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THE ROLE OF ADVANCE RULINGS AND ADMINISTRATIVE PROCEDURES IN TFA IMPLEMENTATION

COMMUNICATION FROM THE UNITED STATES

The following communication, dated 6 August 2018, is being circulated at the request of the delegation of the United States for Members' information.

1 INTRODUCTION

The historic WTO Agreement on Trade Facilitation (TFA) entered into force on 22 February 2017, establishing binding obligations for WTO Members to improve their customs procedures to foster more transparent, efficient, and collaborative interaction between border regulatory agencies and the private sector.

Among the obligations in the TFA are the commitments on advance rulings, set out in Section I, Article 3. Advance rulings are a proven means of facilitating trade, promoting transparency and consistency in customs operations, and fostering the participation of small and medium sized enterprises in global commerce. In fact, in its 2011 Trade Policy Working Paper (No. 118) entitled, Trade Facilitation Indicators, the Organization for Economic Cooperation and Development (OECD) described advance rulings as "the most significant trade facilitation measure".¹

The TFA requires each WTO Member to issue advance rulings on the tariff classification and country of origin of imported goods. In addition, it encourages Members to issue rulings on customs valuation, the applicability of the Member's requirements for relief or exemption from customs duties (such as drawback programs), the application of tariff rate quotas, and other subjects that the Member may consider appropriate.

In addition to the basic requirement to issue rulings, the TFA includes procedural commitments for fairness and transparency in how Members issue rulings. The TFA requires that the procedures and timeline for obtaining an advance ruling be published and that Members specify how long a ruling will apply. A Member also shall endeavor to make publicly available any information on advance rulings that it considers to be of significant interest to other interested parties, taking into account the need to protect commercially confidential information. In addition, the TFA requires Members to provide for appeals of advance rulings and for the modification and revocation of advance rulings.

The United States Customs and Border Protection's (CBP) rulings program provides the international trade community with a transparent and efficient means of understanding how CBP will treat a particular import once it arrives in the United States and also provides the trade community with mechanisms to interact with CBP even after a good has been entered.

This paper's goal is to describe the key features of the United States rulings program and to demonstrate how it implements the TFA obligations—and goes beyond—to provide significant benefits to the trading community.

¹ Moïse, E., T. Orliac and P. Minor (2011), "Trade Facilitation Indicators: The Impact on Trade Costs", OECD Trade Policy Papers, No. 118, p.19, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5kg6nk654hmr-en>.

2 THE RULINGS PROGRAM AT CBP

The US Customs Service began offering advance rulings as Treasury Decisions and Customs Service Decisions as far back as the late 1960s. In 1994, Title VI of the North American Free Trade Agreement Implementation Act, also known as the Customs Modernization Act, came into effect. Two central concepts emerged from the act—"informed compliance" and "shared responsibility". The premise of both concepts is that the trading community should be well informed of its legal and regulatory obligations to maximize voluntary compliance with CBP requirements. Correspondingly, the Modernization Act imposes a greater obligation on CBP to provide the public with information on the trading community's rights and responsibilities. Advance rulings are an important part of this information sharing responsibility. As described below, the modernization program brought with it changes to the CBP rulings program in terms of publication and modification of rulings that are reflected in the TFA.

3 THE ESSENTIAL CHARACTER OF A GOOD RULINGS PROGRAM

In accordance with the TFA and our own experience, the US considers that an effective advance rulings regime has the following characteristics:

- Rulings are simple to obtain and issued in a timely manner;
- Rulings are legally binding;
- Rulings are published, and the rulings process is transparent;
- Confidential information is protected;
- Rulings set the customs practice throughout the United States for that good for all traders;
- There is effective communication externally (with the public) concerning rulings matters;
- There is effective communication internally (within customs) to support a rulings regime;
- The advance rulings system promotes uniformity and fairness.

These elements not only help establish and maintain an effective and useful advance rulings program, but they provide an environment that enables CBP to establish a body of decisions providing guidance to the trade community at each stage in the processing of an import transaction.

