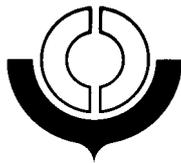


KYOTO CONVENTION

GUIDELINES TO SPECIFIC ANNEX H

Chapter 1

CUSTOMS OFFENCES



WORLD CUSTOMS ORGANIZATION

Table of contents

1. Introduction.....	3
2. Objectives of the Chapter	3
3. Definitions	4
4. General Provisions	4
4.1. Liability of natural persons	5
4.2. Liability of legal persons	6
4.3. Period of limitation	6
5. The investigation and establishment of Customs offences	7
5.1. Investigation powers of Customs	7
5.2. Searches	8
5.2.1. Search of persons.....	8
5.2.2. Search of premises.....	8
5.3. Procedural guarantees	8
6. Seizure and detention of goods and means of transport	9
6.1. Goods not related to an offence	10
6.2. Documentation	11
6.3. Release of goods or means of transport.....	12
6.4. Forfeiture or confiscation of means of transport	13
7. Detention of persons	14
8. Administrative settlement of Customs offences	15
8.1. Administrative settlement.....	15
8.2. Settlement by local Customs office.....	16
8.3. Principle of proportionality	17
8.4. Liability of the declarant	18
8.5. Force majeure	18
9. Return of seized or detained goods and discharge of security	19
10. Right of appeal in an administrative settlement	19

1. Introduction

The primary task of Customs is to ensure compliance with Customs law. To assist in dealing with Customs offences or suspected offences, it is necessary that Customs have powers to investigate and, where appropriate, to impose sanctions against those who are not in compliance.

Chapter 1 of Specific Annex H deals with the investigation and establishment of breaches of Customs law and with the administrative settlement of offences by Customs. The repression of Customs offences, by application of suitable penalties, is also addressed but only to the extent that it falls within the competence of Customs.

This Chapter does not cover measures taken by Customs under bilateral or multilateral mutual administrative assistance agreements nor the measures provided for in the international Convention on mutual administrative assistance with a view to the prevention, investigation and repression of Customs offences of 9 June 1977 (Nairobi Convention).

This Chapter does not specify the procedures to be followed or the various measures that Customs can take to collect fines or execute judgements or sentences handed down by the courts or tribunals.

This Chapter also does not cover measures taken as part of Customs control such as normal inspections carried out for Revenue purposes, auditing of books kept at a place of manufacture, or inspections of Customs warehouses.

Other offences, such as theft, forgery, and assaults upon Customs officers engaged in the performance of their duties, that are committed in connection with a Customs offence are similarly outside the scope of this Chapter.

It should be noted that in many administrations, Customs derive investigatory and other powers under their penal codes beyond those relating to Customs law. The exercise of these powers need not necessarily result in matters relating to Customs law. The scope of this Chapter is not intended to limit the powers granted under national legislation that may be wider than those stipulated in the Chapter, nor to extend its scope to other areas of law. This Chapter fundamentally addresses Customs offences as defined in the legal text and does not affect other powers granted to Customs officers under national legislation.

2. Objectives of the Chapter

This Chapter sets standards aimed to combine the adequate investigation of Customs offences with a minimal disruption of trade. This is because long and costly criminal proceedings as a reaction to frequently occurring minor irregularities may impose disproportionate burdens on trade. Similarly, severe penalties for minor breaches of Customs law are inappropriate.

The Chapter also sets out Standards and Recommended Practices on the administrative settlement of offences by Customs, thus allowing a means to avoid criminal proceedings while at the same time offering procedural guarantees to the parties involved. The

provisions of the Chapter ensure that investigations and penalties are proportionally related to the seriousness of the offence as well as to the culpability of the offender.

3. Definitions

E1/F2 **“administrative settlement of a Customs offence”** means the procedure laid down by national legislation under which the Customs are empowered to settle a Customs offence either by ruling thereon or by means of a compromise settlement;

E2/F3 **“compromise settlement”** means an agreement under which the Customs, being so empowered, consent to waive proceedings in respect of a Customs offence subject to compliance with certain conditions by the person(s) implicated in that offence;

E3/F1 **“Customs offence”** means any breach, or attempted breach, of Customs law.

All the definitions of terms necessary for the interpretation of more than one Annex to the Convention are placed in the General Annex. The definitions of terms applicable to only a particular procedure or practice are contained in that Specific Annex or Chapter.

4. General Provisions

Standard 1

The investigation, establishment and administrative settlement of Customs offences by the Customs shall be governed by the provisions of this Chapter and, insofar as applicable, by the provisions of the General Annex.

The revised Kyoto Convention has a set of obligatory core provisions that are contained in the General Annex. The General Annex reflects the main principles considered necessary to harmonize and simplify all the relevant Customs procedures and practices which Customs apply in their daily activities.

