

Committee on Customs Valuation

NEGOTIATING HISTORY OF THE AGREEMENT ON CUSTOMS VALUATION

Background document by the Secretariat

At its meeting of 26 February 2002, the Committee agreed that the Secretariat should prepare, on its own responsibility, a factual description of the negotiating history of the Agreement on Customs Valuation. The paper was requested in the context of the Committee's discussions related to paragraph 12 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1): Implementation-Related issues, in particular, the discussions related to the tirets in paragraph 7 of Job(01)/152/Rev.1. It was expected that a review of the negotiating history of the Agreement would shed some light on the background of those provisions of the Agreement concerned with the five tirets in paragraph 7. The paper is structured to present an historical account of the negotiations of first the Tokyo Round Code on Customs Valuation, and second, the Uruguay Round Agreement on Customs Valuation. In addition, an Annex to the paper lists texts agreed by the Technical Committee of the World Customs Organization relevant for the discussions on the implementation-related issues. Finally, while all efforts have been made to present a fully comprehensive negotiating history of the Agreement, it must be acknowledged that negotiations were also carried out in informal contexts for which no records are available.

A. PRE-TOKYO ROUND WORK ON CUSTOMS VALUATION

1. Article VII of the GATT 1994 represents the first successful international agreement on general principles of customs valuation. Agreed at the United Nations Conference on Trade and Employment, held in Geneva in 1947, Article VII laid down general principles and guidelines for the elaboration of national legislation on customs valuation. However, the principles were general and created no meaningful uniformity in customs valuation methods, thereby permitting a wide variety of national practices. In 1952 the CONTRACTING PARTIES adopted the report of the Working Party on Examination of the ICC Resolution Recommending the Review of the Steps Taken by Contracting Parties to Give Effect to the Principles of Article VII.¹ In 1954 the Contracting parties appointed the Technical Working Party to make a technical and factual study of the replies submitted by governments to the questionnaire on valuation.² As a result the comprehensive comparative study of existing valuation systems was submitted to the CONTRACTING PARTIES.³ Further consideration to valuation problems was given in the Kennedy Round of Trade Negotiations, particularly related to the "American Selling Price". However, an agreement that was drawn up was never implemented.

2. In December 1969, the Committee on Trade in Industrial Products was established in the GATT to examine, among subjects, the desirability of harmonization of valuation systems and special valuation procedures, the latter commonly referring to cases where invoice values were not acceptable. By this time, about a hundred governments followed the Brussels Definition of Value, either as parties to the convention or as a matter of domestic law or practice, making it by far the most

¹ BISD 1st supplement, p. 102.

² L/228 and Add.1-10.

³ BISD 3rd supplement, pp 103-125.

widely applied system. The United States, Australia, Canada, South Africa and New Zealand did not use the BDV and used varying systems of valuation. Even among those countries applying the BDV, there was considerable variety in its application and interpretation. The BDV method was based on the CIF value while the United States, Australia, and Canada had systems based on the FOB value. Although both groups used invoice values in most cases, in situations where no invoices could be produced or where the invoice price appeared to be unacceptable, the value for customs purposes was established by the two groups according to widely differing methods.

(i) *Systems in use prior to the Tokyo Round*

3. It is worth explaining some of the systems used prior to the elaboration of the Tokyo Round Code. The main difference between the countries using the BDV and the US and Canada was philosophical. The BDV was based on a "notional" concept of valuation (i.e. a price at which goods ought to be sold under a specified set of circumstances) which specified a set of procedures for arriving at the price at which the goods should be valued. The US and Canadian systems were based on a "positive" concept (i.e. the price at which imported goods or like good are in fact sold under specified conditions.) In practice, however, all three systems allowed for significant adjustments from a basic reference price and thus could be used in a neutral or protectionist fashion.