Rulings are simple to obtain

An advance rulings regime requires that the Customs authority inform the public of the availability and requirements of advance rulings and make them accessible. For a 21st Century customs operation, accessibility means availability on the internet. CBP delineates the requirements and other information about its rulings program in published regulations, available in print and online. In the United States, Part 177 (Administrative Rulings) of Title 19 (Customs Duties) of the US Code of Federal Regulations provides the regulatory authority for the US advance ruling process. The regulations, which are cited as 19 CFR 177, can be accessed from the US Government Printing Office at <https://www.gpo.gov/fdsys/granule/CFR-2012-title19-vol2/CFR-2012-title19-vol2-part177>. These regulations provide the necessary detail to the trade regarding how, when, where, and why to request an advance ruling.

Requests for advance rulings from CBP can be filed by letter or online using the electronic rulings template (<https://apps.cbp.gov/erulings/index.asp>). Rulings are issued free of charge. The information must be in a written request and CBP has published guidance on the information required, but CBP does not require a specific form for making a request.

Any importer, exporter, other interested party or the authorized agent of these persons may request a binding ruling from CBP. Requesting a ruling is straightforward and simple. The request must be written in English and contain a statement of the relevant facts relating to the transaction. The request also gives the requester the opportunity to provide a statement of its view about how the transaction should be treated and the basis for its position. Of course, any relevant documents to the request such as photographs, drawings, a sample of the good, invoices, contracts, and product descriptions are all important inclusions to a ruling request. When all the relevant information is included, CBP can efficiently address the subject matter of the ruling request.

Requests for confidentiality, or for a conference to discuss the issues presented in the ruling request, should also be included in the ruling request.

The requester sends the request for a ruling to CBP's Office of Regulations and Rulings. The requester will receive an acknowledgment of receipt of the request.

Most ruling requests go to the National Commodity Specialist Division (NCSO) in New York, which consists of 48 National Import Specialists and 39 National Import Specialists Associates, who are specialists in a grouping of particular commodities. The subjects addressed by NCSO rulings are: Tariff Classification; Country of Origin; Country of Origin Marking; and Eligibility for Preferential Treatment under Free Trade Agreements (FTAs), except for questions concerning regional value content. NCSO typically responds to ruling requests within 30 days. The ruling the requester receives will be concise and will directly address the question posed.

The most common binding ruling requests are about tariff classification of the imported good, because the tariff classification determines the rate of the duties relevant to the application of many legal instruments (import/export licenses, rules of origin, anti-dumping duties, security standards, etc.).

All other requests go to Headquarters (HQ) Regulations and Rulings, housed in Washington, D.C. This office issues rulings on a broader array of topics including: Tariff Classification; Eligibility for Preference under NAFTA and other Trade Agreements; Application of the Navigation laws; Drawback Determinations; Foreign Trade Zone and other Duty Deferral Programs; Marking and other Country of Origin issues; Liquidation and Reliquidation of entries; Customs Valuation; and Entry Procedures. Because these rulings may involve more complex issues, they typically take 90 to 120 days to complete.

In the course of evaluating an advance ruling request, CBP may solicit supplemental information from the person requesting the advance ruling. The submission of supplemental information will extend the time for response. CBP also will extend the time for response if it needs to obtain information from other government agencies or perform a laboratory analysis. If a request for an advance ruling does not contain adequate specific information to provide a binding ruling, the requester will receive general information regarding the matter.

To apply an advance ruling to a transaction, an importer must attach a copy (electronically is accepted) of the advance ruling letter to the documents filed with the appropriate CBP office in connection with that transaction or must otherwise indicate that an advance ruling has been received. When a trader relies on an advance ruling, the customs field office will verify the application of the ruling to the transaction. The CBP office at the port of entry must be satisfied that the transaction described in the ruling is the same as what actually takes place.

