WORLD CUSTOMS ORGANIZATION
ORGANISATION MONDIALE DES DOUANES
ORGANIZACIÓN MUNDIAL DE ADUANAS

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION
-
58th Session
-

VT1417Eb Revised

O. Eng.

Brussels, 19 April 2024.

DRAFT REPORT TO THE CUSTOMS CO-OPERATION COUNCIL ON THE 58th SESSION OF THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION

Opening remarks

1. The 58th Session of the Technical Committee on Customs Valuation was held at WCO Headquarters from 15 to 19 April. The Chairperson, Qianyu LIN (China), welcomed all the delegates, whether attending in person or participating online, and extended a special welcome to those participating in a session of the Technical Committee on Customs Valuation (TCCV) for the first time. She said this was her first time as Chairperson of the Technical Committee, adding that she was grateful to the delegates for placing their confidence in her and hoped she could rely on the support of all participants as she took up this challenge.

2. The Acting Director of Tariff and Trade Affairs joined the Chairperson in welcoming all the delegates. She complimented the Chairperson on her leadership, which had made it possible to conduct an in-depth examination of numerous specific technical questions during the online discussions on the CLiKC! Platform, thereby providing a good basis for the discussions to be held during the session. She also encouraged delegates to use the session as an opportunity to build and strengthen their networks. She concluded her remarks by wishing all participants a productive session.

3. After thanking the Acting Director, the Chairperson informed all delegates of the administrative arrangements required for the smooth running of the session. She reminded the delegates that in order to maintain the technical nature of the meeting, it has been

reaffirmed by the Policy Commission in December 2023 that statements of a political nature are not to be delivered/read during the meeting. Such statements could be provided in writing to the Secretariat for inclusion in an Annex to the Report of the session.

4. In this respect, a statement transmitted by Ukraine is set out in Annex D to this draft Report.

Agenda Item I: ADOPTION OF AGENDA

(a) Provisional Agenda

Doc. VT1392Ec

5. The Chairperson invited comments on the provisional Agenda contained in Doc. VT1392Ec, published on the TCCV Meeting page, and on the 58th TCCV Session Forum Group on the CLiKC! Platform and invited delegates to raise any point that they wished to discuss under item VII of the Agenda - Other Business.

Conclusion

6. The Technical Committee adopted the Agenda.

(b) Suggested programme

Doc. VT1393Ea

7. The Chairperson referred to Doc. VT1393Ea, which set out the suggested programme of work for the 58th Session prepared by the Secretariat.

8. As proposed by delegates, the order of examination for Agenda item V (f) and item V (e) was swapped. Therefore, item V (f) was to be examined following the presentation by the International Chamber of Commerce (ICC) on Incoterms.

Conclusion

9. The Technical Committee adopted the suggested programme as set out in Doc. VT1393Ea, subject to the above mentioned change in the order of examination.

Agenda Item II: **ADOPTION OF THE TECHNICAL COMMITTEE'S 57TH SESSION REPORT**

Doc. VT1391Eb Revised

Background

10. The Chairperson introduced this Agenda item, reminding the meeting of the procedure for the adoption of the Technical Committee's Session Report, approved by Members in the course of the 42nd Session.

11. During the intersession preceding the 58th Session, Canada, China, Japan and Uruguay had submitted comments on the "a" version of the draft Report of the 57th Session of the Technical Committee. These comments had been incorporated into the draft Report, and a "b" version had been published as Doc. VT1391Eb in which Members' comments had been highlighted in red.

12. Comments on the "b" version of the draft Report had been received from Canada, China and Uruguay. This had resulted in a "b revised" version of the draft Report incorporating the comments submitted by the aforementioned Administrations.

Summary of discussion

13. During the 58th Session, no comments had been received on the "b revised" version of the draft Report of the 57th Session. A "c" version of the Report would be published in Doc. VT1391Ec as a final draft to be submitted to the Council for approval.

Conclusion

14. The Technical Committee adopted the Report of its 57th Session.

Agenda Item III: REPORTS ON INTERSESSIONAL DEVELOPMENTS

(a) Director's Report

Doc. VT1394Ea

15. The Chairperson invited the Acting Director to present the Director's Report, contained in Doc. VT1394Ea. The Acting Director summarized the key intersessional activities included in the document.

16. The Acting Director briefed the Technical Committee on a few items of the 89th Policy Commission Session as follows:

(i) The Policy Commission took note of the first draft of the Environmental Scan 2024, including the input provided by Members during the regional consultations. An updated version will be presented to the Policy Commission and Council sessions in June 2024 for endorsement;

(ii) The Policy Commission took note of the first draft of the Implementation Plan 2024-2025 and the activities planned for the next financial year;

(iii) The Policy Commission took note of work of the 3rd Meeting of the Working Group on Data and Statistics (WGDS), and encouraged the active involvement of Members.

(iv) The Policy Commission endorsed the outcomes of the Permanent Technical Committee (PTC) and the SAFE Working Group (SWG) in relation to Green Customs, including the updates to the Coordinated Border Management Compendium endorsed by the PTC in October 2023 and the compiling of a repository of Members' practices on collaboration with regulatory agencies to ensure public safety and security, in particular environmental compliance endorsed by the SWG in November 2023.

17. The Technical Committee was informed that Mr. Ismail NASHID from Maldives joined the WCO Secretariat as Technical Officer on Customs Valuation.

Conclusion

18. The Technical Committee took note of the Director's Report~~,~~ requesting that the Secretariat analyse the possibility of extending the online discussion phase on the CLiKC! Platform to three or four weeks, in the interests of greater participation and to improve productivity. The Acting Director responded positively to this request. (Chair)

(b) the Committee on Customs Valuation Report

19. The observer from the World Trade Organization (WTO) reported on the work of the Committee on Customs Valuation (CCV), which had held a formal meeting on 15 November 2023.

20. During the session, the WTO CCV closed out nine reviews of questions and responses pertaining to the valuation legislation of Members, out of a total of 35 reviews undertaken. In addition, the CCV launched the next triennial review of the Agreement on Pre-shipment Inspection.

21. The delegates were also informed of two other activities of the CCV:

- Reforms are to be introduced in 2024 by the CCV to enhance the information available to Members through online manuals and introductory sessions, to ensure earlier circulation and more detailed meeting agendas, to implement an automated interface for the preparation of agendas, and to agree in principle to regularize the use of experience-sharing sessions.

- A workshop will be held from 22 to 24 May 2024, on the margins of the formal CCV meeting, to assist Members with their notification requirements, in particular, their responses to a checklist of issues regarding their Customs valuation legislation.

22. The written report from the WTO Secretariat is appended in Annex C to this draft Report.

Conclusion

23. The Technical Committee took note of the report.

Agenda Item IV: **TECHNICAL ASSISTANCE, CAPACITY BUILDING AND CURRENT ISSUES**

(a) Report on the technical assistance/capacity building activities undertaken by the Secretariat and Members

Docs. VT1395Ea and VT1405Ea

Background

24. In accordance with the Technical Committee's decision, the Secretariat had monitored and communicated details of the technical assistance/capacity building activities planned and/or carried out by Members in order to provide all Members with useful information for planning purposes and to prevent any duplication of effort in this respect.

25. In Doc. VT1395Ea, the Secretariat had invited the Members to submit information to it, no later than 9 February 2024, concerning their technical assistance/capacity building activities. By the date of publication of the second set of working documents for the 58th Session, the Secretariat had not received any information from Members concerning their technical assistance activities.

26. Information on the technical assistance/capacity building activities undertaken or to be carried out by the Secretariat was set out in the Annex to Doc. VT1405Ea.

Summary of discussion

27. The Secretariat's report on technical assistance/capacity building activities had not given rise to any comments from the delegates attending the 58th Session.

28. Uruguay informed the Technical Committee that, in its capacity as Regional Office for Capacity Building (ROCB), it would be holding both a basic and an advanced course on Customs valuation in Spanish for Members from the Americas and Caribbean region in June and August 2024 respectively.

29. The Chairperson invited Members to take note of the Secretariat's report set out in Doc. VT1405Ea and its Annex.

Conclusion

30. The Technical Committee took note of the report by the Secretariat on the technical assistance/capacity building activities undertaken by the Secretariat and Members, as presented in Doc. VT1405Ea and its Annex.

(b) Progress report on Members' application of the WTO Customs Valuation Agreement

Docs. VT1396Ea and VT1406Ea

Background

31. During the intersession, the Secretariat had published Doc. VT1396Ea, inviting Members to submit a report on the progress made with regard to the application of the WTO Customs Valuation Agreement in their respective countries. This report could cover any aspect of implementation of the Agreement, in particular structural, organizational, legal and procedural aspects.

32. During the intersession preceding the 58th Session, South Africa and Uzbekistan had stated their intention to give presentations to the Technical Committee. Unfortunately, these presentations could not be made, as the Delegates of South Africa and Uzbekistan had been unable to attend the session in person.

33. The Delegate of Chile, who had been due to give her presentation at the 57th Session, was able to present her country's experience of the implementation of the Agreement with particular regard to royalties and license fees under Article 8.1(c).

Presentation by Chile

34. The Delegate of Chile gave her country's presentation on the legislative and regulatory framework and the arrangements adopted by Chile in relation to royalties and licence fees.

35. With regard to the legislative and regulatory framework, Chile has adopted a number of provisions, most of which are based on the provisions of the WTO Customs Valuation Agreement, in particular Article 1, Article 8.1(c) setting out the conditions for adjustment in respect of royalties and licence fees, and Article 8.3 under which any addition is to be made on the basis of objective and quantifiable data.

36. The arrangements introduced by Chile to implement the adjustment in respect of royalties and licence fees stem from the finding that businesses had failed in the past to make sufficient adjustments in this regard. Consequently, it was essential to take action to remedy this situation.

37. Chile accordingly developed an appropriate legislative and regulatory framework with the effect of creating a degree of transparency and predictability for importers. It also provided Customs officials with a legal basis for adding those royalties and fees to the price actually paid or payable.

38. Procedures were introduced for handling adjustments in respect of royalties and licence fees and for encouraging businesses to declare those fees. To that end, Chile amended the existing legislation, introduced an adjustment declaration form as well as the requirement to declare any adjustments within 30 days of filing the tax declaration and codified Customs declarations to take account of the possibility of amending the various elements of the Customs valuation declaration. A number of tax incentives, in particular in relation to income tax, were envisaged with a view to promoting voluntary compliance on the part of businesses.

39. Integrated audit (Uruguay) programmes have been developed and are conducted on the basis of the data set out in internal taxation declarations and by recourse to a risk analysis and assessment system. The auditing measures are focused on commercial transactions with declared values equal to or exceeding USD 50,000.

40. The representative of Chile Customs pointed out that very few audits had been carried out. Nevertheless, those audits had made it possible to identify three scenarios: the first involves a business which has not added its royalties and licence fees despite having declared them as administrative costs in its accounts; the second relates to non-adjustment in respect of royalties and licence fees of an amount representing 1% of the business turnover, and the third scenario involves calculation of the adjustment amount on the basis of a percentage of the resale price for the goods on the national market.

Summary of discussion

41. The response to Chile's presentation was extremely positive. A number of questions and comments were raised by the Delegates of Brazil, Colombia, the Dominican Republic, Ukraine, Uruguay and the ICC.

42. Brazil wanted to know how Chile proceeded if after 30 days the definitive value was still not known, and whether a post-clearance audit (PCA) was carried out globally or declaration by declaration. Colombia asked whether provisional declarations could be made while awaiting the definitive declaration.

43. In response to Brazil's query, the Delegate of Chile said that the definitive value of the fee is known at the time of confirming the tax declaration, and the PCA is carried out either declaration by declaration or globally. In addition, one risk type (specific audit) or more than one risk (full audit) can be envisaged. Responding to Colombia's question, Chile pointed out that ~~T~~there (Chile) is no provisional declaration system for this type of adjustment. On the

declaration of value form, there is a field for indicating the existence of an adjustment to an element of the value. Once the adjustment is known, it will be taken into account by means of a declaration modification request form.

