

MULTILATERAL TRADE
NEGOTIATIONS
THE URUGUAY ROUND

RESTRICTED

MTN.GNG/NG8/W/19
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Special Distribution

Group of Negotiations on Goods (GATT)

Negotiating Group on MTN Agreements
and Arrangements

AGREEMENT ON IMPLEMENTATION OF ARTICLE VII
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE
(CUSTOMS VALUATION CODE)

ASPECTS OF THE CODE PROPOSED
FOR NEGOTIATION

Note by the Secretariat

1. At the meeting of the Group on 27 May 1987, the secretariat was requested to prepare factual background notes on those aspects of the MTN Agreements and Arrangements which had been raised in the discussions (MTN.GNG/NG8/2, paragraph 11). The present note provides background information on the issues identified by the delegation of India, in document MTN.GNG/NG8/W/9, Section (ii).

2. For the issues identified, the note provides information on past discussions in the Committee on Customs Valuation, and in the Technical Committee on Customs Valuation established under the auspices of the Customs Co-operation Council, pursuant to Article 18:2 of the Code. Certain information on the negotiating history is also included.

3. This information should not be regarded as exhaustive, nor is it intentionally selective. Rather, the intention is to provide sufficient information on earlier discussions of these issue in the context in which they have been raised, and on any relevant developments including actions or decisions that might have followed from such previous consideration.

Issue: Burden of proof regarding transaction value
Relevant provisions referred to by participants in the Group:
Articles 1 and 17, and paragraph 7 of the Protocol

4. It has been suggested that adequate flexibility needs to be provided to enable customs administrations to shift the burden of proof to the importer at least in the cases when:

- (i) the declared price is less than that noticed in a series of transactions immediately preceding the relevant one;
- (ii) the declared price is less than that noticed for transactions involving identical goods imported directly from the country of manufacture.

Negotiating history

5. Two texts of an Agreement on Implementation of Article VII were opened for acceptance following the April 1979 meeting of the Trade Negotiations Committee: document "MTN/NTM/W/229/Rev.1" or "MTN/NTM/W/229/Rev.1 as amended by MTN/NTM/W/222/Rev.1" (26S/190-191). Both texts were annexed to the procès-verbal on an equal footing. The Chairman said that "this would not mean that efforts to find a solution to outstanding problems would stop, noting that governments would have time to pursue their efforts to avoid a less than satisfactory outcome in this area since the date for entry into force in both texts was 1 January 1981" (MTN/P/5, paragraph 17).

6. Of these two texts, the former was a complete text, while the latter contained additional elements which several developing countries wished to see incorporated. They felt that "there would be serious prejudice to the interests of such countries unless the Agreement on Customs Valuation that may be finally adopted contains special provisions to meet the trade, financial and development needs of such countries" (MTN/NTM/W/222/Rev.1, first paragraph).

7. The suggestions in MTN/NTM/W/222/Rev.1 which addressed Article 1, concerned its paragraph 2 dealing with sales between related persons. It was proposed that Part III: "Special and Differential Treatment" include a provision¹ to the effect that:

"developing parties, in framing their national legislation, may provide as if the provisions of paragraph 2(a) of Article 1 stood modified" as follows: "... the transaction value shall be accepted provided that the importer demonstrates that the relationship did not influence the price".

8. With respect to Article 8 (adjustments to the price actually paid or payable) it was suggested that Part III include two provisions, as follows:

- (i) "Developing parties, in framing their national legislation, may 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, which the buyer is obliged to discharge himself or ²to require others to discharge as a condition of the sale";² and
- (ii) "Notwithstanding anything contained in paragraph 4 of Article 8, developing parties, in framing their national legislation, may provide for the inclusion in the customs value, in whole or in part, of any price reduction which is not freely available to any other buyer on the sale of such goods for export to the country of importation in the same quantities and at the same level."³

¹ Suggested as Article 22

² Suggested as Article 26

³ Suggested as Article 27

9. It was also suggested that the following language be incorporated in Part III:

"In the event of there being a conflict or incompatibility between any of the provisions of this Part on the one hand and of the other Parts or of the interpretative notes or of the General Commentary on the other hand, the provisions of this Part shall have precedence and those of the other Parts or of the interpretative notes or of the General Commentary shall be construed as having, to the extent of the said conflict or incompatibility, no effect or, as the case may be, modified effect in respect of their application to developing parties."⁴

10. Another proposal was that the period of delayed application of the provision of the Agreement, provided for in Article 21:1, should be ten instead of five years.

