

# **KYOTO CONVENTION**

## **GENERAL ANNEX GUIDELINES**

### ***Chapter 8***

#### ***RELATIONSHIP BETWEEN THE CUSTOMS AND THIRD PARTIES***



WORLD CUSTOMS

ORGANIZATION

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## **1. Introduction**

This Chapter of the General Annex concerns third parties and their relationship to Customs. A third party is defined in the Kyoto Convention as "any person who deals directly with the Customs, for and on behalf of another person, in connection with the importation, exportation, movement or storage of goods".

Examples of third parties covered by Chapter 8 are Customs agents and brokers, freight forwarders, modal and multi-modal carriers and delivery services. The most common of these are Customs brokers or Customs agents who are essentially concerned with presenting and processing Customs documentation on behalf of importers or exporters.

Third parties are not persons who deal with Customs in their own right. For example a port authority who is responsible only to present goods to Customs for physical inspection on behalf of an importer or exporter or a bank that is responsible for producing an original bill of lading to comply with documentary credit arrangements are not third parties as defined for the purposes of the Kyoto Convention.

The facilities granted to third parties in this Chapter offer advantages to all concerned. Importers and exporters are able to employ specialists to deal with complicated and detailed Customs procedures that may be unfamiliar to them and who can act on their behalf at times and places which they themselves would find inconvenient. Carriers and delivery services are able to expedite the movement of goods in their charge through Customs controls and to service the steadily growing proportion of time-sensitive consignments. Customs are able to more steadily and predictably clear goods, thereby better managing their own resources and the release times for the trade. In some countries, Customs also benefit from dealing with agents and brokers who are often more expert at handling the requirements for Customs procedures than some of their customers.

### **Standard 8.1**

*Persons concerned shall have the choice of transacting business with the Customs either directly or by designating a third party to act on their behalf.*

This Standard gives the "person concerned", who is usually the exporter or importer and the owner of the goods, the option of either dealing directly with Customs or designating a third party to deal with Customs. Other "persons concerned" could also include sellers, buyers, consignors or consignees, depending upon the particular transaction. The third party is thus the person who is designated by the "person concerned" to transact business with the Customs on the latter's behalf.

While some Customs administrations are liberal in their dealings with third parties, some have imposed certain restrictions on third party transactions. These restrictions are to ensure that the third party acts with a certain degree of professionalism and responsibility, thereby allowing Customs to fulfil its own responsibilities to ensure compliance with Customs law. Some administrations require third parties by law, regulation or Customs ruling to be licensed. These licensing requirements may stipulate specified criteria that the third party must meet such as age, education, professional competence or moral and financial integrity. Additional criteria generally are that the third party have a registered business premise and meet professional standards for record-keeping. In some countries, third parties must pass qualifying examinations to meet these requirements. Customs' authority in approving third parties is covered by Standard 8.2.

## **2. Conditions and Liability**

### **Standard 8.2**

*National legislation shall set out the conditions under which a person may act for and on behalf of another person in dealing with the Customs and shall lay down the liability of third parties to the Customs for duties and taxes and for any irregularities.*

This provision calls for the national legislation to specify the conditions for persons to act as third parties and to stipulate their liability to Customs. This ensures that Customs can safeguard the revenue and other control requirements as thoroughly in dealing with the intermediary as with his principal.

In particular the relevant national legislation should cover the third party's liability for any duties and taxes and for any irregularities in compliance with Customs requirements.

In some countries third parties and the persons they represent may be held jointly and severally responsible to Customs for duties and taxes and any irregularities, as well as for any concomitant fines or penalties.

In enforcing these and other regulations involving third parties, Customs may wish to take account of certain practical differences between a principal, that is, the direct declarant, and someone acting on his behalf. The principal usually has a closer knowledge of and a clearer responsibility for the accuracy of the information set out in the declaration or other submission to Customs than does the agent, broker or representative. Thus while Customs should hold third parties firmly accountable for all duties and taxes, they could give sympathetic consideration to lifting or mitigating certain penalties. For example, if the infraction is a misstatement and a similar offence that arose solely from defects in the data supplied by the principal, and the third party can show that he had taken reasonable steps to provide accurate and correct information, Customs could take these factors into account before deciding to impose a penalty.

### **Standard 8.3**

*The Customs transactions where the person concerned elects to do business on his own account shall not be treated less favourably or be subject to more stringent requirements than those Customs transactions which are handled for the person concerned by a third party.*

Standard 8.3 requires Customs to treat principals and their third parties equally. Customs must not impose more stringent requirements on anyone preferring to deal directly with Customs rather than employ a third party for any particular transaction or in general. This is to prevent discrimination in Customs' relationships with third parties and those who chose not to use a third party. With the growth of electronic commerce in international trading, with many Customs administrations developing more client-oriented service relationships with the trade, and with increasingly transparent Customs procedures and practices, many principals such as multinational corporations are choosing to deal directly with Customs.