44. The delegates' various concerns were satisfactorily addressed by the Delegate of Chile.

Conclusion

45. The Technical Committee took note of the progress report on Members' application of the Agreement and the presentation given by Chile. (Chile)

Agenda Item V: SPECIFIC TECHNICAL QUESTIONS

(a) Accumulated discounts in E-Commerce sales: Request by Uruguay

Docs. VT1397Ea and VT1407Ea

Background

46. This question concerning discounts for E-Commerce transactions on an electronic platform was submitted to the Technical Committee by Uruguay at the 53rd Session.

47. At the 57th Session, delegates suggested moving the question to Part III of the Conspectus of Technical Valuation Questions, as consensus seemed unlikely in view of the direction that discussions were taking. That said, some Members felt it was too soon to stop examining the question. One suggestion put forward was to re-examine the scenarios one by one rather than to discuss the document as a whole.

48. In response to working document VT1397Ea, Canada forwarded to the Secretariat its written comments which were set out in working document VT1407Ea.

49. During the intersession, the European Union sent a non-paper to the Secretariat for Members' attention in order to help advance the discussions on the question.

Summary of discussion

50. During the online discussion phase on the CLiKC! Platform preceding the 58th Session, the Delegates of Chile, Indonesia, Israel, Uruguay and Uzbekistan discussed this question.

51. During the in-person meeting, in response to the Chairperson's invitation to expand on the written comments it had forwarded during the intersession, Canada expressed its support for the Technical Committee's continuing examination of the question, bearing in mind the importance of the issue addressed, taking each scenario in turn. Canada said that it was prepared to abide by the Technical Committee's final decision. Indonesia echoed Canada's position and suggested beginning with the more straightforward-looking scenarios 1 and 2 before moving on to the more complex scenarios.

52. The Delegate of the European Union gave an insight into the somewhat delayed publication of the European Union's non-paper. This delay was attributed to procedural matters, as determination of the European Union's official position was subject to EU Members States' approval, a procedure which required some time. Furthermore, the purpose of the non-paper was not to provide an answer to the question under consideration, but to provide additional background elements concerning the E-Commerce environment. Generally speaking, the European Union preferred the Technical Committee to show considerable flexibility in its examination of Customs valuation ~~the~~ questions relating to E-Commerce.

53. Uruguay agreed with some delegates that a fixed (or percentage) discount granted by a seller (or platform) for use during a subsequent sale of other goods should be included in the Customs value in accordance with Article 1.1 (b) of the Agreement and Advisory Opinion 16.1. The Delegate of Uruguay commented that other delegations took a different view and that consensus could not be achieved on all the scenarios. The Technical Committee therefore felt that it would be impossible to draw up an instrument on that question. Korea concurred with Uruguay.

54. Japan agreed that delegates continue to examine the question if any country takes responsibility of writing a new draft, although Japan was not sticking to continue this discussion. Ukraine, for its part, suggested continuing the discussion on the CLiKC! Platform during the intersession.

55. To resolve this deadlock, the European Union suggested continuing the discussion by making the distinction between those situations where the discount is granted by the seller and those where it is granted by the electronic platform. Accumulated discounts could be examined at a later stage.

56. The Chairperson suggested that Members should allow themselves time to examine the European Union's non-paper before continuing the discussion at the next session. Uruguay

agreed in principle and suggested that the document be made available in the Committee's three working languages for the next session so as to aid delegates' understanding.

57. The European Union gave its approval to formally send the document to the Secretariat to be translated into the three languages and be made available to delegates as a Technical Committee working document at the next session.

Conclusion

58. The Technical Committee agreed to continue the examination of this question at its next session.

(b) Meaning of the expression "the price for the imported goods" in accordance with paragraph 4 of the Interpretative Note to Article 1: Request by Uruguay

Docs. VT1398Ea and VT1408Ea

Background

59. This question was submitted by Uruguay during the 54th Session and concerns the meaning of the expression "price for the imported goods" in accordance with paragraph 4 of the Interpretative Note to Article 1.

60. At its 57th Session, the Technical Committee decided to conduct a paragraph-by-paragraph examination of the draft Commentary by China, as amended by Canada and Japan. The document would include, where appropriate, some parts of Uruguay's revised version set out in Annex II to Doc. VT1375Ea. The Secretariat's clean version of the document under examination was set out in Annex I to Doc. VT1398Ea to facilitate Members' comments.

61. During the intersession preceding the 58th Session, Uruguay submitted to the Secretariat a new draft Commentary along with an updated version of the "Conceptual structure of the price actually paid or payable in the transaction value method". It was set out in Annex II to Doc. VT1398Ea. And China also submitted to the Secretariat its written comments reviewing the background of the current issue, sharing the inspiration deriving from the ICC's document and highlighting the purpose of the draft Commentary as well as its thoughts on the preparation of the document as set out in Annex III to Doc.VT1408.

62. The Technical Committee had two draft Commentaries and was invited to determine which of the two drafts it intended to use as the basis for the continuing discussion.

Summary of discussion

63. During the online discussion phase of the 58th Session, the Delegations of Chile, China, Japan, Uruguay, Uzbekistan and the ICC, discussed the question.

64. Following her introduction of the question, the Chairperson invited Japan, China and Uruguay to elaborate on the written comments that they had forwarded to the Secretariat during the intersession.

65. Japan pointed out that the expression “the price paid for the acquisition of the imported goods from the seller” was included in the draft Commentary in Annex I to Doc. VT1398Ea without any amendment or additional explanation of the concept. Japan further took the view that this draft Commentary, unlike the new draft Commentary proposed by Uruguay in Annex II to Doc. VT1398Ea, had various shortcomings. The Delegate of Japan suggested using that new draft as a working document for continuing the discussion. As to the new text proposed by Uruguay, the Delegate focused on how that specific technical question had been raised so that the Committee would take a decision on the expression “the price for the imported goods” whereas the new document submitted by Uruguay focused on the “price actually paid or payable”. In Japan’s view, the Technical Committee should decide whether this matter concerned a new specific technical question submitted by Uruguay, in which case the existing question should be moved to Part III of the Conspectus of Technical Valuation Questions.

66. Uzbekistan felt that the table drawn up by Uruguay (*Conceptual structure of the price actually paid or payable in the transaction value method*) could, in fact, be regarded as a more detailed explanation of the transaction value and could be a useful tool facilitating its proper application by businesses. China echoed Uzbekistan’s view, noting that this tool could facilitate the application of the Agreement, after making its comments as shown in paragraphs 67 and 68. Uzbekistan endorsed Japan’s position in suggesting that the question be re-examined as a new specific technical question, taking the new proposal by Uruguay as its basis.

67. China invited the delegates to recall the discussion that took place at the 49th Session in relation to the expressions “for the imported goods” and “related to the imported goods” during examination of the question on “ancillary charges” submitted by Mauritius. China added that the purpose of the draft Commentary that it had submitted at the 54th Session was to study the meaning and every possible aspect of the expression “for the imported goods”.

To facilitate examination of this question, China invited the delegates to consult two documents provided by the ICC and published by the Secretariat on the CLiKC! Discussion Forum during the online phase, with one entitled "*Further Observations on the Role of Annex III, Para. 7*" and the other entitled "*Historical Perspective on Annex III, para. 7*", recommending the two documents be annexed to the draft Report of the 58th Session for ease of reference by any parties concerned. (Previously, the Secretariat published a document forwarded by the ICC and entitled "Historical Review" on the CLiKC! Discussion Forum during the online discussion phase of the 54th Session on the question of "ancillary costs".)

68. Uruguay expressed its appreciation for this interesting document prepared by the ICC. However, it stated that, in its opinion, it was just one possible interpretation of the "GATT Valuation Code" (which is no longer in effect), rather than of our Agreement, which has been in effect since 1995, and which was negotiated in 1994 through the Final Act of the GATT Uruguay Round at Marrakesh. To be approved, paragraph 7 of Annex III, referred to above, did not warrant any additional interpretation of the negotiations of that Final Act, and therefore must be applied. The paragraph is so clear and conclusive that this Technical Committee had previously produced several instruments to ensure its uniform interpretation and application to Customs and to the private sector (for example, see paragraph 8 of Commentary 20.1, Case Study 6.1, paragraph 8 (c) of Commentary 7.1 and paragraphs 7 and 9 of Explanatory Note 5.1). However, Uruguay proposed that it would be useful to update the title of this case and continue the discussions, during which some interesting exchanges of views had already taken place and progress made.

69. The Delegate of Brazil supported Uruguay's comments, stating that all Technical Committee instruments had been adopted in its legislation. Therefore, regardless of the ICC's opinion, her Administration would continue to apply these documents approved by the Committee and referred to in the previous paragraph in a legal and peaceful manner.

70. China noted that, in view of the direction the discussion was taking, it was unlikely that the Technical Committee would reach a consensus on that question.

71. Like Japan and Uzbekistan, China took the view that Uruguay's proposed new draft Commentary could be the subject of a new specific technical question because it concerned the expression "price actually paid or payable" and not the expression "price for the imported goods" which was being addressed by the existing question.

72. At the Chairperson's suggestion, the delegates discussed the possibility of continuing to examine the question holistically on the basis of the draft Commentary set out in Annex II to Doc. VT1398Ea without moving the original question to Part III of the Conspectus of Technical Valuation Questions. Some delegations supported that idea. Those delegates that had previously expressed a different view said they could be flexible. In terms of the title that should be given to this question, the Technical Committee had decided to return to that issue at a later date. However, although Canada was not opposed to begin working off the draft Commentary set out in Annex II, it warned that doing so would merely delay the discussion on the contentious issue of "condition of sale". In other words, the position taken by some Members to treat paragraph 7 of Annex III of the Agreement in a vacuum and make the question of "condition of sale" the corner stone for inclusion of a payment in the price actually paid or payable, regardless of whether the payment is for 'the imported goods' or for 'something else', will also be an obstacle to the successful conclusion of an instrument on the basis of the new proposed text. Unless Members find a way to compromise or resolve their differences on this issue, there will ultimately be no consensus on this new draft text either.

73. The Technical Committee could therefore carry out a paragraph-by-paragraph examination of the document. Due to time constraints, the decision was taken to examine the "*Conceptual structure of the price actually paid or payable in the transaction value method*" during that session; examination of the draft Commentary itself would take place at a later date.

74. Following on from the comments and explanations provided by Uruguay on the table illustrating the "*Conceptual structure of the price actually paid or payable in the transaction value method*", questions and suggestions were put forward by delegates, including in relation to the position in box (14) of the table of the eligibility criteria under Article 1 of the Agreement. According to some delegates, those criteria should be placed at the beginning because their fulfilment was the prerequisite for the remaining conditions. Reference was made to the fact that box (11) did not take account of all situations concerning transport costs and that the table did not include the definition of the price actually paid or payable. There was also criticism of the lack of any link between the different boxes of the document and the text of the draft Commentary. Responding to that criticism, Uruguay felt that the link was established by the final paragraph of the text.

75. One delegate drew attention to the fact that this instrument could very soon become outdated and out of step if it merely listed the other instruments that refer to the concept of the price actually paid or payable.

76. The Chairperson ended the discussion at that point, requesting Uruguay to provide an updated version of the draft commentary taking into account comments made by delegates; and the Technical Committee agreed to revisit the question at the next session.

Conclusion

77. The Committee decided to keep this question on the Agenda for the next session.

(c) Meaning of the expression "in substantially the same quantities" according to Articles 2 and 3 and the respective Interpretative Notes to those Articles: Request by Guatemala

Docs. VT1399Ea and VT1409Ea

Background

78. This question was submitted by Guatemala at the Technical Committee's 55th Session and concerns the meaning of the expression "in substantially the same quantity" according to Articles 2 and 3 of the Agreement and the respective Interpretative Notes to those Articles. The facts pertaining to this question were set out in the Annex to Doc. VT1376Ea.

79. At its 57th Session, the Technical Committee began a paragraph-by-paragraph review of the updated draft Commentary proposed by Guatemala. Delegates proposed amendments with a view to improving the drafting of the draft Commentary.