4. In 1973, the GATT Secretariat prepared a comprehensive study: *Trade Barriers Arising in the Field of Customs Valuation*.⁴ This study described in considerable detail the valuation systems prevalent in the developed countries, and in certain developing countries at the time. In particular, the US system was highly complex and consisted originally of five methods of valuation, ranked in order of preference. These were the Foreign Value (the price in the market of the exporting country); the Export Value (the actual export price of "freely offered" goods); the United States Value (the price of comparable imported products in the US); the Cost of Production (estimated cost of production plus profit of goods in the exporting country); and the American Selling Price (the price of comparable goods in domestic production in the US, used only for specific named products). For a number of products which were included in what was known as the Final List, the US legislation provided that duty should be on the basis of "Foreign Value" or "Export Value" whichever was higher. In addition, for certain chemicals, the value for customs purposes was determined on the basis of prices at which domestically produced comparable articles were sold in the principal US market for home consumption. Under the Canadian system, the primary standard for determining value was the "Fair Market Value" which was the price at the time and place from which the goods were shipped directly to Canada, of like goods for home consumption in the exporting country. This approach explicitly rejected the export value as a basis for valuation. In the event that the Fair Market Value could not be determined, Canadian customs could examine the "costs of production plus profit" in the exporting country, or where that was not possible, the value for duty was to be determined "in such a manner as the Minister of Finance decides". In the case of Australia and New Zealand, dutiable value was determined on the higher of the actual invoice FOB price or current domestic value, which was the price at which the exporter was selling or would be prepared to sell for cash, at the date of exportation, the same quantity of identically similar goods, for consumption in the domestic market.⁵

5. The 1973 Secretariat study also highlighted the main problems arising from valuation procedures at the time. Generally these were i) problems resulting from differences in practices relating to determination of value, where invoice prices were not acceptable; ii) determination of dutiable value on the basis of domestic prices in the exporting countries; iii) determination of dutiable value on the basis of domestic prices in the importing country; iv) systems of fixing minimum values; and v) other problems such as lack of information or inadequate facilities for appeal against decisions

⁴ GATT document COM.TD/W/195, 2 August 1973.

⁵ Ibid, pp 4-5.

by customs, and practices inconsistent with Article VII of the GATT 1994.⁶ The report added that "[developing countries] pointed out that the practices followed by countries to determine value on the basis of domestic prices in the exporting country or on the basis of domestic prices in the importing country posed special problems to their trade. The practice of levying duty on the basis of current domestic value in the exporting country worked particularly to their disadvantage, as for a large number of products because of the supply scarcities, transport bottlenecks and structural imbalances, the domestic prices in these countries ruled at artificially high levels."⁷

(ii) *Committee on Trade in Industrial Products*

6. The basis for the work done within the Committee on Trade in Industrial Products (CTIP) in the area of valuation was provided by specific notifications made by contracting parties of the difficulties encountered by them in particular markets. These notifications are contained in GATT document COM/IND/W/8 and in GATT document MTN/3B/2 item numbers 137-171. While the work was not directed towards adoption of one common system of valuation, it was oriented towards interpreting the provisions of Article VII of the GATT 1994 and to elaborate rules for their application. The CTIP prepared two drafts, one of "draft principles" and one of "draft interpretative notes." These were general guidelines for national customs regulations and practices and formed the basis for future work. They can be found in document MTN/NTM/W/7. While not fully agreed within the CTIP, in view of the progress achieved, it was agreed that the texts would be referred to national administrations for examination and for consideration of changes which might be implied in accepting them.

B. TOKYO ROUND NEGOTIATIONS⁸

7. During the preparatory stage of the Tokyo Round (1974), it was decided in Group 3(b) to put off discussion of customs valuation in order to give more time to national administrations to examine the two drafts prepared by the CTIP. As the Tokyo Round got underway in 1975, it was agreed at the meeting of 5 March 1975 of the Group "Non-Tariff Measures" that negotiations should begin initially in the area of customs valuation. A sub-group of the NTM Group was established called "Customs Matters". At its first meeting on 20-26 May 1975 (MTN/NTM/4) the main positions were as follows: countries with systems based on the BDV recalled that about 100 countries used this approach and the EC suggested that the BDV would be the appropriate basis for a common international system. Some others (Japan, Nordics) considered that the draft principles and interpretative notes worked out by the CTIP would be an appropriate basis for the future work of the sub-group. The US and Canada considered that the BDV had some serious defects and was not a suitable basis for a common system. They did not hold merit in attempting to establish a common system but that the sub-group should concentrate on seeking solutions to particular problems identified. Some developing countries pointed out that practices by which customs value was determined on the basis of domestic prices in the exporting or in the importing countries posed particular problems to their exports. It was agreed that countries which had specific suggestions for elements they wished to be included in any new set of international rules should submit them to the Secretariat. These were circulated in MTN/NTM/W/20 and addenda.

