Publication of the Technical Committee on Customs Valuation

Advisory Opinions

Advisory Opinion 1.1 The Concept of 'Sale' in the Agreement

The Technical Committee on Customs Valuation expressed the opinion that:

(a) The Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade, hereinafter called the 'Agreement', contains no definition of 'sale'. Article 1, paragraph 1, merely stipulates a specific commercial operation satisfying certain requirements and conditions.

(b) Nevertheless in conformity with the basic intention of the Agreement that the transaction value of imported goods should he used to the - greatest extent possible for Customs valuation purposes, uniformity of interpretation and application can be achieved by taking the term 'sale" in the widest sense, to be determined only under the provisions of Articles 1 and 8 read together.

(c) It would however be useful to prepare a list of cases which would not be deemed to constitute sales meeting the requirements and conditions of Articles 1 and 8 taken together. In these cases the valuation method to be used should of course be determined in accordance with the order of priority laid down by the Agreement.

The list prepared pursuant to this opinion is appended. It is not exhaustive and will be added to in the light of experience.

List of situations in which imported goods would not be deemed to have been the subject of a sale

I. *Free consignments*

Where transactions do 'not involve the payment of a price they cannot be regarded as sales under the Agreement.

Examples: gifts, samples, promotional items.

II. *Goods imported on consignment*

Under this trading practice, the goods are dispatched to the country of importation not as a result of a sale, but with the intention that they would be sold for the account of the supplier, at the best price obtainable. At the time of importation no sale has taken place.

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Example

Producer P in country of exportation E sends his agent X in country of importation I a consignment of 50 carpets for sale by auction. The carpets are sold in the country of importation at a total price of 500,000 c.u. The sum to be transferred by X to producer P in payment of the imported goods will be 500,000 c.u. less the costs incurred by X in connection with the sale of the goods and his remuneration on the transaction. Importations on consignment should not be confused with profit-sharing transactions. In the latter cases the goods are imported following a sale and provisionally invoiced at a certain price to which must be added part of the profit made when the goods are sold on the market in the country of importation. Transactions of this kind must be regarded as sales with a clause reserving determination of the final price: the nature of the transaction does not preclude valuation under Article I. but of course particular attention has to be paid to the condition laid down in paragraph I (p) of that Article.

III. *Goods imported by intermediaries, who do not purchase the goods and who sell them after importation*

A distinction must be made between the importations envisaged under this heading and importations of goods on consignment, dealt with under the previous heading: the latter constitute a separate and specific trading practice. The present category covers a whole range of situations encountered in commercial practice, whereby goods arc delivered to intermediaries without having been the subject of a sale and in international usage are not universally considered as importations on consignment.

Example

Importer X in country of importation f acts as an agent for the foreign manufacturer F in the country of exportation E. The imported goods are cleared through Customs by X for replenishment of the agency stocks and later sold in the country of importation for the account and at the risk of F.

It should be noted that agency importations for distribution made in pursuance of a contract of sale already concluded between the supplier and the customer - sometimes nominally between the agent and the customer - do constitute transactions which can be used as a basis for valuation under article 1.

IV. *Goods imported by branches which are not separate legal entities*

Incases where a branch cannot be regarded as a separate legal entity under le legislation concerned, there can he no sale, bearing in mind that a sale necessarily involves a transaction between two separate persons.

V. *Goods imported under a lure or leasing contract*

Hire or leasing transactions by their very nature do not constitute sales, even if the contract includes an option to purchase the goods.

VI. *Goods supplied on loan, which remain the property of the sender*

Goods (often machinery) are sometimes loaned by the owner to a customer. These transactions do not involve sales.

Example

Manufacturer F in country E loans importer X in country of importation I a specialized machine for manufacturing packagings of plastic-coated paper. .

VII. *Goods (waste or scrap) imported for destruction in the country of importation, with the sender paying the Importer* /or *his services*

This case relates to waste or scrap imported for destruction. As costs are incurred in connection with this destruction, the exporter pays the importer an amount for his services.

As the importer does not pay for the imported goods but. on the contrary. is paid for accepting and destroying them, no sale can be considered to have taken place under the terms of the Agreement.

Advisory Opinion 2.1 Acceptability of a Price Below Prevailing Market Price for Identical Goods

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 General Agreement on Tariffs and Trade.

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.

Advisory Opinion 3.1 Meaning of 'Are Distinguished' in the Interpretative Note to Article 1 of the Agreement: Duties and Taxes of the Country of Importation

When the price paid or payable includes an amount for the duties and taxes of the country of importation, should these duties and taxes be deducted in those instances where they are not shown separately on the invoice and where the importer has not otherwise claimed a deduction in this respect?

The Technical Committee on Customs Valuation expressed the following view:

Since the duties and taxes of the country of importation are by their nature distinguishable from the price actually paid or payable, .they do not form part of the Customs value.

Advisory Opinion 4.1 Royalties and Licence Fees under Article 8.T (c) of the Agreement

When a machine manufactured under u patent is sold for export to the country of importation at a price exclusive of the patent fee. which the seller has required the importer

to pay to a third party who is the patent holder, should the royalty be added to the price paid or payable under the provisions of Article 8.1 (c) of the Agreement?

The Technical Committee on Customs Valuation expressed the following view:

The royalty should be added to the price actually paid or payable in accordance with the provisions of Article 8.1 (c), since the payment of the royalty by the buyer is related to the goods being valued and is a condition of sale of those goods.

Advisory Opinion 4.2 Royalties and Licence Fees under Article 8.1 (c) of the Agreement

Phonograph records of a musical performance are purchased by an importer from a manufacturer. Under the laws of the country of importation when he resells the records the importer is required to pay a royalty of 3 per cent of the sale price to a third party, the author of the musical composition, who holds a copyright. No part of the royalty accrues directly or indirectly to the manufacturer, nor is it paid as an obligation under the contract of sale. Should the royalty be added to the price actually paid or payable?

The Technical Committee on Customs Valuation expressed the following view:

The royalty should not be added to the price actually paid or payable in determining the Customs value: payment of the royalty is not a condition of the sale for export of the imported goods but arises from a legal obligation on this importer to pay the copyright holder when the records are sold in the importing country.

Advisory Opinion 4.3 Royalties and Licence Fees under Article 8.1 (c) of the Agreement

Importer I acquires the right to use a patented process for the manufacture of certain products and agrees to pay the patent holder H a royalty on the basis of the number of articles produced using that process. In a separate contract, 1 designs and purchases from foreign manufacturer E a machine which is specially intended to perform the patented process. Is the royalty on the patented process part of the price paid or payable for the imported machine'?

The Technical Committee on Customs Valuation expressed the following view:

Although the payment of the royalty in question is for a process embodied in the machine and one which constitutes the sole use of the machine, this royalty is not part of the Customs value since its payment is not a condition of the sale of the machine for export to the importing country.

Advisory Opinion 4.4 Royalties and Licence Fees under Article 8.1 (c) of the Agreement

A patented concentrate is purchased by importer I from manufacturer M who is also the patent holder, the imported concentrate is simply diluted with ordinary water and consumer-packed before it is sold in the importing country. In addition to the price of the goods, the purchaser is required to pay to manufacturer M. as a condition of sale, a royalty for the right to incorporate or use the patented concentrate in products intended for resale. The amount of the royalty is calculated on the sale price of the finished product.

The Technical Committee on Customs Valuation expressed the following view:

The royalty is a payment related to the imported goods that the buyer is required to pay as a condition of sale of those goods and accordingly should he added to the price actually paid or payable in accordance with Article 8.1 (c). This opinion refers to a royalty paid for the patent incorporated in the imported goods and is without prejudice to other situations.

Advisory Opinion 4.5 Royalties and Licence Fees under Article 8.1 (c) of the Agreement

Foreign manufacturer M owns a trademark protected in the country of importation. Importer 1 makes and sells under M's trademark six types of cosmetics. I is required to pay M a royalty calculated as 5 per cent of his annual gross sales of all cosmetics sold under M's trademark. All of the cosmetics are manufactured to M's formula from ingredients obtained in the country of importation, with the exception of one for which the essential ingredients are normally purchased from M. How is the royalty to be treated with respect to the imported ingredients?

The Technical Committee on Customs Valuation expressed the following view:

The royalty is payable to M irrespective of whether 1 uses M's ingredients or those from local suppliers; it is therefore not a condition of sale of the goods, and for valuation purposes cannot he added by virtue of Article 8.1 (c) to the price actually paid or payable.

Advisory Opinion 4.6 Royalties and Licence Fees under Article 8.1 (c) of the Agreement

An importer makes two separate purchases of a concentrate from foreign manufacturer M. M owns a trademark which may or may not he applied to the goods when they are sold after dilution depending on the terms of a particular sale for importation. The fee for use of the trademark is paid on a per unit basis. The imported concentrate is simply diluted with ordinary water and consumer packed before sale.

In the first purchase, the concentrate is diluted and resold without trademark with no requirement that the fee be paid. In the second case, the concentrate is diluted and resold with trademark and as a condition of the sale for import there is a requirement for payment of the fee.

2. Since the goods in the first purchase are resold without the trademark and no fee is paid, an addition is not appropriate. In the second purchase the fee required by M must be added to the price actually paid or payable for the imported goods.

Advisory Opinion 5.1 Treatment of Cash Discount under the Agreement

When, prior to the valuation of imported goods, a buyer has availed himself of a cash discount offered by the seller, should that cash discount be allowed in determining the transaction value of the goods?

The Technical Committee on Customs Valuation expressed the following view:

Since the transaction value under Article 1 of the Valuation Agreement is the price actually paid for the imported goods, the cash discount should be allowed in determining the transaction value.

Advisory Opinion 5.2 Treatment of Cash Discount under the Agreement

When a cash discount offered by the seller is available but payment for the goods has not yet been made at the time of valuation, would the requirements of Article 1.1 (b) of the Agreement preclude using the sale price as a basis for the transaction value?

The Technical Committee on Customs Valuation expressed the following view:

The fact that a cash discount, although available, has not been availed of because payment has not yet been made at the time of valuation, does not mean that the provisions of Article 1.1. (b) apply; there is, thus, nothing that preludes using the sale price in establishing transaction value under the Agreement.

Advisory Opinion 5.3 Treatment of Cash Discount under the Agreement

When a cash discount is available to the buyer but payment has not been made at the time of valuation what amount should be accepted as a basis for transaction value under Article 1 of the Agreement?

The Technical Committee on Customs Valuation expressed the following view:

When a cash discount is available but payment has not yet been made at the time of valuation, the amount the importer is to pay for the goods should be taken as the basis for transaction value under Article 1. Procedures for determining what is to be paid may vary; for example a statement on the invoice might be accepted as sufficient evidence or a declaration by the importer as to the amount he is to pay could be the basis for action, subject to verification and to possible application of Articles 13 and 17 of the Agreement.

Advisory Opinion 6.1 Treatment or Barter of Compensation Deals under the Agreement

How are barter or compensation deals to be treated with reference to Article 1 of the Agreement?

The Technical Committee on Customs Valuation expressed the following opinion:

International barter takes various forms. In its purest form, it consists of an exchange of goods or services of approximately equal value, without recourse to a common unit of measurement (money) to express the transaction X tons of product A from country E are exchanged for Y units of product B from country I.

