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ARTICLE VII - VALUATION FOR CUSTOMS PURPOSES

The Use of the Commercial Invoice Price in Customs Valuation

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During recent years attention has frequently been drawn to the conflict of opinion between international commerce and customs administrations as regards the bases of valuation used for the purpose of charging ad valorem duties.

The difference is one of approach. Commerce says "This is a bona fide purchase and the price paid for the goods is, without any question, their value. Therefore value should be defined in terms of the price paid on a bona fide purchase". The Administration replies that such a generalization provides no rules, or no standard, for valuing goods for which a price has not been fixed or for which the purchase is not acceptable as bona fide; and that there must be a standard which can be uniformly applied to all importations. The Administration reassures commerce by pointing out that its definition of value admits, in theory, the use of the commercial invoice price as a basis for valuation, and that in practice it is in fact so used in the majority of cases. Commerce is not, however, satisfied in the absence of any guarantee, or even asseveration, that the commercial invoice price will not be rejected without good and sufficient reason.

Up to the present this conflict of opinion has not been satisfactorily resolved. The revision of Article VII of the Agreement may be the opportunity to give it further consideration.

I am taking the liberty of presenting this memorandum having regard, first, to this opportunity, and secondly, to my personal experience in the international field of discussions and negotiations on customs valuation questions, and in particular of discussions with international commercial circles on the special problem of the use of the commercial invoice price in customs valuation. The conclusions drawn from this experience, which perhaps represent some progress in thought on the subject, are contained in Annexes A and B to this memorandum. They are purely personal and must not be taken as in any way committing the Brussels Valuation Committee, or the Customs Co-operation Council, or any of the members of the Committee or of the Council.

Annex A is an exposition of the reasons why a fiscal standard of value, although it may in fact be an attempt to give expression to the bona fide commercial invoice price, must of necessity be expressed in terms which do not guarantee acceptance of such prices; and continues, from this conclusion, and from the arguments upon which this conclusion is based, with suggestions as to the manner in which a modified guarantee might be offered.

Annex B suggests legal provisions which might be adopted to give effect to the views expressed in Annex A.

It may be objected that some of the arguments and suggestions - in particular the suggested Definition of Annex B - are based upon the concept of the Brussels Definition of value rather than upon that of Article VII of the GATT. But the Brussels Definition is a development of the theory and principles of Article VII for application in practice and for that reason it has been selected as the most suitable medium for illustration of the ideas presented. Nevertheless, provided that Article I of Annex B were substantially retained, Articles II to IV thereof could be amplified or reformulated in other terms without loss of the modified guarantee to commerce which it is the intention of the proposal to provide.

ANNEX A

Why a fiscal standard of value, although it may in fact be an attempt to give expression to the bona fide commercial invoice price, must of necessity be expressed in terms which do not guarantee its acceptance: with suggestions as to the manner in which a modified guarantee might be offered.

1. The ostensible purpose of ad valorem import duties is to tax and, by taxation, to increase the price of commercial importations of specified foreign merchandise. The basis of the tax charge should therefore logically be the commercial price.
2. Subject to exceptions, this price has been established, before any goods have to be valued, by agreement between the buyer and the seller of the goods. It is established by the commercial contract under which the goods are imported. The contract is enforceable in law and the price made in it is therefore prima facie evidence of the actual value of the merchandise to which it applies.
3. There may, however, be conditions in a contract, or antecedent to a contract, which point to the probability, or possibility, that the price made is not the price that would have been made had the contract been unconditional. It would be unfair therefore, and would invite evasion, if contract prices were to be used as the basis of duty charges without the reservation that they must be unconditional. This reservation is perhaps best expressed by use of the traditional English term "open market".
4. The terms of contracts also vary as regards delivery of the merchandise to the buyer. There would be an unfair incidence of charge if contract prices were used irrespective of the point at which delivery was offered. A standard has to be fixed and contract prices, as necessary, have to be corrected by adjustment to whatever standard is appropriate.
5. The use, in ad valorem import duty valuation, of commercial prices, as established by the actual contract under which the goods to be valued are imported, is therefore subject to reservations, but can be simply expressed as follows:-

(1) The basis for the valuation of goods for ad valorem import duty purposes shall be -

(a) for goods imported under a commercial contract of sale negotiated in fully open market conditions - the price made under that contract adjusted as necessary to the standard point fixed for delivery;

(b) for goods imported otherwise - the price that would have been made under such a contract, similarly adjusted.