80. During the intersession preceding the 58th Session, China proposed various amendments which the Secretariat included in an updated draft Commentary set out in Annex II to Doc. 1409Ea. The Technical Committee was invited to decide which of the draft Commentaries it would take as the basis for continuing the examination of the question.

Summary of discussion

81. During the online discussions on the CLiKC! Platform, this Agenda item was the focus of comments from Brazil, China, Canada, Chile, Guatemala, Japan, Uruguay and Uzbekistan. Uruguay supported the draft Commentary set out in Annex II to Doc. VT1409Ea and suggested amendments to paragraph 5 and adding a new paragraph to the end of the document. Chile and Brazil were in favour of continuing the examination of the question on the basis of Annex II to Doc. VT1409Ea whilst proposing their respective amendments to the text.

82. Japan expressed concern over the definition of the term “substantially” as “to a large degree”. As far as Japan was concerned, the definition varied from one dictionary to another and from one country to another. Since this word had several meanings in Japan, the fact that a single definition from a single dictionary was used to define “substantially”, a term with many different interpretations, was a source of concern. Guatemala shared Japan’s point of view and thought that this would provide a clear indication of the margin of tolerance to be taken into account.

83. China supported Uruguay’s proposal to add a final paragraph to the draft Commentary. The Delegate of China also thought that the amendments proposed respectively by Brazil and Canada should be taken into account in the final document.

84. During the face-to-face discussions, the Chairperson pointed out that the Technical Committee had two draft Commentaries that it would have to choose between before continuing the discussions.

85. Canada reiterated the view it had expressed during the online discussion, namely that it had no objection to working on either of the two versions of the draft Commentary (Annex to Doc. VT1399Ea or Annex II to Doc. VT1409Ea). The Delegate of Canada commented that, in the light of the support already shown for the version set out in Annex II to Doc. VT1409Ea and the amendments already made to that version, Canada supported that draft Commentary.

86. Guatemala’s preference was for the version of the draft Commentary set out in the Annex to Doc. VT1399Ea, although the Delegation was prepared to be flexible towards China’s version.

87. Japan informed the Technical Committee that it could be flexible in terms of its comments on the CLiKC! Platform regarding the definition of the term “substantially”. The Delegate of Japan sought to continue the discussion based on China’s version of the document. The United Kingdom and Chile likewise expressed a preference for China’s version.

88. In the light of all those views, the Chairperson proposed that the Technical Committee should begin to examine China’s proposal paragraph by paragraph.

89. Following fruitful and constructive discussions, the delegates showed compromise and understanding, thus making it possible to complete the paragraph-by-paragraph examination of the draft Commentary and ultimately to reach a consensus on the drafting of the

document's eight paragraphs. A new instrument, Commentary 26.1, was accordingly adopted by acclamation.

90. The text of Commentary 26.1 is appended in Annex E to this draft Report.

Conclusion

91. The Technical Committee reached a consensus and completed its examination of the question submitted by Guatemala on the "Meaning of the expression 'in substantially the same quantity' according to Articles 2 and 3 of the Agreement". Commentary 26.1 was accordingly adopted and will be subject to approval by the Council of the WCO.

(d) Treatment applicable to transactions agreed in cryptocurrency units: Request by Uruguay

Docs. VT1400Ea and VT1410E

Introduction

92. The Technical Committee agreed at its 55th Session to examine this question submitted by Uruguay on "Treatment applicable to transactions agreed in cryptocurrency units" as a Specific Technical Question. The question deals with Customs valuation treatment of imported goods when the price is based on cryptocurrency units.

93. A draft Advisory Opinion was submitted by Uruguay in the Annex to Doc. VT1338Ea. Following the 57th Session, it was redrafted to incorporate comments received during the discussion. The new draft Advisory Opinion was set out in the Annex to Doc.VT1400Ea.

Summary of discussion

94. Comments were received from Brazil, Chile, China, Indonesia, Japan, Norway, Uruguay, Uzbekistan and the ICC during the online discussion phase. Canada and Japan, in addition to their comments, updated the draft Advisory Opinion set out in the Annex to Doc.VT1400Ea.

95. During the in person meeting, the Committee agreed to continue the discussion of the question on the basis of the updated version provided by Canada on the CLiKC! Platform. The text of the updated draft Advisory Opinion primarily comprised two sections, addressing

the valuation treatments of cryptocurrency by countries that recognize cryptocurrency as legal tender and those who do not, respectively.

96. Japan suggested that the word “crypt asset” should be used instead of “cryptocurrency” because “cryptocurrency” has a narrower meaning than “crypto asset” which includes cryptocurrencies, as well as cryptography-based tokens. In addition, it is used in the report of G20 and IMF. Further Japan suggested that it is important to be recognized as legal tender and it is not sufficient only to be allowed to use legally “as a means of payment”. The Technical Committee deliberated on the distinction among “cryptocurrency”, “crypto asset” and “digital asset”, as well as which term should be used in the draft Advisory Opinion. In response to delegates' requests for clearer definitions of these terms used in the draft Advisory Opinion, the ICC provided several additional paragraphs as a preamble to the text.

97. During the discussion, a number of delegations proposed presentations by countries that had recognized cryptocurrencies as legal tender to facilitate the discussion, particularly with regard to the first section of the draft Advisory Opinion. However, in view of the limited number of such countries, some other delegations were of the view that the priorities for discussion should be placed in the second section, with a view to addressing emerging challenges in cryptocurrency and providing timely guidance to Customs.

98. The Technical Committee agreed to continue the examination of this question at its next session.

Conclusion

99. The Technical Committee agreed to continue the examination of this question at the 59th session.

(e) Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement: Request by Brazil

Docs. VT1401Ea and VT1411E

Introduction

18.

100. The Technical Committee agreed at its 56th Session to examine this question submitted by Brazil on “Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement” as a Specific Technical Question.

101. The question deals with a transfer pricing study using the Cost Plus Method (CPM), a transfer pricing methodology. A draft Case Study was submitted by Brazil for consideration by the Technical Committee, which was set out in the Annex to Doc. VT1346Ea.

102. During the intersession proceeding the 58th Session, Brazil worked with relevant Delegations and the Secretariat to update the text of this case. The updated text was annexed to Doc. VT1411Ea.

Summary of discussion

103. During the online discussion phase, comments were received from Brazil, Canada, China, Japan, Chinese Taipei, Uruguay, and Uzbekistan on the CLiKC! Platform.

104. During the in-person meeting, Brazil thanked China and Malaysia for their assistance in the preparation of the draft Case Study in the intersessional period, and submitted to the Technical Committee an updated draft Case Study primarily based on the revised version provided by Canada during the online discussion phase. As suggested by the Chairperson, the Technical Committee agreed to carry out a paragraph by paragraph examination of this updated draft Case Study. Japan expressed concern over the inclusion of the description which determines the valuation method to be applied to this case as the flexible application of Article 6 of the Agreement as it considered calculating Customs value based on TPS is out of the scope of flexible application. In response to this, Brazil suggested revising the document together with Japan and Japan agreed to it.

105. The Technical Committee reviewed paragraphs 1 to 31 of the draft Case Study submitted by Brazil, made certain amendments to the text, and agreed to continue examining the remaining paragraphs at the next session.

Conclusion

106. The Technical Committee agreed to continue the examination of this question at its next session.

(f) Valuation treatment of freight and freight charges under Article 8 of the Agreement: Request by Mauritius

Docs. VT1402Ea and VT1412Ea

Background

107. The question was submitted by Mauritius at the 56th Session and the Technical Committee agreed to examine it as a Specific Technical Question. It concerns the valuation treatment of freight and freight charges under Article 8 of the Agreement. The facts pertaining to this question were set out in the Annex to Doc. VT1364Ea.

108. During the 57th Session, two approaches emerged with regard to this question. One group of delegates took the view that, for those countries applying a CIF Customs value, the Bunker Adjustment Factor could be included in the Customs value, irrespective of ~~the~~ which (China) party bears those charges. Another group of delegates maintained that because this case relates to a CIF transaction, and the price actually paid or payable for the imported goods made by the buyer to the vendor is inclusive of **all** freight and insurance charges, the additional adjustments in respect of freight and freight charges were not to be included in the Customs value if they were not incurred separately from or additionally to the price actually paid or payable by the buyer.

109. During the intersession, the Secretariat published Doc. VT1402Ea and invited Members to send their written comments and suggestions with a view to advancing the discussion.

Summary of discussion

110. Following her introduction of the question, the Chairperson suggested that, notwithstanding Mauritius' absence from the discussions, the Committee could continue to examine the question, given that the Member had clearly sought to address the concerns raised by delegates during the online discussion phase on the CLiKC! Platform. During that phase, Canada, China, Guatemala, Mauritius, Chinese Taipei, Uruguay, Uzbekistan and the ICC had fruitful discussions in this regard. Since expressing their views at the 57th Session, the delegates had not altered their differing positions.

111. Japan maintained the position it had adopted at the previous session. As far as Japan was concerned, the seller and the buyer had entered into the import transaction at a CIF price, which meant that the freight and insurance were included in that price. Where the buyer did not pay the additional freight in addition to the invoice price, it was to be understood that the

invoice price covered the entirety of the freight, which amounted to 42,535 c.u. Therefore, the Customs value had to be determined on the basis of the transaction value in accordance with Article 1 of the Agreement, without any adjustment. Accordingly, there was no need to add the additional freight to the Customs value. Japan asserted that it had concluded from the views expressed during discussions on the CLiKC! Platform that some delegates did not share its viewpoint. Furthermore, the Delegation did not expect the Technical Committee to reach a consensus in its examination of that question.

112. In Uruguay's view, consensus would not be possible given that there were two contrasting viewpoints. The Delegate of Uruguay recalled that a similar subject had been presented to the Technical Committee by Belarus, but no consensus had been reached, as pointed out by the Secretariat in Doc. VT1388Ea. Mirroring the manner in which the question submitted by Belarus was addressed, Uruguay suggested moving this question to Part III of the Conspectus of Technical Valuation Questions and recommending that Members review their legislation to take account of such situations. Paragraph 57 of Doc. VT0920 from the 38th Session should be borne in mind, as well as the national legislation adopted by Uruguay on this matter in Doc. VT0959 from the 39th Session.

113. Following on from Uruguay, China noted that opinion was divided and, as was the case in its examination of the question submitted by Belarus, the Technical Committee would not reach a consensus. In its understanding, as regards the cost of transport of the imported goods, there are two implications in Article 8.2, the first is: to include or not in Customs value; the second is: if to include, then in whole or in part. The Delegate of China would like the Committee to consider ~~ask~~, from the wording 'in part' in Article 8.2, would the provision inherently imply that members could decide further on how to determine the amount of the freight charges to be included in Customs value through their national legislations.

114. Malaysia reiterated that actual freight had to be included in the Customs value, regardless of who incurred the cost.

115. The United Kingdom expressed doubts over the advisability of adopting a document on matters governed by national legislation as provided for in Article 8.2 of the Agreement. The United States shared the view expressed by the United Kingdom.

116. Canada reiterated its view from the 57th Session in which it highlighted the need to strive for consistency as per Commentary 21.1 in the treatment of the cost of freight between those countries applying a FOB Customs value and those opting to include freight charges (CIF Customs value). In Commentary 21.1, the CIF price being the immutable price actually paid

or payable and inclusive of both the cost of goods and all transportation (*and insurance*[1]) charges, the TCCV had to decide whether in determining the customs value in an FOB country either: i) only the initially estimated or invoiced transportation (*and insurance*) costs built into the CIF price should be deducted from the CIF price, thereby rendering the initially estimated or invoiced price of the goods immutable; or ii) the actual transportation (*and insurance*) costs should be deducted from the CIF price, rendering the price of goods variable. The TCCV ultimately decided that the actual transportation (*and insurance*) costs were to be deducted, and therefore in a CIF transaction, the original estimated or invoiced price for the goods, and consequently the customs value in FOB countries, was variable and contingent on a deduction of the actual transportation (*and insurance*) costs from the CIF price (i.e. the price actually paid or payable). Consequently, if the TCCV adopted a view that the difference between the estimated cost of freight included in the invoiced CIF price and the actual cost of freight (including the bunker adjustment factor) needs to be added to the total CIF price and included in the customs value, this would result in a conclusion exactly opposite of that determined in Commentary 21.1 and would render this committee inconsistent in its direction of how to treat transportation costs. Furthermore, Canada did not agree that the question should be moved to Part III of the Conspectus of Technical Valuation Questions. Canada encouraged Members to take note of and review the informative and helpful non-paper the ICC had published during the CLiKC discussion phase as well as the Incoterms presentation it had made earlier that morning, with the hope that upon careful review of these ICC contributions, some delegations might change their current opinion and that a consensus on this technical question may in fact be achieve.