8. At the 3-4 October 1975 meeting of the sub-group (MTN/NTM/7) it was agreed that the sub-group should continue examination of the written submissions and that priority should be given to four aspects of valuation systems which had been identified as problem areas in the submissions: i) judicial and administrative review procedures; ii) publication of laws, regulations and administrative

⁶ Ibid, pp 8-9.

⁷ Ibid, p. 15.

⁸ For the official drafting history of the GATT Valuation Code, see documents listed in TA/INF/1/Rev. 8, pp 61-68.

decisions; iii) precise and fair handling of non-arm's length transactions; and iv) neutrality of valuation systems. At the 16-18 March 1976 meeting (MTN/NTM/13) the sub-group discussed the specific comments which had been received on the four problem areas (comments were circulated in MTN/NTM/W/33 and addenda). In a general discussion of future work, it was apparent that fundamental differences remained between the EC, the Nordic countries, and Japan on one hand, and the US and Canada on the other. The first group supported a proposal by Japan (MTN/NTM/W/33/Add.3) that the Secretariat should prepare a draft agreement incorporating the various elements contained in the CTIP Draft Principles and Interpretative Notes as well as other proposals that had been submitted to the sub-group. The US and Canada maintained that the negotiations should be aimed at solving specific problems. It was agreed that the Secretariat would prepare a checklist of issues raised and of possible elements that may be included in any new set of international rules or principles to be adopted in the multilateral trade negotiations.

9. At the meeting of 5-8 July 1976 (MTN/NTM/18), the sub-group examined the checklist prepared by the Secretariat (MTN/NTM/W/51) and agreed that a revised version should be prepared which would indicate areas of broad consensus and areas of divergences. While not binding on any delegation, it would constitute a basis for discussion. At the meeting of 26-28 October 1976 (MTN/NTM/23) the revised checklist (MTN/NTM/W/51/Rev.1) was examined. It was agreed that the principles contained in the first part of the paper should be circulated separately and retained for future reference. At this meeting, it was also agreed that a checklist of headings which were considered important for inclusion in a set of rules be drawn up. This was subsequently circulated in MTN/NTM/W/65 and addenda 1-3. Discussion on this checklist was held at the next meeting of 21 February 1977 (MTN/NTM/27).

(i) *The EC submits the draft Code*

10. At the meeting of the sub-group in November 1977 (MTN/NTM/38), the EC submitted a draft valuation code (MTN/NTM/W/122). It contained some of the elements of the earlier CTIP Principles and Interpretative Notes but was more elaborate in that it aimed at establishing a new comprehensive international customs valuation system. In fact, in structure and content, it was an early version of the Tokyo Round Code and present Uruguay Round Agreement. Most interesting was the change of position of the EC with respect to the "positive" versus "notional" approach as contained in the BDV. In adopting the positive approach, the EC delegate stated that this represented a "fundamental change for the European Community (MTN/NTM/W/126)." The "positive" approach was combined with the hierarchical methods of valuation which was what the EC believed "to be good features of the US valuation system". In essence, the draft aimed at "taking the best features of [the US, the EC and Canadian] systems and to combine them together into a new set of rules..." In his statement, the EC delegate added that "Article 1 [states] that the price paid or payable for the imported goods shall be accepted as the basis for determining the customs value provided that the buyer and seller are not related....We recognize..that buyers and sellers may be tempted to arrange the transaction so that the price itself reflects only a small element of the value of the goods and that the remainder is transferred between them by some indirect method. We have, therefore, provided, in Article 7 of our draft (presently Article 8), for certain additions to be made to the price paid or payable if these have not been included in the basic price. But the basic concept is that provided the price paid or payable fully reflects everything which the buyer has to pay to get the goods then that is accepted as the basis for the customs value..." In discussing Articles 2 and 3 of the draft, the delegate further added "It may well be that the customs in looking around find a number of sales of identical goods to different buyers at slightly different prices or maybe the buyer in question can bring forward evidence to show that the seller sells identical goods to other buyers at different prices. In those circumstances there has to be a rule about the price to be taken into consideration. Our proposed rule is that the value should be based upon the average of the prices." In his concluding comments, the delegation added, "it will not have escaped the notice of the developing countries that we make no reference to the price of goods on the domestic market of the exporting country amongst our basic methods of valuation and

that we have excluded it as a fall-back method. We have done this as we accept the validity of the arguments of developing countries at earlier meetings of the sub-group that often the prices on their domestic markets are artificial ones and that the price charged in those markets is no fair measure of the value of their goods at export."

