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# Japan Machinery Center for Trade and Investment

No.401 Kikai Shinko Building
5-8, Shibakoen 3-chome,
Minato-ku, Tokyo 105-0011
Japan

Tel :81-3-3431-9507
Fax:81-3-3436-6455

September 9, 2002

U.S. Customs Service
Office of Regulations and Rulings
Attention: Regulations Branch
1300 Pennsylvania Avenue, N.W.
Washington, DC 20229

Re: Comment on Notice of Proposed Rulemaking, Federal Register Vol. 67, No. 153, August 8, 2002, Amendment of 19 CFR §§ 4.7, 4.7a, 4.8, 4.30, 113.64 (Advance Presentation of Vessel Cargo Declaration)

The Japan Machinery Center for Trade and Investment ("JMC") hereby submits comments on U.S. Customs' Notice of Proposed Rulemaking, Federal Register Vol. 67, No. 153, August 8, 2002, Amendment of 19 CFR §§ 4.7, 4.7a, 4.8, 4.30, and 113.64 to require "Presentation of Vessel Cargo Declaration to Customs Before Cargo is Laden Aboard Vessel at Foreign Port for Transport to the United States."

JMC is an association of 360 firms that manufacture and export machinery products worldwide. It includes most of major companies in Japan which export electronics and machinery goods to the U.S.A. JMC was established in 1952 under Japan's Export and Import Transactions Law to represent the interests of Japanese machinery exporters. JMC has always followed with great interest developments involving U.S. Customs. JMC generally supports U.S. Customs' actions and helps to publicize those actions, as well as U.S. Customs' proposals, in Japan.

JMC created a web site (http://www.jmcti.org) this past April to help Japanese exporters understand U.S. security programs such as C-TPAT and CSI. JMC translates into Japanese documents such as the C-TPAT fact sheet, CSI fact sheet, security recommendations, and the Supply Chain Security Profile Questionnaire (see, *e.g.*, http://www.jmcti.org/C-TPAT/index.htm). These translated documents have helped many Japanese exporters understand how to participate in C-TPAT. Access to the web site is open to JMC's member companies, as well as every company in Japan's trade community. As of August 31, 2002, JMC had over 6,000 visitors to the site.

JMC has the deepest sympathy for the U.S. and its citizens for the death and destruction wrecked on the United States in the events of September 11, 2001. JMC recognizes the necessity for measures that will prevent a similar tragedy in the future. However, JMC is also concerned about the possible disruptive effect of such measures on the efficient flow of international commerce. JMC believes balance is necessary between the likely impact on flow of commerce and concerns of safety and security. In the interest of such balance, JMC respectfully urges Customs to make substantial modifications in the proposed regulation, as discussed below. We thank you in advance for taking these comments into account before issuing any final regulation.

**Comments on the Proposed Regulation**

The proposed regulation, as currently written, raises a number of practical and legal concerns. We first discuss practical concerns, then legal concerns – the inconsistency of the proposal with U.S. international commitments. To summarize, JMC anticipates that the proposal, in its current form, will result in significant delay and additional expense for international trade. JMC believes that making the time "trigger" for presentation of manifest dependent on the time of loading a vessel in a foreign port results in arbitrary discrimination against shippers and vessels. JMC questions how Customs will effectively be able to use information obtained, in some cases, more than a month before arrival of a vessel, when Customs has no ability to deny clearance of a vessel from a foreign port. JMC proposes modifications to the proposal that we believe would result in a better balance between facilitation of international maritime traffic and security concerns.

**Practical Concerns**

JMC is concerned that a requirement for presentation of the cargo information 24 hours before loading raises various troubles as follows if the requirement, as currently written, is enacted.

In this age of just-in-time inventory systems and globalization of sources of supply, the proposal will place a tremendous burden on shippers and vessel operators. Shippers are trying to shorten logistical processes. More and more containers are processed with a shorter and shorter lead- time under current inventory and shipping methods. The requirement to present manifest information 24 hours before loading will cause carriers to seek dock receipt information (which includes cargo information necessary for the carrier to create the cargo manifest) from shippers earlier in the process. This will result in a lengthened logistical lead-time, which will force exporters to increase their inventories and consequently affect the economies of exporting countries. It will result in substantial delays and increased expenses for international trade, as vessels must incur demurrage while waiting for information in port or depart without cargo, which must await a future carrier. For example, Japanese shipping companies state that if Customs promulgates the proposed regulations and they fail to obtain cargo information within the time required, they will be forced to depart without the containers.

