

# GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

MTN/NTM/W/218

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Special Distribution

## Multilateral Trade Negotiations

### Group "Non-Tariff Measures"

#### Sub-Group "Customs Matters"

## CUSTOMS VALUATION

### Comments by Delegation of India

In continuation of the proposal contained in document MTN/NTM/W/215 dated 10 January 1979, the delegation of India has submitted the following further amendments to document MTN/NTM/W/206 dated 14 December 1978.

#### 1. General introductory commentary

Proposal: (a) In paragraph 3 in lines 6 and 7 delete the words "except as mentioned in paragraph 5 below" and substitute the word "it" following these words with the word "It".

(b) Delete paragraph 5 and renumber paragraph 6 as paragraph 5.

Reasons: This is consequential to the proposal for deletion of Article 4 of the draft Agreement.

#### 2. Preamble

Proposal: In paragraph 6 insert the word "normal" in line 2 between the words "consistent with" and the words "commercial practices".

Reasons: This is a minor amendment to make it clear that unauthorized commercial practices are excluded.

#### 3. Article 1

(a) Proposal: In paragraph 1(a)(iii) delete the word "substantially".

Reasons: Unless the scope of the word "substantially" can be precisely defined in interpretative notes, it would be preferable not to use this word.

- (b) Proposal: In paragraph 2(a), in the sixth line, between the words "provided that" and the word "the", insert the following: "the importer demonstrates that".

Reasons: In any arrangement of special relationship the importer will always be in a better position to provide evidence relating to the circumstances surrounding the sale.

- (c) Proposal: For paragraphs 2(b) and 2(c), substitute the following:

"2(b). In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to the transaction value in sales to unrelated buyers of identical, and in their absence, similar goods, for export to the same country of importation at or about the time of importation of the goods to be valued, due account being taken of demonstrated differences in commercial levels, quantity levels and of the elements enumerated in Article 8."

Reasons: The scheme of the draft Agreement contemplates a sequential order of application of the various Articles. If the transaction value cannot be determined under Article 1, resort must be made sequentially to Articles 2, 3 and so on. Paragraph 2(b) of document 206 suggests that the transaction value of a related person shall be accepted if it corresponds to the value of identical or similar goods as determined under Article 5 or 6. This would not appear to be appropriate in cases where values of identical or similar goods are available under Articles 2 and 3 respectively, because without exploring the application of Articles 2 and 3, a jump to Article 5 or 6 should not be permissible. Further, sub-paragraph (iv) of this paragraph in document 206 gives the related buyer the advantage of the lowest price in any country of production in the world whereas Articles 2 and 3 contemplate comparison with goods of the same country of production. The related buyer would, therefore, have an advantage over all buyers whose goods are assessed under Article 2 or 3 in the sequential order, because the former has been given a choice under paragraph 2(c) of opting for the value under Articles 2, 3, 5 or 6 without having to conform to the sequential order contemplated in the scheme as a whole.

#### 4. Article 4

Proposal: This Article should be deleted.

Reasons: This Article, to the extent to which it gives an option to the importer of reversing the application of Articles 5 and 6 is against the basic scheme of the Code to have a sequential order of application of the various Articles. The additional reason for deletion of Article 4 is that paragraph 2 of Article 6 does not for good reasons contain a compulsive provision so far as non-residents are concerned and to the extent to which a non-resident seller may refuse access to his accounts or records or the government of the seller's country may object to the investigation, it would create an avoidable conflict if an option is given to the importer to compel assessment under Article 6.

#### 5. Article 5

(a) Proposal: For the words in line 4 of paragraph 1(a)(i), substitute the following: "or identical goods, or similar goods, or in their absence, goods of the same class or kind".

Reasons: If the factors envisaged in this sub-paragraph are ascertainable with reference to imported goods, identical goods, or similar goods, this ascertainment in the same order should have a preference over the residuary ascertainment with reference to the goods of the same class or kind.

