

## International Trade Policy Developments

### WTO Dispute Settlement Body Puts Philippine Excise Tax on Distilled Spirits on Agenda

On July 29, 2009, under the World Trade Organization (“WTO”) dispute settlement mechanism, the European Communities (“EC”) requested consultations with the Philippines concerning the Philippines' current excise tax regime on distilled spirits, which has been in place since 1997. The EC contended that the Philippine regime discriminates against imported distilled spirits, taxing them at a substantially higher rate than domestically produced spirits.

The EC request for consultations cited a number of specific measures which, the EC argued, are inconsistent with the national treatment principle, specifically Article III:2 of the General Agreement on Tariffs and Trade (“GATT 1994”). The consultations between the EC and the Philippines failed, and consequently, the former requested the WTO Dispute Settlement Body (“DSB”) to establish a panel on December 10, 2009. The DSB included the request for the establishment of a panel in its proposed agenda for January 19, 2010.

On August 10, 2009, the United States (“US”) joined the EC on the consultation. Now, the US wants direct consultations with the Philippines and on January 14, 2010 notified the Philippine delegation and the Chairman of the DSB of its request. In the January 14, 2010 communication, the US cited a more detailed list of legal instruments than those submitted by the EC.

The US noted that the Philippines taxes distilled spirits according to the raw material from which the spirit is distilled. Distilled spirits produced from certain materials that are typically produced in the Philippines are taxed at a low rate. Other distilled spirits are taxed at significantly higher rates. The Philippines' taxes on distilled spirits appear not to tax imported distilled spirits the same as directly competitive or substitutable domestic distilled spirits. In addition, the taxes appear to subject imported distilled spirits to internal taxes in excess of those applied to like domestic products.

The United States enumerated in detail the following Philippine regulations in relation to the taxes on distilled spirits:

Strategic Business Planning  
Supply Chain Planning  
Customs Advisory  
Export Control  
Tax & Transfer Pricing  
WTO & FTA Advisory  
Labor & Employment  
Anti-Illicit Trade

Cambodia  
China  
India  
Indonesia  
Japan  
Lao PDR  
Malaysia  
Philippines  
Singapore  
South Korea  
Taiwan  
Thailand  
Vietnam

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- Section 141 of the National Internal Revenue Code of 1997 (Republic Act No. 8424, an Act amending the National Internal Revenue Code as amended and for other purposes, as subsequently amended, particularly by Republic Act No. 9334, an Act increasing the excise tax rates imposed on alcohol and tobacco products, amending for the purpose Sections 131, 141, 142, 143, 144, 145 and 288 of the National Internal Revenue Code of 1997, as amended);
- Republic Act No. 8240, an Act amending Sections 138, 139, 140 and 142 of the National Internal Revenue Code, as amended and for other purposes;
- Revenue Regulations No. 02-97, Governing Excise Taxation on Distilled Spirits, Wines and Fermented Liquors;
- Revenue Regulations No. 17-99, Implementing Sections 141, 142, 143 and 145(A) and (C) (1),( 2), (3) and (4) of the National Internal Revenue Code of 1997 relative to the Increase or the Excise Tax on Distilled Spirits, Wines, Fermented Liquors and Cigars and Cigarettes Packed by Machine by Twelve Per Cent (12%) on 1 January 2000;
- Revenue Regulations No. 9-2003, Amending Certain Provisions of Revenue Regulations No. 1-97 and Revenue Regulations No. 2-97 Relative to the Excise Taxation of Alcohol Products, Cigars and Cigarettes for the Purpose of Prescribing the Rules and Procedures To Be Observed in the Establishment of the Current Net Retail Price of New Brands and Variants of New Brands of Alcohol and Tobacco Products;
- Revenue Regulations No. 23-2003, Implementing the Revised Tax Classification of New Brands of Alcohol Products and Variants Thereof Based on the Current Net Retail Prices Thereof as Determined in the Survey Conducted Pursuant to Revenue Regulations No. 9-2003;
- Revenue Regulations No. 12-2004, Providing for the Revised Tax Rates on Alcohol and Tobacco Products introduced on or before December 31, 1996, and for those Alcohol and Tobacco Products Covered by Revenue Regulations No. 22-2003 and 23-2003, Implementing Act No. 9334; and
- Revenue Regulations No. 3-2006, Prescribing the Implementing Guidelines on the Revised Tax Rates on Alcohol and Tobacco Products Pursuant to the Provisions of Republic Act No. 9334, and Clarifying Certain Provisions of Existing Revenue Regulations Relative Thereto;



The US alleged that these measures appear to be inconsistent with Article III:2 of the GATT 1994.

The Philippine Permanent Representative to the WTO, in a press release, conveyed its readiness to conduct consultations with the US. While the US request is still for consultation, the EC complaint is already tabled for hearing in a WTO DSB panel. Should the consultation with the US fail, the US may request for the establishment of a WTO panel. If this happens, the Philippines will be battling two giants for its local market for distilled spirits.

The Philippines may be pressured to amend its legislation to address the WTO dispute. However, at this moment, the legislative body may not be able to act to correct the provisions of the law that are inconsistent with the WTO rules because of the upcoming National Election in May 2010. The burden to revise the existing legislation will be passed onto the new set of legislators and may only be dealt with in the second half of 2010.



