

In the name of legal certainty? Comparison of advance ruling systems for tariff classification in the European Union, China and Taiwan

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Abstract

In many jurisdictions, international traders can apply to customs authorities for an advance ruling for tariff classification before they import or export their goods. The advance ruling system for tariff classification is expected to grant more legal certainty to international traders because they can communicate with customs authorities and receive a legally binding tariff classification decision in advance. Such a system is important in the facilitation of international trade. In this paper, the advance ruling systems for tariff classification in the European Union (EU), China and Taiwan will be compared. It is shown that the advance ruling systems for tariff classification in these three jurisdictions all emphasise the efficiency of customs administration more than the legitimate expectation and procedural rights of the applicants. This imbalance might result from the complicated nature of tariff classification; however, it can also make the advance ruling system less attractive for international traders to use.

1. Introduction

Tariff classification is one of the core areas of work for customs authorities and requires attention to complicated and technical details. International traders may be faced with uncertainties because the classification of goods is not always indisputable. In order to reduce such legal uncertainties and facilitate international trade, many national customs laws provide an advance ruling system to decide tariff classifications. Such advance ruling systems provide traders with an opportunity to communicate with the customs authorities before the goods are imported, and for the customs authority to issue an administrative decision on the goods classification.

In this article, I will compare the advance ruling systems for tariff classification in three jurisdictions: the European Union (EU), China and Taiwan. My main observation is that the advance ruling system for tariff classification places greater weight on administrative efficiency than on ensuring legal certainty for the importers, although legal certainty has been claimed to be the underlying rationale.

To demonstrate this argument, for each of the jurisdictions I will describe the validity period of the advance ruling, the binding scope, grounds of refusal to grant an advance ruling, reasons for invalidation, and appeal procedures. I will also discuss the disputes and main issues from these three advance ruling systems.

2. European Union

2.1 Overview: European Binding Tariff Information

The EU is a single customs union.¹ It has a uniform system of customs duties on imports and exports from outside the EU, although the EU has no central customs authority. The customs union is the core principle and the foundation of the EU. The European Binding Tariff Information (EBTI) is the system at the EU level which provides a mechanism for international traders to apply for a decision of goods classification issued by a national customs authority.

Binding Tariff Information (BTI) is a decision issued by a national customs authority to the applicant. The underlying rationale for BTI is two-fold: it can provide legal certainty for importers and can facilitate and ensure uniform application of the EU Customs Code.² Issuing BTIs to traders in a consistent manner is important for the EU customs union. BTI decisions issued by national customs authorities are all recorded in a database that can be consulted by both the public and customs officers.

Legal basis

In 1991, the BTI system was adopted by the Community Customs Code (CCC)³ and its legal basis have been amended over several years. On 1 May 2016, the Union Customs Code (UCC) came into effect, so the UCC is currently the legal basis for EU customs matters.⁴

Article 14 of the UCC provides:

1. Any person may request information concerning the application of the customs legislation from the customs authorities. Such a request may be refused where it does not relate to an activity pertaining to international trade in goods that is actually envisaged.
2. Customs authorities shall maintain a regular dialogue with economic operators and other authorities involved in international trade in goods. They shall promote transparency by making the customs legislation, general administrative rulings and application forms freely available, wherever practical without charge, and through the Internet.

Article 22 to Article 37 of the UCC further regulate the legal basis for BTI. In addition to the UCC, there are two related legal instruments implementing BTI: Commission Delegated Regulation EU 2015/2446 (the so-called Delegated Act, hereafter DA)⁵ and Commission Implementing Regulation EU 2015/2447 (the so-called Implementing Act, hereafter IA).⁶

Validity

As set out in Article 33(3), the validity period of a BTI decision is three years.⁷ Prior to 1 May 2016, the validity period of a BTI was six years and so the new UCC has shortened a BTI's validity period significantly. Prior to the end of the valid period, a BTI may cease to be valid when it no longer conforms to the law because of the adoption of an amendment to the nomenclatures or adoption of other non-tariff measures by the European Commission (EC).

Even if a BTI is about to become invalid, it is possible to extend a BTI's validity if certain conditions are met. This grace period can be up to six months. The conditions for extending a grace period for a BTI are provided in Article 34(9) of the UCC. However, the extended use of a BTI cannot be granted in the following situations:

- the BTI is annulled due to incomplete information
- the BTI becomes invalid as a result of changes to the Nomenclature of the Harmonized System and Combined Nomenclature (CN)⁸

- the revoked BTI decision covers a goods classification which has been decided by the Court of Justice of the European Union (CJEU)
- the BTI is revoked due to administrative errors.

If the circumstances indicated above are not present, the cumulative conditions to grant a grace period are provided in Article 34(9) as follows:

- the applicant is actually entitled to request a grace period
- the applicant has entered into binding contracts based on the classification of the invalidated BTI
- the applicant applies within 30 days prior to the BTI decision being invalidated
- the application is submitted to the original issuing customs authority
- the measure that has led to invalidating the BTI does not expressly exclude extension.

To sum up, the grace period is a measure for protecting a BTI holder's legitimate expectations. However, the extension period is a temporary arrangement, for a maximum of six months. The degree of legitimate expectation is not high.

Binding scope

The objective scope: the same or similar goods

A BTI can only cover the same or similar goods (IA Article 16(2)). The meaning of 'the same type of goods' is interpreted in the case law *Schenker* of the CJEU.⁹ 'The same type of goods' can include identical or similar (but different) goods, but only when the distinguishing features are completely irrelevant for the purposes of tariff classification.¹⁰ In other words, a BTI can cover not only identical goods but also goods with similar characteristics, provided that the differences are irrelevant for the purposes of tariff classification. Furthermore, a BTI may not be modified by the customs authority after it is issued (UCC Article 24(6)).