11. While the US and Nordic countries welcomed the proposal as a positive contribution and a basis for future negotiations, Japan and Australia wished to aim at harmonization on the basis of the BDV, Canada was concerned that the draft went considerably beyond Article VII and would require major changes in its valuation practices and India reserved its position on the question of differentiated treatment in customs valuation for developing countries.

12. By the time of the meeting of 8-9 February 1978, most of the members of the customs sub-group accepted the draft valuation code submitted by the EC as a basis for future negotiations (MTN/NTM/40). The evolution of the EC's draft through the negotiations leading to the Final Draft in 1979 can be tracked in the following main documents:

- MTN/NTM/W/122 (8 November 1977).
- MTN/NTM/W/162 (21 June 1978).
- MTN/NTM/W/175/Rev. 1 (6 November 1978)
- MTN/NTM/W/206 (14 December 1978).
- MTN/NTM/W/223 (2 March 1979).
- MTN/NTM/W/222/Rev.1 (Special and Differential Treatment – 27 March 1979)
- MTN/NTM/W/229/Rev. 1 (Final draft, 8 April 1979, open to signature 12 April 1979).
- MTN/NTM/W/229/Rev.1/Add.1 (Protocol – 22 October 1979, open to signature November 1st 1979).

(ii) *Drafting history of the provisions concerned in the paragraph 7 tirets*

13. In preparing this drafting history, the Secretariat examined all proposals and national position papers submitted during the course of the Tokyo Round negotiations with the view to following the evolution of the provisions concerned in the paragraph 7 tirets. A general observation from this research is that the official documents do not present much in terms of the rationales for these provisions. The minutes of the sub-group's meetings and the drafts themselves provide little technical discussion of the provisions in the final draft. A second observation is that the provisions dealt with by the tirets were, in fact, discussed during the Tokyo Round and the main proponent of the paragraph 7 tirets, India, generally put forward similar views during these discussions, particularly for tirets 57, 58, 60 and 61. A third observation is that the current provisions related to tirets 57, 58, 59 were introduced in document MTN/NTM/W/206 and those related to tirets 60 and 61 were incorporated in document MTN/NTM/W/223. Finally, it should be noted that, in the negotiations, proposals were made by a group of countries which identified themselves only as "a number of delegations" without specifying which delegations were involved.

14. Some specific comments, organized according to the paragraph 7 tirets are provided below.

- *Tiret 57 (The addition of cost of services such as engineering, development, and design work, which are supplied directly or indirectly by the buyer free of charge or at reduced cost for the production of goods under import, shall be included in Article 8.1(b)(iv).)*

15. Article 8.1(b)(iv) of the WTO Agreement on Customs Valuation was first proposed in 1978 in document MTN/NTM/W/206, "circulated at the request of a number of delegations". Article 7 of the EC's draft (MTN/NTM/W/122) contained additions to be made to the customs value and Article 8 of the draft contained elements not to be included in the customs value. Article 8.d of that draft specifically excluded from the customs value the "fees for the drawing up outside the country of

importation of documents incidental to the introduction of the goods to that country". The EC did not give reasons for this exclusion other than that they were "inappropriate to include" (MTN/NTM/W/126). This excluding rule was also provided in document MTN/NTMW/175, "circulated at the request of number of delegations".

16. In document MTN/NTMW/167/Rev.1, Brazil proposed a new Article 7 (k), which specifically excluded from the transaction value the cost of "engineering, development, artwork, design work, plans and sketches relating to the imported goods." In a later draft, "circulated at a request of a number of delegations," it was proposed that these services be included in the transaction value, without specifying the origin of the assists (Article 9.1.b(iv) of document MTN/NTM/W/175/Rev. 1). The present form of Article 8.1(b)(iv) was then proposed in MTN/NTM/W/206. However, India continued to argue against the present form of Article 8.1(b)(iv) throughout 1979, when it proposed to return to Article 9.1.b(iv) of document MTN/NTMW/175/Rev.1 (See document MTN/NTM/W/218, of 9 February 1979, Comments to Article 8). However, this proposal was ultimately not incorporated into the Final Draft.

