Singapore International Arbitration Centre Arbitration Number 222/2022

**VITOL TRADING MALAYSIA LABUAN LTD**

Claimant

And

**NINGBO KEYUAN FINE CHEMICALS CO LTD**

Respondent

**Reply Expert Report of Xu Shanshan**

28 June 2024

1. **Background**
2. I have been instructed by Ningbo Keyuan Fine Chemicals Co., Ltd. ("**Keyuan**" or the "**Respondent**") to act as an expert witness for Keyuan in this arbitration. On 7 June 2024, I issued the first round of expert opinions on issues related to the Rules of Origin of the ASEAN-China Free Trade Agreement.
3. On the direction of Keyuan's representative, I have reviewed three expert reports issued by the expert witness of Vitol Trading Malaysia Labuan Ltd ("**Vitol**" or the "**Claimant**"), dated 26 October 2023 ("**Claimant Expert Report 1**"), 29 December 2023 ("**Claimant Expert Report 2**"), and 7 June 2024 ("**Claimant Expert Report 3**") respectively.
4. Having read the three reports by the Claimant’s expert, I believe that it is necessary to respond to some of the main points therein, and bring them to the attention of the arbitral tribunal. Accordingly, I have collated and produced this reply expert report (the "**Report**").
5. I confirm that, as I have represented in the Report, I have no actual or potential conflicts of interest.
6. **Overview**
7. For the three expert reports issued by Vitol's expert witness, I think the issues that need to be addressed or further clarified include:
   1. Under the general trade model, do imported goods have to complete guarantee procedures before they can be released?
   2. Does the indication “customs cleared” in the electronic system for the corresponding customs declaration mean that there is no ongoing or unfinished verification of the origin of the goods?
   3. What are the statutory circumstances under which a party can apply for a guarantee for customs matters? Must the customs declaration clearly state that the security deposit is due to an investigation into the origin of the goods? If the payment of the deposit is due to origin verification, will this necessarily be reflected in the customs declaration or any document?
   4. When the customs conducts a verification of Form E, will the party concerned necessarily have a record?
   5. After the customs issues the "Special Customs Import Value-Added Tax Payment Certificate", if it finds that it had under (or not) collected the tariffs on the relevant goods, does it have the right to levy additional VAT based on the adjusted amount?
   6. How long does the customs have the right to recover tariffs after the release of imported goods?

1. My response to the above questions is summarised below, for the detailed analysis, please see Section III:
   1. Under the general trade model, the relevant goods can be released after the parties apply for and provide sufficient guarantee. Subsequently, the customs can continue to verify the matters regarding the guarantee, and use the guarantee to offset the tax payable or return/release the guarantee.
   2. "Customs cleared" does not mean that there is no ongoing or unfinished verification of the origin of the goods by the customs. The customs’ authority to verify has nothing to do with whether the goods are "cleared".
   3. In a situation where the tax elements are not yet determined, a party may apply to provide a guarantee for the early release of the goods. The reason for the guarantee is generally not reflected in the customs declaration, but will be reflected in the electronic system.
   4. It is common practice for the customs to conduct a verification of Form E without providing written notice to the parties involved.
   5. After the customs issues the “Special Customs Import Value-Added Tax Payment Certificate", it still has the right to investigate the dutiable value of and tariffs for the goods, and has the right to continue to recover (or supplement) the corresponding VAT.
   6. In the event of underpayment of tariffs due to the taxpayer's violation of the regulations, the customs has a period of three years to seek recovery.
2. **Specific analysis**

Question 1: Under the general trade model, do imported goods have to complete guarantee procedures before they can be released?