The subjective scope: the BTI holder and its representative

A BTI is binding on all customs authorities throughout the EU (UCC Article 26). Furthermore, under the new UCC from 1 May 2016 the BTI holder is obliged to use the BTI when they import the identical goods from the BTI (UCC Article 32(2)(6)). In the past, the applicant was entitled to use the BTI decision, but was not obliged to use it. After 1 May 2016, a BTI holder is obliged to use it, and such obligation may reduce the risk of inconsistencies due to 'BTI shopping' from different national customs authorities. BTI shopping will be discussed in section 2.2 of this paper.

It should be also noted that a BTI is only binding for the holder and their representatives. In other words, even when traders form a multinational group, the BTI issued to one subsidiary cannot be used by another subsidiary. The companies affiliated to the same multinational group do not have legitimate expectations on the BTI decision issue to one group member, even if these affiliated group members have a close economic relationship.

The CJEU case law *Sony Supply Chain Solutions*¹¹ deals with this issue. The multinational Sony Group produces and sells computer games, such as PlayStation 2 Computer Entertainment System (PS2). There are many companies in the Sony Group, such as Sony Computer Entertainment Europe Ltd (SCEE), a company established in the United Kingdom (UK) that is responsible for the marketing, selling and distribution of game machines in the EU, and Sony Logistics Europe BV (SLE), a Dutch company that provides logistical services for other companies in the Sony Group, including customs declarations.

In 2000 and 2001, SLE imported PS2 and applied for a BTI from Dutch Customs in its own name but was not satisfied with the classification decision. SLE argued that SCEE applied for a BTI for the same goods in 2000 from UK Customs, and that the classification decision by the UK Customs should be followed by Dutch Customs. The classification from UK Customs is more favourable than the decision by Dutch Customs and SLE used the legal certainty and legitimate expectation arguments against Dutch Customs.

The CJEU rejected SLE's argument and ruled that SLE is not the representative of SCEE, and therefore, SLE has the same status as a third party and cannot rely on the BTI issued to SCEE. Therefore, the SCEE's BTI from UK Customs does not give rise to legitimate expectation for SLE, and is not binding upon Dutch Customs.

It seems that the CJEU has a restrictive interpretation of 'the BTI holder and its representatives' in order to prevent the abuse of BTI by BTI shopping. However, it is ironic and undeniable that Dutch Customs would have to follow the SCEE's BTI from the UK if SCEE imported the goods to the Netherlands itself instead of SLE. In my opinion, such distinction seems artificial, and is not in line with the consistency principle of application of the UCC, because PS2 is classified differently by UK and Dutch Customs' BTI decisions to the same multinational group.

Refusal to issue a BTI

Article 33(1) of the UCC provides two grounds for refusing to issue a BTI:

- (a) where the application is made, or has already been made, at the same or another customs office, by or on behalf of the holder of a decision in respect of the same goods and, for BTI decisions, under the same circumstances determining the acquisition of origin
- (b) where the application does not relate to any intended use of the BTI or BOI decision or any intended use of a customs procedure.

In other words, if there is already an existing BTI decision on the same goods, the BTI application should be refused. This is to ensure consistent application of EU customs laws. Furthermore, if a BTI decision will not be actually used, the application should also be refused. The BTI should not be abused by the applicant with hypothetical import activities.

Revocation and annulment of an existing BTI

There are two ways to invalidate an effective BTI: annulment and revocation. However, it should be noted that the applicant or the BTI holder cannot invalidate it; it is the customs authorities that initiate invalidation of a BTI.¹²

Annulment: This invalidates a BTI from the starting date. The only reason to annul a BTI is that it was issued based on inaccurate or incomplete information from the applicant.¹³

Revocation: Revocation means that a BTI ceases to be valid. Unlike annulment, revocation does not have retrospective effect.¹⁴ Article 33(7) provides several grounds to revoke BTI decisions.

The common ground for revocation is that the BTI is no longer compatible with the interpretation of nomenclatures because of law or norm changes. Once the law that a BTI decision was based on is changed, the BTI should be revoked. The 'law' includes the interpretation of any of the nomenclatures, explanatory notes referred to in the tariff and statistical nomenclature and on the CCT, a judgment of the CJEU, classification decisions, classification opinions or amendments of the explanatory notes to the Nomenclature of the Harmonized Commodity Description and Coding System.

As to the possible extension period of a BTI being revoked due to changes of explanatory notes to CN, CJEU has ruled on this issue in the British Sky Broadcasting group case.¹⁵ British Sky Broadcasting group, the applicant, imported apparatus for televisions. In this case, the applicant's BTI was revoked

because the relevant explanatory notes to CN under the Harmonized System (HS) Convention were changed. The EU issued a new regulation to incorporate the changes of the explanatory notes. British Sky Broadcasting group argued that its revoked BTI should enjoy the grace period. However, the CJEU rejected this argument and ruled that, while Customs are obliged to issue a BTI with explanatory notes to CN, possible changes of explanatory notes that lead to invalidating a BTI is a risk that is foreseeable to the BTI holder. Therefore, BTI holders cannot claim legitimate expectation or ask for an extension period for their BTI because the change of the EU regulation is based on the change of explanatory notes to CN.¹⁶

Appeals

EU member states should ensure the applicant's right to appeal against any decision taken by the customs authorities, including a BTI decision.¹⁷

The appeal procedures of a BTI depend on the national laws of the member states, and thus there is no EU-wide harmonised procedure to appeal a BTI and the BTI applicant has to appeal a BTI decision at the issuing customs authority. According to the EU's survey¹⁸ on BTI implementation in EU member states (EC 2014), the disparities are quite significant. Despite these disparities, there is still a common pattern, also provided by UCC Article 44. A national appeal procedure of a BTI usually involves a first-phase review process, and the reviewing body is within the customs authorities, followed by a second phase before a higher independent body, such as a court or a specialised court-type body.

It should be noted that the national appeal procedure should be prompt. Article 44(4) provides that: 'Member States shall ensure that the appeals procedure enables the prompt confirmation or correction of decisions taken by the customs authorities'. Article 45(1) also emphasises that: 'the submission of an appeal shall not cause implementation of the disputed decision to be suspended'.