11. The negotiations were resumed in the summer of 1979 and intensified during the autumn. A compromise was reached on 1 November 1979 by way of an agreed Protocol to the Agreement. With this agreement reached, both the text of the⁵ Agreement and of the Protocol were opened for acceptance by governments.

Discussions in the Committee on Customs Valuation and/or in the Technical Committee

12. The question of "Acceptability of a price below prevailing market prices for identical goods" was included in the work programme of the Technical Committee already at the Committee's first meeting in January 1981 (VAL/M/1, paragraphs 45-49 and Annex 3).

13. At the meeting of the Committee on 4-5 November 1981, it was informed by the Chairman of the Technical Committee that the Technical Committee had adopted an advisory opinion on this question. The text is reproduced as Annex 1 to the present note.

14. At the Committee's meeting on 10 May 1983, it was noted that the work programme of the Technical Committee included, among other things, the treatment of fraudulent documents. This item "had arisen from questions raised by developing countries during technical assistance seminars" (VAL/M/7, paragraph 16). At the meeting on 10-11 November 1983, the Chairman of the Technical Committee informed the Committee that among additional texts it had adopted, was an advisory opinion on the treatment of fraudulent documents (VAL/M/8, paragraph 40). The text is reproduced in Annex 2 to this note.

⁴Suggested as Article 30

⁵The provisions contained in the Protocol have been summarized in MTN.GNG/NG8/W/2, paragraphs 25 and 30-35.

15. At the same meeting, in response to a request by the Council in connection with the Ministerial Declaration of 1982 on the MTN Agreements and Arrangements, the Committee examined the adequacy and effectiveness of the Agreement and obstacles to acceptance. The Committee adopted a text which contained, inter alia, the following passages:

"A significant benefit of the new valuation system, to both customs authorities and to traders, has been greater certainty in determining the customs value of imported products and thus the amount of duties payable. Moreover, experience indicates that the new valuation system has saved time and money, and improved the efficiency of the preparation and processing of customs entries."

"The information gathered by the Committee in 1981 on the use of the different valuation methods provided for under the Agreement indicated that, in line with the Agreement's objectives, the vast majority of customs entries were being valued on the basis of transaction value in the eight Parties that reported (EEC, Finland, Hungary, Japan, Norway, Romania, Sweden and United States). This result was considered to be relevant to allaying certain of the fears expressed in respect of the Agreement by some countries which have not yet adhered to it."
(30S/58-59)

16. With regard to obstacles to acceptance, the Committee stated, inter alia, that "countries delaying application of the Agreement under the provisions on special and differential treatment thus have the opportunity to discuss in the Committee any problems they feel might arise out of such application." (30S/60). It also stressed the importance of technical assistance, as "a valuable means for exploring the problems that potential signatories feel might arise from applying the Agreement and sharing with them experience on how such difficulties might be coped with." (30S/60-61).

17. Before concluding its report the Committee reverted to the question of obstacles and listed in this connection the principal difficulties which twenty-two developing countries had mentioned. Greater risk of fraud had been cited by three of these. Further details have been provided to the Group in MTN.GNG/NG8/W/2, paragraph 37.

18. Concluding its report, the Committee stated that:

"in view of the very positive experience which the Parties applying the Agreement have had with its implementation, the Committee hopes that countries which have not yet accepted the Agreement will soon adhere to it. To this end, the Committee and individual members of it remain ready to discuss further with interested parties any obstacles that they may feel exist to their acceptance of the Agreement"
(30S/21).