As the core provisions of the General Annex are applicable to all Specific Annexes and Chapters, they should be applied as appropriate when dealing with Customs offences. Where a specific applicability is not relevant, the general principles of the General Annex should always be borne in mind when implementing the provisions of this Chapter. In particular, Chapter 1 of the General Annex on General principles, Chapter 3 on clearance and other Customs formalities, Chapter 5 on Security and Chapter 10 on Appeals should be read in conjunction with this Chapter on Customs offences.

Contracting Parties should particularly note Standard 1.2 of the General Annex and ensure that their national legislation specifies the conditions to be fulfilled and the formalities to be accomplished in regard to Customs offences.

In line with Article 2 of the Convention, Contracting Parties are encouraged to grant greater facilities than those provided for in this Chapter.

Standard 2

National legislation shall define Customs offences and specify the conditions under which they may be investigated, established and, where appropriate, dealt with by administrative settlement.

Standard 2 requires national legislation to define what are Customs offences. It is essential to Customs in understanding their role and actions in investigating any offence committed. This is also important to assist the trade in their compliance with Customs law and make them aware of the actions that can be anticipated for an infringement.

Customs offence is defined in this Chapter as “any breach, or attempted breach, of Customs law”. Customs law is defined in the General Annex as “the statutory and regulatory provisions relating to the importation, movement and storage of goods, the administration and enforcement of which are specifically charged to Customs and any regulation made by Customs under their statutory powers”.

Most countries also consider the obstruction or hindrance of Customs control measures and the presentation of false invoices or other false documents as Customs offences. However other offences, such as theft and assault upon Customs officers engaged in the performance of their duty, are in some countries dealt with under general criminal law and not treated specifically as Customs offences.

Customs in many countries also investigate offences relating to narcotic drugs and to value-added tax on importation. Consequently, for these countries such offences can also be considered as Customs offences.

In many countries Customs is empowered to investigate offences related to financial operations, in particular exchange controls. This category of offences may also be considered Customs offences insofar as they relate to the importation and exportation of goods. In this connection, see Chapters 4 and 5 of the General Annex on duties and taxes and security.

In some countries, any person who has prepared or caused to be prepared or who has procured documents which are falsified or intended to deceive Customs and are used in a foreign country is regarded as having committed a Customs offence in the country where the documents were prepared. This is a mutual assistance measure expressly provided for in certain preferential trade agreements.

Standard 3

National legislation shall specify which persons can be held responsible in connection with the commission of a Customs offence.

4.1. Liability of natural persons

Standard 3 imposes an obligation to specify in national legislation which persons can be held responsible in connection with a Customs offence. The term “legislation” in this Standard should not be interpreted too narrowly. It allows for common law countries to determine who is an offender under common law jurisprudence. Equally, it allows for civil law countries to have the concept of liability be determined by case law in their legislation.

Customs offences frequently involve more than one person. The extent of their involvement can vary, and the legislation of countries varies in classifying the different degrees of participation. Even though a person may not have been directly involved in all the events

constituting the offence, any person who was substantially involved is still considered to be a principal offender in many countries. Liability can also result from aiding and abetting offences. The liability can include being knowingly involved in the offence by financing or insuring the operations constituting the offence.

In some countries the offender and his accomplice are each held liable for the payment of monetary penalties imposed upon them individually. In others, however, each of these persons may be held jointly liable for the monetary penalties incurred by the other.

Where a Customs offence is committed by a natural person acting for or on behalf of a legal person, that legal person may be held liable for the monetary penalties incurred.

Where a Customs offence arises from untrue particulars furnished in the Goods declaration, the declarant's liability may be limited if he has simply reproduced information communicated to him by his principal and had taken reasonable steps to ensure the validity of the information provided. (See also the Guidelines to Standard 24 of this Chapter.)

4.2. Liability of legal persons

The term “person” includes a legal person which is a company or business entity. However, Standard 3 leaves it to national legislation to determine whether or not, or under which conditions, legal persons can be held liable. Because the economic operators involved in the import or export of goods are often a legal person, Customs offences can be linked to them as legal persons. Due to the size of modern enterprises this frequently means that it is not always possible to identify a natural person who can either benefit from the offence or be the single actor determining the events within a company. In particular, in the case of negligence, the offence is frequently not so much the result of a decision by a single person but that of the general corporate culture in which the failure to use reasonable care results in offences being committed. This economic and social reality has increasingly been acknowledged by legislators. While common law countries, and some individual civil law countries, have long accepted the liability of legal persons, other legal systems have only recently begun to address this issue.