Disregarding the question as to whether a sale has occurred in cases of pure barter, where the transaction is neither expressed nor settled in monetary terms, and there is no transaction value or objective and quantifiable data for determining that value, the Customs value should be established on the basis of one of the other methods set out in the Agreement, taken in the sequence prescribed.

For a variety of reasons (e.g. bookkeeping, statistics, taxation, etc.), it is hard to dispense entirely with reference to money in international trade relations and. hence, pure barter is rarely encountered nowadays. Barter now usually involves more complex transactions in which the value of bartered goods is determined (e.g. on the basis of current world market prices) and expressed in monetary terms.

Example

Manufacturer F in the country of importation I has the opportunity of selling electrical equipment in country E provided an equivalent value of goods produced in country E is bought and exported from that country. After an arrangement between F and X trading

in plywood in country I. X imports into country I a quantity of plywood from country E and F exports electrical equipment to country E. the equipment being invoiced at 100.000 c.u.

The invoice presented on importation of the plywood also shows a value of 100. 000 c.u.: no financial settlement is however made between X and the seller in country E. the payment for the goods being covered by exportation of the electrical equipment by F.

Although many barter deals expressed in monetary terms are concluded without a financial settlement being made, there are situations, where money does change hands, for example, when a balance has to be paid in clearing operations, or in cases of partial barter where part of the transaction involves a money payment.

Example

Importer X in country 1 imports from country E two machines priced at 50.000 c.u.. on the understanding that only one fifth of this sum is to be the subject of a financial settlement, the rest being offset by the delivery of a specified quantity of textile products.

The invoice presented on importation shows a value of 50.000 c.u.: however, the financial settlement between X and the seller in country E involves only 10.000 c.u.. the balance being covered by the delivery of the textile products.

Under the legislation of some countries barter transaction expressed in monetary terms can be regarded as sales, such transaction however will of course be subject to the provisions of Article 1, paragraph 1 (b).

Barter or compensation deals should not be confused with certain sales transactions in which the supply of the goods, or their price, is governed by factors extraneous to the transaction concerned. This would apply in the following cases:

- The price of the goods is fixed by reference to the price of other goods which the buyer may sell to his supplier.

Example

Manufacturer F in country of exportation E has an agreement with importer X in country I to supply specialized equipment designed by F, at a unit price of 10.000 c.u.. on condition that importer X supplies him with relays, used in the production of the equipment, at a unit price of 150 c.u.

- The price of the imported goods depends on the purchaser's willingness to obtain from the same supplier other goods, in a specified quantity or at a specified price.

Example

Manufacturer F in country of exportation E sells leather goods to buyer X in country I at a unit price of 50 c.u. on condition that X also purchases a consignment of shoes at a unit price of 30 c.u.

It should be pointed out that these transactions too are subject to the condition laid down in Article 1, paragraph 1 (b).

Advisory Opinion 7.1 Acceptability of Test Values under Article 1.2 (b) (i) of the Agreement

Can a price below prevailing market prices for identical or similar goods be used as a test value for the purposes of Article 1.2 (b) (i) of the Agreement.

The Technical Committee on Customs Valuation expressed the following opinion:

When a price between unrelated parties has satisfied the conditions prescribed in Article I and, with any necessary adjustments in accordance with the provisions of Article S. has been accepted by Customs as a transaction value, that value can be used as a test value. That is not of course the case where a price is still the subject of an enquiry or where the final determination of the Customs value otherwise remains provisional (see Article 13 of the Agreement).

Advisory Opinion 8.1 Treatment under the Agreement of Credits in Respect of Earlier Transactions

How are credits made in respect of earlier transactions to be treated under the Valuation Agreement when valuing goods that have received the benefit of that credit?

The Technical Committee on Customs Valuation expressed the following view:

The amount of the credit represents an amount already paid lo the seller and accordingly is covered by the Interpretative Note to Article 1 on 'price actually paid or payable' which specifies that the price actually paid or payable is the total payment of the imported goods made, or to be made, to the seller. Thus the credit is part of the price paid and for valuation purposes must be included in the transaction value.

The treatment to be accorded by Customs to the previous transaction which gave rise to the credit must be decided separately from any decision on the proper Customs value of the present shipment. The decision whether adjustment may be made to the value of the previous shipment will depend on national legislation.

Advisory Opinion 9.1 Treatment of Anti-dumping and Countervailing Duties When Applying the Deductive Method

When imported goods which are subject to anti-dumping or countervailing duties fall to be valued by the deductive method under Article 5 of the Agreement, should those duties be deducted from the selling price in the country of importation?

The Technical Committee on Customs Valuation expressed the following opinion:

In the determination of Customs value under the deductive method, anti-dumping and countervailing duties should be deducted under Article 5.1 *(a)* (iv) as Customs duties and other national taxes.

Advisory Opinion 10.1 Treatment of Fraudulent Documents

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

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.

Advisory Opinion 11.1 Treatment of Inadvertent Errors and of Incomplete Documentation

Under the Agreement how should the documents which are incomplete or which are found to contain inadvertent errors be treated?

The Technical Committee on Customs Valuation expressed the following view:

In determining value under the Agreement, Customs administrations cannot be required to rely on documents which are incomplete in respect of relevant information or which contain inadvertent errors which have the effect of distorting the relevant information.

However, situations do arise when it becomes necessary to use the information contained in an incomplete document and to make further enquiries so as to obtain information or facts missing from such a document. Similarly only a part of a document might contain inadvertent error and reliance might be placed on other parts of the document which do not have any such error. Recourse could be taken to provisional clearance as provided by Article 13 of the Agreement pending importer or his agent furnishing complete information or causing the error in the document to he rectified.

Thus the treatment of documents which are incomplete or which contain inadvertent errors can differ from one case to another. In this regard, it is also recognized that there will be differences in the practices followed by Customs administrations and the degree of discretion prescribed by them

Advisory Opinion 12.1 Flexible Application of Article 7 of the Agreement

In the application of Article 7, can methods other than those set out in Articles 1 to 6 be used, if they are not prohibited by Article 7.2 (a) to (f) and are consistent with the principles and general provisions of the Agreement and of Article VII of the GATT?

The Technical Committee on Customs Valuation expressed the following opinion:

Paragraph 2 of the Interpretative Note to Article 7 provides that the methods to he employed under Article 7 should he those laid down in Articles 1 to 6 inclusive hut applied with a reasonable flexibility.

However, if a Customs value cannot he determined by using these methods even in a flexible manner, as a final resort the Customs value may be determined using other reasonable methods provided that such methods arc not precluded by Article 7.2

In determining the Customs value under Article 7, the method used must be consistent with the principles and general provisions of the Agreement and of Article VII of the GATT.

Advisory Opinion 12.2 Hierarchical Order in Applying Article 7

When applying Article 7. is it necessary to follow the hierarchical order with respect to the methods of valuation in Articles 1 to 6?

The Technical Committee on Customs Valuation expressed the following view:

There is no provision in the Agreement that specifically provides that the hierarchical order of Articles 1 to 6 should be followed when Article 7 is applied. However, Article 7 requires the use of reasonable means consistent with the principles and general

provisions of the Agreement and this indicates that where reasonably possible, the hierarchical order should be followed. Thus where several acceptable methods can be used to determine Customs value under Article 7, the hierarchy should be maintained.

Advisory Opinion 12.3 Use of Data from Foreign Sources in Applying Article 7

When applying Article 7 can Customs use information furnished by the importer but obtained by him from foreign sources?

The Technical Committee on Customs Valuation expressed the following view:

It is to he expected, in dealing with transactions which originate outside the country of importation, that a certain amount of data would come from foreign sources. However, Article 7 is silent as to the original source of information to be used in its application, merely requiring that such data be available in the country of importation. The source of the information would therefore not in itself be a bar to its use for the purposes of Article 7 provided that the information was available in the country of importation and Customs were able to be satisfied as to its truth or accuracy.

Advisory Opinion 13.1 Scope of the Word 'Insurance' under Article 8.2 (c) of the Agreement

What interpretation should be given to the word 'insurance' in Article 8.2 (c) of the Agreement?

The Technical Committee on Customs Valuation expressed the following opinion:

It is apparent from the context of paragraph 2 of Article 8 that that paragraph concerns charges connected with the shipment of the imported goods (cost of transport and transport-related costs). Hence the word 'insurance' used in subparagraph fey should be interpreted as referring solely to insurance costs incurred for the goods during the operations specified in Article 8.2 (a) and (b) of the Agreement.

Advisory Opinion 14.1 Meaning of the Expression 'Sold for Export to the Country of Importation

What interpretation should be given to the expression "sold for export to the country of importation' in Article 1 of the Agreement?

The Technical Committee on Customs Valuation expressed the following opinion:

The Council's Glossary of International Customs Terms defines the term importation as 'the act of bringing any goods into a Customs territory and the term exportation as 'the act of taking any goods out of the Customs territory. Therefore, the fact that the goods are presented for valuation of itself establishes their importation which, in turn, establishes the fact of their exportation. The only remaining requirement then, is to identify the transaction relating thereto.

In this respect, there is no need that the sale takes place in a specific country of exportation. If the importer can demonstrate that the immediate sale under consideration took place with the view to export the goods to the country of importation, then Article 1 can apply. It follows that only transactions involving an actual international transfer of goods may he used in valuing merchandise under the transaction value method.

The following examples illustrate the above principles:

Example 1:

Seller S in the exporting country X enters into a contract to sell electric appliances to importer A in the importing country 1 at a price of 5.75 c.u. per piece. S concludes an agreement with manufacture M also in country X to manufacture the goods. Manufacturer M on behalf of S. ships the goods to A in country I. M's selling price to S is 5 c.u. per piece.

In this case, the transaction between S and A involves an actual international transfer of goods and constitutes a sale for export to the country of importation: it would, therefore, be a basis for valuation under Article 1 of the Agreement.

Example 2:

Buyer B in country of importation 1 purchases goods from seller S in the same country 1. The goods are stocked by S in country X. Necessary arrangements for shipment and export of the goods from country X are completed by S and the goods arc imported by B into country 1.

It is not necessary that the sale takes place in a specific country of exportation. Whether seller S is located in country X or 1 or a third country is not a relevant factor. The transaction between buyer B and seller S is a sale for export to the country of importation and would be the basis for valuation of the goods under Article 1.

Example 3:

Seller S in country X sells goods to buyer B in country 1. The goods are shipped from country X in bulk and are subsequently wrapped and put into packages by seller S at a transit port located in country T before being imported into country 1.

The principle applicable to Example 2 would apply to this example also. Whether the country of export is X or T is not a material issue in this case and the sale agreement between seller S and the buyer B constitutes a sale for export to the country of importation and would be the basis for valuation of the goods under Article 1.

Example 4:

Seller S in country X sells goods to buyer A in country I .and accordingly ships the goods. While the goods are on the high sea, buyer A informs seller S that he is unable to make the payment and take delivery of the goods. The seller is able to locate another buyer B also in country 1 and arranges the sale and delivery of the goods to buyer B. Accordingly B imports the goods into country I.

In the above example, the sale between seller S and buyer B results in the importation of the goods which, in turn, establishes it as being a sale for export. The transaction constitutes an international transfer of goods and would be the basis for valuation of the goods under Article 1.