### **Thailand Implements ASEAN-India FTA Tariff Commitments from January 1, 2010**

Thailand has completed its all necessary process and officially started the tariff reduction/exemption under the ASEAN-India Free Trade Agreement ("AIFTA") on January 1, 2010. However, currently, only 3 members, namely Malaysia, Singapore, and India, are eligible for the AIFTA privileges. The related Announcements are:



- MOF Announcement Regarding Tariff Exemption/ Reduction under ASEAN-India FTA, issued on December 29, 2009. The Announcement consists of the tariff schedule for items subject to tariff exemption/reduction under the AIFTA, and
- Customs Announcement (No. 105/ B.E. 2552) Regarding Procedures of Tariff Elimination/ Reduction under ASEAN-India FTA, issued on December 30, 2009. This gives details on customs procedures, and how to obtain AIFTA preferential tariff rates.



Both Announcements have been effective since January 1, 2010.



### **Thailand Grants ASEAN-Korea FTA Tariff Privileges to Korea**

Pursuant to Ministry of Finance ("MOF") Announcement Regarding Tariff Reduction and Exemption Under AKFTA, issued on September 30, 2009, Thailand will grant the privilege to members who have completed their internal process.

On December 30, 2009, Customs Department issued Customs Announcement (No. 104/ B.E. 2552) Regarding Adding The Country Obtaining Tariff Privilege Under AKFTA in Annex 2 of Customs Announcement (No. 72/ B.E. 2552). The Announcement allows Korea to enjoy the privileges granted by Thailand under the ASEAN-Korea Free Trade Agreement ("AKFTA") from January 1, 2010.

In return, Thailand can now enjoy tariff privileges granted by Korea from January 1, 2010 as well.

### **Malaysia Implements 3 Regional FTAs from January 1, 2010**

In late December 09, Malaysia issued the legal enactments to implement 3 ASEAN Agreements to liberalize regional trade involving goods to all ASEAN members, Australia and New Zealand, as well as India, which came into effect on January 1, 2010.

#### ASEAN Free Trade Area ("AFTA")

AFTA, which progressively liberalizes intra-ASEAN trade goods since January 1, 1993, will be fully implemented starting January 1, 2010 between Malaysia, Brunei, Indonesia, Philippines, Singapore and Thailand. Except for a small number of sensitive agricultural goods at 5% duty, Malaysia has abolished duties on 1,943 tariff lines.

## ASEAN-Australia New Zealand Free Trade Agreement (“AANZFTA”)

The AANZFTA opens markets for the goods and services sector and relaxes the conditions for investment and economic cooperation between ASEAN, Australia and New Zealand. For goods, Australia and New Zealand will progressively abolish tariffs within 3 to 10 years. By 2020, all Malaysian exports to Australia and New Zealand will not be charged any import duty.



## ASEAN-India Free Trade Agreement (“AIFTA”)

Under the AIFTA Trade in Goods Agreement, import duty on more than 10,000 tariff lines will be reduced and abolished progressively within 3 to 8 years starting January 1, 2010.



The Ministry of International Trade and Industry (“MITI”) will issue certificate of origins (“C/Os”) under these FTAs retroactively for shipments commencing January 1, 2010.



MITI will also issue C/Os for shipments in December 2009 that arrived in the importing country after January 1, 2010. However, in such cases, it is up to the importing country to decide whether to allow preferential tariff claims using such C/Os.

## **President Signs EOs Implementing Philippine Tariff Commitments Under ASEAN Trade in Goods Agreement, ASEAN-Australia New Zealand FTA and ASEAN-Japan CEP**

Dispelling earlier fears that the Philippines will not be able to implement its regional tariff commitments in 2010, President Macapagal-Arroyo signed on December 23, 2009 three legal enactments relating to the implementation of Philippine tariff reduction schedules:



- Executive Order (“EO”) 850 for the ASEAN Trade in Goods Agreement (“ATIGA”);
- EO 851 for the ASEAN-Australia-New Zealand Free Trade Agreement (“AANZFTA”);  
and
- EO 852 for the ASEAN-Japan Closer Economic Partnership (“AJCEP”)

The above EOs were issued to provide the legal basis for the Philippines to implement its tariff commitments under the said regional free trade agreements (“FTAs”). EOs 850 and 851 were published on December 28, 2009 and the corresponding circular has been issued by the Bureau of Customs (“BOC”). Although EO 852 was signed on that same date, it was only released on January 17, 2010 by the Office of the President. The publication and issuance of BOC circular are expected to be completed as soon as possible.

## ATIGA

The issuance of EO 850 reduces to zero the remaining products in the Philippine Inclusion List (“IL”) in year 2010 under the CEPT-AFTA. The document, in effect, ensures that the Philippines is on track in implementing the ATIGA despite tremendous pressure to slow down tariff reduction.

Thus, tariffs on 1,500 goods – consisting about 17% of tariff lines – will go down to 0% under EO 850. These include, among others: automobiles and parts, certain fruits, vegetables, coffee beans, chemicals, fuel, as well as steel and plywood. The tariffs on petrochemicals, which have

been subjected to a temporary restraining order ("TRO"), have been reduced to zero, prompting the petrochemical industry to protest the government move. Rice has not yet been included as it is pending final resolution of the issue with Thailand.