19. At the meeting of 9 November 1984, the Committee reverted to the question of whether there were any particular reasons preventing non-Parties from joining the Agreement. In the course of the discussion, the observer from the Customs Co-operation Council referred to the

comparative study of the GATT Agreement and the Brussels Definition of Value. As already indicated in MTN.GNG/NG8/W/2, paragraph 38, he also drew the Committee's attention, inter alia, to the Seoul Declaration adopted by the CCC in 1984.

20. On 9 May 1985 the Committee held a special meeting on adequacy and effectiveness of the Agreement, and on obstacles of acceptance which contracting parties might have faced. This was done in pursuance of the CONTRACTING PARTIES' decision of 30 November 1984 on the MTN Agreements and Arrangements. In this connection, the Committee heard a report on an informal meeting of observers and Parties, held on 16 April 1985. This mentioned a number of factors or difficulties influencing a decision on accession, such as, for instance, customs' possibilities for dealing with false invoicing, collusion between buyer and seller, and ways and means of meeting such problems. Information on these points had been provided to the Group in MTN.GNG/NG8/W/2, paragraphs 39-41.

21. Document MDF/12 of 11 June 1985 consolidated the observations made or conclusions reached in special meetings which the Committees and Councils set up under MTN Agreements and Arrangements had held pursuant to the CONTRACTING PARTIES' decision in November 1984 (31S/13). The document was examined by the Working Group on MTN Agreements and Arrangements, whose report to the Council in L/5832/Rev.1 (32S/108) was adopted by the latter in July 1985 (C/M/191, item 4). With respect to customs valuation, the report stated only that:

"the members of the Group shared the favourable evaluation of this Agreement by the Committee on Customs Valuation (MDF/12, paragraphs 21-24)".

22. Paragraph 24 of document MDF/12 read as follows:

"Representatives of Parties and the Chairman informed the observers present at the informal meeting of the very positive experience with the Agreement, in GATT, in the Customs Co-operation Council (CCC) and at the national level. They recalled the provisions on special and differential treatment in the Agreement and the Protocol thereto, the CCC comparative study on the GATT Agreement and the Brussels definition of value, and the CCC work on the economic implications of joining the Agreement and on customs enforcement techniques to counteract false invoicing. As to this latter question, it was stated that Article 17 of the Agreement and paragraph 7 of the Protocol to the Agreement reaffirmed the rights of customs administrations. It was also pointed out that all valuation systems were faced with problems of fraud and that it was possible to establish procedures to deal with such problems under the Agreement. As regards implications for revenue, it was recognized that the taxable base may be subject to some reduction compared to some other systems because of the exclusion of certain uplifts, but it was pointed out that some parties had endeavoured to quantify this and had found that the shrinkage was very small. Moreover, a value had to be put on the simplicity and the savings of administrative expenses that had resulted from the

application of the Agreement and also on co-operation with other countries. As to the administrative difficulties to which acceptance of the Agreement might give rise, it was pointed out in the Committee's special meeting that technical assistance was readily available from many sources."

23. In June 1985, the Customs Co-operation Council published document 32.574 entitled "Customs Valuation, Economic Considerations", focussing on the impact that adoption of the Agreement would have on national revenues and the protection afforded domestic industries.

24. At a meeting on 13 November 1985 (VAL/M/14, paragraphs 10, 20 and 24), the Committee took note of a report from the Technical Committee concerning the effects of false invoicing on customs valuation (VAL/W/32). The report was given in response to the Committee's request at the special meeting of May 1985, which also had before it a letter received from the Customs Administration from one developing country contracting party to the GATT raising concerns about false invoicing (VAL/M/12, paragraphs 5 and 9). The country in question had noted that it could take a decision on acceding to the Agreement "without hesitation only if developing countries can be accommodated, by means of an amendment or at least an interpretation of Article 1, which would enable them to reject the purported transaction value and to value goods by the subsequent methods of the Agreement whenever Customs administrations have bona fide reasons to believe that the invoice value does not represent the total price actually paid or payable for the goods being valued." The Technical Committee had examined and approved the report, analyzing replies received from seven administrations and statements made by two others. The conclusions read as follows:

"On the basis of the replies summarized above⁶ and the discussions during the Tenth Session, the Technical Committee concluded that it was clear that support is lacking for the proposal ... to amend or interpret the Agreement to deal with the problems raised by suspected false invoicing."