6. Further provision is however necessary for special cases (a) where the price includes the duty payable in the country of importation and (b) where the price is payable in foreign currency. The former may have been covered by the fixation of the standard point for delivery, but, to avoid any risk of misinterpretation, an addition, as follows, appears to be desirable:-

(2) A price inclusive of import duty payable in the country of importation shall, as necessary, also be adjusted to exclude that duty.

7. The problem of converting foreign currency prices into the currency of the importing country is less easily resolved. Contractual terms of settlement are usually elastic and do not therefore provide a date for conversion. Settlement may be deferred until after goods have been imported, or may be made out of block purchases of foreign exchange carried forward on running account. Whilst, therefore, the actual commercial settlement (i.e., the cost to the buyer of the contractual currency price) might be appropriate in some cases, it would be inappropriate, and indeed unascertainable, in others. For the latter a fixed date for conversion is necessary and it would be unfair to apply this date only to those importations which, doubtless for good commercial reasons, had not been specifically settled (or covered) by currency purchases in advance of importation. There appears therefore to be no practical alternative to the application of a uniform fixed conversion date to all cases in which a contract requires settlement in foreign currency. It may be remarked that whilst this special-purpose introduction of a time element rejects the commercial settlement price, it nevertheless still does not reject the commercial price itself.

8. A foreign currency conversion provision incorporating a fixed date must therefore be added to the formula set out in paragraphs 5 and 6 above, for example, as follows:-

(3) A price payable in foreign currency shall be converted to its equivalent in the currency of the importing country at the IMF rate of exchange appropriate to a date fixed for such conversion.

9. The formula here completed provides a basis for valuation of imported merchandise in terms of its commercial price, and one which would probably be welcome to the ordinary importer.

10. But Customs administrations have to value, and value uniformly, all merchandise, including merchandise out of the ordinary - such as goods imported under frustrated contracts, breach of warranty goods, goods damaged in transit by sea, etc., and so forth. They would also, if the formula of paragraph 5 were given the force of law, have to observe its precise terms, which, when for example more than one contract applied to the goods to be valued, might not be possible. Moreover, in the case of a dispute, it is doubtful whether such a formula would be a suitable basis for arbitration. Above all, the absence of a time factor would make it impossible, where prices were unstable, to determine values, or settle differences of opinion in respect of any goods imported otherwise than on a firm contract price.

11. For these and other reasons Customs administrations claim that they must be provided with a precise legal standard which, inter alia, incorporates a fixed time factor. For administrations which value to a particular quantity level the standard must also incorporate a fixed quantity factor. Each of these factors rejects in theory the commercial formula of paragraph 5, but neither of them can be dispensed with. Apart from the Customs technical reasons set out in the preceding paragraph, any change (e.g., in particular a change in the quantity level) would affect the amount of protection conferred by the import duties on home production. It would be useless to press for changes in valuation procedure which would be rejected out of hand as undermining the structure of protection in any country. Artificial as such structure might be it could not be assailed on theoretical technical valuation grounds alone.

12. In practice, however, under almost any administrative definition the commercial formula of paragraph 5 is still a fair measure for valuing a considerable proportion of importations. Customs administrations do not ignore the commercial contract price. On the contrary, it is one of their standard criteria of value and is more often than not accepted as the basis of charge. If, however, they are provided only with a formal administrative definition, including factors which make it theoretically irreconcilable with the commercial formula, it is not possible for them to admit the validity of the commercial contract price in advance of any appraisal. Nor is it possible to challenge them for unreasonably rejecting it.