1. According to the statements at paragraph 8 and paragraphs 29-31 of the Claimant’s Expert Report 3, Vitol's expert witness seems to be explaining that under the guaranteed release model (in fact, not all imported goods are subject to guaranteed release, and the applicable statutory circumstances are detailed in paragraphs 12-13 of this Report), the goods can be released only after the customs confirms the tax payable and completes the payment or refund procedures for the security deposit paid by the party.
2. However, in practice, according to Article 29 of the Customs Law of the People's Republic of China[[1]](#footnote-1) and Article 4 of the Customs Guarantee Regulations of the People's Republic of China[[2]](#footnote-2), the relevant goods can be released pursuant to statutory circumstances (see paragraphs 13-15 of this Report for details) after the importer applies to the customs and provides a corresponding guarantee. After that, the customs can confirm the amount of tax payable according to the results of the verification, and handle the guarantee payment/refund procedures accordingly.[[3]](#footnote-3)

Question 2: Does the indication “customs cleared” in the electronic system for the corresponding customs declaration mean that there is no ongoing or unfinished verification of the origin of the goods?

1. Based on paragraphs 16-21 of Claimant Expert Report 1 and paragraphs 1-11 of Claimant Expert Report 2, Vitol's expert appears to be trying to use the “customs cleared” indication on the electronic system for the customs declaration to prove that the customs has no ongoing or unfinished investigations into the origin of the goods. But there is no necessary connection between the two.
2. "Customs cleared" is a term that describes the customs clearance status of the goods, and is not a legal concept. There is no clear definition of the term "customs cleared" in either customs law or the relevant laws and regulations. In practice, when goods are “customs cleared”, this generally means that they can be freely circulated, but the customs can continue to deal with the remaining issues.
3. The parties’ provision of a guarantee is also a way to “clear customs”. As a trade facilitation measure, the customs affairs guarantee system allows parties to withdraw the goods in advance upon the provision of sufficient guarantees, while the customs is investigating the tax elements (see paragraph 13 of this Report for the meaning of advance withdrawal). After a party withdraws the goods, the status of the goods is shown as "customs cleared", but the customs still has the right to continue to verify the tax elements of the goods.

Question 3: What are the statutory circumstances under which a party can apply for a guarantee for customs matters? Must the customs declaration clearly state that the security deposit is due to an investigation into the origin of the goods? If the payment of the deposit is due to origin verification, will this necessarily be reflected in the customs declaration or any document?

1. According to the Customs Guarantee Regulations of the People's Republic of China ("Customs Guarantee Regulations"), a party may apply for a guarantee for customs matters under the following three circumstances:
   1. The party applies for the early release of the goods;[[4]](#footnote-4)
   2. The party applies for specific customs operations;[[5]](#footnote-5)
   3. When the goods, articles, or means of transport which are suspected of violating the law shall be or have already been detained or sealed by the customs in accordance with the law, and the party applies for an exemption or the release of the detention or sealing.[[6]](#footnote-6)

As this case does not involve specific customs operations, and the customs had not yet initiated an administrative penalty or criminal investigation against the parties at the time of Keyuan's application for a guarantee, I understand that the guarantee discussed in this case can be focused on a. the guarantee for the party's application for early release of goods.

1. According to the Customs Guarantee Regulations, the circumstances under which a party may apply to the customs for the provision of a guarantee and request the early release of goods include:[[7]](#footnote-7)
   1. **The commodity classification, dutiable value and place of origin of the imported and exported goods have not yet been determined;**
   2. Valid customs declaration documents have not been provided;
   3. The tax has not been paid within the tax period;
   4. The late filing fee has not been paid;
   5. Other customs procedures have not been completed.
2. Normally, the specific reason for the guarantee will not be reflected in the customs declaration for the imported goods. At present, customs guarantee matters are generally handled paperlessly through the online single window, and the reason for the guarantee will be recorded in the system. The format is detailed in Annex I: "Single Window" Standard Edition User Manual (Electronic Payment System for Taxes and Fees) Chapter 8 Filing of Tax Elements.

Question 4: When the customs conducts a verification of Form E, will the party concerned necessarily have a record?