"The general view was that the provisions of the Agreement and its Protocol are sufficient to satisfactorily resolve the questions raised by Particular note should be taken of the reply received from the reply received from (another developing country GATT contracting party) which would be expected to face the same problems as (the country in question)."

"It was also agreed that the relevant provisions in the Agreement should be supplemented by national measures designed specifically to eliminate fraudulent practices and to combat fraud in a broader sense. In this respect, attention should be drawn to the resources and instruments for mutual administrative assistance which exists at international level" (VAL/W/32, paragraphs 18-20).

⁶The full text of the report, including all replies referred to is contained in VAL/W/32.

25. All administrations which had replied recognized implicitly that false invoicing was a problem. However, no administration had favoured an amendment or interpretation of the Agreement along the lines proposed. In general, they had felt that the provisions in Article 17 of the Agreement and in the Protocol contained the necessary powers to meet the concerns expressed. The developing country referred to above had pointed out that "nothing in those provisions appears to prevent a country exercising any of its rights, and there is no reason why a value appearing on an invoice must automatically be accepted as the transaction value. Reference may be made to Advisory Opinions 2.1 and 10.1 for clarification on this point. In particular, Advisory Opinion 10.1 suggests that invalidation of values may be necessary." The Administration in question added that paragraph 8 of the Protocol defines the term "price paid or payable". (VAL/W/32, paragraph 7). This country also pointed out that "the GATT Code seems to suggest the use of national legislation as a complement to it. The structure of national legislation must play an important part in the determination of values and ought to be so structured as to be a deterrent to persons who seek to use, for purposes of greed and fraud, the spirit of trust intended by the Code. There is also a need for closer co-operation between Customs administrations in exporting countries and developing countries in supplying copies of correct documents when such information is requested to help detect incorrect valuations. In many cases, developing countries do not have either the financial or manpower resources to send officers to the exporting country to investigate cases of falsified documents." (idem, paragraph 10).

26. In November 1985 one delegation requested an extension of the period of delay pursuant to paragraph 2 of the Protocol.⁸ It explained a number of reasons for making the request, inter alia, that:

"the implementation of the Agreement may require changes in other enactments and it may be necessary to alter the penal provisions of other laws dealing with punishment in cases of under-invoicing to make them more stringent in order to prevent unscrupulous importers taking advantage of the concept of "Transaction Value" embodied in the Agreement" (VAL/17, paragraph 1).

⁷One country mentioned paragraph 3, while the developing country referred to in the conclusions, and two other delegations cited paragraph 7.

⁸The request was subsequently granted by a Committee decision.

"Almost all commodities imported into (this country) are charged to duty on ad-valorem basis... . (It) depends for the major part of its internal revenue on indirect taxation and Customs duty forms an important element of this revenue. The declared invoice values are generally accepted even in the present system of valuation prevailing in (the country) which is based on Article VII of the GATT. However, with liberalized imports and high rates of duty, it is imperative that the system is properly implemented as loss of revenue may otherwise be considerable." (VAL/17, paragraph 4).

27. At its meeting on 11 May 1987 the Chairman of the Technical Committee stated, inter alia, that the first meeting of a Joint Expert Group on Customs Valuation Fraud had been held on 19-21 January 1987. The Group had identified and had had preliminary discussions on a number of important items. It looked forward to fruitful and concrete results to be achieved at its next session. The Technical Committee had also been informed that the CCC secretariat had received a submission by a group of developing countries and comments by another developing country "on the need for guidelines for the application of Article 17 relating to the rights of Customs administrations within the context of fraudulent cases. The Committee, while drawing attention to Advisory Opinion 10.1 which clarified that an administration could not be required to rely on fraudulent documentation, expressed the view that this matter should be raised before the Expert Group". (VAL/M/20, paragraphs 16 and 17(h)).