- *Tiret 58 (The residual method of determining customs value under Article 7 shall be inclusive of all residual eventualities, thus allowing valuation based on domestic market price or export price in a third country with appropriate adjustments.)*

17. Article 5 of the EC's draft specifically excluded (1) the cost of production of the goods, (2) the selling price in the country of importation of similar or comparable goods, (3) the price of identical, similar or comparable goods on the domestic market of the country of exportation, or (4) the price of identical, similar or comparable goods for export to a country other than the country of importation. The EC considered those methods "unsatisfactory" and opposed to the principle of avoiding "arbitrary or fictitious" values. The EC stated that they accepted "the validity of the arguments of developing countries in earlier meetings of the Sub-group, that often the prices on their domestic markets are artificial ones and that the price charged in those market is not fair measure of the value of their goods at export" (see paragraph 10 above and MTN/NTM/W/126, paragraphs 15 and 26).

18. Spain argued against the "domestic market price of the country of exportation" because: i) the application of these methods would be very difficult in practice, considering the delay that it would imply and the problem of how the most elementary verification of the data furnished could be obtained; and ii) the costs for sales in the domestic market may be different from those for sales for export. Spain was also against basing valuation on the "export price to third countries" because competition in the country to which the goods were exported would constitute a relevant element affecting the price, and because it would be difficult to verify data in a (third) country of importation located faraway (MTN/NTM/W/172, comments on Article 5 *bis* of MTN/NTM/W/162).

19. The first revision of the EC's draft proposed Article 5 *bis* (1) (a) and (d) that specifically considered as residual methods the "domestic market price of the country of exportation" and "export prices to third countries" (MTN/NTM/W/162, "circulated by a number of delegations"). However, Brazil drafted a new proposed Article 5 *bis* that did not accept "the domestic market price" and the "export price to third countries" as fall-back methods (MTN/NTM/W/167/ Rev.1). The document MTN/NTM/W/175, "circulated at the request of a number of delegations," included the "domestic price" and the "export price to third countries" in the text or in interpretative notes. MTN/NTM/W/175/Rev.1 proposed a general fall-back clause based on any reasonable means consistent with the Code and with Art. VII of GATT which did not exclude any method. India had proposed a similar clause in MTN/NTM/W/188 of September 1978. The final draft of Article 7, as it is currently in force, was incorporated in document MTN/NTM/W/206, of December 1978. However, in February 1979, India insisted on a broader fall-back clause and proposed to delete paragraph 2 of Article 7 which listed the fall-back method exclusions, in order to allow all possible eventualities

(MTN/NTM/W/218). India stated, "since Article 7 is a residuary Article of last resorts, when other Articles fail, it would be pragmatic to retain only the first general paragraph as was the case in document MTN/NTM/W/175/Rev.1". This argument was ultimately not incorporated into the Final Draft.

- *Tiret 59 (The Agreement should be amended to provide for the highest value when more than one transaction value of identical or similar goods is found).*

20. The EC's proposal did not call for basing customs value on the lowest value but the average value (MTN/NTM/W/122, Articles 2.2 and 3.2) in the event of more than one transaction value of identical or similar goods. The EC stated, "It may well be that customs in looking around find a number of sales of identical goods to different buyers at slightly different prices or maybe the buyer in question can bring forward evidence to show that the seller sells identical goods to other buyers at different prices. In those circumstances there has to be a rule about the price to be taken into consideration. Our proposed rule is that the value should be based upon the average of the prices" (MTN/NTM/W/126, Paragraph 11). However, the first revision of the EC's draft already incorporated the principle of the "lowest value", but without providing technical reasons (MTN/NTM/W/162). On the contrary, Spain proposed using the "weighted average value" (total imports divided by total units) instead of the lowest value. Spain argued that "choosing the lowest value might result in the introduction of an exceptional value" (MTN/NTM/W/172 and MTN/NTM/W/189). Document MTN/NTM/W/175/Rev.1 returned to the proposal of the lowest price and, finally, document MTN/NTM/W/206 inserted the draft of the provisions as it is currently in force.