1. Paragraph 60 of the Claimant Expert Report 3 mentions that it is unusual that the customs did not provide Keyuan with contemporaneous records indicating problems with Form E. I do not think this view is realistic.
2. First, it is legal for the customs to not provide the parties with written proof of the verification of Form E. Neither the Revised China-ASEAN Origin Management Measures nor the relevant laws and regulations requires the customs to notify the parties in writing after initiating a verification of origin.
3. Second, it is reasonable for the consignee of the imported goods to be unable to obtain proof that the customs is verifying Form E. On the one hand, in practice, the consignee of imported goods usually contacts the customs through a customs declaration company to understand the customs clearance status of the goods. The customs officials will usually only provide verbal information/notifications about the general situation, and will not issue written documentation. On the other hand, the customs’ verification of Form E may be conducted by requesting information from the parties, or by an on-site inspection, or by requesting the relevant competent authorities of ASEAN Member States. The parties may not necessarily be involved in the process and naturally cannot provide contemporaneous records of the customs investigation. [[8]](#footnote-8)
4. Third, it is unreasonable for the customs to issue written documents in the process of verifying Form E. The customs’ verification of Form E is a procedural act before a tax decision is made. There are no rights or obligations between the customs and its administrative counterpart, and written documents will not be easily issued. After completing the verification, if the customs considers that the imported goods are not subject to the ASEAN preferential tax rate, it will issue a Notice of Customs Supplementary Tax Levy (as shown in Annex 2) requiring the party to pay the customs duties, value-added tax and consumption tax, which is a specific administrative act that can be reviewed and litigated.
5. In summary, it is normal for the parties concerned to not receive a written certificate or notification during the customs’ verification of the place of origin. Where the party has provided a guarantee, after the customs has completed its verification of Form E, the party should then receive the Notice of Customs Supplementary Tax Levy or be informed that they can apply for a refund of the guarantee deposit.

Question 5: After the customs issues the "Special Customs Import Value-Added Tax Payment Certificate", if it finds that it had under (or not) collected the tariffs on the relevant goods, does it have the right to levy additional VAT based on the adjusted amount?

1. According to paragraphs 22-29 of the Claimant Expert Report 1, Section 2 of the Claimant Export Report 2, and 107-113 of the Claimant Expert Report 2, Vitol's expert seems to take the view that once the customs has issued the "Special Customs Import Value-Added Tax Payment Certificate", it means that the customs has determined the customs duties and consumption taxes for the imported goods. This understanding does not correspond with reality.
2. According to the Regulations on the Administration of Taxation of Imported and Exported Goods by the Customs of the People's Republic of China, the calculation formula for calculating the VAT at the import stage is: tax payable = (dutiable value + actual tariff amount + actual consumption tax amount) × VAT rate. It can be seen that the amount of VAT may change with changes in the actual tariff amount.
3. In fact, as mentioned at paragraph 13 of this Report, if the origin of the imported goods has not yet been determined and the parties concerned have provided sufficient guarantees, the customs may first issue the Special Customs Import Value-Added Tax Payment Certificate under the assumption that the preferential tariff rate is applied, instead of determining the customs duties and consumption tax on the imported goods. After verification, if the customs considers that it is necessary to pay additional duties, it may request the party concerned to pay additional VAT in the Notice of Customs Supplementary Tax Levy. For example, in this case, the tariff on the goods involved (tariff code: 2707999000) is the ASEAN preferential tax rate: 0, and the most-favoured nation tariff: 7%. The customs first assumes that the tariff is 0 and issues the Special Customs Import Value-Added Tax Payment Certificate, but this does not preclude any subsequent decision to impose a tariff of 7% and levy VAT corresponding to this part of the tariff.
4. Even if the party concerned does not submit a guarantee for the release, and the customs issues a payment certificate based on the tax elements that have been determined at that time, the customs has the right to subsequently pursue or make up the customs duties (see paragraphs 25-27 of this Report for details).

Question 6: How long does the customs have the right to recover tariffs after the release of imported goods?