Commentaries

Commentary 1.1 Identical or Similar Goods for the Purpose of the Agreement

This commentary examines the question of identical and similar goods in the general context of the application of Articles 2 and 3.

The principles in question are set out in Article 15: they provide that 'identical goods' are those goods that are the same in all respects, including:

(a) physical characteristics,
(b) quality, and
(c) reputation.

Minor differences in appearance do not preclude goods otherwise conforming to the definition from being regarded as identical.

'Similar goods' are goods which, although not alike in all respects, have:

(a) like characteristics, and

(b) like component materials which enable them to:

(c) perform the same function, and

(d) be commercially interchangeable

When determining whether goods are similar, consideration is to be given, among other factors, to the quality of the goods, their reputation and the existence of a trademark.

Article 15 also provides that only goods produced in the same country as the goods being valued can be considered identical or similar to those goods, and it specifies that goods produced by persons other than the producer of the goods being valued be taken into account only when there are no identical or similar goods made by producers of the goods being valued. It further provides that goods incorporating or reflecting engineering, development, artwork, design work, and plans and sketches undertaken in the country of importation are not covered by the term 'identical goods' or 'similar goods'.

Before considering the application of those principles, it would be, useful to examine the determination of identical and similar goods in the general context of the application of Articles 2 and 3. Those two Articles are not "expected to come into question frequently since Article 1 will be applied to the vast majority of importations. In those instances in which Article 2 or 3 are applied, there may have to be consultations between Customs and the importer with a view to arriving at a value under one of those Articles. 'These consultations, together with information from other sources, should enable Customs to determine what, if any goods might be considered identical or similar for purposes of the Agreement. Obviously, there will be many instances where the answer is self-evident and no market enquiries or consultations with importers are necessary.

The principles in Article 15 must be applied on the basis of the particular facts in the market in question with respect to the goods being compared. The questions that might arise in making such determinations will vary because of the nature of the goods being compared and because of differences in market conditions. A careful analysis of the facts in each case, in the light of the principles set out in Article 15, will be necessary to arrive at sound decisions.

The following examples are intended to illustrate application of the principles for determining whether goods are identical or similar in accordance with Article 15; they are not meant to form part of a series of decisions on specific cases. Each example is limited in its scope: in addition to the conditions set out in each of them any remaining requirements of Article 15 would of course have to be fulfilled before goods could be considered as identical or similar.

Example No. 1

Steel sheets of identical chemical composition, finish and size imported for different purposes

Although the importer is to use some of the sheets for automobile bodies, and others for furnace liners, the goods are nevertheless identical.

Example No. 2

Wallpaper imported by interior decorators and by wholesale distributors

Wallpaper which is identical in all respects remains identical for the purposes of Article 2 of the Agreement even if it is imported at different prices by interior decorators on the one hand and by wholesale distributors on the other.

Although differences in price might indicate differences in quality or reputation which are factors to be taken into account in considering whether goods are identical or similar, price itself is not such a factor. Adjustment for commercial level and/or quantity may of course be necessary in applying Article 2.

Example No. 3

Garden insecticide sprayers which are unassembled and goods of identical design already assembled

The sprayer consists of two dismountable parts: (1) a pump and nozzle affixed to a lid and (2) a container for the insecticide. In order to use the sprayer it is disassembled, the container is filled with insecticide, and the lid is screwed on; the sprayer is then ready for use. The sprayers being compared are identical in all respects including physical characteristics, quality and reputation, except that in one case they are assembled and in the other unassembled.

An assembly operation will normally preclude treating assembled and unassembled goods as identical or similar, but when as in this case, the goods are designed to be assembled and disassembled in the ordinary course of their use, the nature of the assembly operation would not preclude them from being considered identical.

Example No. 4

Tulip bulbs of the same size but of different varieties, producing flowers of approximately the same shape and size and of the same color

Since the bulbs are not of the same variety, they are not identical goods: however, because they produce flowers of approximately the same size and shape and of the same color, and they are commercially interchangeable, they are therefore similar goods.

Example No. 5

Inner tubes imported from two different manufacturers

Rubber inner tubes in the same range of sizes are imported from two different producers, both located in the same country. While each producer uses a different trademark, the inner tubes made by both are to the same standard, are of the same quality, enjoy equivalent reputations and are used by motor vehicle manufacturers in the country of importation.

As the inner tubes bear different trademarks they are not the same in all respects and should not be regarded as identical in terms of Article 15.2 *(a)*.

Although not alike in all respects, the inner tubes do have like characteristics and component materials which enable them to perform the same functions. As the goods are made to the same standard, are of the same quality, have equivalent reputations and carry trademarks, they should be considered similar, even though the trademarks are different.

Example No. 6

Normal grade sodium peroxide for bleaching purposes compared with a special grade of sodium peroxide used for analytical purposes

The special grade of sodium peroxide is manufactured by a process using very pure raw material in dust form; it is thus much more expensive than the normal grade. The normal grade sodium peroxide cannot be used in place of the special grade because the normal grade is not pure enough to meet analytical specifications and neither is it clearly soluble nor in dust form. Since the goods are not the same in all respects they are not identical. With respect to similarity, the special grade would not be used for bleaching purposes, or for the large scale production of chemicals, as the price of the special grade is prohibitive for these applications. While both kinds of sodium peroxide certainly have like characteristics and like component materials, they are not commercially interchangeable since the normal grade could not be used for analytical purposes.

Example No. 7

Ink of paper quality and ink of paper and textile quality

To be similar .for the purposes of Articles 3 and 15.2 *(b)* of the Agreement, goods must inter alia be commercially interchangeable with each other. Ink of a quality suitable only for paper printing would not be similar to ink of a quality for paper and textile printing, even though the latter would be commercially acceptable in the paper printing trade.

Commentary 2.1 Goods Subject to Export Subsidies or Bounties

Broadly speaking, export subsidies and bounties are instruments of trade policy which take the form of economic aid granted by governments to natural or legal persons or to administrative bodies, either directly or indirectly; they are intended to promote the production, manufacture or exportation of a product. In this respect the Agreement on Interpretation and Application of Articles VI. XVI and XXIII of the GATT. which was signed at Geneva on 12 April 1979 is noted.

In Article 19 of the above-mentioned Agreement it is stated that "no specific action against a subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement'. However, since a footnote explains that this paragraph is not intended to preclude action under other relevant provisions of the General Agreement, where appropriate, questions arise in respect of treatment of subsidies under the Agreement on Implementation of Article VII.

The first point to decide is whether a subsidized price can in fact be accepted for the purposes of establishing a transaction value under Article 1. In the case of subsidized goods, as in any other case, to reject the transaction value there must be non-fulfilment of one of the conditions set out in Article 1.1. The question here is whether a subsidy could be regarded as a condition or consideration to which the sale or price is subject and for which a value cannot be determined. However, since the basic concept of the Agreement relates to the transaction between the buyer and the seller and what takes place directly or indirectly between them, a condition or consideration in this context must be interpreted as an obligation between the buyer and the seller. Accordingly, Article 1.1 *(b)* cannot apply merely because a sale is subsidized.

Another question is whether the amount of the subsidy could be regarded as forming part of the total payment. The Interpretative Note to Article 1 of the Agreement states that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. A subsidy received by the seller from his government is clearly not a payment by the buyer and does not therefore form part of price paid or payable.

A further question to be answered in considering the treatment of subsidies is whether the price paid or payable by the buyer can be increased by the amount of the subsidy to determine the transaction value. Article 8.4 of the Agreement states that no additions shall be made to the price actually paid or payable in determining that Customs value except as provided in the Article; since a subsidy cannot be regarded as equivalent to any of the elements mentioned in Article 8. there is no possibility of making an adjustment under this head.

It follows from the above that the treatment to be applied for the valuation of subsidized goods is the same as that applied to other goods.

Commentary 3.1 Goods Sold at Dumping Prices

Article VI of the General Agreement on Tariffs and Trade defines dumping as the introduction of products of one country into the commerce of another country at less than the normal value of the products; it also provides that dumping is to be condemned and may be offset or prevented by anti-dumping duties if it causes or threatens material injury to an established industry in the territory of a Contracting Party or materially retards the establishment of a domestic industry.

According to the Preamble to the Valuation Agreement the Parties recognize 'that valuation procedures should not be used to combat dumping'. Therefore, where the existence of dumping of any description is suspected or established, the correct procedure for combating it is by means of the anti-dumping rules in effect in the country of importation as they may be : applicable. There can thus be no question of:

(a) rejecting the transaction value as a basis for valuing the dumped goods, unless one of the conditions laid down in Article 1.1 is not fulfilled;

(b) adding to the transaction value an amount to take account of the ; margin of dumping.

It follows from the above that the treatment to be applied for the valuation of dumped goods is the same as that applied to goods imported at a price below prevailing market prices for identical goods.

Commentary 4.1 Price Review Clauses

In commercial practice some contracts may include a price review clause whereby the price is only provisionally fixed, the final determination of the price payable being subject to certain factors which are set forth in the provisions of the contract itself.

The situation can occur in a variety of ways. The first is where the goods are delivered some considerable time after the placing of the original order (e.g. plant and capital equipment made specially to order); the contract specifies that the final price will be determined on the basis of an agreed formula which recognizes increases or decreases of elements such as cost of labour, raw materials, overhead costs and other inputs incurred in the production of the goods.

The second situation is where the quantity of goods ordered is manufactured and delivered over a period of time; given the same type of contract specifications described in paragraph 2 above, the final price of the first unit is different from that of the last unit and all other units, notwithstanding that each price was derived from the same formula specified in the original contract.

Another situation is where the goods are provisionally priced but, again in accordance with the provisions of the sales contract, final settlement is predicated on examination or analysis at the time of delivery (e.g. the acidity level of vegetable oils, the metal content of ores, or the clean content of wool).

The transaction value of imported goods, defined in Article 1 of the Agreement, is based on the price actually paid or payable for the goods. In the Interpretative Note to that Article, the price actually paid or payable is the total payment made or to be made by the buyer to the seller for the imported goods. Hence, in contracts containing a review clause, the transaction value of the imported goods must be based on the total final price paid or payable in accordance with the contractual stipulations. Since the price actually payable for the imported goods can be established on the basis of data specified in the contract, price review clauses of the type described in this commentary should not be regarded as constituting a condition or consideration for which a value cannot be determined (see Article 1.1 *(b)* of the Agreement).

As to the practical aspects of the matter, where the price review clauses have already produced their full effect by the time of valuation, no problems arise since the price actually paid or payable is known. The situation differs where price review clauses are linked to variables which come into play some time after the goods have been imported.

However given that the Agreement recommends that, as far as possible, the transaction value of the goods being valued should serve as a basis for Customs valuation, and given that Article 13 provides for the possibility of delaying the final determination of Customs value, even though it is not always possible to determine the price payable at the time of importation, price review clauses should not, of themselves, preclude valuation under Article 1 of the Agreement.

Commentary 5.1 Goods Returned after Temporary Exportation for Manufacturing, Processing or Repair

When goods which are reimported after manufacturing, processing or repair abroad are declared for home use national legislations may or may not provide for total or partial exemption from import duties and taxes. In either instance however the determination of the value of the goods as reimported must of course be made in accordance with the applicable provisions of the Agreement.