The theories used to arrive at the liability of legal persons vary widely. The range of natural persons whose actions or omissions can result in the liability of the legal persons differs from one country to another. Some countries also prefer not to address the issue under their system of criminal law, but under a separate system of sanctions imposed under administrative law.

4.3. Period of limitation

Standard 4

National legislation shall specify a period beyond which proceedings in connection with Customs offences may no longer be taken and shall fix the date from which that period shall run.

Standard 4 embodies a generally accepted practice that a “period of limitation” is set in the national legislation that would restrict the period beyond which Customs can take action against offences. As far as natural persons are concerned, two reasons can be identified for the existence of a period of limitation. Firstly, many countries accept the principle that persons should not be punished for events lying too far in the past, unless the offences are extremely serious. The second reason is related to the risk of miscarriages of justice, and is a valid justification for a period of limitation on the liability of a legal person as well. The passage of time may not only make it difficult to establish the facts which indicate that a Customs offence

has been committed. It will also be difficult to establish any evidence to support the charge. Consequently the chances of a miscarriage of justice may increase with the passage of years.

While some countries may have the period of limitation laid down in Customs legislation, in others the statute of limitation is laid down in a separate legislation meant for a general application for all criminal offences, which also includes Customs offences.

For many Customs offences documentary evidence contained in the records of companies can be particularly relevant. Therefore a link between the period of limitation and the period in which importers and exporters are obliged to retain their business records is important. This is particularly valid for administrations which use the modern audit-based methods of risk management, as contained in the General Annex. The periods of limitation for Customs offences can vary from three to twelve years.

The period of limitation can start either from the moment that the offence was committed or, in the event of a continuing breach of Customs law, from the date on which that breach comes to an end. In some countries a new period of limitation runs from the date that Customs initiate proceedings before the expiry of the first period of limitation (for example by preparing an offence report).

5. The investigation and establishment of Customs offences

5.1. Investigation powers of Customs

Standard 5

National legislation shall specify the conditions under which the Customs are empowered to :

- *examine goods and means of transport;*
- *require the production of documents or correspondence;*
- *require access to computerized databases;*
- *search persons and premises; and*
- *secure evidence.*

Standard 5 provides for the investigative powers relating to objects as well as persons. In the course of investigating and establishing a Customs offence, Customs will have to take various necessary measures. The Standard requires that national legislation should specify these investigative powers and the conditions under which the measures can be taken.

The measures that Customs can take in the course of normal Customs control are not to be confused with the measures Customs can take when exercising their investigative powers. In some legal systems the person concerned must be advised by Customs that they are now under investigation.

Investigative powers may be established under common law in some countries, while in civil law countries there may be situations where investigative powers are, in part, determined by case law. Therefore the term “legislation” is not to be taken as restricting investigative powers under either legal system.

National legislation may also provide for certain investigation measures to be decided upon or to be taken only by Customs officers of a particular grade.

Standard 5 does not restrict Customs officers from requesting the assistance of other national authorities in the investigation of Customs offences.

5.2. Searches

Standard 6

Personal searches for Customs purposes shall be carried out only when there are reasonable grounds to suspect smuggling or other Customs offences which are regarded as serious.

Standard 7

The Customs shall not search premises unless they have reasonable grounds to suspect smuggling or other Customs offences which are regarded as serious.

5.2.1. Search of persons

International trade naturally involves the movement of persons, either because they accompany or carry goods or have to negotiate on contracts relating to the import and export of goods. Consequently, minimizing Customs interference with persons is a facilitation of international trade. Standard 6 provides that, as part of an investigation, persons should only be physically searched when there are reasonable grounds to suspect smuggling.

It is an internationally accepted practice that personal searches should only be carried out by an officer of the same sex. It is also a basic additional requirement that intimate searches be conducted by persons with adequate medical training. This means a person with sufficient medical training to carry out such a search without any risk to the health of the person being searched. In some countries such searches may only be carried out by qualified medical personnel.

The types and degrees of personal searches carried out depend on the reasonableness of the grounds for suspicion. Intrusive personal searches may be appropriate when there is a high level of suspicion, whereas a frisk or pat down of persons would be appropriate when there is a lesser level of suspicion.

5.2.2. Search of premises

Searching premises under this provision is different from the normal inspections carried out on a routine basis by Customs to ensure compliance with Customs law, for example to audit books kept at a place of manufacture or to inspect Customs warehouses.

Searches may involve not only commercial premises but also the homes of private persons. It is left to the national legislation to specify the conditions applicable to the searching of premises and, in particular, cases where a search warrant may be required. Many countries have the principle that the search of premises can only be carried out with a warrant granted by a judicial authority.

5.3. Procedural guarantees

Standard 8

The Customs shall inform the person concerned as soon as possible of the nature of the alleged offence, the legal provisions that may have been contravened and, as appropriate, the possible penalties.