(b) Proposal: In line 5 of paragraph 1(b), after the word "identical", insert the following words: "and in their absence", and delete the word "or" occurring before the word "similar".

Reasons: This change is suggested again to maintain the sequential order.

#### 6. Article 6

Proposal: In Article 6, paragraph 1(a), add the following words at the end:

"but from this <sup>4</sup> may be deducted those taxes and duties from which the goods are relieved by reason of the exportation thereof.

Reasons: This is to bring out clearly the concept that the customs value should not contain an element of any internal taxes from which the goods have been relieved on their exportation from the country of production.

7. Article 7

Proposal: Delete paragraph 2 and renumber paragraph 3 as paragraph 2.

Reasons: 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 175/Rev.1.

8. Article 8

Proposal: For paragraph 1 the following shall be substituted:

"1. Where the customs value of imported goods is to be determined on the basis of the transaction value, there shall be added to the transaction value:

(a) the value or the cost of all items, such as the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

- (i) Commissions
- (ii) Brokerages
- (iii) Survey fees
- (iv) Testing fees
- (v) Weighment fees
- (vi) Quality inspection and certification fees
- (vii) Cost of containers which are treated as one for customs purposes with the goods in question
- (viii) Cost of package, whether for labour or materials.

(b) As in clause (b) of paragraph 1 of Article 9 of document 175/Rev.1."

Reasons: The adjustments contemplated in Article 8 are necessary not only for the purposes of Article 1 but also for Articles 2 and 3. It appears that the definition of the transaction value which has been defined in Article 1 as being "the price actually paid or payable for the goods ... adjusted in accordance with Article 8", would not be available for purposes of Articles 2 and 3. The term "transaction value" used in Articles 2 and 3 can, therefore, possibly be interpreted as meaning the invoice value without any adjustment contemplated in Article 8. Since adjustments provided for in Article 8 would be relevant for assessment even under Articles 2 and 3, this revised formulation is being suggested. The same purpose could also be served if the

"transaction value", instead of being defined only in Article 1 could be incorporated in Article 15 which is the definitions Article so that it could then have general application to cover Articles 2 and 3 also. But so long as there is no definition of transaction value in Article 15 the proposed formulation is necessary.

Sub-paragraph (a) of paragraph 1 of Article 8 of document 206 specifies certain items the cost of which is to be added for customs value. Yet, it leaves out equally important and relevant items like survey fees, testing fees, etc. It is necessary that the list of items in sub-paragraph 1(a) should be illustrative rather than exhaustive because firstly no definition can cover all the items or elements which form part of the value of the goods and secondly if the exhaustive list is attempted it will be easily possible for the importers/exporters to change the nomenclature of the services and claim exemption of duty on essential components of value. For example, instead of invoicing certain services as "commissions" or "brokerages" these could be invoiced as testing fees, survey fees, etc., if the latter are not included in this Article.

The formulation in sub-paragraph (b) of paragraph 1 of Article 9 of the previous document 175/Rev.1 was definitely better and covered all the elements which legitimately formed part of the value of the goods. If an item like advertising expenses incurred on behalf of the seller in the country of importation is excluded as is sought to be done in document 206, it will lead to an anomalous situation. It has been argued that advertising charges have been excluded because there is no precise way of quantifying them. But the same can be said of royalties, licence fees, engineering development, art work, design work, plans and sketches, etc. The point with regard to advertising charges would be clear by the following example:

Mr. A exports a product to a country to two different importers B and C. B is not obliged to do any advertising on behalf of A in the former's territory and A, therefore, invoices the goods to him at, say, \$10 a unit. But A remits \$2 to B through the bank remittances separately for the latter to undertake advertising on behalf of the former. At the same time, A invoices his goods to C at \$8 on the understanding that C will spend \$2 for advertising on behalf of A and this is a stipulation in the contract.