117. The Dominican Republic endorsed Canada's position and explained that there needed to be consistency between the FOB and CIF countries over a possible variation in the freight charges so as to provide the transparency and predictability espoused by the Agreement.

118. Agreeing that the additional freight charges should be subject to adjustment, Korea stated that it had reconsidered its position. The Delegate noted that, if the discrepancy in the cost of transportation was established at the delivery destination, it should not be included in the Customs value.

119. The ICC advocated the approach by which additional freight charges would not be subject to adjustment. In response to one delegate's question regarding the legal obligations incumbent

[1] Insurance costs were not specifically or explicitly addressed in Commentary 21.1 but they do form part of a bona fide CIF transaction.

on the parties to the transaction to observe the prices agreed under the Incoterms rules and to provide a breakdown of the various costs on the invoice, the ICC made clear that implementation of those measures was not mandatory; on the contrary, those measures were examples of good practice, and it was often in the seller's interest not to give a breakdown of the costs on the commercial invoice.

120. In the light of the above discussion, the Technical Committee agreed, at the Chairperson's suggestion, to revisit the question at the next session in the hope that Mauritius would be in attendance to weigh in on the discussion.

Conclusion

121. The Technical Committee agreed to continue examining this question at its next session.

(g) Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement: Request by Uruguay

Docs. VT1403Ea and VT1413E

Introduction

122. The Technical Committee agreed at its 57th Session to examine this question submitted by Uruguay as a Specific Technical Question.

123. The question is related to the use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement. A draft Case Study submitted by Uruguay was set out in the Annex to Doc.VT1389Ea.

124. During the intersession preceding the 58th Session, no written comments were received from Members on this question.

Summary of discussion

125. During the online discussion phase, comments were received from Brazil, Canada, China, Chinese Taipei, Uruguay, Uzbekistan and the ICC. In light of these comments, Uruguay updated the draft Case Study on the CLiKC! Platform to incorporate inputs from delegations regarding the text. China proposed some detailed edits to the draft Case Study, including the deletion of the sentences related to PCA.

126. The Delegate of Uruguay, during the in person meeting, briefly reviewed the discussion on this question at the 57th Session. This draft Case Study is mainly based on the facts of Case Study 14.2, with the exception that ICO carried out a compensatory transfer price adjustment after the importation of goods. He took the opportunity to thank the ICC and other delegations for their contributions during the drafting and discussion of this question.

127. The Representative of the ICC reminded the Technical Committee that the main objective of the draft instrument was to address the impact of the compensatory adjustment made by ICO on Customs value determination of the imported goods. As for other facts in this case, he proposed sticking to the original text of Case Study 14.2, as it would help focus the discussion on the compensatory adjustments.

128. To this end, the ICC was concerned that amendments made to the facts of the case, such as those in paragraphs 4, 5, 14, and 28 of the updated version on the CLiKC! Platform, might lessen the impact of this draft instrument.

129. The Delegate of China gave an explanation on the intention of its proposed amendments on the CLiKC! Platform. As indicated by China, by deleting the relevant sentences related to PCA and adding information on advance filing of transfer pricing policies with Customs as well as lodging provisional declaration at the time of importation by the importer, it would encourage voluntary compliance of the multinational enterprises and promote the co-operation between the Customs and the MNEs; furthermore, it would provide greater certainty and predictability on the duty liability of the enterprises involved, thus promoting trade facilitation. The Delegate of Uruguay agreed to delete the relevant text concerning post clearance audit.

130. A number of delegations took the floor to support the continued examination of this question, suggesting that the text be further refined to address Members' concerns.

131. The Technical Committee agreed to continue the examination of this question at its next session.

Conclusion

132. The Technical Committee agreed to continue the examination of this question at its next session.

(h) Valuation treatment of imported goods when goods are provided free of charge according to the quantity purchase: Request by Korea

Docs. VT1404Ea and VT1414Ea

Introduction

133. The Technical Committee agreed at its 57th Session to examine this question submitted by Korea on "Valuation treatment of imported goods when goods are provided free of charge according to the quantity purchased" as a Specific Technical Question.

134. In light of the comments received during the 57th Session, Korea worked with the Secretariat to update the text of the case during the intersession. The updated text was set out in the Annex to Doc. VT1404Ea.

135. As proposed by Korea, the title of this case was changed to "Valuation treatment of imported goods when goods are additionally provided according to the quantity purchased" in the updated text.

136. During the intersession preceding the 58th Session, written comments were received from Uruguay, which were set out in the Annex to the working document VT1414Ea.

Summary of discussion

137. During the online discussion phase, comments were received from China, Japan, Korea, Indonesia, Uruguay and Uzbekistan.

138. The Delegate of Uruguay, during the in person meeting, reiterated his opinion regarding Question 1 in this case, which he had shared on the CLiKC! Platform. He stated that the provision of additional goods constitutes a commercial promotion, and these additional goods could be valued together with the purchased goods under Article 1 of the Agreement. The Delegations of Brazil, Canada, the European Union, Korea and the United Kingdom echoed Uruguay's view.

139. China drew the Technical Committee's attention to Advisory Opinion 1.1, and suggested considering whether the additional goods provided in Question 1 could be deemed as to have been the subject of a sale~~.~~, given that paragraph 5 (a) of the case shows that there's no price for the additional goods in the invoice. The Dominican Republic, Guatemala and Indonesia shared China's concern. Moreover, Indonesia opined these additional goods should be treated as free consignments in line with Advisory Opinion 1.1.

140. As regards Question 2 in this case, some delegations were of the view that the situation described could be understood as retrospective discounts and addressed accordingly, following Example 4 of Advisory Opinion 15.1. However, Korea argued that Example 4 pertains to reduced prices, while Question 2 concerns additional goods provided by the seller.

141. A number of delegations expressed the opinion that Article 1 could not apply in Question 2, as the additional goods are provided in the following year, and there is no sale for these goods. Some other delegations suggested that further reflection should be undertaken before reaching this conclusion. Norway believe Article 1 should apply in Question 2, and that the additional goods that are provided in the following year belong to the same transaction as the goods that were provided in the first year according to the contract. This view was supported by the United States and the ICC.

142. The Technical Committee agreed to change the title of this question to *"Valuation treatment of imported goods when goods are additionally provided according to the quantity purchased"* as proposed by Korea, and continue the examination at its next session.

Conclusion

143. The Technical Committee agreed to continue the examination of this question at its next session.

Agenda Item VI: QUESTIONS RAISED DURING THE INTERSESSION

(a) Application of Article 1.1: Request by Vietnam

Doc. VT1415Ea

Introduction

144. During the intersession, the Customs Administration of Vietnam forwarded to the Secretariat a new question for consideration by the Technical Committee on Customs Valuation at its 58th Session. The question concerns the Customs valuation determination of the imported goods when a "Representative Company" negotiates with the manufacturer to determine the prices of the imported goods, and subsequently receives a "commission" from the importer. Both the "Representative Company" and the importer are subsidiaries of the same multinational corporation.

145. At the 58th Session, the Technical Committee was invited to decide whether it would accept the question as a Specific Technical Question to be examined at a future session.

Summary of discussion

146. During the online discussion phase, questions regarding the facts of this case were raised by Brazil, China, Japan and Uzbekistan on the CLiKC! Discussion Forum. More questions were received from the Dominican Republic, Uruguay and Indonesia during the in person meeting.

147. In response to these questions, the Delegate of Vietnam provided further clarification, and confirmed that more information would be provided during the intersession preceding the next session to address delegates' concerns.

148. The Representative of the ICC was of the view that the key factor in this question is the role of the Representative Company. He reminded the Committee of a presentation made by the ICC in relation to the buying and selling agents at a previous TCCV session, and offered to make another presentation on this topic at the next session to facilitate the discussion on this question. The ICC's offer was accepted by the Technical Committee.

149. In the light of the above discussion, the Technical Committee agreed to include this case as a Specific Technical Question on the agenda of the next session.

Conclusion

150. The Technical Committee agreed to examine this question as a Specific Technical Question at its next session.

b) Treatment applicable to non-payments by the buyer: Request by Uruguay

Doc. VT1416Ea

Introduction

151. During the intersession, the Customs Administration of Uruguay had submitted to the Secretariat a new question for examination by the Technical Committee on Customs Valuation at the 58th Session. The facts pertaining to this question were set out in the Annex to Doc. VT1416Ea.

152. The question relates to a situation where a buyer of goods to be imported ultimately fails to pay the seller all or part of the agreed price, or an indirect payment to a third party imposed as a condition of sale of the goods, or an adjustment prescribed by Article 8.1 of the Agreement.

153. The Technical Committee had been invited to decide whether it would like to examine this question as a Specific Technical Question at a future session.

Summary of discussion

154. As invited by the Chairperson, the Delegate of Uruguay made an introduction of the question. This question involved a situation where, following the conclusion of a commercial contract, the goods were exported and delivered but the buyer ultimately failed to pay all or part of the agreed price. Uruguay sought to determine whether the amounts that the buyer had failed to pay should be included in the Customs value.

155. The Delegate of Uruguay recalled the answers he had given to the questions raised by China during the online discussion phase on the CLiKC! Platform, and reiterated that he was

available during the intersession to provide further clarification on any questions that delegates might have.

156. All delegates who had shared their views on the CLiKC! Discussion Forum were in favour of including this question as a Specific Technical Question on the Agenda of the next session. This position was expressed by the Delegates of Brazil, China, Colombia, the Dominican Republic, the European Union, Indonesia, Malaysia, Uzbekistan, and Sri Lanka.

157. During the discussion, a number of delegates had commented that examination of that question might create the opportunity for the Technical Committee to clarify the term "payable" included in the definition of "transaction value".

158. The Chairperson drew attention of the Committee to Uruguay's comments posted on the CLiKC! Platform which referred to a sentence from the Glashoff and Sherman's book that "*The phrase 'actually paid or payable' expresses the intention that the customs value includes the total price, whether paid or not, in whole or in part.*"

159. Uruguay would argue that this question involved various situations, and it was willing to broaden or restrict its scope in line with the Technical Committee's preferred direction for its future consideration.

160. In the light of the views expressed by the delegates, the Chairperson concluded by confirming that this question would be included as a Specific Technical Question on the Agenda of the next session.

Conclusion

161. The Technical Committee agreed to include this question as a Specific Technical Question on the Agenda of its next session.

Agenda Item VII: OTHER BUSINESS

(a) Presentation by the ICC on Incoterms

Background

162. During the discussion on the question submitted by Mauritius on the "Valuation treatment of freight and freight charges under Article 8 of the Agreement" at the 57th Session, the ICC had offered to give a presentation on Incoterms at the 58th Session.

163. The purpose of this presentation was to help move forward the discussion on the question submitted by Mauritius.

Presentation by the ICC

164. The Representative of the ICC began by recalling the definition of the Incoterms before mentioning their implications for Customs valuation. She went on to introduce Incoterms 2020 before concluding her presentation.

165. Incoterms are three-letter abbreviations in the context of a B2B contract which define the obligations, the allocation of cost and the transfer of risk between a seller and a buyer along the entire logistics chain. They become subject to review every 10 years so that they can be adapted to the constantly evolving environment of international trade. In her presentation, the Representative of the ICC made clear that the Incoterms were not a substitute for the contract of sale, given that they did not, for example, cover the transfer of ownership.