1. Paragraphs 114-115 of the Claimant Expert Report 3 mentions that, according to Article 66 of the Regulations on the Administration of Taxation of Imported and Exported Goods by the Customs of the People's Republic of China, if the customs discovers that taxes have been under collected or omitted after the import or export goods have been released, it shall request the taxpayer to pay back the taxes within one year from the date of payment of the tax or the release of the goods. However, this is not a complete understanding of the relevant provisions.
2. Article 51 of the Import and Export Tariff Regulations of the People's Republic of China, which has a higher legal rank than the Regulations on the Administration of Taxation of Imported and Exported Goods by the Customs of the People's Republic of China, stipulates that if the customs discovers that taxes have been under-levied or omitted after the import or export goods are released, it shall request the taxpayer to pay back the taxes within one year from the date of payment of the tax or the release of the goods. **However, if the tax is under-levied or omitted due to the taxpayer's violation of the regulations, the customs may recover the tax within 3 years from the date of payment of the tax or the release of the goods, and impose a late payment penalty of 5/10,000 of the under-collected or omitted tax on a daily basis from the date of payment of the tax or the release of the goods.[[9]](#footnote-9)**
3. Article 67 of the Regulations on the Administration of Taxation of Imported and Exported Goods by the Customs of the People's Republic of China also contains similar provisions to those in bold in the previous section. It also clarifies that the "date of tax payable" refers to the date on which the taxpayer's violation of the provisions occurs; if the date of the occurrence of the act cannot be determined, the date on which the customs discovers the act shall be the date on which the tax payable.[[10]](#footnote-10)
4. Therefore, if the Customs finally determines that the goods involved in the case do not meet the ASEAN origin standards, the act of declaring the origin of the imported goods to be Malaysia and applying for the ASEAN preferential tax rate will be deemed as an act of false declaration, i.e., a violation of customs regulations.[[11]](#footnote-11) Under the current law, the customs has the right to recover the tax for a period of 3 years from the date of release of the goods, i.e. 25 October 2025, instead of 25 October 2023.
5. **Expert Statement**
6. I hereby declare:
   1. I confirm that I have no actual or potential conflict of interest with respect to my instructions in this matter.
   2. I understand that my duty in providing evidence in this arbitration is to assist the arbitral tribunal in making a decision on the issues involved in the expert evidence. I have fulfilled and will continue to fulfil that duty.
   3. I confirm that this opinion is my own, fair, objective and unbiased, and has not been influenced by the pressure of the dispute resolution process or by any party to the arbitration.
   4. I confirm that all matters on which I express opinions fall within my area of expertise.
   5. I confirm that I have mentioned all matters that I consider relevant to the opinions I have expressed and have brought to the attention of the arbitral tribunal all matters known to me that may adversely affect my opinions
   6. I confirm that, at the time I provide this written opinion, I believe it to be complete and accurate and constitute my honest professional opinion
   7. I confirm that if I subsequently consider that this opinion requires any correction, modification or qualification, I will promptly notify the parties to this arbitration and the arbitral tribunal

Name: Shanshan Xu [SIGNATURE]

Date: 28 June 2024

1. Article 29 of the Customs Law of the People's Republic of China stipulates that, unless otherwise approved by the customs, import and export goods shall be released by the customs after the consignee and consignor have paid the tax or provided a guarantee. [↑](#footnote-ref-1)
2. Article 4 of the Customs Guarantee Regulations of the People's Republic of China Under any of the following circumstances, a party may, before completing customs procedures, apply to the customs to provide a guarantee and request the early release of the goods:

   (1) The commodity classification, dutiable value and place of origin of the imported and exported goods have not yet been determined;

   (2) the valid customs declaration documents have not been provided;

   (3) The tax has not been paid within the tax payment period;

   (4) The late declaration fee has not been paid;

   (5) Other customs formalities have not yet been completed.