### AANZFTA

The Philippines will start cutting down its tariffs on imports from Australia and New Zealand in 2010 until it eliminates duties on 96% of goods by 2020. There are 379 tariff lines or 61% which are duty free in 2010. Out of 620 total lines, 151 or 24% are dutiable between 10-15% in 2010. Lastly, there are 9 tariff lines whose tariff rates will be maintained at 1% from 2010-2014 and then will be reduced to zero in 2015.

### AJCEP

The tariff reduction schedule under EO 852 has not been released for dissemination because the said EO has not been published yet. Section 6 of EO 852 provides the legal basis for private sector to choose either the Japan-Philippines Economic Partnership Agreement ("JPEPA") or AJCEP rates as follows:

*Section 6. Except for Executive Order No. 767, s 2008 which remains in force and effect, all presidential issuances, administrative rules and regulations, or parts thereof, which are inconsistent with this Executive Order are hereby revoked or modified accordingly.*

However, this provision should be read together with the preamble provision:

*WHEREAS, in relation to the Philippines, pursuant to Paragraph 2, Article 79 of the AJCEPA, the Agreement shall enter into force on the first day of the second month following the date on which it makes notification of the completion of its legal procedures but the staging of tariff elimination or reduction shall commence on 01 December 2008.*

As the Philippines has not published EO 852, it could not notify completion of its legal procedures in accordance with paragraph 2, Article 79 of the AJCEPA.

### **Vietnam Implements AANZFTA**

The Ministry of Finance ("MOF") and the Ministry of Industry and Trade ("MOIT") issued Circulars, respectively, to guide the implementation of the ASEAN-Australia-New Zealand FTA ("AANZFTA").

#### MOF Circular 217/2009/TT-BTC: Special Preferential Import Tariff Schedule of Vietnam under the AANZFTA for the Period 2010 - 2012

The Vietnam ASEAN-Australia-New Zealand Free Trade Areas ("AANZFTA") Tariff Schedule pursuant to Circular 217 shall be applicable to customs declarations made with the customs office starting January 1, 2010. The Vietnam AANZFTA Tariff Schedule provides different rates for each year within the period 2009-2012. The imported goods are eligible for the preferential tariff if the following requirements are satisfied:



- Must be included in the Vietnam AANZFTA Tariff Schedule;
- Must be imported into Vietnam from the countries that already implement the AANZFTA Agreement. Currently, only 5 member countries are implementing the AANZFTA. Hence, the new tariff schedule shall apply only to these countries such as Australia, New Zealand, Brunei, Myanmar and Singapore starting January 1, 2010. The MOF will inform in writing the remaining member countries to be accorded the Vietnam AANZFTA rates;
- Must be transported directly from the exporting countries to Vietnam; and
- Must satisfy the rules of origin under the AANZFTA Agreement and have obtained C/O Form AANZ.



Under Circular 217, the majority of import tax duties will be reduced in the period 2010 to 2012.

MOIT Circular 33/2009/TT-BCT: Rules of Origin under AANZFTA Agreement

i. Determination of Origin

Circular 33 provides the Rules of Origin ("ROO") determining eligibility for the preferential tariff under the AANZFTA. Goods are considered as originating from ASEAN, Australia, New Zealand and Vietnam ("Member Country") and shall be eligible for the issuance of C/O Form AANZ if they satisfy the following conditions:



- Wholly originating from or produced in a Member Country;
- Have regional value content ("RVC") of not less than 40% and the final process of production has been performed in a Member Country;
- If all non-originating materials used in the production of the goods have undergone a change in tariff classification ("CTC") at four-digit level (i.e., a change in tariff heading) of the Harmonized System; or
- Goods are listed and satisfied the criteria set forth in the list of specific product rules.

Each Member Country shall permit exporters to decide whether to use the RVC criteria or CTC criteria in determining whether the goods originate in Member Countries.

For the purposes of determining goods origins, RVC is calculated pursuant to one of two formulae provided in Circular 33.

ii. C/O Form AANZ Issuing-Body

C/O Form AANZ is issued by 17 designated agencies in Vietnam.

### iii. Issuance of C/O Form AANZ

Exporters, producers or representatives with a legal power of attorney from exporters or producers (“enterprises”) have the right to request the issuing body to issue the C/O Form AANZ. There are two steps in obtaining C/O Form AANZ:

- Step 1: Enterprises must have completed the procedures for registration of its business entity file. The business entity file includes:
  - Registration of the specimen signature of the representative authorized to sign applications for C/Os Form AANZ and registration of the specimen seal of the enterprise;
  - Business Registration Certificate of the enterprise (certified true copy);
  - Tax Code Registration Certificate (certified true copy); and
  - List of production establishments of enterprise (if any) (in form provided by the MOIT).

Any change in a business entity file must be notified to the C/O Form AANZ issuing-body where registration was made, prior to applying for a new C/O Form AANZ. The business entity file must be updated at least once every 2 years.

- Step 2: Upon completion of registration as mentioned in Step 1, enterprises must complete the application for issuance of C/O Form AANZ. The application documents include:
  - Application for requesting of C/O issuance (in form provided by the MOIT) in which all items have been fully and validly declared;
  - Sample form C/O on which all items have been completed;
  - Completed customs export declaration;
  - Commercial invoice;
  - Bill of lading or document equivalent to bill of lading. However, in case of issuing back-to-back C/O of the whole batch or a portion of batch delivered from a non-tariff area into a State, the same may not be required if it does not exist; and
  - Other documents requested by the issuing-body as it may find necessary.