Standard 8 requires Customs to inform the person concerned of the nature of the alleged offence committed, including the legal provisions that may have been contravened. They must also cite the possible penalties applicable. This notification is to be given as soon as possible after the discovery of the offence. However, in some situations this information may be delayed if it is in the interest of the investigation, for example, when Customs want to track down any accomplices involved in the commission of the offence. Nevertheless, it is important that the person concerned is informed quickly. Not only does this increase the possibilities of establishing any circumstances relating to the offence, but it also may help to prevent further offences taking place. In general, quickly informing the person concerned may also increase the speed at which the offence may be dealt with by an administrative settlement.

Standard 9

National legislation shall specify the procedure to be followed by the Customs after it has been discovered that a Customs offence has occurred and the measures they may take.

Standard 9 requires that the procedures to be followed and the measures Customs can take when an offence is discovered be laid down in national legislation. The intention of this provision is to protect the alleged offender, as well as Customs, in ensuring that all the technicalities involved have been complied with in accordance with the law. Such procedures address the seizure of goods; detention of persons and goods; search of persons, goods and premises; arrest and bail; first information report, etc.

In some countries, these procedures are established in a general code relating to criminal procedure.

Recommended Practice 10

The Customs should set out the particulars of Customs offences and the measures taken in offence reports or administrative records.

This provision recommends that Customs maintain a record of all the measures taken in relation to an offence and articulate the grounds for their actions. This record usually contains such particulars as the nature of the offence discovered; the laws violated; date and location of discovery of the offence; persons implicated; description of any goods, conveyances or documents involved; nature of the investigations undertaken and their results; and officers involved in the discovery and investigation of the offence from the time of the discovery of the offence to the time it is finally settled by an administrative settlement, court proceedings or just closed without any further action. Some administrations maintain such a record in an investigation paper or file.

It should be noted that recording the measures taken in the offence report or in the administrative record is not only to protect the rights of the defendants, as well as Customs, but also to compile statistics and build risk assessment techniques. In addition, this will later facilitate to establish what happened.

6. Seizure and detention of goods and means of transport

Standard 11

The Customs shall seize goods and/or means of transport only when :

- *they are liable to forfeiture or confiscation; or*
- *they may be required to be produced as evidence at some later stage in the procedure.*

The investigation of Customs offences frequently means that a consignment is seized. This seizure of goods can have considerable consequences for the person concerned. He may fail to comply with time limits set in contracts. In the case of just in time production, serious financial losses may be caused if the production process has to be interrupted as a result of seizure. Standard 11 therefore is intended to limit the seizure of goods and/or the means of transport to situations where they are liable to forfeiture or confiscation or when they are required to be produced as evidence.

Seizure is the legal term used to describe the act of Customs by which they physically take control of any goods. Seizure does not mean that the owner has lost title to the goods. It only means that Customs has custody of the goods and the owner no longer has physical control over them.

Within most legal systems in continental Europe, this would mean that the owner could still enter into a contract, obliging himself to sell the goods, but is no longer able to deliver the goods because he does not physically have them. Many legal systems require the delivery of the goods as an essential part of the transfer of ownership of goods; consequently, seizure usually limits the possibility of the owner transferring the title over to a buyer. This latter aspect is not a part of Customs law and it would be for each country to deal with this as provided in their national laws.

Confiscation and forfeiture are the next stage following seizure. Both confiscation and forfeiture mean that the person concerned loses the ownership of the goods. The use of the two different terms depends upon the prevailing legal system, the common law system or the civil law system. (See Recommended Practice 16 for cases of forfeiture/confiscation of means of transport.) It should be noted that not all seized goods are confiscated or forfeited. The decision to confiscate or forfeit the goods depends upon on the factors of each case and the result of the appeals process.

Continued custody of goods and/or means of transport under seizure, although liable to forfeiture or confiscation, may not be necessary in some instances unless the investigation warrants their continued custody. There may also be instances when a photograph of the goods or conveyance or a sample of the goods is sufficient as evidence in court proceedings. In such situations Customs could release the evidence provided that adequate security is given and that the goods and/or means of transport are not subject to any restrictions or prohibitions. (See also Guidelines to Standard 14 and Recommended Practice 15). Customs is therefore encouraged to review their continued custody of seized goods from time to time.

6.1. Goods not related to an offence

Standard 12

If a Customs offence relates only to part of a consignment, only that part shall be seized or detained, provided that the Customs are satisfied that the remainder of the consignment did not serve, directly or indirectly, in the commission of the offence.

