for the Authorized Operator program be developed to allow for integrated supply chain security and greater access to SME's.

4. CUSTOMS VALUATION

It is positive that the drafting committee accepted the recommendation to implement the Customs Valuation Agreement of GATT 1994 explicitly in the draft National Decree in Articles 20 through 31. However, there have been new provisions added or edited which could lead to confusion and misinterpretation and inconsistencies with GATT rules.

We recommend that major revisions to these articles in the draft National Decree be made to accurately reflect the actual text of the Customs Valuation Agreement of GATT 1994.

GDVC should revise reporting procedures for **Export Processing Enterprises** and **Export Processing Zones** to stop requiring filing of BOMs (bill of materials) and adjustments thereto and, instead, to adopt up-to-date "best practices" similar to international best practices involving Trade Zone procedures.

5. PUBLIC NOTICE AND OPPORTUNITY FOR COMMENT

With respect to the commitment of Public Notice and Opportunity for Comment (Section I, Articles 1 and 2), there needs to be additional time provided. The draft Decree was only published in the second half of September 2014, leaving less than 60 days before November 15, 2014, when the Decree is scheduled to be published. As of October 15, 2014, the draft Circulars regarding Classification, Valuation, Authorized Economic Operators, Export Processing Enterprises/Export Processing Zones, and Import Processing Procedures have not been published, as far as we know. Accordingly, it might be appropriate to either delay the effective date of entry into effect of the law, Decrees, and Circulars, or to issue an "Interim Final Decree," and "Interim Final Circulars," which would be subject to additional review and comment during an appropriate period of time, six to nine months, during which time there would be guidance

and “restrained enforcement”⁴ by GDVC, and a Final Decree and Final Circulars be published after the extended review and comment period, based on actual experience, so that the laws and regulations would be more appropriate to commercial operations and business reality in the ports.

6. HARMONIZED SYSTEM TARIFF CLASSIFICATION

With regards to the Harmonized system Tariff Classification, it is recommended that in Article 3 “Interpretation of Terms”, an explicit reference to the General Rules of Interpretation to the Harmonized Commodity Description and Coding System of the WCO be added in lieu of a reference to “common rules.” Similarly, it is also recommended that an explicit reference to the Explanatory Notes to the HS as published by the WCO be added to these terms as an “authoritative guide” for classification of goods for customs purposes.

This is necessary to reduce the number of spurious and erroneous tariff disputes and misclassifications that are occurring and are a burden to importers and exporters. It will also enhance greater uniformity in tariff classification of goods by customs officers at various ports throughout Vietnam. In addition, accurate HS tariff classification and application of these rules will be necessary for purposes of anticipated TPP Rules of Origin, as well as, for an Advance Customs Rulings program to be developed by GDVC. It is reported that the WCO’s Explanatory Notes to the HS have not yet been fully translated into Vietnamese and it is hoped this will stimulate completion of this project.

⁴ Delayed enforcement http://www.cbp.gov/sites/default/files/documents/import_sf_carry_3.pdf

How Will the Rule be Enforced? The interim final rule includes a delayed enforcement date of 12 months after the interim final rule takes effect. During this 12-month period, CBP will show restraint in enforcing the rule. CBP will take into account difficulties that importers may face in complying with the rule *as long as importers are making a good faith effort and satisfactory progress toward compliance.*