- *Tiret 60 (Buying commissions should be taken into account in the determination of customs value of imported goods as it forms a legitimate component of the landed cost of imported goods.)*

21. Article 7 (b) of the EC's draft specifically and exclusively mentioned "selling commissions". The revision of that draft submitted by Brazil in document MTN/NTM/W/167/Rev.1 as well as documents MTN/NTM/W/175/Rev.1 and MTN/NTM/W/206 also only mentioned "selling commissions". However, in comments made in document MTN/NTM/W/189, Spain included "buying commissions". Document MTN/NTM/W/196, "circulated as the request of a number of delegations", proposed to delete the word "selling" leaving only "commissions". India also proposed a general clause for "commissions" without distinguishing selling or buying commissions (MTN/NTM/W/218, commentary to article 8). Article 26 of document MTN/NTM/W/222/Rev.1, "circulated on behalf of several developing countries", proposed that, in framing their national legislation, the Code should provide for the inclusion in the customs value, in whole or in part, of the value of any additional consideration not specified in paragraph 1 of article 8. Finally, document MTN/NTM/W/223, circulated at the request of a number of delegations, incorporated the draft as it is currently in force.

- *Tiret 61 (Persons associated with each other as sole agents, sole distributors, and sole concessionaires, howsoever described, should automatically be deemed "related".)*

22. Issues concerning "related persons" were some of the most controversial matters in the negotiations. The EC draft, in Article 16(2) which contained the definition of related persons, did not make any specific reference to sole agents, sole distributors and sole concessionaires. The issue was introduced in document MTN/NTM/W/206, and the current text was included in document MTN/NTMW/223 and carried forward into the Final Draft.

23. In document MTN/NTM/W/218, India commented on the draft in MTN/NTM/W/206. Specifically, with respect to Article 15, paragraph 5 of the latter document, India proposed to delete

the statement "if they fall within the criterion of paragraph 4 of this Article" in order to consider sole agents, sole distributors and sole concessionaires as related persons. India reasoned "sales to sole agents, sole distributors and sole concessionaires cannot be regarded as sales under fully competitive conditions and the prices in such sales cannot be accepted as a conclusive basis for customs valuation" (MTN/NTM/W/218, p. 7). Following this, in March 1979, several developing countries circulated proposed amendments to the draft Code in order to provide for special provisions to meet the trade, financial and development needs of such countries (MTN/NTM/W/222/Rev.1). In that text, they proposed to add an Article 28 that would read, "Developing parties, in framing their national legislation, may provide that the provisions of paragraph 5 of Article 15 will apply as if the words 'if they fall within the criteria of paragraph 4 of this Article' did not exist at the end of the said paragraph."

24. In the sub-group's meeting of 3 April 1979, "delegations from developing countries" reiterated that in their view the text of MTN/NTM/W/229 and Corr.1 (the Final Draft) "was not neutral between related and non-related traders, on a number of points favoured firms and enterprises of developed countries, did not deal adequately with the problem of price reductions not freely available and with the question of sole agent or sole distributor". These delegations considered that serious prejudice would be caused to their export and imports interests if any agreement adopted in this area did not contain the points in MTN/NTM/W/222/Rev. 1. They concluded that under these circumstances and unless the points raised...were included in MTN/NTM/W/229 they saw themselves unable to accept the draft Agreement ... ". In that same meeting, "delegations from developed countries welcomed the text contained in MTN/NTMW/229 and Corr. 1 and stressed that its adoption would form an important part of the global package in the negotiations. They stated that in their view the text represented a fair, neutral and reasonable compromise between the importers and exporters and a balanced whole. They emphasized that the provisions of the Code were not designed to favour one class of traders as against another...particular problems which developing countries might face could be overcome under the reservations clause of Article 23 on an interim basis. Any difficulties in the operation of the Agreement could also be reviewed in the light of experience...The text represented the most that could be achieved by way of a multilateral solution..." (MTN/NTM/67, paras 3 and 4).

25. Ultimately, a Protocol was added to the Agreement which in paragraph 6, stated that the parties to the Agreement: "Recognized that certain developing countries have expressed concern that there may be problems in the implementation of Article 1 of the Agreement insofar as it relates to importations into their countries by sole agents, sole distributors and sole concessionaires. The Parties to the Agreement agree that, if such problems arise in practice in developing countries applying the Agreement, a study of this question shall be made, at the request of such countries, with a view to finding appropriate solutions" (MTN/NTM/W/229/Rev 1/Add 1). This provision is now Annex III, paragraph 5 of the current version of the Agreement.