If, at the time of applying for a C/O Form AANZ, (i) the completed customs export declaration (item c) above) and/or (ii) the bill of lading are not available, then the enterprise may lodge these documents later. However, these documents must be submitted no later than 15 working days from the date on which the C/O Form AANZ is issued.



With respect to enterprises joining eCOSys, the authorized person signing the application for requesting of C/O issuance shall make declaration through eCOSys and execute the e-signature and transfer information to the C/O issuing-body. If the C/O issuing-body approves the declaration, it shall notify the enterprise through eCOSys to request the submission of physical application for their examination upon issuance of C/O.

iv. Time-limit for Issuance of C/O Form AANZ

A C/O Form AANZ must be issued as soon as possible and no later than 3 working days from the time proper and valid application documents are submitted by the enterprise (for a normal case). This time-limit may be extended for up to 5 working days if the C/O issuing body physically inspects the production or manufacturing location in case the data in the file is insufficient to issue a C/O or they suspect a breach of law with respect to previously issued C/Os.

Any C/O Form AANZ issuing body must update information through eCOSys on a daily basis, namely information on the status of issuance of C/O Form.



## REGULATORY DEVELOPMENTS IN ASIA

### CHINA

#### China Further Adjusts Tariff Lines and Rates for Imports and Exports in 2010

On December 8, 2009, the Customs Tariff Commission of the State Council issued Tariff Execution Plan 2010, regarding further adjustments to the import and export customs tariffs starting from January 1, 2010. The Tariff Execution Plan 2010 mainly covers the most-favored-nation ("MFN") tariff rates, temporary annual duty rates, agreement rates, preferential duty rates and tariff lines, etc.

#### Import Tariff Adjustment

In 2010, China will continue with its tariff reduction plan, in place since 2001 when it acceded to the World Trade Organization ("WTO"). The tariff adjustments resulted in China's overall average duty rate of 9.8%. The average duty rate for agricultural products is 15.2% and 8.9% for industrial products.

- i. MFN – MFN import duty rates on fresh strawberries and five other kinds of products (provisionally preserved fruit and nuts, rice wine, other wine, fabrics containing  $\geq 85\%$  by weight of polyester fibers and wet-blue leather) has been reduced.
- ii. Tariff Quota – 7 kinds of agricultural products (wheat, corn, sugar, wool, wool tops, cotton, and rice) and 3 kinds of fertilizers (urea, compound fertilizer and ammonium dibasic phosphate) will continue to be subject to tariff quota management. The temporary quota duty rate for the urea, compound fertilizer and ammonium dibasic phosphate is still 1%.

- v. Sliding Duty – A certain quantity of cotton imported outside the tariff quota will still be subject to the sliding duty and the duty rate will remain unchanged.
- vi. Specific Duty – The specific duty or compound duty rate for frozen chickens and other 54 kinds of products remains unchanged.
- vii. Conventional Tariff – China will continue to implement conventional tariffs on products coming from relevant countries and regions according to the trade or tariff preferential agreement that China signed with them.
- Asia-Pacific Trade Agreement Tariff Rate on 1767 commodities originating from Korea, India, Sri Lanka, Bengal and Laos.
  - Conventional Tariff Rate on certain commodities originating from Brunei, Indonesia, Singapore, Thailand, Philippines, Vietnam, Burma, Laos and Cambodia under ASEAN-China Free Trade Agreement.
  - Conventional Tariff on 7029 commodities originating from Chile under China-Chile Free Trade Agreement.
  - Conventional Tariff on 6240 commodities originating from Pakistan under China-Pakistan Free Trade Agreement.
  - Conventional Tariff on 7040 commodities originating from New Zealand under China-New Zealand Free Trade Agreement.
  - Conventional Tariff on 2753 commodities originating from Singapore under China-Singapore Free Trade Agreement.
  - Zero tariffs on 1587 commodities that are under the preferential standard of place of origin and originating from Hong Kong, China.
  - Zero tariffs on 1209 commodities that are under the preferential standard of place of origin and originating from Macao, China.



#### Export Tariff Adjustment

- Export tariffs will continue to be implemented on certain products as was done in 2009.
- The interim tariff will be used on some export commodities, including live eels fry.
- The special export tariff will continue to be imposed on some fertilizers.
- With respect to the products that were subject to the export tariffs prior to January 1, 2010, the amount of trade covered by export tariffs remains the same.

#### **China Issues New Measures to Encourage Joint Ventures**

In an effort to promote the development of industries such as the modern service sector, the China State Council published on November 2, 2009 a new measure to encourage overseas

investors with advanced technology and management experience to set up joint ventures ("JV"). The Administrative Measures for Partnership Enterprises Established by Foreign Enterprises or Individuals in the Territory of China ("Measures") will come into effect on March 1, 2010. This Measure will make it easier for foreign companies and individuals to be involved in the Chinese domestic market.

This Measure serves as a reference guide for 2 or more foreign enterprises or individuals planning to establish partnership enterprises with foreign or Chinese enterprises or individuals within China. Foreign enterprises or individuals can make their contribution through the use of Renminbi or other freely-negotiable foreign currency.