During the appeal process the customs authorities have wide discretionary powers to suspend the decision if they have good reason to believe that the disputed decision is inconsistent with the customs legislation or that irreparable damage is to be feared for the person concerned.¹⁹

2.2 The disputed issues of EBTI

BTI shopping

Although the EU has a uniform customs code, it has no central customs authority. Goods imported from non-EU jurisdictions are still dealt with by national customs authorities and national customs authorities are responsible for issuing BTI decisions. It has been argued that there is a risk of BTI shopping²⁰ if different EU member states issue different BTI decisions on the same goods, and the importers can pick and choose a favourable BTI decision.

The problem of BTI shopping in the EU has even been disputed before the World Trade Organization (WTO) panel,²¹ with the United States (US) suing the EC (at that time) for infringing WTO law for failing to ensure uniform administration of customs law, as the tariff classification for a product in Germany is different from the tariff classification in Denmark, the UK and the Netherlands. This is claimed to be contrary to the EU's obligation under WTO law.

Although the WTO panel has ruled that the EU's customs practice is not contrary to WTO law, the EC²² and the Court of Auditors of the EU²³ have conducted research and been aware of the possible negative impacts of inconsistent BTIs and the abusive shopping opportunities. In implementing regulations of the UCC, there are some measures to assist in combating BTI shopping.

First, a national customs officer has to consult the 'EBTI database' before issuing a BTI.²⁴ Consulting the EBTI database can reduce the possible conflicts in advance, and also provide ample data as an interpretation aid for the customs officers when issuing new BTI decisions.²⁵

Second, if the customs authority in one member state discovers inconsistencies, it is obliged to reach out to consult the customs authority of the other member state (IA Article 14). The customs authorities of different member states should cooperate to prevent inconsistencies, and the EC should also be proactive in order to discover inconsistencies and inform other members.²⁶

Last, but not least, after 1 May 2016, a BTI applicant is obliged to use the BTI, with this obligation expected to assist in reducing the temptation of BTI shopping as it is now impossible for the BTI holder to pick and choose the most favourable decision. In other words, an application for a BTI is not risk-free any more: if the result of pre-classification is not satisfactory, the applicant has to appeal it or suffer from the negative impact.

These rules all aim to ensure the consistent application of the UCC and prevent the BTI shopping problem that resulted from divergent BTI decisions. Nevertheless, there are still inherent features of the EU that may inevitably result in divergent BTIs as there is no central customs authority in the EU. Each member state implements the UCC independently. Even if the customs authorities of different member states try their best to cooperate with each other, the risk of BTI shopping cannot be completely eliminated.²⁷

Binding upon another member state

A BTI issued by one member state is binding on all national customs authorities, but it is binding only when the same BTI holder uses the BTI to import the goods. If another party imports the identical goods via the national customs authority other than the customs authority issuing the BTI, that party cannot rely on the BTI, even if this party is an affiliated member to the BTI holder, such as a subsidiary. A dispute can arise when the BTI holder is a part of a multinational company group, and the other group members would like to claim legitimate expectation from an existing BTI. This is discussed in the Sony case above.

Right to be heard

In principle, before taking a decision that would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express their point of view. This is the applicant's right to be heard under the UCC.²⁸

There is a significant change in the UCC regarding the applicant's right to be heard. More precisely, the second sub-paragraph of Article 22(6) expressly provides that the applicant does not have the right to be heard before the BTI decision is issued. The applicant does not have the right to be heard if the customs authority decides not to issue a BTI decision, to annul or revoke the BTI decision, or not grant a period of extended use.

If the applicant is dissatisfied with the decision, they can still appeal; however, in the application phase, the applicant's right to be heard is lessened as administrative efficiency outweighs the applicant's right to be heard. This seems to reflect the fact that the main function of issuing a BTI is to pursue uniform application of the UCC and facilitate administration efficiency, and focuses less on the applicant's procedural rights.

3. China

3.1 Overview: a two-track system with three types of rulings

In China, the central authority for customs is the General Administration of Customs (GAC). There are also regional customs authorities and local GAC offices all over the country.²⁹

The advance rulings system for goods classification in China was first adopted in 2000 as a temporary measure under Order 80 of the GAC.³⁰ In 2007, the advance rulings system was officially adopted.³¹ Under this system, the importer/exporter can apply to a regional customs office for an advance ruling for the goods that they intend to import/export up to 45 days before the import date.

If the regional customs office is able to decide the classification, it will issue a decision of Advance Classification.³² If that office finds out that the goods in the application involve a classification issue which has not been expressly covered or clearly regulated (that is, explained or regulated by the existing legislation or administrative orders), the regional customs office has to inform the applicant to apply for another type of administrative decision: Administrative Ruling.³³ The GAC's administrative ruling on advance classification, though, is applied by a specific individual, will have general binding effect, and is regarded as an extension of legislation. In other words, the regional customs authorities can only issue a classification advance ruling when the subject is doubtlessly clear; if there are still ambiguities or possible legal disputes, the regional customs authority will have to inform the applicant to apply for an advance ruling from the central authorities (that is, the GAC).

There is a third type of decision: Decision of Commodity Classification, which is issued by the GAC.³⁴ This is a new system introduced by Order No. 150 in 2007 and is an abstract administrative behaviour initiated by the GAC to publish its internal discussions and approaches regarding commodity classification, whether the subject matter is clear or not. Such decisions of commodity classification are also regarded as extensions or interpretations of legislation.