In general, persons not involved in the commission of an offence can be affected by an investigation or seizure in two ways. Firstly, the goods of another owner may be part of the same consignment in which an offence has been committed. This usually happens in consolidated consignments, a common industry practice, where consignments belonging to more than one person are combined into a single shipment for logistical purposes. Standard 12

is intended to protect these owners, whose goods are not the subject of the offence, by seizing or detaining only that part of the consignment for which an offence has been committed. Therefore when the offence arises from only part of a consignment and the other part did not serve, directly or indirectly, in the commission of the offence, Customs are obliged to release the remainder of the goods subject to the Customs formalities pertaining to those goods.

The second situation may arise for goods belonging to a single owner where only a part of the goods may have become the subject of the alleged offence and the remainder are not involved, directly or indirectly, in the commission of the offence. In these cases, too, Customs is not to seize or detain the legitimate goods; the principle being that the seizure or detention of goods not involved in the offence should not serve as a punitive sanction to offenders.

However, where legitimate goods are used directly or indirectly in committing the offence, Customs is free to seize or detain them.

6.2. Documentation

Standard 13

When the Customs seize or detain goods and/or means of transport, they shall furnish the person concerned with a document showing :

- *the description and quantity of the goods and means of transport seized or detained;*
- *the reason for the seizure or detention; and*
- *the nature of the offence.*

Standard 13 requires Customs to furnish the person concerned with a document listing the description and quantity of the goods seized or detained. This document should also specify the reason for the seizure or detention as well as the nature of the offence allegedly committed. However, this list should not bind Customs in deciding how to charge a person at any later stage.

6.3. Release of goods or means of transport

Recommended Practice 14

The Customs should release seized or detained goods against adequate security, provided that the goods are not subject to any prohibitions or restrictions or needed as evidence at some later stage in the procedure.

Recommended Practice 14 provides a facilitation measure by requiring Customs to release seized or detained goods against adequate security being furnished. This release is conditional upon the goods not being restricted or prohibited or not being required as evidence at some later stage.

This provision applies to goods which are liable to forfeiture or confiscation under the provisions of Standard 11. Normally the amount of security required to be furnished would be not more than the value of the goods plus any duties and taxes liable on the goods.

Recommended Practice 15

The Customs should release from seizure or detention means of transport that have been used in the commission of a Customs offence where they are satisfied that :

- *the means of transport have not been constructed, adapted or altered or fitted in any manner for the purpose of concealing goods; and*
- *the means of transport are not required to be produced as evidence at some later stage in the procedure; and*
- *where required, adequate security can be given.*

Standard 11 stipulates that means of transport should only be seized or detained when they are liable to forfeiture or confiscation, or when they will be needed for an on-going investigation or as evidence later. Recommended Practice 15, on the other hand, requires Customs to release seized or detained means of transport if certain conditions are established to their satisfaction. These conditions are that the means of transport have not been constructed, adapted, altered or fitted in any manner in order to conceal goods; that they will not be needed later as evidence in the administrative or criminal procedure; and that adequate security can be furnished if required. This does not prevent Customs from seizing or detaining means of transport that are themselves the subject of the offence. In these cases the means of transport should be regarded as the goods rather than as the conveyance of the goods.

6.4. Forfeiture or confiscation of means of transport

Recommended Practice 16

Means of transport should only be forfeited or confiscated where :

- *the owner, operator or person in charge was, at the time, a consenting party or privy to the Customs offence, or had not taken all reasonable steps to prevent the commission of the offence; or*
- *the means of transport has been specially constructed, adapted or altered or fitted in any manner for the purpose of concealing goods; or*
- *restoration of the means of transport which has been specially altered or adapted is not possible.*

Recommended Practice 16 restricts forfeiture or confiscation of the means of transport to three situations. The first situation is when the owner, operator or person in charge was a consenting party or privy to the offence at the time it was committed, or that person did not take reasonable steps to prevent the offence. This restriction is intended to protect the operators of commercial vehicles against the forfeiture of their means of transport, provided that the operator himself is not implicated in the offence in any way. The second situation is when the means of transport has been constructed, adapted, altered or fitted in any manner so as to conceal goods. The third situation arises when the means of transport was altered, adapted or fitted to conceal goods but subsequently could be released at the end of the administrative or criminal proceedings, however it cannot be restored to its original, legitimate condition. In this case Customs can forfeit or confiscate the conveyance on the premise that this would prevent its being used again illegitimately in the future.

Recommended Practice 17

Unless they are likely to deteriorate quickly or it would, due to their nature, be impracticable for the Customs to store them, seized or detained goods should not be sold or otherwise disposed of by the Customs before they have been definitively condemned as forfeited or confiscated or have been abandoned to the Revenue.