The requirement for manifest information 24 hours before loading will change shipment and inventory methods in countries where vessels may submit cargo manifests after departure of the vessel. Multinational companies operating in such countries base their inventory and shipping procedures on the streamlined trade procedures in those ports. The proposal for

advance presentation of cargo manifests could force exporters in such countries to substantially change their logistical patterns. This lack of balance between trade facilitation and security concerns places a heavy burden on multinational companies as well as manufacturers in the countries concerned.

The effect of the proposal is to put the immediate burden for obtaining cargo information on the carrier, who must obtain it from the shipper. Even if a carrier provides the required information to Customs before the vessel leaves a foreign port, but less than 24 hours before departure, the proposal gives Customs the discretion to decline to permit the vessel to unload that merchandise. As we will demonstrate below, such discretion may lead to absurd results, completely unnecessary for security concerns (*e.g.*, in a shipment from Melbourne, Australia, to New York, New York, the shipping time is 50 days; an extra 24 hours or less should not be necessary to assess security risks for the merchandise).

The proposed regulations appear to contemplate authority in U.S. Customs to prevent a vessel from loading cargo in a foreign port (otherwise, there appears to be no reason to require presentation of the cargo information before the vessel is loaded). As discussed below, however, U.S. Customs has no jurisdiction over foreign ports to prevent the vessel from loading cargo at such foreign ports. The necessity of obtaining cargo information 24 hours before loading is not readily apparent. Furthermore, does U.S. Customs also intend to require cargo already loaded on a vessel in a foreign port to unload the cargo, or to unload it at an intermediate foreign port? For example, assume that a vessel loads cargo in Jakarta, Indonesia for a U.S. port and calls at Singapore, Hong Kong, and Tokyo. If U.S. Customs orders the cargo loaded in Jakarta held in Tokyo, who would be responsible for the cost of unloading the cargo and the resultant delay in shipment of the Indonesian cargo? Would the vessel be responsible if the Indonesian cargo on the bill of lading did not actually arrive in the U.S. port?

JMC is also concerned about possible troubles caused by a requirement for "precise description of the cargo." Exporters employ generic descriptions such as "General Merchandise" to avoid cargo theft. Specifying the cargo will identify containers holding cargo attractive to thieves and increase the risk of theft.

The requirement for a precise description of cargo will cause logistical problems in the case of containers loaded with various commodities. Does the proposal require a precise description of all of the commodities in a container?

**Legal Concerns**

Legally, the proposal is inconsistent with U.S. obligations under the GATT, the Convention on Facilitation of International Maritime Traffic, and the International Convention on the Simplification and Harmonization of Customs Procedures.

**GATT**

The General Agreement on Tariffs and Trades, 1996 ("GATT 1996"), to which the United States is a contracting party, provides that the contracting parties "… recognize the need for

minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements."[1] GATT 1996 requires contracting parties to give Most-Favored-Nation treatment to all parties with respect to all rules and formalities in connection with importation and exportation.[2]

GATT 1996 provides that goods to be shipped through the territory of a contracting party, with or without transshipment, shall have freedom of transit through the territory of each contracting party.[3] No distinction shall be made based on the flag of vessels, place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, vessels, or other means of transport.[4] Contracting parties may require in-transit traffic to enter, but except in cases of failure to comply with applicable customs laws "such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions … ."[5] Contracting parties must accord most-favored-nation treatment to traffic in transit to or from the territory of any other contracting party.[6] All regulations imposed by contracting parties on traffic in transit to or from territories of other contracting parties "shall be reasonable, having regard to the conditions of the traffic."[7]

GATT 1996 includes specific security exceptions. Article XXI provides, in part, that "Nothing in this Agreement shall be construed … to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations ..."[8]

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1 GATT 1996, Article XIII:1(c).

2 GATT 1996, Article I:1.

3 GATT 1996, Article V.

4 GATT 1996, Article V:2.

5 GATT 1996, Article V:3.

6 GATT 1996, Article V:5 (*I.e.*, "With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.").

7 GATT 1996, Article V:4.

8 GATT 1996, Article XXI(b). See also GATT 1996, Article XX, which provides that "[s]ubject to the requirement that such measures are not applicable in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,

(continued…)

In the Doha Round, the WTO recognized the need for expediting the movement, release and clearance of goods, including goods in transit. The Ministers agreed to identify trade facilitation needs and priorities.[9]

Thus, GATT 1996 strikes a balance between decreasing and simplifying import, on the one hand, and export documentation and security interests, on the other. GATT 1996 limits the exception for actions taken in regard to security interests to those "necessary" and related to fissionable materials, traffic in arms, ammunition and implements of war, or taken in time of war or other emergency. Actions taken in regard to general security interests may not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In particular regard to shipment through the territory of a contracting party, with or without transshipment, GATT 1996 proscribes "unnecessary delays or restrictions" and requires all regulations imposed on such shipments to be "reasonable, having regard to the conditions of the traffic." GATT 1996 prohibits distinctions on the basis of place of origin, departure, or other bases.