However, this does not mean that Customs treatment has to be exactly the same for a direct principal as for an authorized third party. For example, the granting of deferred payment facilities by Customs to third parties who regularly clear substantial volumes of goods will not necessarily create a precedent which, under this Standard, would then be automatically available to direct principals with only occasional transactions or poor compliance records.

## **3. Third party rights**

#### **Standard 8.4**

*A person designated as a third party shall have the same rights as the person who designated him in those matters related to transacting business with the Customs.*

This Standard similarly guarantees third parties the same rights as their principals. This can include the right to use modern communication and automated systems to fulfil Customs formalities, and the right of access to Customs information on legislative or procedural changes. Third parties should also not be required to retain more records for audit and inspection by Customs than those necessary to ensure that they have carried out their duties in a legal and responsible manner. This is particularly important when certain third parties, such as freight forwarders, may carry on other domestic businesses unrelated to international trading. Customs should not impose requirements on those unrelated records. Furthermore, like all parties who deal with Customs, third parties must also be allowed recourse to appeal procedures.

## **4. Trade Consultation**

#### **Standard 8.5**

*The Customs shall provide for third parties to participate in their formal consultations with the trade.*

This Standard supplements Standard 1.3 of the General Annex that calls for Customs to establish and maintain consultative relationships with the trade, by requiring Customs to include third parties in their formal consultations. The inclusion of third parties with other traders in carefully managed consultative processes is a feature of modern, effective Customs administration. All parties, including Customs themselves, will benefit from timely, friendly and regular consultation on any matters affecting the movement of goods in international trade. This includes, as an example, proposed legal or procedural changes, especially when these may require substantial changes to the computer and information technology systems of traders. Likewise commercial plans to relocate major operational centres which could entail corresponding redeployment of Customs human and technical resources, as well as those of traders, should be the subject of prior trade consultation.

Co-operation and consultation may be managed through formal Joint Customs/Trade Committees at all national, regional and local levels. At the national level this co-operation is often supplemented by concluding Memoranda of Understanding (MOU's) between Customs and trade representative bodies or between Customs and individual companies. MOU's have been found particularly useful in some countries for assisting Customs to combat fraud and drug smuggling, and they have brought advantages to the trade in the form of reduced Customs interventions at the frontier. These Memoranda often include joint training and awareness programmes. Such exchanges provide real practical benefits to both sides in terms of better compliance, improved facilitation and more effective resource management.

The consultative process should particularly be encouraged at regional and local levels. By communicating directly at the time and place of trading operations, many problems can be avoided or solved for all parties concerned. Some countries have established regional and local Customs Liaison Committees which deal with day-to-day issues successfully and timely. (See the Guidelines to Chapters 1 and 3 of the General Annex for other examples of the benefits of consultation and communication with the trade).

## **5. Customs decision not to transact business**

### **Standard 8.6**

*The Customs shall specify the circumstances under which they are not prepared to transact business with a third party.*

There may be circumstances when Customs will refuse to transact business with a third party. Standard 8.6 requires Customs to state the reasons when this would occur. These exceptional circumstances must be clearly prescribed in national legislation, regulations or Customs rulings and provided to third parties. The reasons or circumstances would include :

- Conviction of a serious Customs offence within a specified recent period, or
- Consistent failure by the third party to fulfil responsibilities to the principal or to Customs, including repeated instances of gross negligence or infringement of Customs rules.

Unless a third party has committed a very serious offence, Customs should issue written warnings for reprehensible actions or omissions by the third party in dealing with them before Customs decides to suspend or revoke any license or authorization or to refuse to do business with the third party.

### **Standard 8.7**

*The Customs shall give written notification to the third party of a decision not to transact business.*

The decision not to transact business with the third party is a very important one and Customs should study the implications of such a decision before it is taken. Once Customs decides to withdraw a third party's facility to transact business with them, Standard 8.7 requires Customs to give written notification of their intention and the reasons for it. This notification should be furnished within a reasonable time in advance of the actual withdrawal or final decision.

What constitutes a reasonable time is dependent upon the cause of the action and the immediate impact to the third party and his principals. For example if the third party has other transactions pending with Customs and Customs can be assured that these will be properly completed, they should provide a window of several days or weeks before the decision will take effect. This would allow the third party sufficient time to conclude his current business and not incur new obligations to principals. The benefit of this "grace period", provided that Customs is satisfied that no further loss or offences would be incurred, is for the benefit of innocent principals as much as for the third party or Customs. In such instances the principals concerned who designated the third party in question should be notified of the revocation and informed of any alternative means that may be available for them to carry on their dealings with Customs.

The third party should also be given the opportunity to appeal against the withdrawal by Customs. This may be allowed before the final decision is made depending on the particular circumstances involved. (See Standard 10.2 of the General Annex). However, in cases where the third party has committed a criminal offence, the authorization to transact business with Customs should be revoked with immediate effect.

Refusal to do business with a third party should be open to reconsideration, upon request, after a certain period of time from the original cause of refusal.

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