166. As regards Incoterms 2020, there are 11 such abbreviations in total (as compared with 13 under Incoterms 2000) which can be presented in various ways. Taking the seller's responsibility as an example, Incoterm EXW (Ex Works), on the one hand, relates to the seller's minimum responsibility and, on the other hand, Incoterm DDP (Delivered Duty Paid) relates to its maximum responsibilities.

167. In terms of the changes introduced between Incoterms 2010 and 2020, the speaker commented that Incoterm DAT had become Incoterm DPU. Only the name had changed, she explained, and the content had remained the same. Another change was the distinction in the level of insurance cover between the CIP rule (Carriage and Insurance Paid To) and the CIF rule (Cost, Insurance and Freight). Explanatory notes were introduced to aid users' understanding of the Incoterms.

168. The Representative of the ICC would regard the possible link between Incoterms and Customs valuation as self-evident, bearing in mind that the Customs value was determined in the light of the Incoterm used in the shipment of the goods. Most countries opted for a CIF (Cost, Insurance and Freight) Customs value whereas others, to a lesser degree, relied on the FOB (Free on Board) rule to determine the Customs value.

169. Depending on the Incoterm used in the transaction, in order to determine the Customs value, it would be necessary either to deduct or to add specific costs based on whether the country concerned had opted to apply the CIF or FOB rule.

170. In conclusion, the Representative of the ICC stated that there were no major changes between Incoterms 2010 and 2020. She commented further that the 2020 version introduced the idea of simplifying the Incoterms and providing advice for all users. As regards the DAP rule, the costs involved in Customs clearance could be borne by the seller or the buyer depending on the specific nature of those costs. If treated as transport costs, they would be borne by the seller, but if regarded as Customs clearance costs, they would be payable by the buyer. In the context of Incoterms 2020, the former approach had been adopted.

Summary of discussion

171. The importance and quality of the ICC's presentation was unanimously recognized by delegates. The Delegates of Algeria, Bangladesh, Côte d'Ivoire, the Democratic Republic of the Congo, the Dominican Republic, Finland, Indonesia, Malaysia, the United States and Uruguay then expressed their concerns to the Representative of the ICC.

172. To the question of Bangladesh as to whether Incoterms are mandatory in a commercial contract, the ICC replies that, legally speaking, Incoterms are not mandatory. However, if Customs declarations require them to be mentioned, it is advisable to specify them on the invoice.

173. Côte d'Ivoire asked whether Customs administrations were involved in Incoterms revision cycles. The presenter stressed that it was up to the local ICC in each country to determine which structures should be involved during the consultation phase. A delegate of the ICC put forward the idea of carrying out a survey within the Technical Committee to identify which administrations would be interested in taking part in the consultations for the next revision of the Incoterms rules.

174. With regard to the question of Algeria about the breakdown of transport costs on the invoice, the ICC representative agreed that when goods are exported, freight costs may indeed be indicative, and that it may be difficult to break them down on the invoice. However, she felt that this should not be a major problem during customs clearance, as the contractual invoice amount is global and invariable.

175. In response to the comment of the United States on the misuse of Incoterms, the ICC recognized that some people do indeed misuse Incoterms. How this is dealt with will depend on the intention behind the act. This may lead, for example, to legal action if the act is malicious in intent.

176. The Representative of the ICC also provided answers to the delegates' other concerns.

Conclusion

177. The Technical Committee took note of the presentation by the ICC.

(b) Presentation by the Secretariat on WCO Performance Measurement Mechanism (PMM) and implementation of the main WCO tools

Presentation by the Secretariat

178. Maka KHVEDELIDZE from the Secretariat made reference to the working document OC0262Ea that was originally presented at the 42nd Session of the Technical Committee on Rules of Origin. She drew the attention of the delegates to the PMM methodology for assessing the efficiency and effectiveness of all Customs competences through 49 Key Performance Indicators (KPIs) to measure 23 expected outcomes related to 4 dimensions of Customs performance: Trade Facilitation and Economic Competitiveness; Revenue Collection; Enforcement, Security and Protection of Society; and Organizational Development.

179. The TCCV was informed that the first cycle of the PMM assessment had been launched in November 2023, while inviting the nominated PMM National Contact Points (NCPs) from the Member administrations to submit the data points for each KPI through a fully digitalized IT platform latest by 24 April 2024.

180. The reference was given to the three Expected Outcomes (Increased compliance with classification rules, Increased voluntary revenue compliance and Fairer revenue collection) under the Revenue Collection dimension to be measured in the scope of the PMM with the corresponding KPIs.

181. The Secretariat highlighted that while the PMM was primarily designed to assess Customs efficiency and effectiveness, they also aimed at measuring the application of the main WCO instruments and tools leveraging with the two KPIs to measure the awareness and use of the main WCO instruments and tools. Further updates of the PMM were envisaged while considering the rest of the expected outcomes and the relevant tools for eventual discussions and inclusion in the next cycles of the PMM.

182. The Secretariat further clarified that the development of the new KPIs to measure the implementation of the relevant main WCO instruments and tools could be initiated with the joint efforts taking into account also the recent guidance of the Performance Measurement Mechanism Project Team (the WCO body responsible for the PMM maintenance), namely the work to be done in reciprocity and that the relevant WCO Working bodies responsible for the respective main WCO tools should be in the position of initiating the request of developing the implementation KPIs in coordination with the PMMPT according to the PMM maintenance procedure *(WCO Member/Group of Members/Secretariat/Chair of another relevant working body can submit proposals on KPIs to monitor the implementation of relevant WCO tools and instruments).*

Summary of discussion

183. In response to questions raised by delegates, the Secretariat reiterated that the PMM assessment was voluntary and was to be conducted in two consecutive phases (self-assessment and peer review), in order to ensure the credibility of the assessment process. The peer review would be conducted only if Members request it after the self-assessment stage.

184. However, the completion of the peer review should be a prerequisite for a thorough performance evaluation. It would enable the WCO to ensure data quality, and to provide evidence-based technical assistance and capacity building support. In this respect, the delegates were further updated about the deliberations of the 15th Session of the Capacity Building Committee, namely considering the PMM as a foundation for evidence-based decision-making, providing a roadmap for impactful investments on a national scale.

185. During the first cycle of the PMM assessment, it would be possible to identify performance gaps as the difference between the existing performance and regional or global benchmarks, which, in turn, might serve as a basis for capacity-building interventions. The Secretariat had indicated that the second stage of the PMM assessment, the peer review stage, would focus on data reliability, although it would be undertaken on demand and based on funding. It would enable the WCO to validate the findings of the self-assessment phase and provide evidence-based technical assistance and capacity-building support. Starting from the second cycle of the PMM assessment, tracking the progression or regression of those capacity gaps

would also be possible, thus giving an indication of the impact of the capacity-building interventions performed.

186. With regard to questions on the elaboration of the tools in the area of revenue collection, the Secretariat clarified that the PMM aimed at measuring the application of the so called main tools, including the selected main tools having major impact on the corresponding expected outcome under the PMM dimension of Revenue Collection. It was further explained that the PMM was not the forum for developing the tools but rather evaluating the application of the selected main tools (use and awareness) thus giving indication for any eventual amendments, if needed.

187. Regarding the inquiry if the PMM considered the measures of World Bank Doing Business Trading Across Borders, the Secretariat moved on to underline that the Doing Business coverage was limited to the time and cost associated with the logistical process of exporting and importing goods, while WCO PMM outlined the methodology for assessing the efficiency and effectiveness of all Customs competences structured around four dimensions of Customs performance: Trade Facilitation and Economic Competitiveness; Revenue Collection; Enforcement, Security and Protection of Society; and Organizational Development. It was further explained that the measures related to the release time for export and import were captured in a comprehensive and granulated level under the PMM.

188. With respect to the engagement of private sector in the PMM exercise, the Secretariat explained that the dialogue with the private sector had been in place from the very beginning and that was the practice to be maintained to ensure that the PMM was in line with the commercial practices sand realities. The PMM's development incorporated input from stakeholders, through consultations with the Private Sector Consultative Group (PSCG), academia and partner international organizations. The delegates were further updated that the Chairperson of the PSCG was invited to the 1st meeting of the PMMPT to share the perspectives/expectations of the PMM from the private sector perspective.

189. The Secretariat ensured the Committee that the PMMPT would continue further coordination to ensure synergies with other working bodies and any eventual implementation KPIs could be developed in future depending on the emerging needs and priorities on the respective bodies.

Conclusion

190. The Technical Committee took note of the presentation delivered by the Secretariat and the subsequent discussion.

Agenda Item VIII: PROGRAMME OF FUTURE WORK

191. Upon the proposal of the Delegation of Uruguay, the Technical Committee agreed to consider holding a celebration at the 60th Session in 2025, for which a specific item would be added to the Agenda of the 59th Session.

192. The Secretariat informed the Technical Committee that the following items would be included on the Agenda for the 59th Session:

I. Adoption of Agenda/Suggested programme

II. Adoption of the Technical Committee's 58th Session Report

III. Reports on intersessional developments

- Director's Report
- WTO Committee on Customs Valuation report

IV. Technical assistance, capacity building and current issues

- Report on technical assistance/capacity building activities undertaken by the Secretariat and Members
- Progress reports from Members' on practical application of the WTO Valuation Agreement

V. Specific technical questions

a) Accumulated discounts in E-Commerce sales : Request by Uruguay

b) Meaning of the expression "the price for the imported goods" in accordance with paragraph 4 of the Interpretative Note to Article 1: Request by Uruguay

c) Treatment applicable to transactions agreed in cryptocurrency units: Request by

Uruguay

d) Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement : Request by Brazil

e) Valuation treatment of freight and freight charges under Article 8 of the Agreement : Request by Mauritius

f) Use of transfer pricing documentation when examining related party transactions under Article 1.2 (a) of the Agreement : Request by Uruguay

g) Valuation treatment of imported goods when goods are additionally provided according to the quantity purchased: Request by Korea

h) Application of Article 1 of the Agreement: Request by Vietnam

i) Treatment applicable to non-payments by the buyer: Request by Uruguay

VI. Questions raised during the intersession

VII. Other business

- ICC's presentation on the case submitted by Vietnam
- Discussion on the preparation for a celebration at the 60th Session

VIII. Elections

IX. Programme of future work

X. Dates of next meeting

Agenda Item IX: DATES OF NEXT MEETING

193. The Secretariat informed the Technical Committee that the 59th Session of the Technical Committee on Customs Valuation had been provisionally scheduled for 14 to 18 October 2024.

CLOSING REMARKS

194. The Chairperson thanked all the delegates for their support and active participation during this session, and expressed gratitude to the Secretariat, the interpreters and the supporting staff for their work. The Acting Director took the opportunity to congratulate the Committee for adopting a new instrument, and thanked all the delegates for their interest and dynamism displayed during the discussions aimed at achieving consensus. She anticipated reconvening with all the delegates at the next session to build upon the progress made during this session.