28. At the above mentioned meeting, the observer from the Customs Co-operation Council gave further information on the work carried out in the CCC relation to valuation fraud. The Joint Expert Group had "identified a number of sectors deserving consideration, in particular the identification of cases of fraud, the need for an appropriate administrative organization to implement legislation, and the need for developing countries to have detailed valuation legislation, and mutual administrative assistance it had been found useful to prepare a draft recommendation specifically addressing the question of valuation fraud. He invited interested countries to participate in the second meeting of the Joint Expert Group scheduled for end-September beginning-October 1987." The Committee took note of the statements made and agreed to keep the matter on the agenda (*idem*, paragraphs 66-68).

29. The observer from the Customs Co-operation Council also gave a report on a special meeting which had been held on 11-13 March 1987 with the purpose of giving non-Parties an opportunity to examine problems faced in connection with the possible adoption of the Agreement. Nineteen countries and three international organizations had participated in this meeting, which had been convened in the framework of the Seoul Declaration, by which all CCC members States had been invited to intensify their efforts with a view to acceding to the GATT Agreement. Participants had addressed problems relating to technical obstacles, economic and budgetary obstacles, administrative obstacles, and fraud." With respect to technical obstacles, one of the matters identified was the "application of Article 17 and paragraph 7 of the Protocol, in particular the determination of the burden of proof if the transaction value was refused. Participants had agreed

that further studies on these points could be undertaken by the CCC Secretariat and the Technical Committee, with a view to adopting appropriate instruments...". "With respect to fraud and false invoicing, stress had been laid on mutual administrative co-operation. The participants had been invited to take part in the work of the Joint Expert Group. Many participants had stated that the solution to their concerns were to be found either in amending the Agreement or in enlarging the scope of its Protocol. In this connection, participants had been informed of the fact that the MTNs under the Uruguay Round offered the possibility of reconsidering the Agreements deriving from the Tokyo Round and that negotiators were free to table proposals to this effect. The full report of the meeting was contained in CCC document 33.945, which would be submitted to the June 1987 Council [of the CCC], and in October 1987 to the Technical Committee for consideration and follow-up (idem, paragraphs 71-72).

30. A statement by the observer for the Customs Co-operation Council at the fourth meeting of the Group on 5-6 November 1987, referring, inter alia to CCC work on transaction value and fraud, is summarized in MTN.GNG/NG8/4, paragraph 25.

ANNEX 1

Advisory Opinion 2.1¹

ACCEPTABILITY OF A PRICE BELOW PREVAILING
MARKET PRICES FOR IDENTICAL GOODS

1. The question has been asked whether a price lower than prevailing market prices for identical goods can be accepted for the purposes of Article 1 of the Agreement on implementation of Article VII of the Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade.
2. The Committee considered this question and concluded that the mere fact that a price is lower than prevailing market prices for identical goods should not cause it to be rejected for the purposes of Article 1, subject of course to the provisions of Article 17 of the Agreement.

¹ An advisory opinion answers a question raised on the application of the Agreement to a particular set of facts, actual or theoretical. Thus when the facts in a situation are identical to those described in the advisory opinion, a clear solution is available for the use of Customs administrations: in cases where the facts are not identical the advisory opinion would probably not be directly applicable but could nevertheless serve as a guide in resolving the problem.

ANNEX 2

Advisory Opinion 10.1

TREATMENT OF FRAUDULENT DOCUMENTS

1. Does the Agreement require Customs administrations to rely on fraudulent documentation?

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* * *

2. The Technical Committee on Customs Valuation expressed the following view:

Imported goods have to be valued under the Agreement on the basis of actual facts. Therefore any documentation which contained false information as to the facts would be contrary to the intention of the Agreement. In this respect it is noted that Article 17 of the Agreement and paragraph 7 of the Protocol underline the right of Customs administrations to satisfy themselves as to the truth and accuracy of any statement, document or declaration presented to them for Customs valuation purposes. It follows that an administration cannot be required to rely on fraudulent documentation. Further, should documentation prove to be fraudulent subsequent to the determination of a Customs value, invalidation of that value would be a matter for national legislation.