Rulings are legally binding, ensuring that the importing community can rely on the decision

A ruling represents the official position of CBP with respect to the particular transaction or issue described therein and is binding on both CBP and the requester until modified or revoked. The principal benefit for the holder is the assurance that the decision will be applied at the border at the importation.

Rulings are published, and the rulings process is transparent

As part of the Customs Modernization Act, CBP is required to publish advance rulings.² Originally, the rulings were published in the agency's bound volumes, and then in the agency's weekly gazette. However, since 2002, rulings have been published on the Customs Rulings Online Search System (CROSS), which is accessible via the CBP website or directly using the following hyperlink: <http://rulings.cbp.gov>. The CROSS database contains rulings issued from 1989 until the present. CROSS is searchable by anyone, anywhere in the world and allows any person to download and print rulings free of charge. CROSS increases predictability of CBP action and provides consistency in decisions made by the field offices. All importers benefit, not just those who request rulings, because they can search for rulings that have similar facts to their business, learn how CBP has

² See 19 U.S.C. §1625.

treated transactions like theirs, and determine whether to request more specific information in their own ruling.

Last year CBP issued more than 4,800 advance rulings, and as of April 2018, there are over 198,000 rulings available on CROSS. CROSS also includes modifications and revocations of advance rulings, as well as internal advice decisions and protest review decisions. Likewise, the rulings on CROSS cover all matters for which CBP has enforcement authority. Those topics include: tariff classification, valuation, country of origin, duty drawback, duty deferral, applicability of any quota or tariff quota, eligibility under preference programs, applicability of navigation and cabotage laws (i.e., dredging, towing, and passenger laws), and treatment of goods in transit.

Protection of commercially confidential information

Since rulings are published, there must be a method to protect commercially confidential information. Requesters have the right to request that certain designated information provided as part of the ruling request be kept confidential and not included in the published ruling. In practice, CBP and the requester often discuss the specific requests to balance the need to have legally sufficient advance rulings while protecting information that is confidential.

Additionally, if information is clearly business confidential, CBP still does not disclose that information even if the requester did not make a specific request to protect it.

This regulatory scheme promotes trust between CBP and the importer community. Privileged, classified, or specific information (such as trade secrets) for which there is a clear and compelling need to withhold from disclosure are not included in published rulings. But by publishing the rulings, CBP honors the public's right to know with regard to government decision making. These practices provide transparency and protect confidentiality.

Rulings set the customs practice throughout the United States for that good for all traders

In addition to being binding and timely for the requester, CBP rulings provide guidance to others in the trade community with the same merchandise. Because many rulings provide a detailed description of the merchandise and an in-depth discussion of the applicable law and the issues presented, they represent a rich resource for brokers, importers, and import specialists to understand how CBP will treat their merchandise. Technically, an advance ruling letter is only binding for the transaction described therein. However, if CBP determines that the merchandise is the same in all material respects to that described in the ruling, the ruling will apply.

Most rulings are never modified or revoked and remain in effect indefinitely, with no fixed expiration. However, when a change in position is needed because of new information or circumstances, the rulings process allows CBP to change its views with attention to procedural safeguards and opportunities for the trade to provide input. Before changing or revoking a ruling, CBP is required to publish the proposal in its gazette for public comment. The public is given a 30-day comment period before a final decision is made. When a final decision is published, it is effective 60 calendar days after publication. This delayed effective date of a modification or revocation gives the trade time to adapt to the new ruling.

Effective external communication is essential

External communication with the trade community is also vital, especially with regard to a particular ruling letter. At CBP, importers may request a conference in writing, to discuss the issues in their request for an advance ruling, at the time the ruling request is filed.³ The conference affords the importer the opportunity to supplement the request with pictorial representations of the good or even a sample of the good. Conferences are scheduled to afford the parties an opportunity to freely and openly discuss the matters set forth in the advance ruling request before the ruling is issued. CBP will consider the issues presented before proceeding with the ruling letter. The two-way communication builds confidence in the rulings program.