The regulation aims to provide a facility for foreign enterprises or individuals planning to establish business partnership or JV in China. The following is the general procedure in availing of this facility:

- Designated representatives or agents can directly apply for registration of the proposed partnership enterprise with the local industrial and commercial administrations that are authorized by the State Administration of Industry and Commerce. Provided that the project listed in the business scope of the partnership enterprise does not require prior approval from the Ministry of Commerce. Otherwise, approval from the Ministry of Commerce should be sought before local registration.
- The documents prescribed in the Measures of the People's Republic of China for the Registration of Partnership Enterprises and the explanation qualified for industrial policies for foreign investment should be submitted to the enterprise registration organ while applying for the registration of the establishment.

In the approval process for registration, the enterprise registration organ should simultaneously notify the information related to the registration with the competent commerce department of the same level.

This Measure also applies to partnership enterprises established in the Chinese mainland by companies or individuals from the Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan.

The partnership enterprise is a totally different form of foreign investment since the previously released laws aimed at foreign-funded companies will not be applicable to this form of enterprise.

## INDONESIA

### MOF Issues Tax Incentives on Importation of Steel Cord and Raw Materials

On November 18, 2009, the Ministry of Finance ("MOF") issued a tax incentive regulation providing that the Government will bear import duties for companies that produce steel cord of HS 7217.30.31.10. MOF regulation No. 187/PMK.11/2009 ("MOF-187") took effect on December 31, 2009.



The Government, through MOF, has allocated the fund of about IDR 5,600 million to cover payment of import duty for the importation of steel cord. However, in order to enjoy the facility, the goods must meet the following conditions:

- There is no domestic production of such goods; or
- There is domestic production but the quality does not meet the needed specification, or such materials are not produced in adequate quantities.

The incentive facility can be obtained through the Director General of Customs (“DGC”) by submitting a Plan of Import Goods (“RIB/Rencana Impor Barang”), which has been previously approved by Director General Metal, Machinery, Textile and various industries. The RIB should contain at least the following:

- Date of RIB;
- Name of Company; Tax payer number (NPWP);
- Address of company;
- Address of customs office where the goods will be enter;
- Description, type and specification of technical goods;
- HS, quantity, country origin, estimation of import price;
- Chairman of company;
- Estimation of import duty that would be paid by government.

The DGC will process an application within 14 days of receiving complete documents. The DGC, on behalf of MOF, will decide on the acceptance of an application.

Companies that have obtained approval from MOF have to conduct importation and the imported goods are not allowed to be transferred to other companies. Otherwise, the importer will have to pay the import duty borne by the Government plus 2% interest per month (up to maximum penalty of 24 months).

### **MOT Issues New Procedure for Importation of Used Capital Goods**

On December 22, 2009, the Ministry of Trade (“MOT”) issued MOT-63 to effect new procedure for importation of used capital goods for 1 year, from January 1 – December 31, 2010, which may possibly be extended. MOT-63 identifies products that would be categorized as used capital goods and specifies that importation of used capital goods can only be done by the following:

- Direct user company – Company that imports used capital goods for their own use;
- Reconditioning company – Company that holds reconditioning permit and imports used capital goods for export purpose and/or domestic demand. The imported used capital goods would be reconditioned prior to the transfer to a third party; and



- Remanufacturing company – Company that holds remanufacturing permit and imports used capital goods for export purpose and/or domestic demand. The imported used capital goods would have undergone some process (repairing process) prior to the transfer to a third party.

Although the last 2 types of described companies above may conduct similar processes before transferring the end products to third parties (either export or sell to domestic market), there is no written guidance relating to their clear differentiation.

In order to obtain the facility:

i. A direct user company shall submit its application to Director of Import, MOT, with the following documents:

- Copy of business license;
- Copy of Importer Registration Number (“API”);
- Copy of Tax Payer Number (“NPWP”)

ii. A reconditioning company or remanufacturing company shall submit its application to Director of Import, MOT, with the following documents:

- Copy of business license as recondition company or remanufacture company;
- Copy of Importer Registration Number (“API”);
- Copy of Tax Payer Number (“NPWP”)
- Copy of Feasibility Report on infrastructure facility for conducting recondition/remanufacture activities (include machinery, and other equipment in supporting after sales service);
- Recommendation letter issued by Ministry of Industry (“MOI”);
- For domestic purpose, the applicant shall indicate purchase order of the third party that requires the said imported goods.

MOT-63 also specifies the following:

#### Pre-shipment Inspection

Any importation of used capital goods shall require technical verification which would be conducted by appointed surveyor at country of origin. The technical verification would include: (i) usability of goods; (ii) specification of HS code; (iii) volume/quantity and value of the used capital goods.

The surveyor would have to issue a Certificate of Inspection, stating: (i) the goods are useable and can be utilized; (ii) the goods are not scrap; and (iii) the specification of goods, volume/ quantity and value of the goods. The Certificate of Inspection should be attached as part of



supporting document at importation for customs clearance. Otherwise, Customs would reject and require the importer to re-export the goods.

### Reporting

Approved importers are required to submit reports of import realization on the 15<sup>th</sup> of every third month.

### Sanctions

If violations are found, the importer may possibly face revocation of its import license (API).

## JAPAN

### Japan Updates Strategic Goods Export Control List

On December 9, 2009, the Ministry of Economy, Trade and Industry ("METI") announced the updated list of export control goods and technologies list for public comments. The new list reflects the changes on the dual use controlled items under the Wassenaar Arrangement of December 2008 and will include other international regimes such as the Nuclear Suppliers Group, the Australia Group, and Missile Technology Control Regime.