One significant difference between an administrative ruling and a decision of commodity classification is that the decision of commodity classification is initiated by the customs authority and not triggered by an applicant. Therefore, although an advance ruling and a decision of commodity classification are both generally binding upon all customs offices, a decision of commodity classification is not an advance ruling for the importers/exporters in the strict sense. Its main function is to disclose internal information to applicants in order to increase an individual's trust in the customs authorities and prevent disputes in the future.³⁵

To sum up, the advance ruling of goods classification system in China is a two-track system with three types of decisions. In addition to issuing a decision of advance classification when there is no doubt, the regional customs offices are responsible for discovering the ambiguity of the existing norms regarding goods classification. If the goods classification is already clear, a regional customs office can issue a decision; if the goods classification is not clear, the regional customs offices have to inform the applicant to apply for an administrative ruling from the GAC. With this two-track approach, possible diversities can be avoided.

The three types of advance rulings for goods classification in China are outlined in Table 1.³⁶

Table 1: Types of advance rulings for goods classifications

	Issuing organisation	Subject matter	Initiating party	Binding scope	Validity
A decision of advance classification (预归类决定书)	Regional Customs	The subject which is already clearly regulated	An individual applicant	The issuing regional customs	1 year
An administrative ruling on advance classification (行政裁定)	GAC	The subject which is not clearly regulated	An individual applicant	Nation-wide	Valid until revoked
A (general) decision of commodity classification (归类决定)	GAC	Both	GAC	Nation-wide	Valid until revoked

Legal basis

In China, the legal basis for advance rulings for goods classification is Article 43 of the Customs Law of the People’s Republic of China.³⁷ It provides that:

At the written request of a unit conducting foreign trade, Customs may provide an administrative decision in advance concerning the classification of certain imported or exported goods. The imported or exported goods shall be classified according to the administrative decision on the same goods. The Customs shall publish all administrative decisions about the classification of goods.

Article 43 of China Customs Law was further implemented in 2000 by the Order of the General Administration of Customs of the People’s Republic of China No. 80. Order No. 80 was later abolished and replaced by Order No. 158³⁸ which was issued on 1 May 2007 under the full title of *Rules of the General Administration of Customs of the People’s Republic of China on the Commodity Classification of Import and Export Goods*. The GAC also issued Order No. 92 (*The Interim Measures of the People’s Republic of China for the Administration of the Administrative Rulings of Customs*) to regulate administrative rulings from all levels of customs offices (GAC 2001).³⁹

Validity

Under Order No. 158, a decision of advance classification by a regional customs authority is valid unless the legislation or a higher authority’s decision – such as one by the GAC – is amended or abolished. Therefore, a regional customs authority’s decision of advance classification is in principle valid until its legal basis no longer exists. This is a significant difference to the old interim system that was adopted in 2000 under which the decision by the regional authority was only valid for one year.

As to other types of rulings issued by the GAC, they are valid as legislation until they are revoked.

Binding scope

The two types of decisions of goods classification have different binding scopes. A decision of advance classification issued by a regional customs authority is only binding upon the same regional customs office, while an administrative ruling issued by the GAC is generally legally binding to all regional customs authorities in China as it is regarded as an extension of legislation. Not only can the applicant rely on an administrative ruling but other individuals can rely on a decision of commodity classification if they import/export the identical goods. A decision of commodity classification is also valid throughout the country.

Refusing to issue an advance ruling

Under Order No. 158, there are no longer express grounds for a regional customs authority to refuse to issue a decision of advance classification. Nevertheless, under the old law (Order No. 80), the grounds of refusal are provided by Article 10 which provides that, if the formal and substantive conditions of issuing a decision of advance classification are not met, the regional custom office can refuse to issue. Furthermore, Article 10 especially provides that the customs office may refuse to issue a decision of advance classification if the importer does not intend to import the goods. In other words, if the customs authority finds out that the importer tries to abuse the system and get a decision for goods not being imported, such application will be refused.

Although Order No. 158 does not mention grounds of refusal any more, the grounds in abolished Order No. 80 seem still applicable. It is because such behaviour is what the Chinese legislators had predicted and wanted to address. In the interpretation book of China Customs Law, which is published by the National People's Congress of the People's Republic of China, the interpretation of Article 43 of China Customs Law expressly mentions that 'if the application for a decision of advance classification is not related to an actual import or export, the Customs may refuse to accept the application'.⁴⁰ Therefore, if an applicant's actual import or export is unrelated to the application of the decision of advance classification, the customs authority should refuse it.

Invalidation of an advance ruling

According to Order No. 158 Article 19,⁴¹ if there is a mistake found in a decision of advance classification by a regional customs office, the applicant must stop applying the decision. A decision should be revoked when the objective facts are mistaken. Furthermore, if the other norms on which the regional customs' decision of advance classification is based, is changed, the decision should also become invalid automatically. This situation involves law amendment or a new administrative order issued by the GAC.

As to the GAC's administrative ruling, Order No. 92 Article 19 provides three grounds for revocation and is similar to Order No. 158 Article 19. As to the GAC's general decision of commodity classification, Order No. 158 Articles 23 and 24 reiterate the same grounds in Order No. 158 Article 19 indicated above.

To sum up, according to Orders No. 92 and No. 158, the most important grounds for revoking an advance ruling is that the ruling is based on incorrect information, that is, the facts are mistaken.

Appeals

If a regional customs office refuses an application, the applicant may apply for reconsideration, because the refusal is a specific administrative act.⁴² If the applicant disagrees with the decision of advance classification, it is a specific administrative act, and thus the applicant can appeal and request reconsideration.⁴³

If the applicant disagrees with the GAC's administrative ruling or its decision of commodity classification, they cannot appeal the general decision immediately, but have to appeal the specific decision when the goods are imported/exported, and appeal the legality of the decision at the same time.⁴⁴ This is because

the GAC's general decision of commodity classification is regarded as an extension and interpretation of legislation, and thus cannot be appealed by an individual.

3.2 The significant features of the advance ruling system in China

The two-track system in China emphasises administration consistency and aims to prevent possible conflicts concerning advance tariff classification decisions. Among the three types of advance rulings, the GAC's administrative ruling on advance classification plays an especially important role to reduce inconsistencies. An administrative ruling is issued due to an individual application, but it has general binding as a piece of legislation. Such general decisions of commodity classification cannot be appealed directly. Instead, the importers/exporters have to wait until the customs authority has made the specific classification decision based on the administrative ruling.