JMC recognizes that security measures, some like those in the proposal, are "necessary" to protect the security of shipping and the United States. However, it is difficult to see how a requirement for presentation of manifest information before a vessel is loaded in a foreign port is uniformly "necessary." For example, shipping times between Melbourne, Australia, and New York, New York are approximately 50 days and those between San Salvador, El Salvador, are approximately 3 days.[10] Under the proposal, cargo information for the former shipment must be presented to Customs at least 51 days before arrival in the U.S., whereas cargo information for the shipment from San Salvador must be presented to Customs at least 4 days before arrival in the U.S. Such discrimination appears to be arbitrary, based not on the security interests of the U.S, but on the distance of the port of export from the port of import.

(…continued)

nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contraction party of measures … necessary to protect human, animal or plant life or health …"

9 Doha WTO Ministerial 2001, Ministerial Declaration, WT/M/N(01)/DEC 1, para. 27, November 20, 2001 ("Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations. In the period until the Fifth Session, the Council for Trade in Goods shall review and as appropriate, clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area.")

10 "http://www.shipguid.com/cgi/esg"

JMC does not understand why it is necessary for Customs to have more than 50 days to assess risks of cargo from Melbourne and only 4 days to assess risks of cargo from San Salvador. Customs cannot prevent the vessel loaded in the foreign port from clearing from that port, because it has no jurisdiction. Customs can only prevent the vessel from unloading in the U.S. port of arrival, which is the enforcement action in the proposal. JMC respectfully suggests that the time for the advance presentation of manifest information to Customs should be based on the time of arrival in the U.S., not the time of loading in the foreign port. JMC suggests that presentation of manifest information at a reasonable time before arrival at the first U.S. port would be sufficient for any assessment of terrorist risks, and would strike a suitable balance between unnecessary delay and security interests.

The proposal requires advance presentation of the same information for foreign cargo remaining on board as for cargo destined to the U.S. This is inconsistent with the requirements of Article V of GATT 1996, which proscribes unnecessary delays or restrictions against such traffic and requires all regulations to be reasonable, "having regard to the conditions of the traffic." As noted above, it is difficult to see how a requirement that does not distinguish between a voyage that will take 50 days and one that will take 3 days meets this latter criterion. Furthermore, such a requirement distinguishes between places of departure, contrary to paragraph 2 of GATT 1996 Article V. JMC respectfully proposes that advance information for foreign cargo remaining on board be limited to necessary information. Also, for the same reasons stated above, JMC suggests that the time for the advance presentation of such information to Customs should be a reasonable time before the time of arrival in the U.S., not before loading in the foreign port.

**Convention on Facilitation of International Maritime Traffic**

The U.S. is a Contracting Government of the Convention on Facilitation of International Maritime Traffic ("IMO Convention on Facilitation").[11] Article I of that Agreement provides that Contracting Governments undertake to adopt "all appropriate measures to facilitate and expedite international maritime traffic and to prevent unnecessary delays to ships and to persons and property on board."

The IMO Convention on Facilitation distinguishes between "standards" and "recommended practices"; the former are "necessary and practicable" and the latter are "desirable" in order to facilitate international maritime traffic.[12] In its standards, the IMO Convention provides that a vessel's cargo declaration "shall be the basic document on arrival and departure

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[11] 18 UST 410, TIAS 6251. According to Customs' web site, "Customs enforces this convention to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages." http://www.customs.ustreas.gov/imp-exp2/pubform/compend/intl.htm. See also Inter-American Convention on International Waterborne Transportation (Convention of Mar del Plata) (June 7, 1963), TIAS 12064, which contains similar provisions.