³ This may be an importer, exporter, other interested parties; or the authorized agent (e.g., attorney or broker) of these parties, which is consistent with TFA Article 3.9(c), states that a ruling "applicant" is an exporter, importer or any person with a justifiable cause or a representative thereof.

Of course, the notice and comment procedures for the issuance of modifications or revocations of particular rulings also afford stakeholders the ability to communicate concerns or support for a customs action before a decision is final.

In addition, CBP communicates with the trading community through its Informed Compliance Publications (ICPs). This series, "What Every Member of the Trade Community Should Know About: ...", is published on its website at www.cbp.gov/trade/rulings/informed-compliance-publications. CBP's Regulations and Rulings Directorate has issued and maintains the ICPs on new or revised requirements, regulations or procedures, and on a wide variety of classification and valuation issues. The Regulations and Rulings Directorate also provides public outreach sessions or training on all technical trade and legal areas.

Effective communication within CBP

CBP's Regulations and Rulings Directorate issues advance rulings. The directorate has three divisions responsible for the rulings. The NCSO in New York City has four branches: Metals, Machinery, Chemicals, Manufacturing Materials and Petroleum; Electronic, Agricultural, Footwear, Automotive and Aerospace; Textiles and Wearing Apparel; and Consumer Products and Mass Merchandising. The above-referenced eRulings program helps provides the infrastructure for NCSO to contribute to CBP's robust rulings program.

The Commercial and Trade Facilitation Division and the Border Security and Trade Compliance Division are at CBP headquarters in Washington, D.C. Each division has five and three branches, respectively, that issue advance rulings on a broad array of topics.

Within CBP's Regulations and Rulings Directorate, the HQ and NCSO offices communicate on a regular and ongoing basis. Regulations and Rulings also frequently communicate with the CBP personnel located at the Centers of Excellence and Expertise on specific imports or compliance issues within a particular industry. In addition to teleconferences and email, internal communication at CBP is facilitated by the Automated Commercial Environment (ACE), the primary system through which the trade community reports imports and exports and the government determines admissibility, and which serves as the single window.

The advance rulings system promotes uniformity and fairness

As discussed above, CBP actively engages the importing community before taking final action. CBP issues rulings and other decisions that importers can use for guidance for the merchandise described in the ruling, whether or not the ruling was issued to them. CBP publishes its rulings so that any member of the public can access them in print or online. CBP has clear regulations that are also freely available online and that govern every aspect of its rulings program. All these aspects of CBP's rulings program make it uniform in application.

In addition to publication practices to support uniformity, requesters have access to a judicial review of the advance ruling in the Court of International Trade (CIT). The CIT has national jurisdiction over matters that arise out of the customs and international trade laws of the United States. Decisions by the CIT are binding on Customs and importers. CIT decisions can be appealed to the Court of Appeals for the Federal Circuit, which is located in Washington, D.C., and then, in rare instances, may be considered by the Supreme Court of the United States. This robust system of judicial review provides a vital element of fairness to the trade community.

Through these procedural safeguards and transparent practices, CBP's administrative rulings program also promotes fairness for traders and consistent and efficient application of customs laws.

Conclusion

An advance rulings regime fosters openness, efficiency, and transparency. An advance rulings program is key aspect of a modern customs administration and provides a vital service to the trade community in the form of predictability, certainty, and fairness.

The system provides a process under which rulings are simple to obtain, legally binding, timely provided, and made publicly available while protecting confidential information. The system is supported by consistent and transparent communication within CBP and with traders.

The United States encourages all Members to share their views and experiences concerning advance rulings, including the different scale and practices in their advance rulings programs and the use of advance rulings by their exporters. The United States further encourages Members to share these views with a view toward full TFA implementation and achieving its aims of further expediting the movement, release and clearance of goods, including goods in transit. The US looks forward to working with Members seeking further information in establishing an advance rulings regime or expanding an existing advance rulings program.
