

Pros And Cons Of CBP's Offer To Help With Customs Disputes

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On June 18, 2015, U.S. Customs and Border Protection published a Federal Register notice offering CBP's assistance to U.S. exporters in resolving disputes with foreign customs agencies. CBP will assist U.S. exporters under the auspices of the World Customs Organization (WCO) in disputes regarding the tariff classification or customs valuation of goods that the U.S. exporters import into foreign countries. CBP has assisted U.S. exporters in such disputes in the past and the announcement formalizes its willingness to engage with foreign governments on behalf of U.S. industry interests. In our experience, this process has yielded positive results for U.S. companies (including decreased tariffs on imported goods) and their customers and is most successful when it is used as part of a multifaceted approach.



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Background on CBP Participation at the WCO and WCO Dispute Mechanisms

CBP is well-positioned for advocacy through the WCO, as it frequently participates in meetings concerning the application of the Harmonized Commodity Description and Coding System (HS) and the World Trade Organization's Customs Valuation Agreement (CVA). Such meetings provide valuable opportunities for CBP to advance U.S. industry interests, including any disputes that U.S. industry may have with foreign customs agencies.

Tariff Classification

CBP represents the United States at meetings under the auspices of the International Convention on the Harmonized Commodity Description and Coding System. Specifically, CBP is the U.S. representative to the WCO's Harmonized System Committee. The HSC is charged with settling tariff classification under the Harmonized Commodity Description and Coding System. Additionally, the HSC is responsible for reviewing and updating the chapter and section notes as well as the headings of the HS. Finally, the HSC also reviews and amends the explanatory notes to the HS, which are important tools that WCO members and importers use to determine the correct classification of a product.

With respect to disputes over tariff classification, Article 10 of the HS Convention governs disputes

between contracting parties concerning the interpretation or application of the HS Convention. The article provides that parties with potential disputes should first try to settle the dispute through bilateral negotiations. If such negotiations cannot resolve the dispute, the parties may refer the dispute to the HSC for its consideration and recommendations. The HSC, in turn, refers irreconcilable disputes to the WCO council for its recommendations.

Customs Valuation

CBP represents the United States at the WCO with respect to issues arising under the CVA. The WCO's Technical Committee on Customs Valuation (TCCV) is responsible for examining the administration of the CVA, providing WTO members with advisory opinions regarding particular customs valuation issues, and issuing commentaries or explanatory notes regarding the CVA. Pursuant to Annex II to the CVA, the TCCV is authorized to examine specific problems arising from the customs valuation systems of WTO members. Like the HSC, the TCCV may get involved in disputes amongst foreign customs agencies.

CBP's Role at the WCO May Resolve Export Issues for U.S. Exporters

In the notice, CBP provides an example of its engagement with another customs administration to successfully resolve a tariff classification issue for a U.S. exporter. In 2014, a U.S. exporter notified CBP of a foreign customs administration's misclassification of its textile exports. The U.S. exporter requested that, pursuant to Article 10 of the HS Convention, CBP (1) contact the foreign customs administration to resolve the tariff classification dispute; and (2) refer the matter to the HSC, if it could not be resolved bilaterally. CBP reviewed the U.S. exporter's request and confirmed that it agreed with the company's position. CBP reached out to the foreign customs agency to address the issue directly with the agency. Within seven months of the U.S. exporter's request, CBP secured a favorable result because the foreign customs administration agreed to reclassify the merchandise in a manner consistent with the United States' position. Consequently, the U.S. exporter obtained correct tariff treatment of its imported merchandise in the foreign country as a result of CBP's engagement.

Requesting CBP's Assistance and Recommendations for Increasing Likelihood of Success

CBP's notice instructs U.S. exporters to request assistance in a dispute with a foreign customs agency by submitting a formal letter to CBP. This request should be similar to a binding classification or customs valuation ruling request in format. For example the submission should describe the relevant legal requirements under the HS system or the CVA and include any applicable CBP rulings, U.S. court cases and HSC or TCCV decisions in support of the exporter's position. In addition, where available, we recommend including evidence of other foreign customs agencies' position on the legal issue (such as D-memoranda issued by the Canadian Border Services Agency or binding tariff information letters issued by EU customs agencies). In addition to supporting the exporter's legal analysis, such evidence will also help CBP determine whether the legal issue will have support from other members at the WCO.