C. POST TOKYO ROUND – PRE 1994 URUGUAY ROUND

26. The Tokyo Round Agreement on Customs Valuation came into force on 1 January 1981 and was accepted by all developed countries. The developing countries, Argentina, Brazil, and India, acceded to it by invoking the provisions which delayed application for five years. Most other developing countries showed reluctance to accede to the Agreement. Therefore, during most of the 1980's, the work in the Tokyo Round Committee on Customs Valuation was concerned with implementation matters. Reviewing legislation and dealing with interpretative questions occupied much of the Committee's meetings. One of the principal preoccupations was how to encourage more developing countries to accede to the Agreement. The problems voiced by many developing countries during the negotiation of the Code did not disappear and indeed became the stumbling blocks to wider accession of the code by contracting parties. Since the initial discussions surrounding the Tokyo Round Code, the main implementation difficulties cited by developing countries have

related to the fear that the Agreement would not allow their customs administrations to control under-valuation and fraud, and that the Agreement would contribute to a loss of revenue. In the lead up to the Uruguay Round, these concerns were voiced consistently and it became clear that this would be an issue for negotiators.

27. During this period, two Decisions concerning the interpretation of the Agreement were adopted by the Tokyo Round Committee on Customs Valuation which are related to the issue concerned by tiret 57. Both were later adopted by the WTO Committee on Customs Valuation at its first meeting in May 1995 and are contained in WTO document G/VAL/5. The first is the Decision on the Meaning of the word "undertaken" in Article 8.1(b) (iv) of the English text of the Agreement., adopted on 3 March 1983 (VAL/M/6, paragraph 18). It states that, "The Committee agreed that in the context of Article 8.1(b) (iv) of the Agreement, the English word "undertaken" was to be understood as meaning "carried out". It noted that the French and Spanish texts of the Agreement were not affected." The second Decision is on Linguistic consistency of the term "development" in Article 8.1(b)(iv). At the Committee meeting of 9-10 May 1985, the Chairman stated that,

"Consultations have taken place and in the light of these I suggest that the matter be settled by including the following statement in the minutes of the meeting, on the understanding that this would be without prejudice to rights and obligations under the Agreement and that members of the Committee can revert to the matter should the need arise.

"The Parties to the Agreement considered that the terms "development" in English, "travaux d'étude" in French and "creación y perfeccionamiento" in Spanish in Article 8.1(b) are understood to exclude "research" in English, "recherche" in French and "investigación" in Spanish, as stated in paragraph 6 of VAL/W/24/Rev.1. However, one signatory, Argentina, considered that, as used in Article 8.1(b), the Spanish expression "creación y perfeccionamiento" could not be interpreted as allowing any part of the value to be excluded from the "creación y perfeccionamiento"."

D. THE URUGUAY ROUND

28. During the Uruguay Round negotiations, the aim of negotiating the Tokyo Round Codes (including the Customs Valuation Code) was "to improve clarity or expand [them], as appropriate". The negotiations on the Customs Valuation Code took place in the Negotiating Group on MTN Agreements and Arrangements, one of the fourteen groups constituted to handle negotiations in the area of trade in goods. In the formal and informal discussions, developing countries stressed that more flexibility was needed in the Agreement to enable customs administrations to shift the burden of proof to the importer when the declared price was less than that noticed in earlier transactions of the identical good. The inability of customs administrations to deal effectively with the problem of under-valuation resulted in considerable loss of revenue. India argued that its experience with implementing the Agreement showed that the rule that transaction value must be accepted had further accentuated the trend towards under-valuation, as the importers were certain that the customs would not be able to reject the declared lower collusive prices.⁹ This position was supported by Brazil and some other Members. These Members maintained that the provisions (Article 17 of the Agreement and paragraph 7 of the Tokyo Round Code's Protocol) were insufficient to deal with the problem of under-valuation as there was often collusion between exporters and importers. The negotiated result of these concerns was the Ministerial Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value. It is important to note that while this flexibility was requested by developing countries, the text has been worded in such a way that its provisions can be invoked by all signatory countries.

⁹ GATT document MTN.GNG/NG8/W/9, 30 September 1987.