Those situations where total or partial exemptions are granted are encompassed by the term 'Temporary exportation for outward processing', which is denned in Annex E.8. of the Kyoto Convention as:

"Customs procedure under which goods which are in free circulation in a Customs territory may be temporarily exported for manufacturing, processing or repair abroad and then reimported with total or partial exemption from import duties and taxes"

Where such exemptions apply, the question that arises is whether, at importation, the products may be regarded as a separate category of importation whose treatment is a matter of Customs technique involving no question of valuation or whether they can and should be valued at importation like any other goods.

In this regard it is noted that under provisions for exemption the assessment of import duties and taxes may sometimes be made by deducting from the amount of the import duties and taxes applicable on the full value of the reimported goods the amount of the import duties and taxes that would be charged on importation of the goods temporarily exported. The assessment may alternatively be based on the value added by processing of the goods abroad, and this may involve apportioning the fail value of the reimported goods between the goods temporarily exported and the process abroad. In some instances moreover the rate of duty will depend on the value of the reimported goods, which must then be established for this purpose.

In all these cases it will be necessary to determine the full value of the goods as reimported in accordance with the applicable provisions of the Agreement (as for the

importations referred to in paragraph 1 above). The method used for this purpose as well as the result should be uniform for all administrations. The treatment under any provisions for relief is a matter separate from valuation.

The following examples illustrate the range of situations which can arise.

Examples

(i) Importer X of machine-tools in country I imports certain specialized machines manufactured abroad. As imported these machines have been equipped with electric motors supplied by X to exporter E.

(ii) Importer X in country I imports men's shirts. The fabric for the shirts is supplied by X to exporter E, who is responsible only for the making up and the provision of accessories (buttons, thread and labels).

(iii) Trader X imports into country I plastic gear wheels. These products have been manufactured abroad by exporter E using polyamide moulding material supplied by X.

(iv) Company X in country I imports a machine-tool after having sent it abroad for repair; on reimportation company X pays only the repair charges to exporter E.

Clearly, in the cases envisaged, both the transaction giving rise to the importation of the goods in question and the price made relate not to the goods in the state in which they are imported, but to the materials used and the services supplied by the foreign manufacturer, and in some cases to the services alone.

However the following points should be borne in mind.

Article S.I *(b)* of the Agreement stipulates that in determining the transaction value of the imported goods there shall be included the value, apportioned as appropriate, of certain goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods.

It is thus possible to establish the transaction value under Articles 1 and 8, taken together, in cases of the kind illustrated by examples (i) to (iii) where it could be said that a sale has taken place, and wherever the conditions of Article 1 are fulfilled the transaction value so established will constitute the Customs value of the goods in the state in which they are imported.

Situations of the kind illustrated by example (iv), where it is more a matter of the supply of services, at first glance appear to constitute a different case. However, the following considerations should he home in mind:

- As far as possible all reimported goods should be treated in the same way for valuation purposes, particularly in the light of the statement in the Preamble 'that Customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply".
- The basic intention of the Agreement is that the transaction value established under Articles 1 and 8 should be used to the greatest extent possible for Customs valuation purposes.
- Advisory Opinion 1.1 on the concept of 'sale' in the Agreement states that uniformity of interpretation and application can be achieved by taking the term 'sale' in the widest sense, to be determined only under the provisions of Articles 1 to 8 read together.

On the basis of the above argumentation it could be concluded that goods imported after repair abroad should, for valuation purposes, be treated in the same way as those obtained as a result of manufacturing or processing. Otherwise, the hierarchical sequence of

the Agreement will have to be followed. Since in the specific instance of repair it is unlikely that one of the other methods laid down by the Agreement would be applicable, Article 7 would apply for example by means of a flexible interpretation of the provisions of Articles 1 and 8 taken together.

Administrations applying the rules of Customs valuation in this context are, of course, free to grant exemption from duty under national legislation.

Commentary 6.1 Treatment of Split Shipments under Article 1 of the Agreement

For the purposes of this commentary the term 'split shipments' means consignments of goods which, though forming the subject of one transaction between a buyer and a seller, are not presented for clearance in a single shipment for reasons connected with delivery, transportation, payment or the like and are consequently imported in partial or successive shipments, either through the same Customs office or through different Customs offices.

Most cases of goods being imported in split shipments will fall into one of the following three categories:

A. The goods constitute a complete industrial installation or plant and are split up because they come from different sources, or because it would be physically impossible to import them in a single shipment, or because of the necessity of convenience of staggering the shipments to conform to a plant assembly schedule.

B. The shipments are split because the quantity is such that it would be impossible or inconvenient for the parties to import all the goods in one shipment.

C. The shipments are split for reasons of geographical distribution.

A. *Splitting up of industrial installations or plants*

This type of case concerns the importation of certain groups of goods, and whole installations which, on account of their size, have to be imported in several shipments. The treatment of these split shipments for tariff and Customs technique purposes will of course depend on national legislation in the country of importation.

The Customs value of each shipment will be based on the price actually paid or payable, that is. an appropriate proportion of the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods, as reflected in the transaction concluded by the parties.

If the partial shipment has been the subject of a separate invoice it will be necessary to add to the amount of the invoice the adjustments determined under Article 8 (where appropriate making an apportionment for the total transaction) and to treat deductions similarly.

If the partial shipment has not been the subject of a separate invoice, in determining its Customs value, an apportionment of the total value of the transaction could be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles.

In general in these cases the Customs value of each consignment cannot be finally determined at the time of importation since such importations often involve elements such as engineering costs or price review clauses (see Commentary 4.1). If it becomes necessary to delay the final determination of the Customs value, the importer will nevertheless be able to withdraw his goods from Customs by virtue of Article 13 of the Agreement. The provisional duty assessed by the Customs in cases where goods are imported in split shipments may of course be amended when the Customs value is finally determined.

B. Shipments split for reasons of quantity

In this case it is assumed that the transaction involves a quantity of goods consisting of identical units or sets sold at an agreed unit price. The delivery dates may have been fixed in advance or left to the convenience of the parties.

Since for the purposes of Article 1 neither the time at which the sale contract was concluded nor market fluctuations after the date when the contract was concluded have to be taken into account (see Explanatory Note 1.1), the determination of the Customs value of the goods is to be based on the price actually paid or payable.

However, if importations in split shipments are not effected within a reasonable time reflecting the normal commercial practice in the trade concerned, the Customs administration may consider it necessary to make enquiries concerning the price actually paid or payable, verifying especially whether there is a complementary agreement which modifies the original price. This action could be taken under the provisions of Articles 13 and 17 of the Agreement.

The unit price may well depend on the total number of units involved in the transaction, but Article 1.1 *(b)* is nevertheless not applicable. When the Interpretative Note to paragraph 1 *(b)* of Article 1 quotes as an example of such a condition the case where the seller establishes the price of the imported goods on condition that the buyer also acquires a certain quantity of *other* goods, it lays down a principle relating to *other* goods, not to the *same* goods involved in a single transaction.

C. *Shipments split for reasons of geographical distribution*

This situation is in fact a usual practice in international trade. The buyer agrees to buy from a seller in a single transaction a quantity of goods to be sent in separate shipments to two or more ports or Customs offices of one country of importation or two or more countries of importation. The Customs value of the fraction of the goods imported through each Customs office or each Customs territory has to be determined under Article 1 of the Agreement on the basis of the price actually paid or payable for this fraction.

Conclusion

In the light of the above considerations concerning the treatment of the various types of split shipments, it will be seen that the valuation method envisaged in Article 1 can be applied to split shipments provided the requirements of Article 1 can be met.

Commentary 7.1 Treatment of Storage and Related Expenses under the Provisions of Article 1

I. *General*

The treatment of storage expenses for Customs valuation purposes requires the determination of the exact nature of the expenses as well as where and by whom they are incurred.

This commentary is based on the assumption that the transactions in question meet the requirements of Article 1 of the Agreement. If this is not the case. Article 1 would not be applicable and one of the other methods in the Agreement, selected in the prescribed sequence, would have to be used.

The commentary covers only the aspect of storage and the expenses related to moving the goods into and out of storage. It does not encompass other activities such as cleaning, sorting or repacking which may take place in a warehouse.

No distinction is to be made between ordinary storage warehouses and Customs warehouses where goods are stored under Customs control in a designated place without payment of import duties and taxes. The valuation treatment of storage expenses would be the same in either case.

The situations regarding storage in which a valuation question may arise include the following:

- the goods are in storage abroad at the time of the sale for export to the country of importation;
- the goods are put into storage abroad subsequent to their purchase but prior to their export to the country of importation;
- the goods are put into storage in the country of importation prior to their clearance for home use;
- the goods are temporarily stored incidental to their transport.

The treatment of expenses incurred in these situations is examined in Parts II to V below.

While this list of situations is not exhaustive, the examples serve to illustrate the general principles involved in the treatment of storage and related expenses. Obviously each case must be considered individually having regard to the relevant circumstances.

II. *The goods are in storage abroad at the time of the sale for export to the country of importation*

Examples

(a) Buyer A in country of importation I purchases from seller B in country of exportation X goods warehoused by B in country X. The ex-warehouse price paid by A to B includes the warehousing expenses incurred.

(b) Buyer A in country of importation I purchases at an ex-factory price from seller B in country of exportation X goods which, at the time of the transaction, are warehoused by B in country X. In addition to the price for the goods, buyer A pays seller B the warehousing expenses on the basis of a separate invoice.

(c) Buyer A in country of importation I purchases at an ex-factory price from seller B in country of exportation X goods which, at the time of the transaction, are warehoused by B in country X. In addition to the price for the goods, buyer A is required to pay the warehouse proprietor the storage expenses incurred by seller B.

The Note to Article 1 specifies that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.

It can be assumed that the warehousing expenses will be recovered by the seller as part of the price actually paid or payable by the buyer. If not, these expenses should be included in this price if they constitute a payment made directly or indirectly to the seller or for his benefit.

Thus, in the case of the examples above, the warehousing expenses will be part of the price actually paid or payable for the goods.

III *The goods are put into storage abroad subsequent to their purchase but prior to their export to the country of importation*

Example

Buyer A in country of importation I purchases from seller B in country of exportation X goods which he warehouses in country X, on his own account, before importation into country I.

Expenses incurred by the buyer *after* purchase cannot be considered as a payment made directly or indirectly to the seller or for his benefit; hence they are not part of the price actually paid or payable. On the other hand, these expenses do represent activities undertaken by the buyer on his own account; the costs of these activities are to be added to the price actually paid or payable for the imported goods only if Article 8 provides for adjustment in respect of them. In this example no such provisions exist and the storage expenses would not be part of the Customs value.

IV. *The goods are put into storage in the country of importation prior to their ,: clearance for home use*

Example

Buyer A in country of importation 1 purchases goods from seller B. Upon arrival at the port of importation, buyer A stores the goods on his own account in a Customs warehouse pending the starting of his production schedule in which the imported goods are to be manufactured into other products. Three months later buyer A presents the declaration for home use and pays the storage charges.

The Note to Article 1 specifies that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. In that respect it is also stated that the costs of activities undertaken by the buyer on his own account, other than those for which an adjustment is provided in Article 8, shall not be added to the price actually paid or payable.