   The state has restrictive provisions on the entry and exit of goods and articles. If a license is required but cannot be provided, and in other circumstances where a guarantee is not allowed pursuant to the laws and administrative regulations, the customs will not release the goods under guarantee. [↑](#footnote-ref-2)
3. Article 18 of the Customs Guarantee Regulations of the People's Republic of China If the guarantor fails to perform the relevant legal obligations within the prescribed time limit, the customs may offset the payment from the secured property and rights in accordance with the law. If the parties provide a guarantee by means of a letter of guarantee, the customs may directly require the guarantor who bears joint and several liability to perform the guarantee liability.

   Article 20 In any of the following circumstances, the customs shall notify the parties concerned in writing to go through the procedures for the return of the secured property and rights:

   (1) The parties have already fulfilled the relevant legal obligations;

   (2) The party concerned no longer engages in specific customs business;

   (3) There is still a surplus of the secured property or rights after the customs has taken measures to offset the seizure;

   (4) Other circumstances requiring return. [↑](#footnote-ref-3)
4. Article 4 of the Customs Guarantee Regulations of the People's Republic of China Under any of the following circumstances, a party may, before completing customs procedures, apply to the customs to provide a guarantee and request the early release of the goods:

   (1) The commodity classification, dutiable value and place of origin of the imported and exported goods have not yet been determined;

   (2) the valid customs declaration documents have not been provided;

   (3) The tax has not been paid within the tax payment period;

   (4) The late declaration fee has not been paid;

   (5) Other customs formalities have not yet been completed.

   The state has restrictive provisions on the entry and exit of goods and articles. If a license is required but cannot be provided, and in other circumstances where a guarantee is not allowed pursuant to the laws and administrative regulations, the customs will not release the goods under guarantee. [↑](#footnote-ref-4)
5. Article 5 of the Customs Guarantee Regulations of the People's Republic of China If a party applies for the following specific customs operations, it shall provide a guarantee in accordance with customs regulations:

   (1) Transport enterprises undertaking the road transportation of goods between the Mainland, Hong Kong and Macao, and undertaking the domestic road transportation of goods under the supervision of the customs;

   (2) Temporary entry or exit of goods or articles;

   (3) Goods imported for repair and export processing;

   (4) The import of leased goods;

   (5) The transit of goods and means of transport;

   (6) Temporarily storing goods under customs supervision outside the customs supervision area;

   (7) Mortgaging goods under customs supervision to financial institutions;

   (8) Handling customs business for bonded goods. [↑](#footnote-ref-5)
6. Article 7 of the Customs Guarantee Regulations of the People's Republic of China If a party fails to provide the guarantee or the guarantee provided does not comply with the requirements, the customs shall not handle the specific customs business listed in the preceding paragraph.

   Article 7 Where goods, articles or means of transport suspected of violating the law shall be or have been detained or sealed by the customs in accordance with law, the parties concerned may provide a guarantee to the customs and apply for exemption or release of the detention or sealing.

   If the goods, articles or means of transport suspected of violating the law cannot or are inconvenient to detain, the parties concerned or the person in charge of the means of transport shall provide an equivalent guarantee to the customs; if no equivalent guarantee is provided, the customs may detain other property belonging to the party of an equivalent value.

   If the goods, articles or means of transport suspected of violating the law are prohibited from entering or leaving the country, or the original goods must be used as evidence, or shall be confiscated in accordance with the law, the customs shall not handle the guarantee. [↑](#footnote-ref-6)
7. Article 4 of the Customs Guarantee Regulations of the People's Republic of China Under any of the following circumstances, a party may, before completing customs procedures, apply to the customs to provide a guarantee and request the early release of the goods:

   (1) The commodity classification, dutiable value and place of origin of the imported and exported goods have not yet been determined;

   (2) the valid customs declaration documents have not been provided;

   (3) The tax has not been paid within the tax payment period;

   (4) The late declaration fee has not been paid;

   (5) Other customs formalities have not yet been completed.