The specific advance ruling issued by a local customs office, on the contrary, is binding in only limited circumstances. It is only binding upon the issuing customs office and only valid for one year. Although it is binding, the benefit of the legal certainty of such a decision is short. Since such decision is specific, it can be appealed directly.

The advance ruling system for classification in China demonstrates a strong emphasis on consistency and administration efficiency. The importer/exporter's legitimate expectation and right to appeal are not mentioned.

4. Taiwan

4.1 Overview: advance tariff classification ruling on imported goods

Taiwan is a much smaller jurisdiction than the jurisdiction of the EU and China. The central customs authority of Taiwan is the Customs Administration, which is part of the Ministry of Finance. There are only four local customs offices in Taiwan.⁴⁵ Since 1999, the advance tariff classification system has been adopted. The main purpose of the advance tariff classification ruling system is to prevent disputes between customs authorities and importers. This advance classification ruling system only applies to importers, not exporters. This is also different from the EU and China.

Legal basis

The legal basis of the advance tariff classification ruling system on imported goods in Taiwan, is Article 21(4) of the Customs Act.⁴⁶ Article 21(4) of the Taiwan Customs Act is implemented by the Regulations Governing the Implementation of Advance Tariff Classification Ruling on Imported Goods.⁴⁷

Validity

An advance tariff classification ruling in Taiwan is valid until the relevant rules are amended and there is no restriction on the validity period. However, the issuing customs office may amend an advance tariff classification ruling⁴⁸ but then must inform the holder of the advance tariff classification in writing. The modification usually results from changes to customs regulations, in which case the basis of the advance tariff classification also needs modifying. If the advance tariff classification ruling holder can demonstrate that they have concluded contracts based on goods that were the subject of the ruling, they may be entitled to an extension period, such as a 90-day grace period. However, it is at the discretion of the issuing customs office to decide if this grace period is granted or not.

Binding scope

An advance tariff classification ruling issued by one of the regional customs offices in Taiwan is binding on the other three regional offices.

Refusal to issue an advance ruling

According to Article 6 of Taiwan's Regulations of Advance Tariff Classification Ruling,⁴⁹ there are four grounds for refusing, or not accepting, an application for an advance tariff classification ruling. There are two grounds related to the nature of the goods and two related to preventing inconsistencies.

The first ground is that 'goods are hypothetical, during design stage, or not yet produced'. The second ground is 'goods as disqualified inherently for an advance ruling on tariff classification by Customs, such as waste'. These two grounds are both related to the nature of the goods: when a good is not existing (yet) or is just waste, the Taiwanese customs authority can refuse the application because there is no legal meaning in the application for an advance goods classification.

The other two grounds of refusal involve parallel pending cases on the same or similar goods. The application may be refused when the application is identical with the goods being in a pending case in the court, or when the application is identical or similar with the goods being in a pending administrative review case. The underlying rationale for these two grounds of refusal is to prevent possible conflicts with the court decisions or the later review results.

Reasons of invalidation of an advance ruling

There are no invalidation grounds in Taiwan's Regulations of Advance Tariff Classification Ruling. It seems that Taiwan Customs may modify an advance tariff classification ruling when it finds it necessary. Furthermore, according to Taiwan's Administrative Procedure Act,⁵⁰ if a decision is based on incorrect information, the decision can be regarded as invalid.⁵¹ The Administrative Procedure Act is the general Act applicable to all administrative decisions, and thus it also applies to an advance tariff classification ruling.

Appeals

The appeal procedure for an advance classification ruling in Taiwan is quite lengthy. If an applicant is not satisfied with the ruling, they can request a review. However, if they are not satisfied with the result of review, they cannot appeal. Instead, they must import the goods first, then appeal the definitive tariff classification decision of classification, which is based on the advance tariff classification ruling. To appeal a definitive tariff classification decision, the importer has to go through a two-phase administrative review first, and then they may bring the dispute to the court.

4.2 Disputed issues in Taiwan

The new amendment in 2015: expanding the scope of application

Prior to 2015, Taiwan Customs could refuse to issue an advance tariff classification ruling if the applicant had imported the same goods before. The underlying reason of such refusal seems to be an administrative efficiency concern. If the same goods had been imported before, it implies that the applicant has accepted the goods classification previously, and thus it is no longer necessary for the applicant to have an advance ruling. However, in 2015 Taiwan's Regulations of Advance Tariff Classification Ruling was amended. The new Article 6 expressly states that an applicant who has previously imported the same goods is still entitled to an advance tariff classification ruling if no such ruling has been issued before. The reason for the amendment⁵² to Article 6, provided by the Ministry of Finance, is to reduce possible disputes between the customs authorities and importers.

The appeals procedure

Another criticism of Taiwan's tariff classification advance ruling system is the appeal procedure. After the applicant applies for a ruling, there are two possible results: refusal or issuing. In either case, if the applicant is not satisfied with the result, they can request a review from the central customs authority in

Taiwan. This first-instance review is not part of the judicial remedy. In this review process, the applicant can express their opinion during the first-instance review. If the applicant is not satisfied with the review result, they cannot appeal to the court and must wait until the goods are actually imported and receive the definitive tariff classification decision, and then appeal that decision.

The appeal of that definitive tariff classification decision involves two phases of administrative review. The first phase is dealt with by the regional customs office and the second phase involves the reviewing committee, organised by the Ministry of Finance. Only after the two-phase review process has been completed can the applicant appeal the definitive tariff classification to the court. In other words, if a definitive tariff classification decision is based on an advance tariff classification ruling, the applicant has to go through three phases of review. The function of the review by the customs administration on the advance tariff classification ruling overlaps with the first-phase review of the definitive tariff classification decision undertaken by the regional customs authority.