Expenses incurred by the buyer *after* purchase cannot be considered as a payment made directly or indirectly to the seller or for his benefit; hence they are not part of the price actually paid or payable. On the other hand, these expenses do represent activities undertaken by the buyer on his own account; the costs of these activities are to be added to the price actually paid or payable for the imported goods only it Article 8 provides for adjustment in respect of them. In this example, no such provision exists and the storage expenses would not be part of the Customs value.

V. *The goods are temporarily stored incidental to their transport*

Examples

(a) Importer I purchases goods ex-factory in the country of exportation. Storage expenses are incurred at the port of export pending the arrival of the exporting vessel.
(b) At importation, a period of time elapses between the unloading of the goods and the lodgement of the Customs declaration. During this period, the goods are stored under Customs control thus incurring storage expenses.

Expenses of this kind, arising out of incidental storage of goods during transport, should be regarded as charges associated with the transport of goods. They are, therefore, to be

treated in accordance with the provisions of Article 8.2 *(b)* of the Agreement or if the expenses are incurred after importation, they must be treated in accordance with the Note to Article 1 which provides that the cost of transport after importation shall not be included in the Customs value provided it is distinguished from the price actually paid or payable for the imported goods.

Commentary 8.1 Treatment of Package Deals

For the purpose of this commentary a package deal is taken to be an agreement to pay a lump sum for a correlated group of goods, or a group of goods sold together, the price of the goods sold constituting the only consideration.

Examples of package deal transactions involving potential valuation problems:

(A) Different goods are sold and invoiced at a single overall price;
(B) Goods of different quality sold and invoiced at a single overall price are only partially declared for home use in the country of importation;
(C) Different goods, included in the same transaction, are invoiced at individual prices established solely for tariff or other reasons.

Valuation treatment

(A) Different goods are sold and invoiced at a single overall price.

Presuming that the other conditions of Article 1 have been met, the fact of a single overall price for different goods does not constitute an impediment to establishing transaction value. In those instances where the goods are classifiable under separate tariff headings at different rates of duty, the overall price which has been negotiated as part of a package deal which meets the requirements of Article 1 of the Agreement should not be rejected when applying that Article, solely for the purposes of tariff classification.

In addition there is the practical problem of the proper apportionment of the overall price among the goods which are classifiable in different headings. Several methods are possible including, for example, the use of prices or values of identical or similar goods in previous importations, if such methods can provide a valid indication of the price of the various goods covered by the package deal. Suitable price breakdowns, based on generally accepted accounting principles, could also be supplied by the importer.

(B) Goods of different quality sold and invoiced at a single overall price are only partially declared for home use in the country of importation.

In this situation, the nature of the problem is different and can be -illustrated by the following example:

> A consignment comprising goods of three different qualities (top quality A. average quality B and low quality C) is purchased at an overall unit price of 100 currency units per kilo. In the country of importation, the buyer declares quality A for home use at 100 currency units per kilo but assigns the other qualities to some other procedure.

Since the overall price actually paid or payable has been agreed for a set of goods of various qualities there is no selling price for the goods declared for home use and Article 1 of the Agreement is therefore not applicable in this instance.

Article 1 of the Agreement is applicable however if in the above example, instead of only one of the different qualities of goods being declared for home use. a specified and equal proportion (1/3 or 1/2. for example) of each of the products contained in the total package making up the consignment were declared for home use. It would then be possible to retain as a basis for transaction value, under the terms of Article 1. the price represented by the proportion of the total price which the quantity of goods declared for home use bears to the total quantity purchased.

(C) Different goods, included in the same transaction, are invoiced at individual prices established solely for tariff or other reasons as illustrated in the following example:

> Product A and B, which have been purchased in a package deal at a price of 100 c.u. are invoiced at 35 and 65 in order to reduce the total liability of the importer for the Customs duty (the rates being 15 per cent for product A and 6 percent for product B), without overall price of the transaction payable to the seller.

In the above example the prices have been set or modified (some upwards and some downwards) to inappropriately reduce liability for Customs duties. This type of practice may also be used to circumvent antidumping measures or quotas.

Noting the fact that a case of price manipulation of the kind described above is a matter for the Customs enforcement authorities, the imported goods nevertheless need to be valued for Customs purposes.

In this connection it should be noted that the off-setting arrangement in the example in question represents a condition or consideration for which value cannot be determined with respect to the goods being valued. Therefore, the provisions of Article 1.1 *(b)* apply and valuation cannot be based on the transaction value of the imported goods.

Commentary 9.1 Treatment of Costs of Activities Taking Place in the Country of Importation

This commentary examines the treatment of costs of activities taking place in the country of importation within the context of Article 1 and its Interpretative Note.

In dealing with this question, a listing of activities in the country of importation and their treatment for valuation purposes would not be a useful approach. Such a listing could not be exhaustive and moreover, in many instances, the valuation treatment of any given activity would differ depending on the circumstances of the transaction. On the other hand, a brief statement of principle would cover a wide range of possibilities.

In this respect, in the determination of the Customs value under Article 1 of the Agreement, when the costs of activities occurring after importation are not included in the price actually paid or payable, they are not to be included in the Customs value unless it is specifically provided for by virtue of Article 8. This includes those which might be regarded of benefit to the seller but undertaken by the buyer on his own account. 4. Conversely, when such costs are included in the price actually paid or payable for the imported goods, they are not to be deducted from that price unless there is compliance with the relevant provisions of the Interpretative Note to Article 1 of the Agreement which states that:

The Customs value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable for the imported goods:

(a) charges for construction, erection, assembly, maintenance or technical assistance, undertaken after importation on imported goods such as industrial plant, machinery or equipment,
(b) the cost of transport after importation,
(c) duties and taxes of the country of importation (considered to be by their nature distinguishable, see Advisory Opinion 3.1)

The meaning of the term 'importation' needs to be clearly established. In the Customs Co-operation Council's Glossary of International Customs Terms, the term importation is denned as 'the act of bringing or causing any goods to be brought into a Customs territory'. It is noted however that various national legislations provide more specific definitions to the term than the one above. Therefore any reference to that term must be within the context of the national legislation of the country in question.

With respect to subparagraph (a) of the Interpretative Note to Article 1. the phrase 'undertaken after importation' should be flexibly interpreted as covering activity carried out in the country of importation. In that context, the cost of activities covered in subparagraph («J would also be excluded from the Customs value even if they take place prior to importation so long as they are carried out as part of the installation of the imported goods. An example of this would be a charge for the laying of a concrete foundation undertaken prior to the importation of the machinery which is subsequently erected on that foundation.

On the specific question regarding transport, it is worth noting that while subparagraph (6) of the Interpretative Note to Article 1 refers to the cost of transport after importation, it would be consistent with the overall thrust of the Interpretative Note as it relates to post importation charges and costs to encompass within this expression loading, unloading and handling costs taking place after importation. The same rationale would also apply to post importation insurance charges.

Commentary 10.1 Adjustment for Difference in Commercial Level and in Quantity under Article 1.2 (h) and Articles 2 and 3 of the Agreement

When applying the Agreement, it may be necessary to make an adjustment to take account of demonstrated differences in commercial level and quantity in respect of Articles 1.2 (b) (test values), 2.1 (b) (identical goods) and 3.1 (b) (similar goods). Although the wording in Article 1.2 f/y is somewhat different from that found in Article 2.1 (b) and 3.1 (b), it is clear that the principles involved are the same: account has to be taken of differences attributable to commercial level or quantity and it must be possible to make the necessary adjustment on the basis of demonstrated evidence which clearly establishes its reasonableness and accuracy.

Where Customs is made aware of a transaction which may be used to establish a test value under Article 1.2 (6) or the transaction value of identical or similar goods under Articles 2 and 3, it must be established whether that transaction was made at the same commercial level and in substantially the same quantities as that of the goods being valued. If the commercial level and quantities are comparable in terms of that transaction no adjustment for these factors is necessary.

However, if there are differences in commercial level and quantity it will then be necessary to determine whether the price or value is affected' by those differences. It is important to bear in mind that the mere existence of a difference in commercial level or quantity would not of itself require that an adjustment be made; an adjustment will be necessary only if a difference in the price or value results from a difference in commercial level or quantity and then the adjustment must be made on the basis of demonstrated evidence which clearly establishes its reasonableness and accuracy. If this requirement cannot be met, the adjustment cannot be made.

The following examples illustrate situations involving questions of adjustments only for different commercial levels and quantities and do not include other adjustments such as for differences in distances and modes of transport. For the purpose of the examples on Articles 2 and 3, it is presumed that the Customs value of the imported goods cannot be determined under the provisions of Article 1 and is to be determined on the basis of the previously accepted transaction value of identical or similar goods.

The following examples which deal with identical goods have equal application to similar goods.

Application of Articles 2 and 3
Same commercial level and quantity - no adjustment

Example No. I

Supplier	Quantity	Unit price	Importer	Level
E	1.700 articles	5 c.u. c.i.f.	I	Wholesaler

There is the following transaction value involving a sale of identical goods:

Seller	Quantity	Unit price	Importer	Level
R	1.700 articles	6 c.u. c.i.f.	P	Wholesaler

In this case no adjustments are necessary and the transaction value of 6 c.u. c.i.f. would be the Customs value under Article 2.

Same commercial level, different quantity - No adjustment

Situations can also arise where there are differences in either level or quantity but in which those differences have no commercial relevance be cause the seller does not take either level or quantity into account when selling his goods. In such cases also no adjustment is required.

Example No. 2

Supplier	Quantity	Unit price	Importer	Level
E	2.000 articles	5 c.u. c.i.f.	I	Wholesaler

There is the following transaction value for identical goods:

Seller	Quantity	Unit price	Importer	Level
E	1,700 articles	6 c.u. c.i.f.	P	Wholesaler

Customs have determined that R sells his goods at a price of 6 c.u. to all purchasers who buy at least 1,000 units of his goods but does not otherwise vary his price according to the quantity purchased. In this case, although there is a difference in quantities, that difference has not affected the price because the seller of the identical goods does not vary his price within the quantity range in which both sales were made: therefore, no adjustment for quantity is required. The transaction value of 6 c.u. c.i.f. would be the Customs value under Article 2.

Different commercial level, different quantity – No adjustment

Example No. 3

Supplier	Quantity	Unit price	Importer	Level

E	1,500 articles	5 c.u. c.i.f	I	Wholesaler

There is the following transaction value for a sale of identical goods:

Seller	Quantity	Unit price	Importer	Level
R	1,200 articles	6 c.u. c.i.f.	P	Retailer

R does not vary his price according to level of purchase but will sell to anyone who purchases at least 1,000 units at 6 c.u. each. In this example, although there is a difference in commercial level, no difference in price is attributable to level because the seller of the identical goods sells to all purchasers without regard to commercial level. Also, since both transactions are comparable with respect to the quantity in that they are both in excess of 1.000 units, no adjustment for quantity is required. In this case the transaction value of 6 c.u. c.i.f. would he the Customs value under Article 2. : .

Different commercial level, different quantity – Adjustment

In those instances where a difference in price is attributable to commercial level or quantity, an adjustment must he made in order to arrive at a value at the same commercial level and for substantially the same quantities as the goods being valued. When making such adjustment, the sales practices of the seller of the identical or similar goods is the governing factor.