The updated list of parts covers broad range of goods and technologies of categories 1 to 9 in Wassenaar list. Wassenaar dual-use items are also subject to export control in other countries which have stringent export control regulation. For example, Hong Kong already announced its planned new list reflecting Wassenaar 2008 in November 13. The United States also announced EAR update on December 11, 2009 in the Federal Register, which is already in effect.

The following are samples of some changes for the information technology and electronics industry:

- Electronics: Export Trade Control Order Appendix I, Category 7, Integrated circuit, Field Programmable Logic Devices (ECCN 3A001.a.7) – Due to change in technical specifications, the export control over certain field programmable logic devices is eliminated. The new control parameters are clearer and take into account advances in technology.
- Computers: Foreign Exchange Order Appendix, Category 8, Software and Technology designed for development or manufacturing of Digital Computers (ECCN: 4D001.b.1/4E001.b.1) – In line with advancement of processor technology, the export control is relaxed in relation to Adjusted Peak Performance ("APP"), repealing 0.04 Weighted TeraFLOPS ("WT") and substituting with 0.1 WT.
- Information Security (Cryptography items): Export Trade Control Order Appendix I, Category 9, Information security equipments and components (ECCN: 5A002) - The relaxation of control over certain wireless personal area network equipment devices with published or commercial cryptographic standard. Two of exemptions notes are



added, and one of them below will affect a lots of consumer products with wireless capability.

- Exemption Note: Wireless "personal area network" equipment that implement only published or commercial cryptographic standards and where the cryptographic capability is limited to a nominal operating range not exceeding 30 meters according to the manufacturer's specifications.

The interpretation of this exemption note will be elaborated later by METI in a seminar to be conducted before the implementation day. If the interpretation is the same as in the U.S. EAR, which is already being implemented, this exemption note will cover wireless consumer products such as home entertainment systems, peripherals for PC, cell phone headsets, and iPod headphones, etc. The key element of this exemption note is based on limited short-range wireless technologies such as Bluetooth (IEEE 802.15.1), Wibree (ultra low power Bluetooth), or Zigbee (IEEE 802.15.4). However, this new exemption note does NOT decontrol wireless local area networks, such as WiFi standard (IEEE 802.11), which operate over greater distances than Bluetooth and generally equipped in PC or Mac.

There is no announcement yet on the effective date of this new control list. Implementation usually takes place few months after the announcement to give way for public comments. Exporters and manufactures who have Wassenaar dual-use items in their product range have to review their classification of items based on the new criteria and specification of the control list.

## MALAYSIA

### Malaysia Caps Fuel Sale to Foreign Cars at Borders

As part of efforts to prevent rampant smuggling of Malaysian fuel, which is highly subsidized, Domestic, Trade, Co-operative and Consumerism Affairs Minister, Ismail Sabri Yaakob, announced in Parliament in December 2009 that foreign-registered motorists traveling to Malaysia would be allowed to pump a maximum of only 20 liters of fuel within a 50km radius from the country's borders, including in Sabah and Sarawak. Vehicles with more than 20 liters of fuel in their tanks would also not be allowed to cross the border. This order takes effect from December 16, 2009.

According to reports, Singapore registered cars may be allowed to have more than 20 liters of fuel in their tanks when they leave the country as Singapore has already imposed a ruling that all vehicles crossing its borders must have their tanks filled to at least three-quarters full of fuel. However, there is currently still much confusion on the ground regarding the actual implementation of the measure.

Mr. Ismail indicated that his officers already issued circulars to petrol stations that fall within that particular radius, adding that stern action would be taken against those found breaching this order, including heavy penalties and revoking of licenses. There are about 300 petrol stations within 50km of the Singapore and Thai borders.



The order, which was aimed at preventing the smuggling of petrol and diesel, would be in place until a new mechanism for the management of fuel subsidy is implemented next year.

This is not the first time that Malaysia has tried to curb the sale of its subsidized fuel to foreigners. For instance, the government has previously announced that it would ban all petrol stations at the borders from selling petrol and diesel to foreign-registered vehicles beginning in June 2009 and also planned to have owners of such vehicles pay non-subsidized prices for petrol across Malaysia. However, the government called off the plan after pump prices were raised sharply to levels close to the then market price.

## PHILIPPINES

### Distressed Exporters to be Given Reprieve

Finance Secretary, Margarito Teves, approved on November 23, 2009, the proposal to assist exporters affected by the crisis. To implement the decision, the Bureau of Customs ("BOC") issued Customs Administrative Order ("CAO") No. 5-2009 Granting Temporary Relief to Distressed Exporters Unable to Timely Liquidate Imported Raw Materials/Articles Intended for Manufacture into Finished Products for Export, which was published on December 3, 2009, and extends the following to exporters:

- To be able to legally sell to the domestic market cancelled export orders made from imported raw materials for as long as they pay import duties and taxes;
- To be able to negotiate with the BOC for a compromised rate of payments on fines and penalties on imported raw materials whose liquidation has expired as a result of withdrawn orders.

CAO 5-2009 covers only those distressed legitimate exporters duly certified by the Bureau of Export Trade Promotion under the Department of Trade and Industry ("DTI\_BETP") and deemed qualified by the BOC. Exporters are not normally allowed to sell finished goods made of imported materials to local market. These pertain to finished goods made out of raw materials that were imported tax and duty free, which has a one-year prescriptive period for liquidation.

