

UNCTAD Trust Fund for Trade Facilitation Negotiations¹

Technical Note No. 22

Advance rulings

The measure in the WTO context

Article X of GATT “Publication and Administration of Trade Regulations” sets out transparency obligations and legal redress provisions on Customs matters for WTO members.

Article X:1 stipulates that “Laws, regulations and judicial decisions and administrative rulings of general application [...] pertaining to the classification or the valuation of products for Customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports and exports [...] shall be published promptly in such a manner as to enable governments and traders to become acquainted with them”.

Article X:3 (a) and (b) requires WTO members to administer laws, regulations, decisions and rulings in a uniform, impartial and reasonable manner and “maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to Customs matters”.

While advance rulings per se are not mentioned in Article X, they fall under the generic heading of administrative rulings. The WTO Agreement on Rule of Origin already contains such advance ruling provisions (Article 2(h) and 3(f) whereby upon request assessment of original should be issued as soon as possible but no later than 150 days. In the context of WTO negotiations on trade facilitation WTO Members submitted a number of proposals to institute advance ruling regimes and related procedures whereby exporters and importers may obtain, upon request, individual rulings from Customs administrations prior to an import or export. For an overview of proposals see the WTO’s reference document TN/TF/W/43 (latest revisions) Chapter D, 1.

Background

Informal enquiries from traders to Customs concerning the potential treatment of their goods in the market of their trading country are common in many countries. Advance ruling provisions allow setting up a formal process for such requests, making the ruling legally binding on the Customs Authority over a fixed time period and thus leading to time savings at border crossings.

Although details of Advance Ruling provisions vary from country to country, common elements allow for its definition: An advance ruling for Customs purposes is a **binding official decision prior to an importation or exportation**, issued by a competent Customs authority **in writing**, which provides the applicant with a **time-bound ruling on the goods to be imported**.

¹ This Technical Note has been produced jointly by the World Customs Organization (WCO) and UNCTAD.

The World Customs Organisation's guidelines on advance rulings in accordance with the provisions of standard 9.9 of the Revised Kyoto Convention define the term as follows: “The expression ‘binding ruling’ (or ‘advance ruling’) generally designates the option for Customs to issue a decision, at the request of the economic operator planning a foreign trade operation, relating to the regulations in force. The main benefit for the holder is the legal guarantee that the decision will be applied” (see <http://www.wcoomd.org>)

Article X aims at lending transparency and predictability to the regulatory environment pertaining to trade, particularly Customs procedures and formalities. Their complexity often constitutes a major trade barrier leading to delays and additional costs to the business community and consumers. For this reason also, new companies in the market and small- and medium-sized enterprises (SMEs) sometimes hesitate to engage in foreign trade. Authoritative and binding advance rulings allow traders and investors to make business decisions in a stable and predictable environment for a specified period of time, regarding taxes and duties on certain import and export goods.

To reduce delays at border points and during Customs clearance, importers and exporters and their agents need to familiarise themselves with regulations and conditions (Customs, investment, financial and transport) in their own country and often those of their trading partners. This is particularly important to take full advantage of trade benefits and preferential agreements in force. Many developed and some developing countries possess the administrative and legal mechanisms to issue advance rulings for investment and trading purposes, and post-application requirements, but rarely individual rulings, on their websites.

Subject areas

Classification according to the national Customs tariff

The identification of the proper tariff heading and subheading determines the duty rate to be applied to commodities. Many tariffs contain 10,000 headings or more, with highly-technical chapters, such as chemical compounds, textile goods, and electronic components. Sometimes, final classification depends on laboratory analysis of a sample of the goods. Hence, an advance analysis and classification decision will simplify the clearance process and reduce delays.

Assessment of Customs value

This involves the determination of the valuation criteria of goods according to the national Customs tariff—normally giving effect to the International Convention on the Harmonized Commodity Description and Coding System (generally referred to as ‘Harmonized System’ or simple ‘HS’) and in line with Article VII, GATT 1994. Such Customs valuation defines duty liability and the compilation of foreign trade statistics. Valuation can be a complex and lengthy process, for example in situations when seller and buyer are related or associated. In such cases the Customs authority may have to probe into the circumstances of the transaction to assess whether the invoice price reflects the true price payable, or when the transaction value of an identical or similar import has to be computed. A final decision often depends on the importer submitting satisfactory documentation. An advance valuation decision greatly facilitates Customs clearance.