Each phase has the legal period of 30 days, which can be extended. The long appeal procedure can make the applicant reluctant to appeal or even apply for the advance ruling. Once the applicant has an unsatisfactory advance ruling, it is extremely time consuming to challenge it before they can finally bring the case to court. Such a long process creates an incentive to take the risk of not applying for the advance ruling, and waiting until the goods are imported. In other words, the complicated appeal process might make the system less attractive because there is extra uncertainty involved.

5. Comparisons of the EU, China and Taiwan

After comparing the advance ruling systems of the EU, China and Taiwan, a common feature has been identified: in these three systems, the applicant's procedural rights and legitimate expectations are weighted less than the consistency and efficiency of the customs administrations. There are three indicators showing this common feature: the binding effect scope, the extent of legal expectation, and the protection level of the procedural rights. All these comparisons demonstrate that the legal certainty principle is the ancillary purpose of the system. These comparisons are elaborated below.

5.1 Binding effect

The first comparison is the binding effect of an advance ruling on other national customs authorities. Among these three jurisdictions, Taiwan is a small jurisdiction and every advance ruling issued by a local customs office will be binding upon other local customs offices.

On the other hand, China and the EU both involve numerous local customs offices, and thus the binding effect of an advance ruling for another customs office is an issue. In theory, a BTI issued by an EU member state will be binding upon another member state. However, as indicated in the Sony case in the EU, a BTI has a very strict subjective scope: only the original BTI holder can rely on the BTI in another EU member state. Even when the economic operator is part of a multinational group, a subsidiary of the group may not rely on the BTI issued to another subsidiary nor claim its legitimate expectation while it imports the same goods via the customs office of another member state. Consequently, a BTI itself is only binding upon another customs authority when the BTI holder relies on it.

China has three types of advance rulings for classification. The ones issued by the central customs authorities are binding upon all local customs administrations. However, the advance ruling issued by a regional customs office is not binding on other regional customs offices.

It would seem that the binding effect of advance rulings is limited, especially when such rulings are issued by local authorities. It is a common phenomenon in the EU and China.

5.2 Legal certainty and legitimate expectation

Comparing the advance ruling systems for goods classification in the three jurisdictions, there is a common feature. Although ‘pursuing the legal certainty of the importers/exporters’ is mentioned as a purpose of the advance ruling system in all three jurisdictions, the case law and the implementation demonstrate that the legal certainty is an ancillary purpose, rather than the main purpose. It seems that the priorities of the advance ruling of goods classification are pursuing administration efficiency and preventing inconsistencies. In other words, the system is designed mainly for the convenience of the customs administration.

In the EU, the BTI decisions do not grant legal certainty to BTI holders as the system originally claimed. In the case law, *British Sky Broadcasting group*, the court clearly indicates that a BTI holder cannot request a grace period for their BTI because they do not enjoy legitimate expectation on a BTI, if the explanatory notes to CN for relevant goods is changed. In other words, although the explanatory notes to CN are not legally binding in the HS Convention, the explanatory notes to CN will prevail over the EBTI holder’s legitimate expectation rights. The court’s reasoning seems weighted towards the uniform application of EU customs with HS Convention more than the individual BTI holder’s legitimate expectations.

In China, the advance ruling system is expected to make decision making on goods classification more transparent and build trust between customs authorities and individuals. To prevent inconsistencies, the central authority, the GAC, takes the main responsibility of issuing generally binding decisions, either upon an individual’s request or spontaneously. An advance ruling decision by a local customs office can only cover non-disputed issues, has limited validity, and is not binding upon other local customs offices. The advance ruling system in China, in fact, has the main function of amending legislation.

In Taiwan, due to the small scale of the jurisdiction, an advance ruling is binding upon all local customs offices. However, the issuing authorities can modify an advance ruling in Taiwan when they think it necessary. The extent of legal certainty and legitimate expectations for holders of advance ruling decisions in Taiwan is lower than in the EU and China, where an advance ruling cannot be ‘amended’ and can only be invalidated due to numerous reasons provided in the law.

5.3 Applicants’ procedural rights

A further common feature in these three jurisdictions is that the applicants’ procedural rights are not well protected.

In the application phase, the UCC of the EU expressly lowers the protection level of an applicant’s right to be heard. Applicants are not entitled to a right to be heard or a right to appeal.⁵³ The local customs authorities make BTI decisions based on the written evidence submitted by the applicants and the applicants do not have the right to express their opinion orally. In China and Taiwan, issuing an advance ruling for classification is also based on written evidence submitted by the applicants. The right to be heard is not clearly mentioned by the relevant regulations.

As to the procedural rights in the appeal phase, China’s and Taiwan’s appeal procedures are not convenient to the applicants. In China, the GAC’s decisions are generally applicable nationally and regarded as an extension of legislation. In China, the applicant cannot appeal a generally binding administrative ruling directly. In Taiwan, an applicant has to go through a very long appeal process to challenge an advance classification ruling. There is a common feature in China and Taiwan regarding the appeal of an advance ruling for classification: the applicant must appeal the advance ruling after the goods are actually imported, and such a requirement can delay the appeal process and can cause dissatisfaction for applicants.

6. Conclusion: is an advance ruling system emphasising administrative efficiency still desirable?

Based on the comparison above, I can draw some conclusions. In these three jurisdictions, their advance ruling for goods classification systems all provide opportunities for importers to communicate with the customs authorities regarding the classification. Applicants can get binding advance rulings and reduce their risk for their imports.

However, such advance ruling systems for classification do not provide as high a level of legal certainty and legitimate expectation as international traders might expect. Across the three jurisdictions, it is demonstrated that the holders of such rulings do not have strong legitimate expectations. An advance ruling for classification will be subject to a change in law, and the conditions for the possible extension of an invalid ruling due to law change, or even a change to the explanatory notes to CN, are strict. This is shown clearly in the case law of the EU. Furthermore, the applicants' procedural rights, such as the right to be heard and right to appeal, are derogated in these three jurisdictions.