   The state has restrictive provisions on the entry and exit of goods and articles. If a license is required but cannot be provided, and in other circumstances where a guarantee is not allowed pursuant to the laws and administrative regulations, the customs will not release the goods under guarantee. [↑](#footnote-ref-7)
8. "Revised Measures for the Administration of Origin of Imported and Exported Goods under the Comprehensive Economic Cooperation Framework Agreement between the People's Republic of China and the Association of Southeast Asian Nations" by the customs of the People's Republic of China

   Article 17 In order to determine the authenticity and accuracy of the certificate of origin (or flow certificate), to determine the origin qualification of imported and exported goods, or to determine whether imported and exported goods meet other requirements stipulated in these Measures, the customs may conduct origin verification in the following ways:

   (1) Require the consignee of imported goods or his agent, the consignor of exported goods or his agent, and the manufacturer to provide information and materials related to the origin of the goods and the issuance of a certificate of origin;

   (2) On-site verification of the production status of export goods, and review and copy relevant contracts, invoices, account books and other relevant materials;

   (3) Request the relevant competent authorities of ASEAN member states to verify the authenticity of the certificate of origin (or movement certificate) and the origin qualification of the goods, and provide relevant information on the exporter or manufacturer and the goods if necessary;

   (4) Other procedures mutually agreed upon by the customs authorities of both parties.

   While waiting for the verification results, upon the application of the consignee of the imported goods or his agent, the customs may handle the guaranteed release in accordance with the law, except for situations where the guaranteed release is not allowed in accordance with laws and administrative regulations. [↑](#footnote-ref-8)
9. Article 51 of the Import and Export Tariff Regulations of the People's Republic of China If the customs finds that the tax is under-collected or omitted after the import and export goods are released, it shall request the taxpayer to pay back the taxes within one year from the date of payment of the tax or the release of the goods. However, if the tax is under-levied or omitted due to the taxpayer's violation of the regulations, the customs may recover the tax within 3 years from the date of payment of the tax or the release of the goods, and impose a late payment penalty of 5/10,000 of the under-collected or omitted tax on a daily basis from the date of payment of the tax or the release of the goods.

   If the customs discovers that the goods under customs supervision have been under-levied or omitted due to the taxpayer's violation of the regulations, it shall recover the tax within three years from the date on which the taxpayer should pay the tax, and impose a late fee of 5/10,000 of the undercollected or omitted tax on a daily basis from the date of tax payment. [↑](#footnote-ref-9)
10. Article 67 of the Regulations on the Administration of Taxation of Imported and Exported Goods by the Customs of the People's Republic of China If the taxpayer violates the provisions and causes the tax to be under-paid, the customs shall recover the tax within 3 years from the date of payment of the tax; If the tax is evaded due to the taxpayer's violation of the regulations, the customs shall recover the tax within 3 years from the date of release of the goods. In addition to recovering taxes in accordance with the law, the customs shall also impose a late payment penalty of 5/10,000 of the under-collected or omitted tax on a daily basis from the date of payment of the tax or the release of the goods to the date on which the customs discovers the violation.

    If the tax is under-levied or omitted due to the taxpayer's violation of the regulations, the customs shall recover the tax within 3 years from the date on which the taxpayer shall pay the tax, and impose a late fee of 5/10,000 of the undercollected or omitted tax on a daily basis from the date of tax payable to the date on which the customs discovers the violation.

    The term "date on which the tax shall be paid" as used in the preceding paragraph refers to the date on which the taxpayer's violation of the provisions occurs; if the date of occurrence of the act cannot be determined, the date on which the customs discovers the act shall be the date on which the tax payable. [↑](#footnote-ref-10)
11. Article 86 Customs Law Anyone who violates the provisions of this Law by committing any of the following acts may be fined and, if there are illegal gains, shall have the illegal gains confiscated: (3) the import and export goods or articles or transit, transshipment or transport goods are falsely declared to the Customs; [↑](#footnote-ref-11)