CBP will then review the request and determine whether it agrees with the U.S. exporter's position before it reaches out to the foreign customs agency or the WCO. After CBP reviews the request and confirms it agrees with the position, it will determine the appropriate course of action (e.g., initiation of consultations or dispute settlement proceedings at the HSC or TCCV).

Pros and Cons for U.S. Exporters of Engaging CBP

The example in the notice demonstrates that CBP's assistance is a useful tool that can yield beneficial

results for U.S. exporters. That said, U.S. exporters should consider certain pros and cons of this process before engaging CBP.

Cons:

- Since this mechanism is not widely used today, it is difficult to predict timing and success from dispute to dispute. For example, if CBP reaches out to a foreign customs agency regarding a classification dispute, the customs agency may not respond in a timely manner or at all. In turn, such a delay may prevent CBP from bringing the dispute to the WCO, as the HSC may be hesitant to take up the dispute before the foreign customs agency has had the opportunity to respond directly to CBP. In this way, the foreign customs agency can potentially prolong disputes.
- Ultimately, this procedure is more political than legal. At the HSC level, classification decisions are decided by a simple vote by the members. Accordingly, even if a U.S. exporter's position (and by extension, CBP's position) is legally correct, CBP may not prevail at the HSC if enough members disagree.
- WCO decisions are not enforceable like WTO decisions. CBP or other WCO members do not have the ability to enact measures, like retaliatory duties, to urge foreign customs agency to adopt a WCO decision.

Pros:

- Presents an opportunity for U.S. exporters and/or their customers to improve bottom lines through duty savings on exports to foreign countries.
- Provides U.S. exporters and/or their customers with a faster mechanism to resolve issues with foreign customs agencies than a typical WTO dispute. WTO disputes normally take several years to resolve. In contrast, CBP's assistance may help resolve an exporter's dispute with a foreign agency before it escalates to a dispute between customs administrations at the WTO or WCO. For instance, CBP cites an example where it was able to resolve the dispute without having to address the issue directly with the HSC.
- Potentially increases the likelihood of success and provides a faster result than if a U.S. exporter and/or their customer engaged the foreign government directly. CBP's engagement can signal additional potential repercussions to foreign customs agencies of not resolving the dispute — such as the threat of an international tribunal. Accordingly, foreign customs agencies may be more motivated to resolve the dispute if CBP is involved.

Best Practices

In light of the pros and cons discussed above, we have developed some best practices that U.S. exporters may consider should they decide to take CBP up on its offer. First, the exporter should work with its customs compliance department to get a better understanding of how other foreign customs agencies treat the particular issue. This will give the company a better idea of the potential vote count at the HSC or TCCV. This information will also be useful for CBP because CBP may be able to use it to encourage the foreign customs agency to agree to CBP's position without having to take the issue to the WCO.

Second, exporters should also consider various tools that it may use to ensure the foreign agency implements any decision. Recall above, the HS Convention and CVA do not include dispute settlement provisions that give CBP or the U.S. the ability to encourage enforcement. As such, the importer should consider working with other U.S. trade agencies like the U.S. Trade Representative's Office, the U.S. Department of Commerce and the U.S. Department of State. These agencies can voice concern regarding the particular issue to signal to the foreign customs agency that this issue is important to the entire U.S. government. Contacts from multiple U.S. agencies can help ratchet up domestic pressure in the foreign country so that the country's customs agency is forced to work with CBP. Furthermore, we think that reaching out to these agencies at the start of the process will make them aware of the issue in the event that the foreign customs agency becomes recalcitrant and refuses to cooperate with CBP or the WCO. In addition, as needed, importers may wish to engage other like-minded countries and Capitol Hill, to also provide the necessary support for the administration as it considers advocacy at the WCO.

In sum, this process can be an important and efficient tool that U.S. exporters can use to reduce its duty exposure around the world. As we explain above, U.S. exporters can take various steps to reduce the potential pitfalls associated with this process so that it can obtain a favorable result.

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