195. The Chairperson officially closed the session.

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LIST OF DELEGATES
LISTE DES DELEGUES
LISTA DE DELEGADOS

CHAIRPERSON/
PRESIDENT/
PRESIDENTE

Qianyu LIN
Senior Supervisor II
Division of Duty Collection
Shenzhen Customs
China
qianyu.lin@163.com

WTO MEMBERS
MEMBRES DE L'OMC
MIEMBROS DE LA OMC

BELGIUM/BELGIQUE/BÉLGICA

Delegate/Délégué/Delegado

Embe BOMBO
Financial Expert
General Administration of Customs and Excise
Embe.bombo@minfin.fed.be

Alternate/Suppléant/Suplente

Klaas PARIDAENS
Attaché
General Administration of Customs and Excise
Klaas.paridaens@minfin.fed.be

BELIZE

Delegate/délégué

Emelda COCOM
Assistant Comptroller Valuation
Belize Customs and Excise Department
Emelda.cocom@customs.gov.bz

BENIN

Delegate/délégué

Idrissou IMOROU
Directeur de la Législation et de la Coopération
Direction générale des douanes
iimorou@douanes.bj

Alternate/Suppléant/Suplente

Laurent Parfait MEKOUN
Formateur
Direction Générale des Douanes
lmekoun@douanes.bj

BRAZIL / BRESIL

Delegate/Déléguée/Delegada

Kelly MORGERO
Customs Officer
Special Secretariat of the Federal Revenue (rfb)
Kelly.morgero@rfb.gov.br

Alternates/Suppléants/Suplentes

Dao REAL
Customs Officer
Special Secretariat of the Federal Revenue of Brazil
Dao.real@rfb.gov.br

CANADA

Delegate/Délégué/Delegado

Dominique RIVERIN
Senior Program Advisor
Customs Valuation Program
Canada Border Service Agency
Dominique.riverin@cbsa-asfc.gc.ca

Alternate/Suppléant/Suplente

Benoît GOSSELIN
Liaison Officer and First Secretary
Canada Border Services Agency
Benoit.gosselin@international.gc.ca

CHILE/CHILI

Delegate/Déléguée/Delegada

Caroll OSORIO
Technical Department Assistant
National Customs Service
cosorio@aduana.cl

CHINA / CHINE

Delegate/Déléguée/Delegada

Li YAN
First Secretary
Mission of China to the EU
liyangacc@outlook.com

Alternates/Suppléants/Suplentes

Tianbo XIE
Senior Supervisor III
Division of Duty Collection
Huangpu Customs
Gacc
13501505606@163.com

Xioxiao WANG
Senior Supervisor
Valuation Division
Department of Duty Collection
Gacc
wxx_banana@163.com

CHINESE TAIPEI / TAIPEI CHINOIS

Delegate/Délégué/Delegado

Shao-Yu ZHANG
Specialist
Customs Administration
009254@customs.gov.tw

COLOMBIA / COLOMBIE

Delegate/Déléguée/Delegada

Maritza ARDILA ESTUPIÑAN
Funcionaria de la Coordinación de Valoración Aduanera
Subdirección Técnica Aduanera
Direccion de Impuestos Y Aduanas Nacionales
mardilae@dian.gov.co

COMORES

Delegate/Délégué/Delegado

Mohamed SOIDIK
Chef des Services Valeur
Soidik2017@gmail.com

CONGO (REPUBLIC OF THE) / CONGO (REPUBLIQUE DU)

Delegate/Délégué/Delegado

Jude LOUBOVE
Attaché douanier
Douanes congolaises
loubovejude@gmail.com

CONGO (DEMOCRATIC REPUBLIC OF THE)
CONGO (REPUBLIQUE DEMOCRATIQUE DU)

Delegate/Délégué/Delegado

Carol LUTALADIO MBUTA
Directeur de la Valeur
Direction Générale des Douanes et Accises
Carlut2000@yahoo.fr

Alternate/Suppléant/Suplente

Richard SOKI KEKE
Sous-Directeur Valeur
Direction Générale des Douanes et Accises
rj.soki_2012@yahoo.fr

COTE D'IVOIRE

Delegate/Délégué/Delegado

Aboa Leopold AKE
Conseiller
Direction Générale des Douanes
leopoldakepinto@yahoo.fr

Alternate/Suppléant/Suplente

Yacouba MEITE
Directeur
Direction générale des douanes
meiteyac@yahoo.fr

DOMINICAN REPUBLIC / REPUBLIQUE DOMINICAINE / REPUBLICA DOMINICANA

Delegate/Déléguée/Delegada

Santa Marianela MARTE DE LOS SANTOS
Gerentetécnica I
Dirección General de Aduanas
s.marte@aduanas.gob.do

EUROPEAN UNION / UNION EUROPEENNE / UNION EUROPEA

Delegate/Délégué/Delegado

John TAYLOR
Administrator
Directorate General for Taxation and Customs Union
European Commission
John.taylor@ec.europa.eu

Alternates/Suppléants/Suplentes

Agnieszka SZARKOWSKA
Legal and Policy Officer Customs Valuation
Directorate General for Taxation and Customs Union
European Commission ~~- Taxud~~
agnieszka-anna.szarkowska1@ec.europa.eu

Han BOSCH
Legal and Policy Officer
Directorate General for Taxation and Customs Union
European Commission

Vanni PESTELLI
Legal and Policy Advisor
Directorate General for Taxation and Customs Union
European Commission
vanni.pestelli@ec.europa.eu

FINLAND / FINLANDE

Delegate/Délégué/Delegado

Ville SUOMINEN
Senior Expert
Customs
ville.suominen@tulli.fi

GABON

Delegate/Délégué/Delegada

Nadia NIOMBA NZONDO NGOMA
Chef de Service
Direction Générale des Douanes et Droits Indirects
nadianiomba@yahoo.fr

Alternate/Suppléant/Suplente

Paule Dalhia ONOUVIET
Attaché Dounier
Douanes
Attachedouanier.bruxelles@gmail.com

GUATEMALA

Delegate/Délégué/Delegado

Cesar Augusto MO ISEM
Customs Attache
Customs Administration
camoisem@sat.gob.gt

HONG KONG CHINA

Delegate/Délégué/Delegado

Suk-ha CHO
Senior Trade Controls Officer
Customs and Excise Department
Sh_so@customs.gov.hk

Alternate/Suppléante/Suplente

Kam-hung CHENG
Inspector
Hong Kong Customs and Excise Department
Neil_kh_cheng@customs.gov.hk

INDIA/INDE

Delegate/Délégué/Delegado

Schweta CHANDER
Additional Director
Central Board of Indirect Taxes and Customs
shweta.chander@gov.in

Alternate/Suppléante/Suplente

Jainandra Singh KANDHARI
First Secretary (Trade)
Central Board of Indirect Taxes and Customs
Js.kandhari@nic.in

INDONESIA / INDONESIE

Delegate/Délégué/Delegado

Alvari Ovinda ADNA
Head of Customs Valuation IV section
Directorate General of Customs and Excise
alvariovinda@gmail.com

Alternates/Suppléantes/Suplentes

Maulana ICHSAN
Head of Customs Valuation I
Directorate General of Customs & Excise
Maulana.ichsan@kemenkeu.go.id

Saut MULIA
Customs Attache
Embassy of the Republic of Indonesia
Saut.mulia@kemenkeu.go.id

ISRAEL

Delegate/Délégué/Delegado

Aviya GORGI
Advisor
Finance, Customs and Taxation
Mission of Israel to the EU
Fca-assistant1@brussels.mfa.gov.il

JAPAN/JAPON/JAPÓN (EL)

Delegate/Délégué/Delegado

Takahiro HASHIKOMI
Section Chief
Ministry of Finance
Customs Tariff Bureau
Takahiro.hashikomi@mof.go.jp

Alternate/Suppléant/Suplente

Shizuko SUZUKI
Valuation Specialist
Customs
Nobletranquila95@gmail.com

KENYA

Delegate/Délégué/Delegado

David KIRUI
Manager
Customs and Border Control
David.kirui@kra.go.ke

KOREA / COREE

Delegate/Délégué/Delegado

Inseon JO
Interpreter
Korea Customs Service
Nj1105@korea.kr

Alternates/Suppléants/Suplentes

Yongji JO
Assistant
Korea Customs Service
Jyj8680@korea.kr

Chang Seon NA
Assistant Director
Korea Customs
Ncs5042@korea.kr

Seog Hwan HONG
Senior Manager
Korea Customs Service
Corporate Audit Division
Nj1105@korea.kr

MALAYSIA / MALAYSIE

Delegate/Déléguée/Delegada

Athavan SUBRAMANIAM
Deputy Director of Customs
Royal Malaysian Customs Department
Athavan.subra@customs.gov.my

Alternate/Suppléant/Suplente

Ahmad Yasir BIN KHIRI
Second Secretary (customs)
Embassy
yasir.khiri@customs.gov.my

MALI

Delegate/Délégué/Delegado

Mamadou TRAORE
Directeur des contrôles après dédouanement
Direction Générale des Douanes
madouatraore@yahoo.fr

MONGOLIA / MONGOLIE

Delegate/Délégué/Delegado

Tumurbat BAZARRAGCHAA
First Secretary
Embassy of Mongolia in Brussels
tumurbat@embmongolie.be

NETHERLANDS / PAYS_BAS

Delegate/Délégué/Delegado

Marcel BRAVENBOER
Accountant
Dutch Customs
m_bravenboer@douane.nl

NIGERIA

Delegate/Délégué/Delegado

Aliyu KAITA
Comptroller of Customs
Nigeria Customs Service
Kaita.aliyu@customs.gov.ng

Alternates/Suppléants/Suplentes

Tosin ADENIYI
Superintendent of Customs
Nigeria Customs Service
adeniyi.david@customs.gov.ni

Haladu UBALE
Customs Attaché
Nigeria Customs Service
Ubalehaladu123@gmail.com

NORWAY / NORVEGE / NORUEGA

Delegate/Délégué/Delegado

Jarle LILLELAND
Senior Advisor
Norwegian Customs
jsli@toll.no

Alternate/Suppléante/Suplente

Stine CLEMENTZ-ANTONSEN
Senior Advisor
Norwegian Customs
Stine.clementz-antonsen@toll.no

PORTUGAL

Delegate/Déléguée/Delegada

Ireneia PEREIRA
Head of Division
Tax and Customs Authority
Ireneia.romao.pereira@at.gov.pt

SAUDI ARABIA / ARABIE SAOUDITE

Delegate/Délégué/Delegado

Yousef ALOTAIBI
Valuation Section Manager
Zakat, Tax and Customs Authority
irt@zatca.gov.sa

SENEGAL

Delegate/Délégué/Delegado

Cheikh DIOP
Chef du Bureau de la Valeur
Direction Générale des Douanes
chdiop@douanes.sn

SINGAPORE

Delegate/Délégué/Delegado

Teik Choon CHOO
Assistant Head
Tariffs and Trade Services Branch

Singapore Customs
Customs_international@customs.gov.sg

Alternate/Suppléant/Suplente

Vinod Prem KUMAR
Senior Officer
Tariffs and Trade Services Branch
Singapore Customs
Customs_international@customs.gov.sg

SRI LANKA

Delegate/Délégué/Delegado

Chandima Sujeewa Achala CHANDRASEKARE
Additional Director General of Customs
Sri Lanka Customs
achalacustoms@gmail.com

Alternate/Suppléant/Suplente

Dappula AAREWATTA
Senior Director of Customs
Sri Lanka Customs
dappula@gmail.com

SWEDEN / SUEDE

Delegate/Déléguée/Delegada

Viktoria BERNTSSON
Technical Officer
Swedish Board of Customs
Viktoria.berntsson@tullverket.se

THAILAND/THAILANDE/TAILANDIA

Delegate/Délégué/Delegado

Suranarong MALAI
Chief of Customs Valuation Unit 1.2
Thai Customs Department
107682@customs.go.th

Alternates/Suppléants/Suplentes

Chayanut KLIANGPIBOON
Customs Technical Officer
Thai Customs Department
Chayanut_kl@customs.go.th

Kachamoke TANTINON
Customs Technical Officer
Thai Customs Department
110052@customs.go.th

UKRAINE

Delegate/Délégué/Delegado

Igor DANKOV
Customs Counsellor
Mission of Ukraine to the EU
Igor.dankov@mfa.gov.ua

UNITED KINGDOM / ROYAUME-UNI / REINO UNIDO

Delegate/Délégué/Delegado

Nigel MOONEY
Senior Policy Advisor
Hm Revenue & Customs
Nigel.mooney@hmrc.gov.uk

UNITED STATES/ETATS-UNIS/ESTADOS UNIDOS

Delegate/Délégué/Delegado

Robert DINERSTEIN
Attorney Advisor
US Customs and Border Protection
Robert.dinerstein@cbp.dhs.gov

Alternate/Suppléante/Suplente

Joy Marie VIRGA
Attorney-Advisor
U.S. Customs and Border Protection
Joymarie.virga@cbp.dhs.gov