The WTO Valuation Agreement provides the rules and methods for determining the Customs value of imported goods. Typically, duty liability is determined by application

of the ad valorem rate set out in the importing country's national tariff (implementing the Harmonized System) and the customs value.

In certain cases, complex issues are present which affect the customs value, such as, whether a royalty payment is dutiable, whether a commission is a buying or selling commission, or whether a price in a related party transaction is acceptable for determining customs value. Often in these cases documentation, such as a royalties agreement or a sales agreement, must be analyzed. In order to determine customs value these issues must be resolved. Decisions on these issues prior to importation through an advance ruling would often facilitate the Customs clearance of goods at the time of importation.

Verification of the origin of goods declared for preferential treatment

This procedure includes appraisal of a range of elements such as classification and valuation, assessment of the production and/or minimum treatment in accordance with the preferential agreements concerned. Preferential treatment extended under bilateral, plurilateral and international trade regimes (e.g., the General System of Preferences (GSP) or regional free trade agreements) confers lower duty on condition that the goods comply with the rules of origin of the trade regime. Hence, to promote the smooth exchange of goods between participating countries, trade agreements normally include provisions on advance ruling.

This procedure includes appraisal whether a product qualify for preferential market access under a given free trade arrangement in accordance with the provisions on rules of origin contained in a given preferential trade arrangement. Preferential treatment extended under regional trade arrangements (e.g., the General System of Preferences (GSP) or free trade agreements) means a lowering or phasing out of customs duties for trade among members of a preferential trade arrangement and constitutes an important exception to the Most Favoured Nation rule of the GATT. Hence, to promote the smooth exchange of goods between participating countries under preferential conditions, trade agreements normally include provisions on advance rulings.

Implications of the measure

Costs

Costs connected with setting up an advance ruling regime will vary from country to country, depending on whether or not similar regimes are already in place for taxation and other domestic business purposes, or authorised traders. In such cases, advance rulings on Customs matters may be modelled in a similar fashion. A team of Customs experts on classification, valuation and origin determination, e.g., together with a judge and tax expert, set up to hand down authoritative rulings, might only need some training or study of the functioning of advance ruling regimes, issuing binding rulings as well as revocation and appeal mechanisms in other countries. Such training and operating expenses are likely to be offset by more expeditious Customs operations due to the implementation of advance rulings.

Countries receiving many applications for advance rulings may need to develop a database—or expand current ICT systems—to publish, archive and search rulings. A sequencing of advance ruling can also be envisaged, (i) with the issuance and communication of provisions with limited scope in paper form, at a first stage; (ii) an electronic application process which would also allow for the online storage of advance

rulings, at a subsequent stage; and (iii) an advance ruling process requested, provided, published and searchable in electronic form at an ultimate stage. Countries may also consider a cost-recovery scheme by charging a fee for rulings.

Benefits

Advance rulings are a proven trade facilitation tool for both traders and Customs administrations that enhance the certainty and predictability of Customs operations. While traders obtain precise and binding information in advance of the actual transaction and for analogous ones during a specified period in future, at the time of clearance of the goods in question processes are expedited and delays reduced. Moreover, advance and binding information, e.g. on classification, gives the trader precise duty and tax liabilities and thus allows her to decide if imported goods are competitive in the domestic and foreign marketplaces.

Disputes with the Customs authority on tariff headings, valuation and origin, i.e. eligibility to preferential treatment, are reduced because of the process of deliberation among Customs officials taking place before the issuance of the advance ruling. In addition, many advance ruling provisions foresee an appeal mechanism. Automated Customs clearance, pre-arrival clearance and electronic release of goods from Customs will be expedited by advance rulings. Traders will also be able to conduct just-in-time operations more efficiently. Advance rulings can raise cooperation and build confidence between traders and Customs while reducing time-consuming complaints and appeals.

Transparency can be improved through publication of application procedures for advance rulings and potentially lead to greater compliance when individual rulings are made public, either in a gazette or on a database accessible to the trading community. Confidential information, e.g. on production and processing methods needed to classify a good, are protected. Customs integrity will not be challenged during the clearance of consignments benefiting from advance rulings because the Customs decision is made prior to clearance. A database of advance rulings can contribute to uniformity, consistency and predictability of decisions as they are made available as precedents for similar situations.

In sum, advance rulings may be crucial at the time a company contemplates cross-border investment or trading in a new market or line of activity. The effect of investment rules, taxation matters or Customs procedures on them can be clarified as well and made binding to all parties involved, doing away with surprise elements at the time of the actual transaction.