If an adjustment is necessary because of differences in quantity, the amount of the adjustment should be readily determinable. With respect to commercial level, however, the criteria used may not be that evident. Customs will have to examine the sales practices of the seller of the identical or similar goods. Once the seller's practice is clear, an examination of the activities of the importer of the goods to be valued should provide a basis for determining what commercial level the seller of the identical or similar goods would accord to the importer. Development of this information, as noted in the general introductory commentary, with require consultation with the parties concerned.

Example No. 4

Supplier	Quantity	Unit price	Importer	Level
E	1,700 articles	4 c.u. c.i.f	I	Wholesaler

There is the following transaction value for a sale of identical goods:

Seller	Quantity	Unit price	Importer	Level
F	2,300 articles	4.75 c.u. c.i.f.	P	Wholesaler

Customs have established that a price list from which F sells is bona fide and that he sells his goods to all purchasers at a price which varies according to the quantity purchased: for purchasers who buy less than 2,000 articles the price is 5 c.u. c.i.f., while for those who buy 2,000 or more articles the unit price is 4.75 c.u. c.i.f.

The difference in quantities purchased is a commercially relevant factor which affects the price at which the goods are sold and an adjustment must be made for the

difference attributable to quantity. The amount of the adjustment for quantity in this case would be 0.25 c.u., i.e. 5 c.u. c.i.f. would be the Customs value under Article 2.

As previously noted Articles 2 and 3 require that an adjustment must be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment.

The Notes to Articles 2 and 3 provide as an example of such evidence that of price lists which contain prices referring to different levels or different quantities. The determination as to the bona fides of price lists will have to be made on a case-by-case basis. In the absence of such an objective measure, the determination of Customs value under the provisions of Articles 2 and 3, as the case may be, would not be appropriate.

Example No. 5

Supplier	Quantity	Unit price	Importer	Level
D	2,800 articles	1.50 c.u. c.i.f	K	Wholesaler

There is the following transaction value for a sale of identical goods:

Seller	Quantity	Unit price	Importer	Level
E	2,800 articles	2.50 c.u. c.i.f. less 15 %	R	Retailer

Customs has ascertained that E adheres to a published price list from which he allows a 20 per cent discount to wholesalers and a 15 per cent discount to retailers. In the foregoing transaction the sale to R is in accord with this price list. Accordingly, this evidence would permit an adjustment of the transaction value of the identical goods by using the price list unit price of 2.50 c.u. c.i.f. and the 20 per cent discount to the wholesale level. Thus 2.50 c.u. less 20 per cent would be the Customs value under Article 2.

Application of Article 1.2 (b)

Different commercial level, same quantity – Comparable test Value

In a sale between related parties, Article 1.2 (b) provides the importer the opportunity to demonstrate that his value closely approximates one of the test values set out in the sub-paragraphs of that provision; it follows that the test value must be demonstrated in all its aspects, including where appropriate, level and quantity. The principles involved in Article 1.2 (6) for adjustments for these factors are the same as those for Articles 2 and 3 except that the adjustments to the transaction value of identical or similar goods are for the purpose of establishing the Customs value of the imported goods while under Article 1.2 f^ the adjustments are made to the test value only for comparison purposes.

Example No. 6

Supplier	Quantity	Unit price	Importer	Level
E	1,700 articles	5 c.u. c.i.f	I	Wholesaler

I provides Customs with the following test value which is a transaction value of identical goods to an unrelated buyer:

Seller	Quantity	Unit price	Importer	Level
F	1,700 articles	6 c.u. c.i.f.	R	Retailer

Customs ascertains that F sells his goods to wholesalers at a price of 5 c.u. c.i.f. and that I is a wholesaler.

The amount of the adjustment in this case would be 1 c.u. The test value, after taking account of the difference attributable to level, would be 5 c.u. Since the related-party price equals the test value as determined above, that price can be accepted as transaction value under Article 1.

Lack of demonstrated evidence – Test value rejected

Example No. 7

Seller	Quantity	Unit price	Importer	Level
E	20,050 articles	1.50 c.u. c.i.f.	I	Wholesaler

I provides the following test value which is a transaction value of identical goods to an unrelated purchaser:

Seller	Quantity	Unit price	Importer	Level
E	1,020 articles	2.10 c.u. c.i.f.	F	Retailer

E states that he only occasionally sells to independent retailers; he further states that he has made no sales to independent wholesalers but that if he were to do so, his price would be 1.50 c.u. each c.i.f.

Since E has made no sales to unrelated Wholesaler, but merely indicates a willingness to do so at the indicated price, there is a lack of demonstrated evidence which would establish the reasonableness of the adjustment, Because no adjustment can be made for the difference in level, the test value presented by I is not acceptable for comparison purposes.

In order to value the goods under Article 1 when there is a question of relationship, or under Article 2 or 3, there should normally be consultation between the importer and Customs. These consultations, and information from other sources, should enable Customs to determine whether an adjustment need be made and whether it can he made on the basis of demonstrated evidence.

Commentary 11.1 Treatment on Tie-in Sales

There are two broad categories of tie-in sales. In one the condition or consideration relates to the price of the goods, in the other, it relates to the sale of the goods. Situations where the conditions or considerations relate to the price as well as the sale are to be treated as tie-in sales of the first category.

In tie-in sales of the first category the price of one transaction is conditioned by terms of other transactions between the seller and the buyer. It follows that in such sales the price is not the sole consideration. Such tie-in sales represent a situation wherein the price is subject to a condition or consideration for which a value cannot be determined with respect to the goods being valued and, accordingly, the price must be rejected for the purpose of establishing the transaction value in accordance with the provision of Article 1.1 (b). The

Interpretative Note to that Article lists three examples which includes: (1) the seller establishes the price of the imported goods on condition that the buyer will also buy other goods in specified quantities; (2) the price of the imported goods is dependent upon the price or prices at which the buyer of the imported goods sells other goods to the seller of the imported goods: and (3) the price is established on the basis of a form of payment extraneous to the imported goods, such as where the imported goods are semi-finished goods which have been provided by the seller on condition that he will receive a specified quantity of the finished goods.

In this respect, however, causion must be exercised to ensure that the application of Article 1.1 (b) is not extended beyond the intended purposes.

For example, if a seller grants a quantity discount calculated on the quantity or the monetary value of a single order, the fact that a buyer qualified for the discount by placing an order consisting of a number of different items, none of which of themselves would have qualified for the discount, does not represent a situation where Article 1.1 *(b)* would apply.

The second category of tie-in sales, where condition or consideration relates to the sale of the goods, includes what has commonly been termed as 'countertrade'. Countertrade is taken to mean transactions in which sales to a country are intimately linked to sales from that country although in some instances, sales from yet another country can be involved. Countertrade is essentially a mechanism of paying for goods in international trade through the exchange of products for products. In some instances, countertrade can involve the exchange of services for products and vice versa.

Countertrade provides a means by which a country can obtain required goods from foreign sources and at the same time maintain balanced trade flows by ensuring export sales of its own products - counterproducts. Countertrade may involve the full or partial payment for an imported product in the form of products produced in and exported from the importing country, rather than payment in currency. Frequently, however, payment for both transactions will be in currency.

A listing of the more common countertrade practices are as follows:

(a) Barter: a single exchange of goods for goods, no payment in currency made (note advisory opinion 6.1).

(b) Counterpurchase: an exchange of goods for goods and money, or an exchange of goods for services and money.

(c) Evidence account: counterpurchase is often expressed in the form of an evidence account. For the purpose of payment, the evidence account is established with the foreign trade bank or a central bank and the exporter's counterpurchases are credited against current or future counterpurchase obligations. Such deals provide a degree of flexibility to the exporter, since instead of facing an immediate demand, the evidence account allows the exporter more time to leisurely "shop around' to effect the counterpurchase.

(d) Compensation or buy-back: the sale of machinery, equipment, technology or a manufacturing or processing plant in exchange for a specified amount of the final product as full or partial payment.

(e) Clearing agreement: a bilateral arrangement between two countries to purchase designated amounts of each other's products over a specified period of time, with the use of a freely convertible clearing currency of a third country, i.e. a 'hard' currency.

(f) Switch or triangular trade: an arrangement whereby one of the parties to a bilateral trade agreement (such as a clearing agreement in subparagraph *(e)* above) transfers its credit balance to a third party. For example, countries A and B have a clearing agreement and A buys a product from country C and payment is effected by having country B transfer its payment under the clearing agreement to country C instead of to country A.

(g) Swap: the exchange of identical or similar goods from different locations in order to save transportation costs. This type of transaction differs from barter in *(a)* above, in that an identical or similar product is exchanged solely for the purpose of gaining" the advantage of a closer source of supply such as where a Japanese buyer purchases a quantity of Venezuelan made oil and swaps it for an equal amount of Alaskan crude which had been purchased by an East Coast American buyer.

(h) Offset arrangement: the sale of a product, usually of a high technology nature, is possible on the condition that the exporter incorporates in his final product specified materials, parts or components which he has acquired from the country of importation.

There does not appear to be a single reliable estimate of how much international trade involves the use of countertrade. Estimates which do exist vary widely, ranging from one percent of world trade to one quarter of the world's international commerce. This diversity of opinion is primarily due to the fact that, as opposed to the usual methods of measuring world trade, there are no means of reporting and analyzing countertrade transactions as such. In fact countertrade is not always easy to identify especially in those cases where transactions are expressed in monetary terms and are paid for separately. However, while.there is no agreement as to the magnitude of countertrade, there is general agreement that it is becoming a larger factor in world trade.

As to the effect of countertrade on the price or cost of the goods, again there does not appear to be a single opinion. It can be said, however, that the exporter considering a counterpurchase must price his goods in the knowledge that not only must he sell his own goods but also those of his customer. It can be expected that the exporter may increase his price because of this factor. Hence, the price of goods exported to a country requiring or practicing countertrade can be expected to be equal to or higher than the price of the goods had there been no countertrade. H). By the same token, either in lieu of or in addition to the foregoing, the exporter may be able to command a lower price for the goods which he has to purchase. Hence the price for the counterpurchased goods can be expected to be equal to or lower than the price had there been no countertrade. These goods, of course, may be imported into the exporter's own country or they may be sent to any other country.

With respect to Customs valuation, the first consideration would necessarily be one of whether the conditions of Article 1 would or would not preclude the application of that Article to any transaction involving countertrade. In view of the number of different forms countertrade can take, it would be unlikely that any single conclusion in this regard could be made and it would be necessary to take a decision on the basis of the facts of each transaction, including the type of countertrade involved.

Commentary 12.1 Meaning of the Term 'Restrictions' in Article 1.1 (a) (iii)

Under the provisions of Article 1 of the Agreement the Customs value of imported goods shall be the transaction value provided, inter alia, there are no restrictions as to the disposition Or use of the goods by the buyer other than those which:

(i) are imposed or required by law or by the public authorities in the country of importation:
(ii) limit the geographical area in which the goods may be resold: or
(iii) do not substantially affect the value of the goods.