URUGUAY

Delegate/Délégué/Delegado

Guzman MAÑES
Capacitación
Dirección Nacional de Aduanas
gmanes@aduanas.gub.uy

VIETNAM

Delegate/Déléguée/Delegada

Pham Thanh HUYEN
Customs Official
General Department of Viet Nam Customs
huyenpt2@customs.gov.vn

****

OBSERVER ADMINISTRATIONS
OBSERVATEURS DES ADMINISTRATIONS
OBSERVADORES DE LOS ADMINISTRACIONES

ALGERIA / ALGERIE

Delegate/Délégué/Delegado

Mourad AMI
Sous Directeur des Bases de Taxation
Direction Générale des Douanes
Ami55mour55@gmail.com

KOSOVO

Delegate/Délégué/Delegado

Bekim MEHMETAJ
Customs Attache
Kosovo Embassy in Belgium
Bekim.mehmetaj@dogana-rks.org

Alternates/Suppléants/Suplentes

Fitore MEHMETI
Head of Sector
Kosovo Customs
Fitore.mehmeti@dogana-rks.org

Mefail SHEHU
Head of Unit
Kosovo Customs
Mefail.shehu@dogana-rks.org

****

OBSERVERS / OBSERVATEURS / OBSERVADORES

ICC – INTERNATIONAL CHAMBER OF COMMERCE

Paulette VANDER SCHUEREN
Partner
Mayer Brown
Pvanderschueren@mayerbrown.com

Marius COSNITA
Senior Manager
British American Tobacco
marius_cosnita@bat.com

Mark NEVILLE
Principal
International Trade Counsellors
mkneville@itctradelaw.com

Jean-Marie SALVA
Senior Partner
DS Avocats
salva@dsavocats.com

Wim VANHOEYMISSEN
Indirect Tax Manager
Procter & Gamble
Vanhoeymissen.w@pg.com

Arnaud FENDLER
Associate Lawyer
DS Avocats
fendler@dsavocats.com

Lionel VAN REET
Principal
Customs & International Trade
Baker McKenzie
Lionel.vanreet@bekermckenzie.com

IMF – INTERNATIONAL MONETARY FUND

Marco Antonio BORGES DE SIQUEIRA
Technical Assistance Advisor
msiqueira@imf.org

WTO – WORLD TRADE ORGANIZATION

Jess NICOL
Counsellor
Jesse.nicol@wto.org

° ° °

SECRETARIAT/SECRETARIA

TARIFF AND TRADE AFFAIRS DIRECTORATE/
DIRECTION DES QUESTIONS TARIFAIRES ET COMMERCIALES/
DIRECCIÓN DE ARANCELES Y DE ASUNTOS COMERCIALES

Acting Director

Gael GROOBY

VALUATION SUB-DIRECTORATE/
SOUS-DIRECTION DE LA VALEUR/
SUBDIRECCIÓN DEL VALOR

Technical Officer

Jiabin LUO

Technical Attaché

Joseph OUEDRAOGO

INTERPRETERS/INTERPRÈTES/INTÉRPRETES

Louise DIXON
Jean-François MICHEL
Lara RIVARD
Antonio GARZON JOLI
Marta PIERA MARIN
Carmen PRIETO LOPEZ
Ashraf IBRAHIM
Melpomene KONSTANTINIDI
Mourad RAMDANI

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REPORT BY THE WTO TO THE 58TH SESSION OF THE TCCV

15-19 APRIL 2024

The WTO last reported to the TCCV at its 57th Session in October 2023. Following the TCCV meeting, the WTO's Committee on Customs Valuation (WTO CV Committee) held its formal meeting on 15 November 2023, which was chaired by Mr Omar CISSE of Senegal. The next formal meeting is scheduled for Thursday, 23 May 2024.

Status of Notifications relating to Customs Valuation Legislation

The WTO CV Committee reviews four types of notifications pertaining to the customs valuation legislation of Members, which include: Members' laws, regulations, and administrative procedures; Members' responses to a checklist of issues related to their legislation; Members' date of implementation of the Decision on Interest Charges; and whether Members adopt the practice referred to in paragraph 2 of the Decision on the Valuation of Carrier Media. The status of notifications regarding Members' customs valuation legislation, and any questions and responses pertaining to that legislation, is compiled in a report, the most recent version set out in document G/VAL/W/232/Rev.18.[2]

At the November 2024 meeting of the WTO CV Committee, the Chairperson acknowledged the work by Members in submitting notifications and related questions pertaining to customs valuation legislation. New updates of legislation from Bolivia, Colombia, and the Philippines had been submitted for review. Although the Committee had undertaken the review of questions and responses pertaining to the valuation legislation of 35 Members, it was able to close out nine of those reviews at that meeting. The WTO CV Committee also launched the next triennial review of the Agreement on Preshipment Inspection.

As always, the WTO Secretariat wishes to acknowledge the positive contribution of Members of the TCCV to the work of the WTO CV Committee and appreciates their work in encouraging the submission of customs legislation notifications as well as responses to questions raised by Members in relation to that legislation.

Other Activities

There are two other activities of the WTO CV Committee that may be of interest to Members of the TCCV. First, following a WTO-wide call to improve the functioning of WTO committees, the WTO CV Committee made several changes to enhance its operation and practices. These changes included reforms to enhance the information available to Members through online manuals and introductory sessions, to ensure earlier circulation and more detailed meeting agendas, to implement an automated interface for the preparation of agendas, and to agree in principle to regularize the use of experience-sharing sessions. These reforms are to be introduced in 2024. With respect to experience-sharing, several Members requested that any sessions not duplicate the work of the TCCV.

Second, the Chair of the WTO CV Committee has called for a workshop on WTO customs valuation notifications with the aim to assist Members with their notification requirements, in particular, their responses to a checklist of issues regarding their customs valuation

[2] This is a WTO document that may be obtained through the hyperlink to the WTO documents system.

legislation.[3] This workshop will be held from 22-24 May 2024, on the margins of the formal meeting, and aims to assist capital-based officials from more than two dozen Members to satisfy WTO transparency commitments.

[3] The checklist of issues is contained in the Annex to document G/VAL/5 (also hyperlinked).

Statement of Ukrainian delegation

Dear Chair, dear Colleagues

We refer to 2022 Council Conclusions which condemned any acts of aggression on the Customs borders and called for enhancement of Customs cooperation. Contrary to this Russia supported by Belarus continue military attacks on the Customs territory of Ukraine. The war seriously affects the ability of Ukrainian Customs to operate as usual.

Devastating Customs implications of the Russian war are as follows:

- Russian army is shelling Ukrainian cross-border points and critical infrastructure.
- Half of Ukrainian Customs border points are closed due to combat actions
- All airports are closed. Russian Navy blocks all seaports
- No trade and no free trade regime exist between Ukraine and aggressors
- The WCO Regional Training Centers in Ukraine are in danger
- Russia attempted to annex 20% of Ukrainian Customs territory

The WCO was established for bringing Customs together for a safer and more prosperous world. Instead, the Russian war destroys Ukraine's customs borders; ruins Ukraine's customs infrastructure; undermines security at borders and disrupts global trade supply chains. This is not compatible with the WCO principles.

We thank our partner countries for the support to Ukrainian Customs. We ask all Customs administrations to demand that Russia follows Council conclusions of 2022 and stops ruining international Customs cooperation.

Thank you!

COMMENTARY 26.1

MEANING OF THE EXPRESSION "IN SUBSTANTIALLY THE SAME QUANTITY" ACCORDING TO ARTICLES 2 AND 3 OF THE AGREEMENT

1. The purpose of this commentary is to develop a comprehensive understanding of the concept and meaning of the expression "in substantially the same quantity" so that customs administrations can more effectively apply the valuation methods set out in Articles 2 and 3.

2. The Agreement makes no reference to any particular quantity which would need to be taken into consideration when deciding whether the price actually paid or payable for the imported goods is a valid basis for the determination of the customs value under Article 1.

3. However, in order to determine the customs value using the transaction value of identical or similar goods, as set out in Articles 2 and 3, the "quantity" of the goods is indeed taken into account.

4. In interpreting the expression "in substantially the same quantity" in Articles 2 and 3, it is necessary to introduce some flexibility regarding quantities. Given that goods are not always imported in the same quantity, it would be difficult to apply the methods set out in Articles 2 and 3 if the interpretation of this expression were very restrictive.

5. The preambular section of the Agreement states that the "…customs value should be based on simple and equitable criteria consistent with commercial practices…". According to accepted lexicographical sources, "substantially" is defined as, inter alia, "to a large degree" or "essentially". Therefore, this standard inherently allows for some degree of flexibility with the quantities involved, which need not be precisely the same.

6. Similarly, Explanatory Note 1.1 articulates principles for establishing the appropriate degree of flexibility to be accorded to questions of the time element. In that instrument, the Technical Committee on Customs Valuation considered the time element in relation to Articles 1, 2 and 3 and concluded, in paragraph 12, that:

   "…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 General Introductory Commentary [the preamble of the Agreement], the Agreement seeks to base Customs value on simple and equitable criteria consistent with commercial practice. 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."

7. Drawing from these principles, the word "substantially" is intended to make the term "the same quantity" somewhat less rigid and introduce a degree of flexibility commensurate with its above-cited definitions. On the other hand, it is a commercial reality that the quantity purchased will often affect the price. Therefore, "substantially" should be understood as encompassing a quantity that aligns to the greatest extent possible with quantities found in

previously accepted transaction values involving the same relevant commercial practices. Ultimately, however, what constitutes “substantially the same quantity” should be determined on a case-by-case basis considering the totality of the circumstances of the transaction.

8. As set out in paragraph 2 of General Introductory Commentary to the Agreement, consultations between the customs administration and the importer with the aim of establishing a basis of valuation in accordance with the provisions of Articles 2 and 3 will also allow for the exchange of information in relation to the practical and concrete application of this expression “in substantially the same quantity”.

53rd Session of TCCV

Agenda Item Item V (b), Valuation treatment of ancillary charges in relation to Article 1 of the Agreement: Request by Mauritius

ICC comments

1. ICC would like to thank the delegations from China, Brazil, Uruguay and Mauritius and the earlier comments in the context of the 52nd Session by Bosnia Herzegovina, Mexico China, Mauritius and Uruguay on this case, which is of great interest for the private sector and we would submit for customs authorities as well. Note: With apologies, the Sept. 29 note was sent in error and only this commentary expresses the views of the ICC.

2. From our perspective, when examining charges that are potentially dutiable as comprising a part of the price actually paid or payable (the PAPP) it is necessary to examine the charge only through an application of all of the following authorities: Article 1 and the Interpretative Notes thereto and Annex III, para. 7.

3. Annex III, para. 7 serves to clarify the central point of the Interpretative Note to Art. 1, at para. 1 that the PAPP is the "total payment" for the imported goods. The Annex III, para. 7 reference to "all payments" is entirely consistent. The attached Historical Perspective on Annex III, para. 7 may be helpful.

4. While further facts are still being developed, Programme I (savings program) and Programme II (club charges) appear to present examples of common commercial practices to provide incentives to customers to purchase more of the seller's goods or services.

5. Here, the buyer is assured of anticipated future benefits: in Programme I the anticipated benefit is "free units" and in Programme II the anticipated future benefit is hotel packages and gifts. Separate invoices for those Programmes are issued to the seller.

6. Based on the information in the historical perspective, we would recommend adding to the text in paragraph of point 5 of the Annex to VT1282Ea, with new text in bold.

   Interpretative Note 1 to Article 1 makes clear that direct and indirect payments made by the buyer to or for the benefit of the seller are to be included in the "price actually paid or payable." Paragraph 7 of Annex III of the Agreement **elaborates** that "The price actually paid or payable includes all payments actually made or to be made, as a condition of sale of the imported goods, by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller." The savings program charges and club charges would form part of the "price actually paid or payable" if they were paid as a condition of sale of the imported goods, when applying Article 1 of the Agreement. **As presented** in this case, the savings program charges and club charges are payable only if ICO accepts to join the programmes. The payment of these charges is not a condition of the sale of the imported goods and therefore is not be included in the "price actually paid or payable".