It is undeniable that classification in customs administration is complex and the quantity of imported/exported goods is huge. Therefore, in the application phase, applicants' right to be heard is inevitably lowered; otherwise the speed of issuing a decision will be delayed. Furthermore, inconsistencies in different customs' decisions can take place even in one jurisdiction, such as China or the EU. Therefore, there are often restrictions on the binding scope of an advance ruling. These concerns are quite normal and can be the reason that these three advance ruling systems for classification provide rules to prevent inconsistencies. At the end of the day, the customs authorities are still responsible for controlling the borders and ensuring that they levy customs duties correctly. It is a tempting idea for customs authorities to regard an advance ruling for classification system as a measure mainly to pursue administrative efficiency as well as uniform application of the customs laws.

Nevertheless, if an advance ruling system cannot provide a sufficient legitimate expectation level, it can deter economic operators from using it. If an advance ruling system cannot provide enough legal certainty, the incentive for economic operators to use it will be less. Such a deterrent effect will be contrary to the original policy goal, which was to encourage international traders to use the advance ruling system for classification.

To sum up, the advance ruling systems for classification in the EU, China and Taiwan all have the similar shortcoming, in that the applicant's legitimate expectation is less protected. It seems that the current advance ruling system pursues legal certainty of the customs authorities rather than for the economic operators. Therefore, in reality, the system pursues more the administration efficiency, not legal certainty for the applicants. In the long-term development, such an imbalanced design can make the system less desirable for the applicants.

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Notes

- 1 Article 28 of the Treaty on the Functioning of the European Union.
- 2 As set out in the preamble to and the case law of the European Court of Justice. The background and history of a BTI, see also Valentine 2008.
- 3 It was adopted by Article 12 of the CCC, which was later succeeded by Article 20 and further amended by Article 33 of the UCC.
- 4 The new instructions for the new UCC; see 'Interim Administrative Guidelines on the European Binding Tariff Information (EBTI) system and its operation', 15 April 2016, viewed 1 June 2016, ec.europa.eu/taxation_customs/resources/documents/customs/customs_code/guidance_interim_ebti_en.pdf.
- 5 The full text (in 23 EU official languages) is published at eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.343.01.0001.01.ENG&toc=OJ:L:2015:343:TOC, viewed 1 June 2016.
- 6 The full text (in 23 EU official languages) is published at eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.343.01.0558.01.ENG&toc=OJ:L:2015:343:TOC, viewed 1 June 2016.
- 7 Article 33(3) of UCC.
- 8 See the case law *Joint Case C-288/09 and C-289/09 British Sky Broadcasting Group plc (C-288/09) and Pace plc (C-289/09) v The Commissioners for Her Majesty's Revenue & Customs*, [2011] ECR I-02851, Section 2.1.5.
- 9 *C-199/09, Schenker SIA* [2010] ECR I-12311.
- 10 As above, paragraph 24.
- 11 *Case C-153/10 Staatssecretaris van Financiën v Sony Supply Chain Solutions (Europe) BV* [2011] ECR I-02775.
- 12 Article 34(4) of UCC.
- 13 Article 34(4) and Article 27(3) of UCC.
- 14 Article 34(4) of UCC.
- 15 *Joint Case C-288/09 and C-289/09 British Sky Broadcasting Group plc (C-288/09) and Pace plc (C-289/09) v The Commissioners for Her Majesty's Revenue & Customs*, [2011] ECR I-02851.

- 16 As above, paragraph 109.
- 17 Article 44 of UCC.
- 18 The Commission of European Union, 'Report of the second phase of the EBTI monitoring of Member States (2009-2010)', October 2014, ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/customs/ebti_report-phase2_en.pdf.
- 19 Article 45(2) of UCC.
- 20 'BTI shopping' is defined by the Commission in its BTI guidelines as 'BTI shopping is the term used to describe the illegal practice of submitting more than one application, usually to different Member States customs administrations, for the same goods'.
- 21 EC – Selected Customs Matters, WT/DS315/R, 2006, the panel report is available on the WTO's website.
- 22 The Commission's Report of the first phase of the EBTI monitoring of Member States (2007-2008) and Report of the second phase of the EBTI monitoring of Member States (2009-2010), ec.europa.eu/taxation_customs/common/publications/info_docs/customs/index_en.htm.
- 23 Court of Auditors, Special Report No 2/2008 concerning Binding Tariff Information (BTI) together with the Commission's replies, in different official languages, eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008SA0002.
- 24 IA Article 16 (4) and Article 17.
- 25 Limbach 2015, p. 209.
- 26 IA Article 23.
- 27 European Commission, Interim Administrative Guidelines on the European Binding Tariff Information (EBTI) System and its operation (effective from 1 May 2016), p. 16, viewed 1 June 2016, ec.europa.eu/taxation_customs/customs/customs_duties/tariff_aspects/classification_goods/index_en.htm.
- 28 Article 22(6) of UCC, first sub-paragraph.
- 29 Article 3 of Customs Law of the People's Republic of China. The full English text can be found at the official website of the General Administration of Customs of the People's Republic of China, viewed 1 June 2016, english.customs.gov.cn/Statics/644dcaee-ca91-483a-86f4-bdc23695e3c3.html 《中华人民共和国海关法》
- 30 See 'The Interim Rules of the General Administration of Customs of the People's Republic of China on Advance Commodity Classification of Import and Export Goods promulgated in the form of Order No. 80 of the General Administration of Customs on February 24, 2000', which is already abolished. See 海关总署第80号令 《中华人民共和国海关进出口商品预归类暂行办法》
- 31 'Rules of the General Administration of Customs of the People's Republic of China on the Commodity Classification of Import and Export Goods Adopted at the Executive Meeting of the General Administration of Customs on February 14, 2007, promulgated in the form of Order No. 158 of the General Administration of Customs of the People's Republic of China on March 2, 2007, and effective as of May 1, 2007, 海关总署第158号令 《中华人民共和国海关进出口货物商品归类管理规定》
- 32 The official term is '预归类决定书' in Chinese.
- 33 The official term is '行政裁定' in Chinese.
- 34 The official term is '归类决定' in Chinese.
- 35 The GAC has also published the introduction about the difference between Order No. 80 and No. 158. The GAC expressly indicates a 'decision of commodity classification' is the new public form of the administrative instructions in the past. Available only in Chinese and viewed 1 June 2016, www.customs.gov.cn/publish/portal0/tab49664/info431862.htm.
- 36 Table 1 is translated from the explanation announcement from General Administration of Customs in China. See www.holyluck.cn/cn/ShowNews.aspx?NewsId=82.
- 37 The full English text can be found at the official website of the General Administration of Customs of the People's Republic of China, viewed 1 June 2016, english.customs.gov.cn/Statics/644dcaee-ca91-483a-86f4-bdc23695e3c3.html 《中华人民共和国海关法》 (viewed on 1 June 2016)
- 38 The full English text can be found at the official website of the General Administration of Customs of the People's Republic of China, viewed 1 June 2016, english.customs.gov.cn/Statics/bd8abe0c-b785-471b-b6ee-d62ef6a83aec.html 海关总署第158号令 《中华人民共和国海关进出口货物商品归类管理规定》
- 39 The full English text, viewed 1 June 2016, can be found at www.lawinfochina.com/display.aspx?lib=law&id=2414&CGid=海关总署第92号令 《中华人民共和国海关行政裁定管理暂行办法》
- 40 The National People's Congress's interpretation book on the specific legislation is not the official legal source, but is important to see the underlying rationale and concerns of the legislators. The interpretation of China Customs Law, viewed 1 June 2016 (available only in Chinese), is published at the National People's Congress's website, Article 43 is at www.npc.gov.cn/npc/flsyywd/xingzheng/2002-07/11/content_297435.htm 《中华人民共和国海关法释义》