Due to their nature, identification of the first two exceptions noted above would not normally create problems. In the case of the third exception, however, a number of factors may have to be taken into consideration to determine whether the restriction has substantially

affected the value or not. These factors include the nature of the restriction, the nature of the imported goods, the nature of the industry and its commercial practices, and whether the effect on the value is commercially significant. Since these factors may vary from case to case, it would not be proper to apply a fixed criterion in this respect. For example, a small effect on the value in a case involving one type of goods may be treated as substantial while a much greater change in the value of goods of another type may not be treated as substantial.

An example of restrictions as to the disposition or use of the goods which do not substantially affect the value of the goods is mentioned in the Interpretative Notes to Article 1. i.e.: where a seller requires a buyer of automobiles not to sell or exhibit them prior to a fixed date which represents the beginning of a model year. Another such example would he where a manufacturing firm of cosmetics imposes through contractual provisions a requirement on all importers that its product be sold to consumers exclusively through individual sales representatives undertaking house-to-house sales since its whole distribution system and advertising approach is based on this kind of sales effort.

On the other hand, a restriction which could have a substantial effect on the value of the imported goods is one that is not usual in the trade concerned. An example of such a restriction would be the case where a machine is sold at a nominal price on condition that the buyer uses it only for charitable purposes.

Explanatory Notes

Explanatory Note 1.1 Time Element in Relation to Articles 1, 2 and 3 of the Agreement

Article I

Article 1 of the Agreement on Customs Valuation stipulates that (he Customs value of the imported goods shall he the transaction value, that is, the price actually paid or payable for the goods when sold for export to the country of importation, subject to any necessary adjustments and provided that certain conditions are satisfied.

Neither in this Article nor in the corresponding Interpretative Notes is there any reference to a time standard external to the actual transaction, which would need to be taken into consideration when deciding whether the price actually paid or payable is a valid basis for the calculation of the Customs value.

Under the valuation method in Article 1 of the Agreement, the basis for establishing Customs value is the actual price made in the sale giving rise to the importation, the time at which the transaction took place being immaterial. In this connection the expression "When sold ..." in paragraph 1 of Article 1 is not to he regarded as giving any indication of the time to be taken into consideration when deciding whether a price is valid for the purposes of Article I: it merely indicates the type of transaction involved, namely one in which the goods were sold for export to the country of importation.

Consequently, provided that the conditions prescribed in Article 1 are fulfilled, the transaction value of imported goods should he accepted irrespective of the time at which the sale contract was concluded, and hence, irrespective of am market fluctuations after the date when the contract was concluded.

Article 1 does make a subsidiary reference to a time standard in paragraph 2 *(b)*: this relates only to 'test' values and thus does not influence the situation that there is no time element involved in determining transaction value under Article 1.

Paragraph 2 *(b)* provides that 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 one of three alternatives occuring at or about the same time. But if the term 'occuring at or about the same time' were the only reference to be taken into consideration, there could in some cases be a

substantial difference between the conditions affecting the goods being valued and those affecting the goods furnishing the test value, and an inappropriate comparison could result.

The application of paragraph 2 *(b)* must be in a manner consistent with the principles of the Agreement. The time of export, which is the standard of comparison for the purposes of Articles 2 and 3 would be one approach.

Other measures within the framework of the Agreement would also be possible, in particular time standards adapted to the principles underlying the test values in question, namely: for subparagraph 1.2 *(b)* (i) the time of export to the country of importation of the goods being valued, for subparagraph 1.2 *(b)* (ii) the time of sale in the country of importation of the goods being valued, and for subparagraph 1.2 *(b)* (iii) the time of import of the goods being valued.

Articles 2 and 3

The time element is treated differently in Articles 2 and 3 of the Agreement. Unlike Article 1, in which the valuation of imported goods is based on an autonomous element, namely the price actually paid or payable for the goods. Articles 2 and 3 refer to values previously established in accordance with Article 1, namely transaction values of identical or similar imported goods.

To provide uniformity of application Articles 2 and 3 state that the Customs value determined under the provisions of these Articles is the transaction, value of identical or similar goods exported at or about the same time as the goods being valued. Thus these Articles establish an external time standard to be taken into consideration for their application.

It should be noted that the external time standard applicable under Articles 2 and 3 is the time when the goods to be valued are *exported,* and not the time when they are *sold.*

This external time standard must allow for practical application of the Article in question. Hence, the words 'or about' should be regarded as intended simply to make the terms 'at the same time' somewhat less rigid. In addition, it should be noted that according to its Preamble, the Agreement seeks to base Customs value on simple and equitable criteria consistent with commercial practices. Starting from these principles 'at or about the same, time' should be taken to cover a period of time, as close to the date "of exportation as possible, within which commercial practices and market conditions which affect price remain the same. In the final analysis, the question must be decided on a case-by-case basis within the overall context of the application of Articles 2 and 3.

The requirements in respect of time of course cannot alter the strict hierarchical order of the Agreement which requires that Article 2 must be exhausted before Article 3 can be invoked. Thus, the fact that the time of exportation of similar goods (as opposed to identical goods) is closer to that of the goods to be valued can never reverse the order of application of Articles 2 and 3.

The material time for Customs valuations

The foregoing remarks on the role of the time element in the application of Articles 1, 2 and 3 of the Agreement do not, of course, have any bearing on the material time for Customs valuation. Article 9 makes provision for the time to be taken into consideration for conversion of currency only.

Explanatory Note 2.1 Commissions and Brokerage in the Context of Article 8 of the Agreement

Introduction

Article 8, paragraph 1 (a) (i) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade states that, in determining Customs value under

the provisions of Article 1, commissions and brokerage, except buying commissions, shall be added to the price actually paid or payable to the extent that they are incurred by the buyer but are not included in the price. According to the Interpretative Note to Article S. the term 'buying commissions' means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued.

Commissions and brokerage are payments made to intermediaries for their participation in the conclusion of a contract of sale.

Although the legal position may differ between countries with regard to the designation and precise definition of the functions of these intermediaries, the following common characteristics can be identified:

Buying and selling agents

The agent (also referred to as an 'intermediary') is a person who buys or sells goods, possibly in his own name, but always for the account of a principal. He participates in the conclusion of a contract of sale, representing either the seller or the buyer.

The agent's remuneration takes the form of a *commission*, generally expressed as a percentage of the price of the goods.

A distinction can be made between selling agents and buying agents.

A selling agent is a person who acts for the account of a seller', he seeks customers and collects orders, and in some cases he may arrange for storage and delivery of the goods. The remuneration he receives for services rendered in the conclusion of a contract is usually termed "*Selling Commission*". Goods sold through the seller's agent cannot usually be purchased without payment of the selling agent's commission. These payments can be made in the ways set out below.

Foreign suppliers who deliver their goods in pursuance of orders placed through a selling agent usually pay for the latter's services themselves, and quote inclusive prices to their customers. In such cases, there is no need for the invoice price to be adjusted to take account of these services. If the terms of the sale require the buyer to pay, usually direct to the intermediary, a commission that is additional to the price invoiced for the goods, this commission must be added to the price when determining transaction value under Article 1 of the Agreement.

A buying agent is a person who acts for the account of a buyer. rendering him services in connection with finding suppliers, informing the seller of the desires of the importer, collecting samples, inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods.

The buying agent's remuneration which is usually termed "buying commission" is paid by the importer, apart from the payment for the goods.

In this case, under the terms of paragraph 1 (*a*) (i) of Article 8, the commission paid by the buyer of the imported goods must not be added to the price actually paid or payable.

Brokers (and brokerage)

There is a somewhat theoretical difference between the terms 'brokers' and 'brokerage' on the one hand and the terms 'buying/selling agent' and 'commissions' on the other: in practice there is no clear-cut distinction between the two categories. Moreover, in some countries the terms 'broker' and 'brokerage' are seldom, if ever, employed.

Where the term 'broker' is in use, it generally refers to an intermediary who does not act for his own account: he acts for both buyer and seller and usually has not role other than to put both parties to the transaction in touch with each other. The broker's remuneration is known as brokerage which is usually a percentage on the business concluded as a result of

his activities. The percentage received by a broker is commensurate with his rather limited responsibilities.

Where the broker is paid by the supplier of the goods, the total brokerage will normally be included in the invoice price; in such cases, no problem arises with regard to valuation. In case it is not so included, and yet incurred by the buyer, it should be added to the price paid or payable. On the other hand, the broker may be paid by the buyer, or each of the parties to the transaction may pay part of the brokerage: in these cases, the brokerage should be added to the price actually paid or payable insofar as it is incurred by the buyer, is not already included in that price and does not constitute a buying commission.

Conclusion

To sum up, when determining the transaction value of imported goods it will be necessary to include in that value commissions and brokerage incurred by the buyer, except buying commissions. Accordingly, the question of whether or not payments made to intermediaries by the buyer and not included in the price actually paid or payable should he added to that price will depend, in the final analysis, on the role played by the intermediary and not on the term ('agent" or "broker") by which he is known. It is also clear from the provisions of Article 8 that commissions or brokerage payable by the seller but which are not charged to the buyer could not be added to the price actually paid or payable.

It may also be worth pointing out that the existence and the nature of services rendered by intermediaries in connection with a sale are often not apparent from the commercial documents presented with the Customs declaration. In view of the importance of the interests at stake, national administrations will need to take whatever reasonable measures they consider necessary to ascertain the existence and precise nature of the services in question.

Explanatory Note 3.1 Goods not in Accordance with Contract

General

The treatment of goods not in accordance with contract poses a preliminary question, namely whether some or all of the situations are to be dealt with as matters of Customs valuation or, alternatively, are to be handled as matters of Customs technique (see Annex F.6. to the Kyoto Convention).

Although it seems that some situations involve questions that, in most countries, depend on national legislation not relating to Customs valuation, other situations may demand the application of valuation standards. This explanatory note therefore aims at the formulation of valuation rules for all foreseeable normal situations for the guidance of administrations which wish to treat those situations by valuation methods.

The term 'goods not in accordance with contract' can have different meanings under various national legislations. For example, some administrations consider damaged goods as falling under this term, while others limit the term to sound goods which do not meet contractual specifications, the question of damaged goods being handled under separate procedures or other provisions of law. Therefore the present document has been subdivided to identify situations to facilitate arriving at a uniform approach under the Agreement. These are:

I. Damaged goods:
   (A) Upon importation, the shipment is found to be totally damaged, having no value.
   (B) Upon importation the shipment is found to be partially damaged, or having scrap value only.

II. Goods not in accordance with specification, i.e. goods which are not damaged hut which are not in accordance with the original contract or order. MI. Importation of goods replacing goods under 1 or II above:

(A) In a subsequence shipment.

(B) Included in the same shipment.

Since the nature of the damage and the type of goods can create an unlimited number of individual circumstances, it is not intended in this explanatory note to go into detail with respect to the differences between 'totally damaged' and 'partially damaged' for valuation purposes.

VALUATION TREATMENT

I. *Damaged goods*

(A) *The goods are totally damaged*

On the presumption of the existence of national procedures for the re-exportation, abandonment or destruction of the goods, there is no liability to duty (see also Standard 6 of Annex F.6. to the Kyoto Convention).

(B) *The goods are partially damaged or have scrap value only*

Where the goods are re-exported, abandoned or destroyed, as in subparagraph (A) above, there is no liability to duty.