29. During the negotiations, two other issues were also raised by developing countries as important considerations for their acceptance of the Agreement. These related to the provisions in the Agreement and its Protocol relating to officially established minimum values and to importations into developing countries by sole agents, sole distributors and sole concessionaires. Regarding minimum values, Article 7 of the Agreement prohibits determination of value for customs purposes on the basis of officially fixed minimum customs values. Paragraph 3 of the Protocol to the Agreement, which contained provisions for special and differential treatment for developing countries, permitted developing countries to make a reservation to enable them to retain such values on a limited transitional period "under such terms and conditions as may be agreed upon by the Parties to the Agreement". Developing countries proposed that this transitional period should be sufficiently long.

30. With respect to the issue of sole agents and distributors, under the BDV, which most developing countries had adopted, it was possible for customs to include in the dutiable value, in appropriate cases, special discounts obtained by such agents. This was not the case under the Tokyo Round Code where the concept that transaction value should be generally accepted would require the customs to accept in all cases unless a relationship could be proven, the price obtained by the sole agent, irrespective of the level of special discount or the purpose for which it is obtained. India and some other developing countries had argued that the acceptance of this principle could lead to the government losing a serious amount of customs revenue. As it would not be possible to raise the revenue lost by other taxation measures, the decline in revenue collection could have serious implications on the government's efforts at economic development.¹⁰

31. The result of the negotiations relating to these concerns is the Ministerial Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires. The first part of this Decision clarifies the provisions that were in the Protocol (moved to paragraph 2, Annex III in the WTO Agreement) relating to officially fixed minimum values. The second part of this Decision concerns sole agents, sole distributors and sole concessionaires. The agreement treats them as unrelated parties so that no special discounts are added to the transaction value. The Protocol under the Tokyo Round (paragraph 5 of Annex III of the WTO Agreement) recognized that for certain developing countries changeover from their existing practices in relation to importations by such agents, distributors and concessionaires may pose problems, and provided that, if a request was made, the Parties to the Code should agree to undertake a study of the question with a view to finding appropriate solutions. The text of the Decision adopted emphasises that while developing countries could continue without changing their existing practices relating to discounts for such agents during the five-year delay period, during this period, however, these countries could, with the assistance of the CCC (WCO), conduct appropriate studies on the importation of sole agents as well as in other areas identified as being of potential concern to them. The text urges the CCC to provide technical assistance to requesting developing countries for this purpose, in accordance with the provisions of annex II of the WTO Agreement.

32. Apart from these three Ministerial Decisions, the Code changed very little under the Uruguay Round Negotiations. The Protocol became Annex III to the Agreement, the role of the WCO Technical Committee was clarified and drafting changes were made to bring the Agreement into legal consistency with the Agreement establishing the World Trade Organization. The expectation of the adoption of these three texts was that they would facilitate application of the Agreement by developing countries.

¹⁰ Rege, Vinod, "Developing Country Participation in Negotiations Leading to the Adoption of the WTO Agreements on Customs Valuation and Pre-shipment Inspection – A Public Choice Analysis", *World Competition, Law and Economics Review*, Volume 22, Number 1, March 1999, p.78.

ANNEX

TEXTS ISSUED BY THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION (WCO) RELATED TO EACH TIRET.

Tiret 57

- Commentary 18.1: Relationship between Articles 8.1(b) (ii) and 8.1 (b) (iv).
- Case-study 1.1: Report on a case study with special reference to article 8.1 (b): engineering, development, artwork, etc.
- Case-study 8.2: Application of Article 8.1.

Tiret 58

- Advisory Opinion 12.1: Flexible application of Article 7 of the Agreement.
- Advisory Opinion 12.2: Hierarchical order in applying Article 7.
- Advisory Opinion 12.3: Use of data from foreign sources in applying Article 7.

Tiret 59

- Commentary 1.1: Identical or similar goods for the purpose of the Agreement.

Tiret 60

- Commentary 17. 1: Buying Commissions.
- Explanatory Note 2.1: Commissions and brokerage in the context of Article 8 of the Agreement.
- Explanatory Note 5.1: Confirming commissions.

Tiret 61

- Advisory Opinion 21.1: Interpretation of the expression "partners in business" in Article 15.4 (b).
 - Explanatory note 4.1: Consideration of relationship under Article 15.5 read in conjunction with Article 15.4.
 - Case-study 9.1: Sole agents, sole distributors and sole concessionaires.
 - Case-study 11.1: Application of the article 15.4 (e) related party transactions.
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