Distressed legitimate exporters are those who have imported raw materials for the manufacture of finished goods for exports, whose contract with the buyer has been cancelled due to financial crisis and not for reasons of quality. In view of such cancellation, the finished products can no longer be supplied to the intended buyer or to any other international buyer, and the only recourse is to sell them locally, after paying the duties and taxes on imported raw materials. Such goods, even if they have been disposed and paid the corresponding taxes and duties, the liquidation of the imported materials with the BOC has expired and subject to applicable fines, surcharges and penalties.

Under this condition, the legitimate exporter can apply for the compromise of the applicable fines, surcharges/penalties with the BOC through the relevant Collector of Port. However, such application would require supporting documents to establish that they are really categorized as distressed exporters. The supporting documents include Certification by the DTI-BETP and other



relevant documents. However, the application will be subject to thorough review by the Office of the Deputy Commissioner for Assessment and Operations Coordinating Group of the BOC.

The concession was finally arrived at after many exporters complained to trade and customs officials that they cannot dispose of previously ordered goods when buyers backed out. As a result, they failed to present export documents proving they have exported the imported raw materials and liquidate the imported raw materials within the prescribed period because their buyers cancelled their orders. Those greatly affected were the top three 3 exporters such as the electronics and semiconductor industry; garments manufacturers and automotive parts makers using imported intermediate products. These three sectors contributed close to 70% of the monthly export revenues of the Philippines during the pre-crisis period.

Hence, CAO 5-2009 was issued to provide temporary relief to distressed exporters. CAO 5-2009 took effect from the date of publication and shall remain in force 1 year thereafter.

### **President Signs Law Amending Customs Brokers Act or RA 9280**

During the first half of November 2009, the representatives of the Senate and the House signed the final draft of the amendments to the Customs Broker's Act ("CBA") and subsequently sent it to the Office of the President for signature by President Macapagal-Arroyo. On December 15, 2009, President Macapagal-Arroyo signed into law Republic Act ("RA") 9853 which amends 2 key provisions of RA 9280 or the Customs Brokers Act. The said RA will take effect 15 days after its publication in the Official Gazette.

Under RA 9853, the following sections have been amended:

#### Section 27

Section 27 has been amended to allow exporters to facilitate the processing of their export declarations without the aid of customs brokers.

#### Section 29

Section 29 of RA 9280 has been amended to allow any firm to act as a customs broker, provided that it has at least 1 in-house licensed broker and paid-up capital of at least Php 1 million.

## THAILAND

### **DFT Establishes Hotline for AFTA Stakeholders**

On January 8, 2010, Commerce Minister, Mrs. Porntiwa Nakasai, launched the AFTA Hotline 1385 Operating Center, which is organized by the Department of Foreign Trade ("DFT") and located on the fourth level of the DFT Building. It is one of several measures to help Thailand cope with AFTA implementation.

There are 4 main units within AFTA Hotline 1385 Operating Center, namely:

- Q&A Unit;



- Monitoring Unit – To monitor regularly the situation of import and export to prepare up-to-date strategies;
- AFTA Mobile Unit – To provide knowledge and consultancy on AFTA to related parties; and
- Remedy Unit – To provide suggestions on how to take advantage of the agreement and remedial measures for problems caused.

Other measures for AFTA implementation include establishing a committee to control and manage FTA impact, with the Commerce Under-Secretary acting as the Committee President, and holding seminars to educate and conduct public hearing. The Ministry of Commerce (“MOC”) will monitor the process at the importing hub to observe and listen to any problems raised.

There are approximately 10 officers manning the Center. For the AFTA Mobile Unit, it is still a planned project which has not yet been implemented.

Currently, there is no official operating center for other FTAs; ASEAN countries are Thailand’s closest economic and trading partners, as compared to other countries.

#### **IEAT and BOI Establish Investment Service Centers in Bangkok**

In an effort to provide investment services, the Industrial Estate Authority of Thailand (“IEAT”) and the Board of Investments (“BOI”) established their own investment service centers. The IEAT established the “Total Solution Center (“TSC”) while the BOI established the One Start One Stop (“OSOS”) Investment Center.

The IEAT, in cooperation with the Customs Department, established the TSC to assist investors by providing consulting services and useful information for investors in 13 areas of IEAT free zones, regardless of what industry they are investing in. The official opening of the center was held on December 3, 2009. TSC Head Office is located in Makasan District, Bangkok. The focal facility is the electronic database which links information between IEAT and Customs Department. This facility helps save time and paperwork in completing several processes. In terms of management, TSC offers assistance to investors in completing their tax and customs procedures, claiming for tax and customs privileges, obtaining visas and work permits (for alien workers), environment control, etc.

BOI also provides another investment service, the OSOS Investment Center, which officially opened on November 23, 2009, The OSOS is located in Chamchuri Square. The center aims to assist investors, whether Thai or foreign, small or large, BOI-approved or not.

Due to the difficulties in dealing with several agencies for many transactions, the center assists investors to complete their government transactions in one stop investment center. The center houses approximately 30 representatives from over 10 agencies. The center offers business consulting services and assistance in registering a company, obtaining investment promotion, obtaining a foreign business license, completing an environmental impact assessment, requesting permission to use land for industrial operations, etc. In addition, information and services on certain types of businesses such as pharmaceuticals, food, energy, mining and logistics are



provided. In addition, on January 4, 2010, the BOI will also provide services for visas and work permits in the OSOS.