Recommended Practice 17 deals with the sale of seized or detained goods. Customs can obtain the right to dispose of these goods either through the process of forfeiture or confiscation, or through their being abandoned by the owner during the administrative process dealing with the offence. The phrase “condemned as forfeited” means the confirmation that forfeiture has, in fact, taken place. In some jurisdictions this confirmation can occur through a court proceeding or by the expiration of a specified claim period.

Customs will usually sell these goods through an agent or by auction depending on the administrative procedure of each administration.

There are other situations, however, when Customs should dispose of the goods even before they have been forfeited, confiscated or abandoned to the Revenue. This occurs when the goods are physically deteriorating, when by their nature they would diminish in value, or because they become obsolete or rendered commercially valueless. These include perishable goods, animals and goods for which adequate storage facilities are not available (e.g. chemicals or other bulk materials). The sale is to protect the interests of the owner of the goods as well as Customs while awaiting the outcome of the investigation or any administrative

or judicial proceedings. In these situations Customs will retain the proceeds of the sale in lieu of the actual goods.

In some countries, the option to buy the goods is given to the person from whom the goods were seized. Guidelines to Standard 26 should be consulted with regard to disposal of the proceeds of sale.

7. Detention of persons

Standard 18

National legislation shall specify the powers of the Customs in connection with detention of persons and shall lay down the conditions therefor, in particular the period after which detention becomes subject to a review by a judicial authority.

The detention of persons (with or without being arrested) is a considerable interference with a person's liberties. In most jurisdictions the term "detention" means that the person may not have the freedom to leave until Customs has satisfied themselves as to the particulars of the person's declaration for the procedure concerned.

Persons should only be detained when there is a reason for Customs to suspect that the person or the goods are not in compliance with Customs law and they take measures to determine this. Some examples of when a person may be detained would be while awaiting the completion of a search of the person's vehicle, personal belongings or premises, or when the person is suspected of carrying narcotics internally, while awaiting medical results.

It is a generally accepted practice that the detained person has the right to access to legal advice as soon as the detention begins. Therefore the powers of detention and the circumstances under which such detention is permissible should be stipulated in the national legislation.

In some countries Customs do not themselves detain persons, but where they do Standard 18 requires national law to determine a period beyond which Customs need the permission of a judicial authority for the continued detention of a person.

In some countries, the maximum period for detention without judicial review is 24 hours, while other countries allow a maximum period of four days' detention without the need for judicial permission.

It is also a generally accepted practice that once a judicial authority must review the case, the detained person should have access to the judge in order to present his case.

8. Administrative settlement of Customs offences

8.1. Administrative settlement

Standard 19

The Customs shall take the necessary measures to ensure, where applicable, that as soon as possible after a Customs offence is discovered :

- *the administrative settlement of the latter is initiated; and*
- *the person concerned is informed about the terms and conditions of the settlement, the avenues of appeal and the time limits for such appeals.*

Administrative settlement is a facilitation of trade by providing an alternative to costly and lengthy court proceedings. Standard 19 requires Customs to initiate such a settlement, where appropriate, so that offences can be settled faster and without burdening the time of the courts. Most national legislation empowers Customs to settle offences without having to go to a judiciary.

It should be noted that for the purposes of this Convention administrative settlements only apply to offences settled by the Customs administration. In many countries the authority to administratively settle Customs offences may be limited to certain categories of offence, to the seriousness of the offence or to goods below a certain value. Nevertheless the person concerned will always have the right to submit the case to a judicial authority.

Administrative settlement of a Customs offence is defined in this Chapter as “the procedure laid down by national legislation under which Customs are empowered to settle a Customs offence either by a ruling thereon or by means of a compromise settlement”. Thus there are two types of Customs administrative settlements.

The first type is described as settlement by a ruling. The term “ruling” in this context means a unilateral act by Customs which is independent of the consent of the person concerned. A wide variety of terms are used in the legal systems of various countries to describe this ruling. Some countries describe it as an administrative fine, while other countries refer to it as a civil penalty or a compound. The person concerned will always have the right to reject the ruling and submit an appeal. (See Chapter 10 of the General Annex.)

The second type of administrative settlement is described in the definition as a “compromise settlement”. This type depends on the consent of the person concerned. However, this consent does not require as a precondition the admission of guilt by the person.

Administrative settlements, especially compromise settlements, can be used more widely if the persons concerned are aware of this possibility. Standard 19 not only requires that the administrative settlement should be initiated as soon as possible after the offence has been discovered, but also that the person concerned should be informed of the terms and conditions of the settlement. This is a requirement contained in the General Annex, Chapter 10 on Appeals, but the principle is repeated here to emphasize the particular importance for Customs to notify persons of their right to appeal in the serious matter of an offence. Consequently, Standard 19 provides that the person should be informed of any avenues of appeal open to him in an administrative settlement and of any time limits for such appeals. Avenues of appeal may

be closed once the person has accepted a compromise settlement of a Customs offence, since the person would have chosen the compromise settlement over proceedings before a court or other authority independent of Customs.