A, consequently, does not make any remittance to C for advertising charges. Under the provisions of Article 8 of document 206, the goods imported by B would be assessed at \$10 whereas those imported by C would be assessed at \$8 although in the situation described above, there is no justifiable warrant for this discrimination in assessment. The customs value of the goods in both cases should be identical. Possibilities of prices being deliberately reduced and the reduction being claimed on account of fictitious or unintended advertising charges, also cannot be ruled out.

9. Article 9

Proposal: In line 1 of paragraph 2 insert the words "or about" between the words "at" and "the time".

Reasons: There may be a time-lag although insignificant between the time of importation and of the filing and finalization of the assessment documents. It may also not always be possible to determine the precise time of importation/exportation.

10. Article 13

Proposal: In line 3 after the words "the importer shall nevertheless", insert the words ", except where the goods are liable to confiscation under the legislation of the importing country,".

Reasons: If frauds or misdeclarations are detected during the course of the determination of customs value, the goods may, as a result of the fraud being proved, become liable to confiscation under the legislation of many of the importing countries. In such cases, the importer cannot obviously be given a mandatory right to withdraw goods from the customs.

11. Article 15

Proposal: (a) Delete sub-paragraph (c) of paragraph 2 and renumber the existing sub-paragraphs (d) and (e) as sub-paragraphs (c) and (d) respectively.

Reasons: This is consequential to the amendment proposed in respect of paragraph 1(b) of Article 8.

Proposal: (b) In sub-paragraph (c) as so renumbered, add the following words at the end after substituting the full stop with a comma: "except when they are sold or traded in under the same brand or trade-mark".

Reasons: Goods having the same trade-mark or brand should, in the normal course, approximate more closely to each other, even though produced in different countries, than the products of the same country having different trade-marks or brands.

Proposal: (c) In paragraph 5, delete the words "if they fall within the criterion of paragraph 4 of this Article" and insert "." after the last word that remains after this deletion.

Reasons: Sales to sole agents, sole distributors or 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.

12. Article 27

This Article will need appropriate amendments so that there is no right of veto to any single signatory. The procedures for amendment of the Agreement should be in conformity with the principles of the GATT.

13. Note to Article 1. Price actually paid or payable

Proposal: (a) In lines 10 and 11 for the words "even though they might be regarded as", insert the words "except when they are also and to the extent to which they are" and delete the last sentence in lines 11 and 12.

(b) In line 4 of paragraph 2 after the words "after importation" insert the words "except when the charges are incurred directly or indirectly by the seller or on his behalf" and delete the last sentence in lines 4 and 5.

Reasons: All charges, expenses and costs in respect of all activities which are undertaken on behalf of the seller and the benefit of which accrues directly or indirectly to the seller, must to the extent to which they are on behalf of him and the benefits accrue to him, be regarded as the cost of the goods and should be included in the customs value.

14. Note to Article 1.2

Proposal: (a) Delete the last sentence in paragraph 2.

Reasons: A related person should not have a choice of jumping to Article 4 without having to follow the sequential order.

Proposal: (b) Delete paragraph 3.

Reasons: This is a deletion consequential to the amendment to Article 1, paragraph 2(b).

15. Note to Article 6

Proposal: In the last sentence of this note, insert the following words at the end: "except when they bear a common trade-mark or a brand".

Reasons: Already given above.

16. Note to Article 7

Proposal: Delete this note.

Reasons: The Article being a residuary Article which will come into operation only in very exceptional circumstances, this note is not necessary.

17. Note to Article 8.1(b)(ii)

Proposal: Delete paragraph 5.

Reasons: The option given to the importers to have the customs duty apportioned in any manner would not be appropriate for countries where tariffs are high and the rates of duty liable to change.

18. General

Proposal: Apart from what has been said above with reference to the notes, such notes or portions thereof as would become redundant or irrelevant or would be in direct conflict with the amendments that have been proposed to the various Articles of the draft Agreement would need to be deleted or modified appropriately.