### **DFT to Sanction Exporters with Invalid C/Os**

The Department of Foreign Trade (“DFT”) issued on November 2, 2009 DFT Announcement regarding measures that will address practices of entrepreneurs and exporters regarding the issuance of C/O that may distort international trade. The DFT announcement took effect on December 1, 2009.

The announcement allows DFT to check the accuracy of the C/O accuracy, both randomly and upon request from importers. Corresponding penalties will be imposed in case violations of the regulations are committed such as: commodities do not comply with the rules of origin; the name of exporters specified in the C/O is fraudulent; necessary documents are forged, etc. The penalties shall constitute desisting the issuance of C/O for particular exporters or prohibiting them to deal on any transaction with DFT. The duration of punishment would vary according to the severity of the violation. In some cases, the Court’s judgment will be required and offenders may be subject to civil punishments.

## **VIETNAM**

### **MOF Instructs Customs Officers in Cases Where Further Verification is Required under Pilot E-Customs Procedures**

On November 25, 2009, the Ministry of Finance (“MOF”) issued Circular No. 222/2009/TT-BTC providing instructions to the pilot e-customs procedures. Accordingly, in case of doubt about the origin of goods, the customs authorities shall require the importer to provide additional documents for evidence, or request the competent authorities of the exporting country to confirm the origin.

Verification of the origin of goods shall be completed within 150 days from the date on which the complete and valid customs declaration dossier were filed. In the course of goods quality inspection applicable to common goods, the customs authorities shall prefer that facilities and equipment conducting the inspection of goods’ quality be utilized. If there are signs of violation of quantity, weight, the customs body shall directly inspect the goods for accurate determination. For those items that the equipment used by customs authorities or direct customs officers cannot determine the amount of goods, or the inspection can not be done by such devices, nor directly checked by customs officers, the customs authorities shall base the results of the examination undertake by inspection service providers for goods inspection and determination.

For goods provided in the list of products subject to quality inspection, customs offices shall base their examination implementing the customs procedures on either of the following:

- Registration of Examination of the goods quality,
- Notice of Inspection Exemption, or
- Food Quality & Hygiene Inspection Control Results.



## MOF Implements Import Control Regulation

On December 11, 2009, the Ministry of Finance ("MOF") sent Official Letter No. 17433/BTC-TCHQ to municipal and provincial customs departments in deference to the instructions of the Deputy Prime Minister Nguyen Sinh Hung as recorded in Official Letter No. 7332/VPCP-KTTH, dated October 20, 2009, in relation to import control measures. The MOF Official Letter provides the following instructions:

### Goods to be Placed in the Red Lane

The customs sub-departments must put the following goods in red lane for purposes of actual inspection, checking of HS codes, dutiable prices and origins:

- i. Goods included in the list of consumer goods in which import duties must be paid before customs clearance of such goods (e.g., automobiles);
- ii. Goods included in the list of the goods subject to State quality inspection;
- iii. Goods included in the list of goods subject to inspection of food hygiene and safety; and
- iv. Goods which duties need to be paid prior to customs clearance.

For goods included in the list of consumer goods for which import duties must be paid before customs clearance, customs procedures must be done at import border-gates, and shall not be stored in bonded warehouses.

Pursuant to the General Department of Customs Official Letter No. 8030/BTC-TCHQ dated December 31, 2009, consumer goods mentioned in (i) and (ii) above shall exclude the following:

- Consumer goods used as materials for processing and production;
- Goods imported to form fixed assets;
- Goods transited and warehoused in Vietnam before export to a third country;
- Goods traded by the mode of temporary import for re-export or transportation from or to Vietnamese border-gate; and
- Goods imported into free duty areas.

### Strengthening Customs Enforcement

To strengthen customs inspection, monitoring and control, the following actions are required:

- Enhance inspection after post-clearance with respect to imports classified in green lane, yellow lane, and the items that are susceptible to commercial fraud;
- Enhance control, anti-smuggling efforts, collection and analysis of information, establishment of special projects against commercial fraud; and



- General Department of Customs to carry out random inspection and examination.

### **GDC Clarifies Guidelines in Making Changes on Name of Importer in Customs Declarations**

Under prevailing regulations, revision of customs declarations that have been submitted to the Customs offices may only be permitted in the following cases:

- Before the Customs offices conduct the actual goods inspection or issue a decision on actual inspection exemption; or
- Within 60 days from the date of customs declaration registration with respect to errors that affect amount of tax payable, provided that certain regulatory conditions must be satisfied.

However, in response to private sector inquiries regarding changes in the name of the importers recorded in the customs declaration submitted to the Customs offices, and when export customs procedures have been completed and goods have already been exported, the General Directorate of Customs ("GDC") issued Official Letter No. 7988/TCHQ-GSQL dated December 30, 2009, and provided the following guidelines:

- Enterprises are allowed to make additional declaration to change the name of importer in the customs dossier. However, enterprises shall be subject to an administrative penalty if such additional declaration is made over the time-limit mentioned above; and
- The additional declaration must be made in the form issued by the Ministry of Finance. Sub-departments of customs where the export customs declaration is registered must certify the additional declaration and the export customs declaration.



# BRYAN CAVE INTERNATIONAL TRADE

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