If, however, the importer takes delivery of the goods the Agreement would apply in the following manner:

Article 1: The price actually paid or payable was not for the damaged goods actually imported, and therefore Article 1 is not applicable. However, if only a portion of the shipment is found to be damaged, one could accept as transaction value the price represented by the proportion of the total price which the undamaged quantity bears to the total quantity purchased. The damaged portion of the shipment will be valued under one of the subsequent provisions of the Agreement, in the prescribed order, as set out below.

Article 2: In the majority of instances it would be improbable that a damaged shipment could be valued on the basis of the transaction value of identical goods, i.e. damaged goods being sold for export to the country of importation. That is not to say, however, that this standard can be completely ignored since certain products might lend themselves to such an approach.

Article 3: The comments under Article 2 would have application under Article 3.

Article 5: If the damaged goods or identical or similar goods are sold in the country of importation in the condition as imported and all other requirements of the provision are met, the Customs value of the damaged goods could be properly determined under the deductive method. If the goods are repaired prior to sale, and if the importer so requests, the value could be determined under the provisions of Article 5.2 with an allowance for the cost of repairs.

Article 6: Not applicable inasmuch as damaged goods are not manufactured or produced as such.

Article 7: While, as noted above, there are distinct possibilities of arriving at a Customs value for damaged goods under one of the preceding standards of the hierarchy, it could he anticipated that the majority of instances would be dealt with under the provisions or Article 7. In this event, the value must be determined using reasonable means consistent with the principles and general provisions of the Agreement and of Article VII of the General Agreement and on the basis of data available in the country of

importation. 8. The method of valuation to he employed under Article 7 could he a flexible application of Article 1, that is, in the example cited:

(a) a renegotiated price (bearing in mind that this price may reflect either an element of compensation by the seller, or the fact that the seller wishes to avoid the expense of having the goods returned to him. or both);
(b) the full price originally paid or payable, reduced by an amount equal to any one of the following:
  (i) the estimate of a surveyor independent of the buyer and seller;
  (ii) the cost of repairs or refurbishing;
  (iii) the insurance settlement.

Attention is drawn to the fact that an insurance settlement may not he an accurate measure of the reduction of value due to damage, because it can be affected by extraneous circumstances such as over-insurance, underinsurance or negotiations. Nevertheless payment of an insurance settlement to the buyer does not affect acceptance by Customs of a price reduced by reason of damage at importation. In other words, even though the price actually paid or payable to the seller remains unchanged, with the compensation for the damage being handled as a separate matter between the insurance carrier and the importer, the value of the goods must be established on the basis of their condition as imported.

II. *Goods not in accordance with specification*

(A) *Re-exportation, abandonment or specification*

On the presumption of the existence of national procedures for the re-exportation, abandonment or destruction of the goods, there is no liability to duty (see also Standard S of Annex F.6 to the Kyoto Convention).

(B) *Retained*

If, despite the non-conformity to specifications found upon delivery, the goods are kept by the importer, the determination of the Customs value would be influenced by the nature of the non-conformity. Goods of this type would fall into two categories: those which involve a shipment of the wrong goods (e.g. a shipment of woollen gloves against an order of sweater) and those which are. in fact, the goods actually ordered but which fail to conform to the specifications in the original order to such an extent that the buyer seeks some form of reimbursement from the seller.

(i) *Wrong goods*

Article 1: If there is no sale for export, transaction value is not applicable.

Article 2: Applicable, on the basis of the transaction value of identical goods if available.

Article 3: In the absence of a transaction value for identical goods, the transaction value similar merchandise could apply.

Article 5: In the absence of a Customs value determined under Article 2 or 3. the value could properly be determined under the deductive method. either if the goods are sold in the condition as imported or. if the importer so requests, under the provisions of Article 5.2.

Article 6: Computed value would have application in the context of the hierarchical order. However, a judgement would have to be made, in view of the relative origins of the situation, as to whether this Article could be applied, particularly noting the provisions of the first sentence of Article 5.2.

Article7: In the absence of a determination of the Customs value under the preceding standards, Article 7 would apply. In the example cited, a price agreed to and paid by the importer for the gloves, even though after actual importation, might be accepted under a flexible application of Article 1 (but see the caveat in paragraph 8 (a)).

(ii) *Goods not conforming to specification*

A number of situations may arise depending on the level of agreement, or disagreement, between the buyer and the seller. For example, the seller may take steps to bring the goods into conformity, either directly or through' other parties, or he may render some form of compensation to the buyer which is extraneous to the goods themselves. On the other hand, the seller may not agree that there is, in fact, a non-conformity to specifications or_ alternatively, the buyer may be seeking an amount of redress from the seller which is predicted on damages resulting from the non-specification rather than on a measure of the non-specification itself. From the Customs valuation aspect, however, the price actually paid or payable still exists and since the Agreement docs not make specific provisions for this situation, if all other conditions are met, the value will be determined on the basis of transaction value under Article 1. Nothing in this section precludes 'goods not conforming to specification' being considered as 'wrong goods' and dealt with as in (i) above.

III. *Replacement goods*

(A) *In a subsequent shipment*

There are two possibilities. The replacement may be sent:

(a) invoiced at the original price, separate arrangements having been made as regards credit for the original goods: or

(b) invoiced free of charge.

In the case of (a), other conditions being met, the price would form the basis for determination of the Customs value under Article 1.

Where replacement goods are sent free of charge, as in (b) they should be regarded as goods imported in fulfilment of the original transaction: in these circumstances it would be therefore appropriate to accept the price in that transaction for determination of the Customs value under Article 1, the treatment of the first shipment being a matter for separate consideration.

(B) *In the same shipment*

With certain types of goods it is trade practice for the sellers to include in their shipments a quantity of articles "free of charge' as replacement for articles which experience shows are likely to be defective or damaged in transit: similarly materials somewhat in excess of the ordered measurements may be sent, for example because the edges are known to be liable to damage in transit. In these cases the sale price should be regarded as covering the total quantity shipped, no attempt being made to value separately the 'free replacements or to take account of the additional quantity for valuation purposes.

Explanatory Note 4.1 Consideration of Relationship under Article 15.5, Read in Conjunction with Article 15.4

Article 15.4 of the Agreement sets out 8 situations only where, for the purposes of the Agreement, persons shall be deemed to be related.

In Article 15.5 the Agreement further provides that persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire

(hereinafter referred to for brevity as sole agent), however described, of the other shall he deemed to he related for the purposes of the Agreement only if they fall within the criteria of paragraph 4 of Article 15.

The wording of Article 15.5 of the Agreement has two objectives. The first is to provide a clear departure from the concept held in certain valuation systems that sole agents are by their nature related to their suppliers.

On the other hand it is recognized that parties who have been established as being sole agents should not on that basis alone be considered as being unrelated if. in fact, they meet one of the criteria in Article 15.4. Therefore, the second objective of Article 15.5 is to direct consideration of the relationship of parties solely within the provisions of Article 15.4.

The persons who wish to become associated in business in that one will become the sole agent of the other, will contact each other through a variety of means such as notices in business and trade journals and other avenues available in trade circles. Negotiations will he undertaken and. in most cases, written contracts will result which specify the terms and conditions of the sole agency agreement.

It can be expected that three situations will be encountered. The first involves an established and reputable manufacturer/seller whose products are much sought after in the markets of the importing country. Obviously, in these circumstances, the manufacturer/seller will be in the stronger negotiating position and the terms of the contract will weigh more heavily in his favour in terms of the conditions and requirements placed upon the sole agent. Parenthetically, however, this inevitably is accompanied by a higher price for the goods.

The second situation is the reverse, wherein the importer is a large enterprise with many distribution, sales and service locations in a lucrative market. In this instance the importer would have more influence in the negotiating process in terms of the conditions and requirements placed upon the supplier. The supplier, moreover, would be likely to accept a somewhat large distribution and sales structure. The third situation is between these two extremes where the parties open and conclude their negotiations on a more equal footing.

In such cases the resulting contract becomes critical, recognizing that such contracts are freely entered into, usually have termination or renewal provisions, and are enforceable under the civil laws of the countries concerned in the event of a breach of a condition by one of the parties.

The question which must be considered is whether the terms or conditions of the contract are such as to meet one of the provisions of Article 15.4. There will be instances where the contract establishing a sole agency does establish a relationship, such as when the contract includes a provision relating to persons appointed as officers or directors of one another's businesses under Article 15.4 (*a*), or where there is an exchange of stock (5 per cent or more) under Article 15.4 (*d*). It could be envisaged that some contracts could create a third entity which might bring in the provisions of Article 15.4 (*f*) and (*g*), while others could create a partnership under 15.4 (*b*) On the other hand, it is reasonable to assume that such contracts would not usually create an employer/employee relationship under Article 15.4 (*c*) nor a family relationship under Article 15.4 (*h*)

It can therefore be concluded with some assurance that the specific provisions of the contract can be expected to give a clear indication of the applicability or non-applicability of the provisions of the Agreement in question.

The remaining provision of Article 15.4 defining relationships is that of 15.4 (*e*) wherein one person directly or indirectly controls the other. The Interpretative Note to Article 15.4 (*e*) provides that 'for the purposes of this Agreement, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter".

Obviously, caution must be exercised in this respect to ensure that unintended results do not occur through improper interpretations of this provision when considering the terms

and conditions of contracts which have been freely entered into by otherwise unrelated parties. The examples given in paragraphs 6 and 7 above represent situations wherein the terms and conditions of the contracts are heavily weighted in favour of one party over the other and the former would he legally in a position to exercise restraint over the latter. However, in any contract, verbal or written, even of the most simple type, one party is always in a position to legally exercise restraint or direction over the other in accordance with the terms of the contract and that party will have legal remedies if the terms of the contract are not met.

For example, in a basic contract to deliver at a given price, both parties have legal direction over the other, that is. one must deliver and one must pay a certain price. This, however, would not create a relationship under Article 15.4 (*e*) Even in a more complex contractual arrangement where the seller, because of royalty payments on the imported goods, has the right to establish and audit the accounting systems the importer must use to account for the royalties, the exercise of this operational direction would not of itself create a relationship under Article 15.4 (*e*).

It can be concluded that it is not the intent of the Agreement to create a relationship out of every contract or agreement which of their very nature establish legal rights or obligations, enforceable under national laws. Therefore, the wording of the Interpretative Note to Article 15.4 (*e*) wherein a person is legally or operationally in a position to exercise restraint or direction over another must normally be taken to apply to situations other than those wherein two parties, who are otherwise unrelated, freely enter a contract.
In other words, if the parties are free to negotiate or not negotiate, if the parties are free to enter or not enter the contract and if the contract can be terminated by either one of the parties upon notice, by action of a type specified in the contract or by means of not acting on a renewal provision then, regardless of the terms or conditions or the degree of control of one party over the other given by these terms or conditions, it would be difficult to envisage circumstances wherein such contracts would cause the parties to fall within the purview of Article 15.4 (*e*) or its Interpretative Note. To create such a relationship, the conditions of Article (*e*) must normally exist independently of the freely entered terminable contract under consideration. The question of whether such contacts would create restrictions, conditions or considerations of the nature envisaged under Article 1 would have to be dealt with under the relevant provisions of Article 1.