[12] IMO Convention on Facilitation, Article VI.

providing information required by public authorities relating to the cargo"[13], and recommends that public authorities only require certain information on the cargo declaration, specifically, on arrival: (1) name and nationality of the vessel; (2) name of master; (3) port arrived from; (4) port where report is made; (5) marks and numbers, number and kind of packages, quantity and description of the goods; (6) bill of lading numbers for cargo to be discharged at the port in question; (7) ports at which cargo remaining on board will be discharged; and (8) original ports of shipment in respect of goods shipped on through bills of lading.[14] The Convention requires, as a "standard" that "[I]n respect of cargo remaining on board, public authorities should require only brief details of the minimum essential items of information to be furnished."[15]

The IMO Convention on Facilitation recommends that public authorities take appropriate action to keep port time to a minimum and to ensure that "satisfactory port traffic flow arrangements are provided so that handling and clearance procedures for cargo will be smooth and uncomplicated."[16] The Convention recommends that public authorities develop procedures to use pre-arrival information "… to permit clearance prior to the arrival of cargo."[17] The Convention also provides that public authorities should provide procedures for clearance of cargo based on the International Convention on the Simplification and Harmonization of Customs Procedures ["Kyoto Convention"].[18]

As in the case of GATT 1996, the IMO Convention on Facilitation has a "security" clause. The Convention provides that nothing in the Convention shall be interpreted as precluding a Contracting Government from applying "temporary measures considered by that Government to be necessary to preserve public morality, order and security …"[19]

Thus, the purpose of the IMO Convention on Facilitation is to facilitate and expedite international maritime traffic and prevent unnecessary delay. Given this purpose, the provision in Article V(2) permitting "temporary measures … necessary to preserve … security" calls for balance between facilitation and avoidance of delay of maritime traffic, on the one hand, and security, on the other. Although the Convention encourages the use of

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13 IMO Convention on Facilitation, Standard 2.3.

14 IMO Convention on Facilitation, Recommended Practice 2.3.1.

15 IMO Convention on Facilitation, Standard 2.3.2.

16 IMO Convention on Facilitation, Recommended Practices 2.12, 2.12.1., as amended (May 3, 1990); see also Recommended Practice 3.11

17 IMO Convention on Facilitation, Recommended Practice 4.7, as amended (September 9, 1999).

18 IMO Convention on Facilitation, Recommended Practice 4.8, as added (September 9, 1999).

19 IMO Convention on Facilitation, Article V:2.

electronic filing and contemplates submission of cargo information prior to arrival, these procedures are to facilitate clearance, not result in delay. The Convention specifies the information that may be required on cargo declarations and recommends that no other information be required. Similar to GATT 1996, Article V, the Convention requires that only brief details of the minimal essential information should be required to cargo that is to remain on board an arriving vessel.

As stated above in regard to GATT 1996, JMC recognizes that security measures are "necessary" in these post-September 11 times. These measures must be balanced with resultant delays and restrictions and only truly "necessary" measures should be implemented. As illustrated in the comparison of shipping times between Melbourne and New York, on the one hand, and San Salvador and Miami, on the other, it is difficult to see how a requirement for presentation of manifest information before a vessel departs from a foreign port, regardless of the time before the vessel arrives in the U.S., strikes the proper balance. This is particularly true since Customs has no effective use for the information before arrival of the carrier in the U.S.; *i.e.*, Customs does not have extraterritorial jurisdiction to prevent the departure of the vessel from the foreign port. Again, JMC respectfully suggests that the time for the advance presentation of manifest information to Customs should be a reasonable time before arrival in the U.S. , not the time of loading in the foreign port.

There is no authority in the IMO Convention on Facilitation for requiring presentation of cargo information before loading a vessel in a foreign port. The reference in Recommended Practice 4.7 to submission of cargo information before arrival of a vessel is clearly to facilitate maritime traffic, not to delay it. Given the purpose of the Convention to facilitate and expedite maritime traffic, and to prevent unnecessary delay, requiring presentation of cargo declarations before loading is inconsistent with the purposes of the Convention.

The proposal requires information not required on the Cargo Declaration, contrary to the recommendation of the IMO Convention on Facilitation that public authorities not require any other information than that listed in Recommended Practice 2.3.1. JMC recognizes the necessity for the date of scheduled arrival in the U.S., which is not included in the information in Recommended Practice 2.3.1. However, the requirement for a "precise description" of the cargo, without a definition of that term except by reference to HTS numbers, goes beyond the Convention's recommendation of "quantity and description of the goods." JMC respectfully suggests that the Convention's requirement is sufficient for security concerns.

The requirement for advance presentation of the same information for foreign cargo remaining on board as for cargo destined to the U.S. is inconsistent with Standard 2.3.2 of the IMO Convention on Facilitation limiting information for cargo remaining on board a vessel to "brief details of the minimum essential items of information." The Convention, by making this requirement a "standard", as opposed to the "recommended practice" limiting the information on the cargo declaration for import cargo, clearly requires less information than that for import cargo. In view of the similar requirement in GATT 1996, Article V, JMC respectfully proposes that advance information for foreign cargo remaining on board be limited to necessary information. At the very least, a lesser degree of specificity describing the cargo should be sufficient for such cargo.