8.2. Settlement by local Customs office

Recommended Practice 20

Where during clearance of the goods a Customs offence has been discovered which is regarded as of minor importance, it should be possible for the offence to be settled by the Customs office which discovers it.

Given the nature of international trade and the number of parties that can have responsibilities for the goods and the data related to them, there will be situations when minor offences are committed at the time of clearance of goods. In these cases, administrative settlements are a practical and facilitative measure to resolve the offences. When Customs decides to settle an offence administratively, it is a further facilitation if that settlement can take place quickly.

Therefore it is most practical to allow the Customs office which discovered the offence to grant the administrative settlement for a minor offence and thereby speed up the conclusion of the settlement for both Customs and the party involved. However, the Organization of Customs, the degree of centralization and the level of training of Customs officers at field or port locations vary from administration to administration. Recommended Practice 20 therefore limits cases of administrative settlement to minor offences only. Nevertheless, in some administrations the practice of allowing the settlement of offences by the Customs office that discovered them is also extended to offences that may be more than simply of minor importance.

It should be noted that this Chapter does not specify what is meant by “an offence regarded as of minor importance”. Customs administrations will need to decide which offences fall into this category and what rank of officer will be delegated to deal with them. For examples of some minor offences, see the Guidelines to Standard 3.39 of the General Annex. It is also important that the offence should not be settled by the officer who discovered it, in order to maintain an element of objectivity in deciding the settlement. This should be done by any officer of equivalent rank or higher.

Administrations may also need to take into account that in cases involving large amounts for the settlement or in more important cases, the involvement of higher levels within the Customs organisation may provide an additional guarantee for correct and consistent decision-making.

Recommended Practice 21

Where a traveller is regarded as having committed a Customs offence of minor importance, it should be possible for the offence to be settled without delay by the Customs office which discovers it.

As in the Recommended Practice 20, it is equally important that the Customs office that discovered the offence should also administratively settle minor offences committed by travellers. This settlement should be effected as soon as possible so as not to disrupt the movement of travellers.

Standard 22

National legislation shall lay down the penalties applicable to each category of Customs offence that can be dealt with by administrative settlement and shall designate the Customs offices competent to apply them.

Most administrations, in order to reduce the burden of the courts, provide for the administrative settlement of Customs offences by imposition of a penalty on the offender. This should be considered as a measure to more rapidly settle cases. Standard 22 requires national legislation to specify the amount of penalties that can be applied for each type of Customs offences to be dealt with through the administrative settlement.

In most countries, the legislation lays down a maximum and sometimes a minimum penalty that can be imposed. This range of a maximum and a minimum penalty is given so that some amount of discretion may be used considering the circumstances of the offence.

In some administrations only Customs locations having officers of a certain grade are allowed to offer administrative settlement of Customs offences. This is to avoid any misuse of the powers granted as these officers are usually better trained and have more responsibilities that include such decision-making. Standard 22 also requires these Customs locations to be designated in national legislation.

By having these important factors clearly enumerated in national legislation, the administrative settlement process is more transparent to international traders and travellers. This also promotes some assurance that the settlements will be more uniformly administered throughout the Customs territory.

The penalties commonly applicable are fines, forfeiture of the goods and, where appropriate, forfeiture of the means of transport. The term “fine” is commonly used to refer to the amounts payable by the offender under an administrative settlement procedure. This term should be interpreted in its general sense and not in the legal sense given to it in certain countries, where fines can be imposed only by the courts.

In a compromise settlement Customs may require the abandonment of the goods and/or the means of transport. The same may also be applied for a settlement by a Customs ruling. However, in some administrations the forfeiture of goods and/or means of transport cannot be done by an administrative settlement.

Where the compromise settlement procedure is used, national legislation should specify a range of maximum and minimum penalties that can be applied, as well as the minimum penalties applicable to each category of offence.

8.3. Principle of proportionality

Standard 23

The severity or the amount of any penalties applied in an administrative settlement of a Customs offence shall depend upon the seriousness or importance of the Customs offence committed and the record of the person concerned in his dealings with Customs.

Standard 23 contains the principle commonly referred to as the principle of proportionality. It is intended to prevent excessively severe penalties from being applied for minor offences. It states that the severity or the amount of penalties applied must be commensurate with the seriousness of the offence and with the Customs record of the offender.

In many countries the amount of any penalty imposed under the administrative settlement is not based on the value of the goods but relates to the amount of duties and taxes evaded or unduly repaid, as it is this latter amount that reflects the extent of loss to the Revenue. This Standard does not preclude the application of severe penalties in cases of repetition of Customs offences, which in isolation would be regarded as of minor importance.