13. The anomaly presented by the use, in theory on the one hand and in practice on the other, of valuation criteria which are often irreconcilable in strict law was considered by Customs valuation experts in drafting the Brussels Definition of value. This Definition represented the first attempt, subsequent to the drafting of Article VII of the GATT, at the drawing up, by a number of countries in collaboration, of a precise definition for legal use in conformity with the GATT Article. The anomaly was partly met by formulating a definition in very flexible terms, and partly by strengthening it by a recommendation to use the commercial contract price wherever reasonably possible. The results achieved did not, however, give satisfaction to the ICG, who claimed that insufficient recognition was given to the commercial price.

14. Further progress may be possible by giving some form of modified recognition to the commercial formula set out in paragraphs 5, 6 and 8. Whilst, for reasons already stated, Customs administrations would doubtless feel bound to resist the introduction of this formula into the definition of value itself, they might nevertheless be prepared to seek legal sanction for its use in suitable cases.

15. The problem would then be to provide a definition which was not incompatible with the general use of the formula, and to devise means of linking the two so that the definition provided the legal theory in association with the formula as a legalized variant of application.

16. A draft suggestion is contained in Annex B. The formula is put in the forefront of a combined provision which could serve as a nucleus for valuation law in all countries. It makes provisions only for the c.i.f. and f.o.b. systems of valuation, but could if necessary be varied to include any firmly established intermediate system.

ANNEX B

Draft provisions to serve as a nucleus of law
on import duty valuation in all countries

Article I

(1) The "actual value" of any goods shall, so far as may reasonably be possible, but without prejudice to the definition of value contained in Articles II to IV below (hereafter called the "Definition"), be taken to be -

- (a) in the case of goods imported under a commercial contract of sale negotiated in fully open market conditions - the price made under that contract adjusted for delivery in accordance with the Definition;
- (b) in the case of goods imported otherwise - the price that would have been made under such a contract, similarly adjusted;

always provided that

- (c) a price inclusive of import duty payable in the country of importation shall, as necessary, also be adjusted to exclude the duty;
- (d) a price payable in foreign currency shall be converted to its equivalent in the currency of the importing country at the IMF rate of exchange appropriate to the standard of time fixed for valuation under the Definition.

(2) Duty paid on a value properly declared by the importer on the above basis and accepted by the Customs shall be deemed to be duty paid on a value declared in accordance with the Definition.

Article II

(1) Where the value of any imported goods is not determined in accordance with Article I, their value shall be taken to be the normal price, that is to say, the price which they would fetch at the time

*(when the duty become payable
(of exportation to the country of importation

on a sale in the open market between buyer and seller independent of each other.

(2) The normal price of any imported goods shall be determined on the following assumptions:

(a) that the goods are treated as having been delivered to the buyer at

*(the port or place of introduction into
(the port or place of shipment to
the country of importation; and

(b) that the seller will bear all costs, charges and expenses incidental to the sale and to delivery of the goods at that port or place; but

(c) that the buyer will bear any duties or taxes applicable in the country of importation.

Article III

Where the normal price would depend upon the quantity in the sale, it shall be determined on the assumption that the sale is a sale

*(of the quantity to be valued
{ of the quantity in which the greater volume of the goods is
{ sold in the trade between the countries of exportation and
{ importation.

Article IV

where the determination of the value depends upon factors which are expressed in a currency other than that of the country of importation, the foreign currency shall be converted into the currency of the importing country at a rate of exchange based upon the par values of the currencies involved as established by, or under the authority of, the International Monetary Fund.

* Of the alternatives in this Article and in Article III the first is to apply uniformly to countries using c.i.f. system of valuation and the second uniformly to countries using the f.o.b. system of valuation.