- 41 Order No. 158 Article 19 ‘Article 19: Where there is any mistake in the contents of a Decision of Advance Classification, the regional Customs that has issued the Decision of Advance Classification shall immediately issue a Notice on Revocation of Advance Commodity Classification Decision of the Customs of the People’s Republic of China (hereinafter referred to as the Notice; see Annex 3 for its format), and notify the applicant to stop using the Decision of Advance Classification.
- Where any change occurs to the rules according to which a Decision of Advance Classification is made, and the Decision of Advance Classification is no longer applicable as a result, the regional Customs that has issued the Decision of Advance Classification shall issue a Notice, or make an announcement, to notify the applicant to stop using the Decision of Advance Classification.’ The English version of Article 19 is not precisely translated from the Chinese. It should mean the situation that the rules which are the basis of the decision of advance classification, change.
- 42 This is regulated by Article 3 and Article 28 of Administrative Reconsideration Law of the People’s Republic of China 《中华人民共和国行政复议法》
- 43 This is regulated by Article 28 of Administrative Reconsideration Law of the People’s Republic of China.
- 44 Interim Measures On The Administration Of The Administrative Rulings Of Customs, Order of the General Administration of Customs of the People’s Republic of China (No. 92), Article 20.
- ‘If any party to the import and export activities protests the specific administrative act made by the customs office, and raises objection to the administrative ruling on which that specific administrative act is based, it may file an application for examination of the administrative ruling at the same time it applies for reconsideration of the specific administrative act. The customs office of reconsideration shall, after accepting that application for reconsideration, transfer the application for examination of the administrative ruling to the GAC, which shall make the examination and decision.’ The full English text is published at en.pkulaw.cn/display.aspx?cgid=38652&lib=law 《中华人民共和国海关行政裁定管理暂行办法》
- 45 The four regional customs are Taipei, Taichung, Kaohsiung, and Keelung customs. The organisation of Taiwan Customs, viewed 1 June 2016, eweb.customs.gov.tw/ct.asp?xItem=46680&CtNode=12929.
- 46 The full English text, viewed 1 June 2016, is available at law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=G0350001 《關稅法》
- 47 The full English text, viewed 1 June 2016, is available at law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=G0340077 《進口貨物稅則預先審核實施辦法》
- 48 As above, Article 9: ‘Customs may modify the result of advance ruling and notify the concerned Applicant with explanation in written form. If the Applicant is able to prove that a contract has been entered into, the transaction has been conducted according to the contract and the change in tariff classification will cause loss, the Applicant may apply for an extension of the period of the validity of the ruling, but such an extension shall not exceed 90 days.
- ‘In the case where modifying an advance tariff classification ruling change involves import regulations, the imported goods shall be subject to the import regulations in effect at the time of importation’.
- 49 As above, Article 6: ‘1. Goods are hypothetical, during design stage, or not yet produced;
2. Subject matter being applied for advance ruling on tariff classification is identical or similar to the disputed goods being dealt with pursuant to the provisions of Act Article 13, 17 or 18 of Customs Act.
3. Subject matter of an advance ruling on tariff classification being applied is identical or similar to the disputed goods is underway of administrative relief; or
4. Application determined as disqualified for an advance ruling on tariff classification by Customs, such as waste’.
- 50 The full English text of Administrative Procedure Act is available at law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=A0030055 《行政程序法》
- 51 As above, Administrative Procedure Act Article 111.
- 52 See Ministry of Finance’s gazette, gazette.nat.gov.tw/EG_FileManager/eguploadpub/eg021074/ch04/type1/gov30/num3/images/Eg01.pdf 《進口貨物稅則預先審核實施辦法部分條文修正總說明》 and Taiwanese Parliament’s official announcement at lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/08/07/15/LCEWA01_080715_00276.pdf 《立法院第 8 屆第 7 會期第 15 次會議議案關係文書 進口貨物稅則預先審核實施辦法部分條文修正條文》, viewed 1 June 2016, available only in Chinese.
- 53 Article 22(6) of UCC; DA Article 10.

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