8.4. Liability of the declarant

Standard 24

Where untrue particulars are furnished in a Goods declaration and the declarant can show that all reasonable steps had been taken to provide accurate and correct information, the Customs shall take that factor into account in considering the imposition of any penalty.

Standard 24 applies to the special position of declarants who are acting on behalf of another party. These declarants are important to international trade as their services can facilitate the import and export of goods for those unfamiliar with local requirements. Although their knowledge of Customs legislation may impose on them an additional duty of care when making a declaration, they usually do not have access to the business administration of their principal. As a result their possibilities for verifying the information provided by their principal are limited.

Based on this, Standard 24 allows that if the declarant had taken all reasonable steps to verify the validity of the information provided by his principal, his liability should be limited. Thus it is acknowledged that a limited requirement for due care rests with the declarant to question information which is unusual or incongruous. However, this does not require that he necessarily verify every particular furnished.

In reviewing the circumstances of an offence and determining the size of any penalty, Customs should take these factors into account. (See also Standard 3.39 of the General Annex and its Guidelines.)

8.5. Force majeure

Standard 25

Where a Customs offence occurs as a result of force majeure or other circumstances beyond the control of the person concerned and there is no question of negligence or fraudulent intent on his part, no penalty shall be applied provided that the facts are duly established to the satisfaction of the Customs.

Standard 25 requires Customs not to impose any penalty when offences are committed as a result of force majeure or other circumstances beyond the control of the person concerned. This also reflects the principle of proportionality. It provides for situations in which the person concerned may be fully aware of the fact that he is committing an irregularity but is forced to do so because of circumstances beyond his control. Examples may be the non-compliance with time limits imposed on the movement of goods under Customs control that are caused by mechanical failure of the means of transport, bad weather or landing in an airport not approved for the handling of the goods because of an emergency. However the person concerned should be able to substantiate such reasons and circumstances to the satisfaction of Customs.

This Standard does not apply to offences where there is negligence or fraudulent intent on the part of the person concerned.

9. Return of seized or detained goods and discharge of security

Standard 26

Goods that have been seized or detained, or the proceeds from the sale of such goods after deduction of any duties and taxes and all other charges and expenses incurred, shall be :

- *turned over to the person entitled to receive them as soon as possible after the Customs offence has been definitively settled; or*
- *when this is not possible, held at their disposal for a specified period,*

provided that the goods have neither been condemned as forfeited or confiscated nor abandoned to the Revenue as a result of a settlement.

The results of a settlement of a Customs offence will determine the disposition of the goods that were detained or seized. When the settlement determines that the goods will be condemned as forfeited or confiscated or they are abandoned to the Revenue, the goods or the proceeds of sale of the goods become the property of the government. When the goods are subject to restrictions or prohibitions Customs may require them to be re-exported or destroyed.

Where the goods are neither condemned as forfeited or confiscated nor abandoned to the Revenue, Standard 26 requires Customs to turn them over to the person entitled to receive them if they were seized or detained in accordance with Standard 11. If they were released in accordance with Recommended Practice 14 or 15, then Customs is required to discharge any security furnished.

In the event the goods are sold or otherwise disposed of in accordance with Recommended Practice 17, the proceeds of the sale should be turned over to the person entitled. However, Customs may deduct any duties and taxes and all other charges and expenses incurred in the sale before turning over the proceeds.

10. Right of appeal in an administrative settlement

Standard 27

Any person implicated in a Customs offence that is the subject of an administrative settlement shall have the right of appeal to an authority independent of Customs unless he has chosen to accept the compromise settlement.

Standard 27 on the right of appeal in an administrative settlement distinguishes between the two types of administrative settlement, i.e administrative settlement by a Customs ruling and a compromise settlement.

One of the purposes of a compromise settlement is to avoid court proceedings that can be costly and time-consuming. As this settlement depends on the consent of the person involved, most countries do not provide for a subsequent right of appeal to an independent authority. These countries consider that the access to an independent authority is ensured when the person does not consent to the compromise settlement of the offence and elects to bring it to a court of law.

Some countries make this compromise settlement subject to the approval or supervision of judicial authorities. In other countries Customs must inform the judicial authorities of the settlement. Both requirements are to ensure that the person has access to a court of law if he believes that undue pressure is exerted on him by Customs.

In an administrative settlement by a unilateral decision of Customs, the person concerned must have a right of appeal to an authority independent of the Customs administration. Countries may also create the right of appeal to a higher authority within the Customs administration, but this cannot replace the right of appeal to an independent authority in the final instance. For a detailed explanation on the right of appeal, see Chapter 10 of the General Annex and its Guidelines.