**Kyoto Convention**

Annex A.3 of the Kyoto Convention, to which the U.S. is a contracting party, concerns customs formalities applicable to commercial means of transport.[20] The Kyoto Convention makes the same distinction between "standards" and "recommended practices" that the IMO Convention on Facilitation does. The Kyoto Convention requires, as a "standard," that customs formalities applicable to commercial means of transport be "reduced to the minimum necessary to ensure compliance with the laws and regulations which [customs is] responsible for enforcing."[21] For purposes of Annex A.3, "'Customs formalities applicable to commercial means of transport' means all the operations to be carried out by the person concerned and by Customs in respect of commercial means of transport arriving in or departing from the Customs territory and during their stay therein."[22]

Thus, the Kyoto convention reiterates the requirement that requirements for cargo carriers be limited by "necessity." In other words, as in the case of GATT 1996 and the IMO Convention on Facilitation discussed above, the Kyoto Convention requires a balance between the Customs formalities required and security interests. For the reasons given above, JMC respectfully recommends that the proposal be modified to strike a better balance between these interests. The time for presentation of advance cargo information should be based on arrival of a vessel in the U.S., not loading abroad, to avoid arbitrary and unnecessary distinctions based on the time of shipment from the port of departure. The level of specificity of the description of the import cargo should be that reasonably necessary. Information for in-transit cargo that is not destined for the U.S. should be limited to that absolutely necessary.

**Recommendations on the Proposed Regulation**

JMC is seriously concerned about the possible troubles that would result if the proposed regulations are implemented, in their current form, on grounds of their apparent inconsistency with GATT 1996, the Convention on Facilitation of International Maritime Traffic, and the International Convention on the Simplification and Harmonization of Customs Procedures.

However, JMC recognizes the necessity for measures to address the terrorism concerns of these times. JMC respectfully proposes the following changes to the proposed regulations to

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20 See Kyoto Convention, Annex A.3. (May 1979), "http://www.unece.org/trade/kyoto/ky-a3-e0.htm".

21 Kyoto Convention, Standard 3; see also Standard 18, which requires customs control before arrival at a designated customs office or other approved place of call to be reduced to a like minimum, and Standard 26, which requires customs control upon arrival at a designated customs office or other approved place of call to be limited to a like minimum.

22 Kyoto Convention, Annex A.3. (Definitions) (May 1979), "http://www.unece.org/trade/kyoto/ky-a3-e0.htm".

strike a fair balance between facilitation and avoidance of unnecessary delay and expense in international trade, on the one hand, and security concerns, on the other:

1. Advance presentation of cargo information should not be based on the time of loading the vessel, it should be a reasonable time before arrival of the vessel in the United States. Because of the nature of maritime traffic, times of shipment vary greatly with distance, and basing time of presentation on a time before departure from the foreign port results in arbitrary discrimination based on the place of departure. We recommend that advance presentation be a reasonable period before arrival in the United States, taking into consideration the ability of Customs to effectively use such information.

2. The requirement for a "precise description" of the cargo, with implicit encouragement to use HTS numbers, exceeds the recommendation of the IMO Convention on Facilitation. We believe that the recommendation of the Convention in this regard, for the "quantity and description of the goods" is sufficient describe the cargo to Customs. Since it is difficult to imagine a terrorist honestly describing terrorist weapons as such, we fail to see any effective purpose for this requirement. U.S. Customs should continue to allow the use of the general description in the submission of the cargo manifest information.

3. The requirement that in-transit cargo be listed on the Cargo Declaration, apparently to the same degree of specificity as import cargo, is inconsistent with the treatment of such cargo by GATT 1996 and the IMO Convention on Facilitation. We urge that advance information for such cargo be limited to information that is absolutely necessary, taking into consideration the specific provisions of GATT 1996, Article V, and IMO Convention on Facilitation Standard 2.3.2.

4. Finally, if Customs is unable to accept our proposals above, we respectfully ask Customs to bestow favorable treatment as follows on exporters, importers, shippers, and other entities admitted into the Customs-Trade Partnership Against Terrorism.

C-TPAT participants should be allowed some delay in presentation of cargo information. Such parties could be required to present the information before arrival of the importing vessel in U.S. territorial waters, but not before departure of the vessel from the foreign port.

C-TPAT participants should be allowed to continue to use the general descriptions currently used.

We thank you again for your kind consideration of these comments.

Sincerely yours,

Osamu Morimoto
Executive Managing Director
Japan Machinery Center for Trade and Investment

担当：部会・貿易業務グループ　橋本　Tel.　03-3431-9800,03-3431-9630