Implementation

A legal authority for advanced rulings should be constituted under the Customs act—or an existing authority designated to discharge advance rulings—to ensure an equitable application of procedures, transparency and legal redress in case of a dispute. Advance ruling is mostly applied to determine classification, origin and Customs value. Nevertheless, Customs administrations may further expand its scope to cover other tariff and duty regimes, such as excise duties, tariff exemptions, drawbacks, etc. Moreover, nationally-based companies can apply for advance rulings for goods they intend to import or export. Other companies with a justifiable cause, including foreign companies, may, in principle, also apply for advance rulings, provided all necessary details are presented in a satisfactory way.

The applicant must supply Customs administration with all necessary details and documents (and sometimes samples) relating to the goods planned for import or export. The level of information depends on specific requirements pertinent to particular goods, e.g. when classification is based on a specific content; this has to be documented through catalogues, declaration by the producer etc. If any details are confidential, the trader must explain this in the application. Most countries require a special application form, in which the trader must declare all relevant details and attach supporting documents. In some countries, the application form can be submitted electronically, including supporting documents.

The ruling is legally binding on the holder and on the authorities and valid for a defined period, e.g. three or five years. This implies that the holder of a ruling may carry out several transactions within the set time limit, provided that the contents of the goods and other circumstances remain unchanged. Customs may revoke an advance ruling if legislation or other rules are amended. In such cases, a period of grace should be given to the holder. Advance rulings are generally issued in writing within a prescribed time limit, e.g. 30-120 days after submission of the request. Additional time may be necessary if the applicant omits essential information or if laboratory analysis of samples is required.

Except for confidential information, Customs should make decisions public (via official gazette, web or database access) to ensure transparency in their administration and uniform treatment to all traders. Customs offices must be fully informed of advance rulings. Advance rulings should be subject to appeal by the applicant. Binding advance rulings are often issued free of charge; some countries charge the trader for additional costs, such as laboratory analyses and technical expert advice. Upon importation or exportation of goods under advance ruling the declarant must refer to the exact number and date of the decision in her Customs declaration.

Local capacity

Simplification and streamlining of Customs procedures, including the introduction of advance ruling, is advisable for countries with an active business and trading community. While the planning and strategy setting for modernisation are the responsibility of a ministry or department, the actual implementation and operation is undertaken at local Customs offices.

Local Customs staff, therefore, should be given targeted training as to the philosophy and benefits related to advance rulings. They need to be cognizant of Customs procedures and nurture close relationships with the trading community. Computer literacy is highly desirable.

As with any new procedure, training is necessary to ensure that the administration and publication of the new discipline is developed within the strategic framework of the Customs service. Normally, in-house trainers or managers will be capable of such activities. Should such capacity not be locally available, cooperation from WCO and Customs services of other countries can be an option.

References and tools available

World Customs Organization (WCO)

Relevant WCO instruments include inter alia the International Convention on the Simplification and Harmonization of Customs Procedures (Revised Kyoto Convention)

as well as general information on the Harmonized Commodity Description and Coding System. See <http://www.wcoomd.org>

World Trade Organization (WTO)

The WTO Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 can be found on http://www.wto.org/english/docs_e/legal_e/20-val.pdf. Information on rules of origin and the Uruguay Round Agreement on Rules of Origin are available on http://www.wto.org/English/docs_e/legal_e/22-roo_e.htm

The Global Facilitation Partnership for Transportation and Trade (GFP)

The Global Facilitation Partnership for Transportation and Trade (GFP) brings together the world's leading organizations and practitioners in trade and transport facilitation. It creates an open information and exchange platform on major new developments and all aspects of trade and transport facilitation. See www.gfptt.org.

Further UNCTAD Technical Notes

Further Technical Notes and various reports are available via <http://r0.unctad.org/ttl/technical-notes.htm>. See in particular:

- Technical Note No. 1 (Publication of Trade Regulations and their Uniform Administration)

The *Technical Notes* have been produced by technical experts contracted by UNCTAD within the Trust Fund project "Capacity building in developing countries and least developed countries to support their effective participation in the WTO Negotiations Process on trade facilitation", financed by the Governments of Sweden and Spain. Their purpose is to assist Geneva- and capital-based negotiators to better understand the scope and implications of the various trade facilitation measures being proposed in the context of multilateral negotiations on trade facilitation. The Technical Notes have not been edited, and the opinions expressed may not necessarily coincide with those of the organization or the donors of the Trust Fund. For comments and enquiries please contact trade.logistics@unctad.org. All Technical Notes are available via <http://r0.unctad.org/ttl/technical-notes.htm>