   On the basis of Article 1 and the Interpretative Notes and Annex III, para. 7, we believe that payments for the Programme I savings program and Programme II club charges are

not indirect payments for the imported goods--despite the fact that they are paid to the seller and are based on a per unit pricing. These payments are not <u>for the imported goods</u> because they are not related to the imported goods in the sense of Interpretative Note to Art. 1, para. 4. They are not conditions of sale of the imported goods; instead, they are conditions of the buyer's participation in Programmes I and II.

Additionally, the savings program charges and club charges are not included in the exclusive list of additions of Article 8 of the Agreement and in accordance with the provisions of paragraph 4 of Article 8, these charges should not be added to the price actually paid or payable when applying the transaction value method.

7. As for the currency surcharge, we think more facts may be helpful. Its mandatory status alone should not be dispositive. While mandatory and perhaps a condition of sale of the imported goods, in some instances currency charges are part of a financing arrangement, or a currency hedging arrangement. For example, the choice of currency may be optional, with the surcharge applying when a certain currency is selected, or may be part of a program to factor receivables. Depending on the specific facts of the transaction, this payment may be independent of and not connected to the sale of the imported goods within the meaning of Art. 1, its Interpretative Notes and Annex III, para. 7. In other words, it might not be an indirect payment for the imported goods because it might not be related to the goods in the sense of Interpretative Note to Art. 1, para. 4 nor a condition of sale of the imported

8. We look forward to the continued discussion of this important question during the forthcoming Session.

Best wishes to all,
ICC team

53rd Session of TCCV

ICC VIEWS: HISTORICAL PERSPECTIVE ON ANNEX III, PARA. 7

1. From our vantage point, the trade community has wrestled with a recurring question, what is the intersection of (i) Article 1 and the Interpretative Notes thereto and (ii) Annex III, para. 7 on the meaning of the price actually paid or payable (the PAPP)? We recognize that this definition goes to the very beating heart of the Valuation Agreement, since Transaction Value is the basis for appraisement of imported merchandise for over 90% of imports.

2. This same question has arisen in the discussions at the Technical Committee. Some suggestions have been made to analyze specific technical questions from the perspective of Annex III, para. 7 only, as though that were an independent authority and Art.1 need not be satisfied, or that we should look upon these two sources as setting up an option, such that, alternatively, either Art. 1 or Annex III, para. 7 might be satisfied in finding the PAPP. Other comments have focused on the "condition of sale" requirement of that Annex III, para. 7, to the exclusion of the underlying "payment for the imported goods" criterion of Art. 1.

3. This is not the opportunity to enlarge upon the issue, but extensive research reveals that there is no background information of any kind in the GATT records for the Annex III, para. 7 Protocol (now living as Annex III). The source documents reveal that the Protocol was presented an addendum to the draft of the Valuation Agreement, and this para. 7 text was an afterthought to that afterthought. There is no record of any debate nor any record of how it (along with present para. 6) came to be appended to the Protocol, which primarily dealt with concessions to developing countries.

4. We believe that the Valuation Agreement positive focus on the PAPP created a coherent and self-contained system. The focus is the price paid or payable for the imported goods, usually but not always shown in an invoice price. Fair enough. But the designers of the system wisely recognized the opportunity for parties to "game the system."

5. The special rules focused upon related party pricing is the best-known example of both that knowing assessment by the drafters that the relationship of the parties might influence the price and the means of redressing that distortion.

6. But so, too, is the purpose served by the adjustments made under Art. 8. When one analyzes Art. 8, one sees a common underlying theme. Each of these are off-invoice or separately invoiced charges that could be/should be and normally would be included in a price for the imported goods. The Valuation Agreement holds that these costs must be added to what is in fact an artificially lowered PAPP so as to arrive at the customs value of imported goods.

7. The definition of the PAPP articulated in Art. 1 and its Notes was "amplified" by Annex III, para. 7 (to use the phrase employed in Commentary 20.1, at para. 8 and in Case Study 6.1, at para. 5). Art. 1 was NOT replaced by the Annex III text.

8. This means that the PAPP must still be shown to have been <u>for the imported goods</u> and the payment was made to the seller or to a third party to satisfy an obligation of the seller. What then is the role of Annex III, para. 7? Why is it there and what use are we to make of it?

9. As will be demonstrated below, we submit that only the timing of its introduction to the GATT (October 22, 1979), coming months after the close of negotiations and the promulgation of the main body of the Agreement and Annex I, prevented its inclusion (as well as that of the para. 6 text) as an Interpretative Note. Its clarifying and amplifying role is that of an Interpretative Note.

10. Annex III, par. 7 tells us the PAPP includes all payments made to the seller as a condition of sale. This "all payments" tells us that we are dealing with more than one payment. In other words, we are in an Art. 8-type situation, where there is most likely an invoice price but there are other payments being made. We may say "like Art. 8" because these payments do not fall within an Art. 8 definition.

11. But there could be, and in fact there have been situations, where a separate payment is being made for goods or services that have such a close connection to the imported goods that they should be properly dutiable. A good example would be a seller charging a price for the goods and also separately invoicing for certain production costs. A formulistic approach would lead to the production charge being nondutiable, as it is not a part of the invoice price for the goods nor would it fall under Art. 8. Another example would be for the strictures of Art. 8.1 (b) being avoided by the buyer paying the seller for the needed tooling rather than providing the tooling for free or at a reduced cost. In both of these examples, the subject payments would be indirect payments for the imported goods

12. We submit that in those examples from para. 11, and in myriad others as well, the authority for adding those separated charges in order to find the PAPP lies in Art. 1 and its Notes, read in conjunction with Annex III, para. 7. We conclude that Annex III. Para. 7 should have no independent status in this or other customs valuation analyses; rather, its role is to take into account and to provide the authority to deal with these artificially bifurcated payments, which are indirect payments for the imported goods.

13. If the payment is for "something else," as established, the payment may become a part of the PAPP or as an addition to value under Article 8, even if it is not part of the PAAP for the imported good. When a second payment is not for a separately identified good, service, or intangible asset, then it would follow that that the second payment is actually further consideration for the imported good. In such a case, the buyer is implicitly required to make the payment as a condition of sale of the imported good to the buyer. Such an analysis is only relevant when the second payment is not identified as being for "something else."

14. We might add that the mere fact that the invoicing for any charges at issue—whether optional or not—may be on a per-unit-of- imported-product basis is NOT enough to make the payment one for the imported goods under an Art. 1 and Annex III, para. 7 study. A foreign seller's explicit requirement that the importer/buyer store imported goods in facilities located in the country of importation owned by the seller, with a separate payment for that storage being imposed on a per-unit charge, is but one of countless examples of a nondutiable payment.

15. It bears emphasis that there is a role in this discussion for the goods being or not being related to the goods. Annex III, para. 7 does not itself refer to payments being related to the goods. After a reference to the price for the imported goods, the Interpretative Note to Art. 1, at para. 4 establishes that payments that are not related to the goods are not part of the customs value.

16. We submit that the proper interpretation for this "related to the goods criterion" is the same as that employed in Art. 8 (a) and 8(c) of the Agreement. A bifurcated or separate payment which

falls within the PAPP is one that has such a relationship to the production or sale of the goods that it should have been "included in" the PAPP in the first instance. In other words, as discussed in para. 11 above, such an artificially split payment will not avoid dutiable status. Instead, Annex III, para. 7 serves to clarify the central point of the Interpretative Note to Art. 1, at para. 1 that the PAPP is the "total payment" for the goods. (For our purposes, perhaps a better phraseology here would have been to "the total of all payments.") The Annex III, para. 7 reference to "all payments" is entirely consistent with Art. 1. Taken together, "all payments" comprise the "total payment." This indeed is a useful clarification.

17. Whether there is such an innate connection between the separate payments and the PAPP as to dictate dutiable status might be gauged by accepted industry or trade practice or convention or by reference to such governing trade rules as the INCOTERMS. The INCOTERMS describe which ancillary costs (such as consular or export license fees) will be borne by the seller or by the buyer depending on the specific sales term governing the sales transaction.

18. In the same vein, the Annex III, para. 7 criterion of condition of sale may also be seen as being implicit in a payment related to the goods that would comprise a part of the total payment for the goods. But a payment with only an attenuated connection to or relationship with the production or sale of the imported goods would fall outside the ambit of this discussion. We can apply the teaching of Advisory Opinion 4.17. The "franchise" fees there were not related to the production or sale of the imported goods.

19. A separate payment by the buyer for a truly separate right is a condition of that buyer's acquisition of that right and is not a condition of sale of the imported goods. Simply put, such a payment remains separate and apart from and is not a payment for the imported goods. Therefore, it is not dutiable.

54th Session of TCCV

ICC VIEWS: HISTORICAL PERSPECTIVE ON ANNEX III, PARA. 7

1. From our vantage point, the trade community has wrestled with a recurring question, what is the intersection of (i) The General Introductory Commentary and Article 1 and the Interpretative Notes thereto and (ii) Annex III, para. 7 on the meaning of the price actually paid or payable (the PAPP)? We recognize that this definition goes to the very beating heart of the Valuation Agreement, since Transaction Value is the basis for appraisement of imported merchandise for over 90% of imports.

2. This same question has arisen in the discussions at the Technical Committee. Some suggestions have been made to analyze specific technical questions from the perspective of Annex III, para. 7 only, as though that were an independent authority and Art.1 need not be satisfied, or that we should look upon these two sources as setting up an option, such that, alternatively, either Art. 1 or Annex III, para. 7 might be satisfied in finding the PAPP. Other comments have focused on the “condition of sale” requirement of that Annex III, para. 7, to the exclusion of the underlying “payment for the imported goods” criterion of Art. 1.

3. This is not the opportunity to enlarge upon the issue, but extensive research reveals that there is scant information in the GATT archives for Annex III, paras. 6 and 7. The source documents reveal that the Protocol was presented in October, 1979 as an addendum to the draft of the Valuation Agreement in the hope of inducing more developing countries to adopt the Valuation Agreement. The Protocol was itself based upon a list of proposed amendments which developing countries had introduced days before the negotiations ended in April, 1979. Many of those sought-after concessions were rejected and never adopted in the Protocol.

4. There is no record of any debate nor any record of how present Annex III, para. 6 came to be appended to the Protocol, as it was not included within that April draft.

5. As for the text we now know as Annex III, para. 7, to be sure, there had been a proposal by the developing countries to take into account “additional consideration” but that differed in substantive ways. First, it was to apply only to developing countries and second, there was discretion in fixing the amount to be added to make customs value. Third, the suggested text was for the “inclusion in the customs value, in whole or in part, of the value of any additional consideration not specified in paragraph 1 of Article 8, which the buyer is obliged to discharge himself or to require others to discharge as a condition of the sale.” The proposed text is reminiscent of the Art. 1 focus on customs value, the reference to “value” of the additional consideration which calls to mind Art. 8.1 (b) and (d), the Art. 8.1 (c) reliance on “condition of sale” and the “whole or in part” discretion afforded by Art. 8.2. What is also striking is that paragraph 1 of Art. 8 was

seen as embracing various components of “consideration.” What the developing countries were seeking was a new Art. 8.1 (e) in all but name. Their effort was rejected. The Annex III, para. 7 text, which is rooted in the PAPP, bears only the remotest connection to that April, 1979 proposal. It might be said that, unlike the case of its neighbor, para. 6, a traceable genealogy might be discerned for Annex III, para.7 since the April proposal would have taken us into customs value being impliedly grounded in consideration. Still, Annex III, para. 7 is not a lineal descendant of the developing countries’ efforts since the April proposal is markedly different.

6. We believe that the Valuation Agreement positive focus on the PAPP created a coherent and self-contained system. The focus is the price paid or payable for the imported goods, usually but not always shown in an invoice price. Fair enough. But the designers of the system wisely recognized the opportunity for parties to “game the system.”

7. The special rules focused upon related party pricing is the best-known example of both that knowing assessment by the drafters that the relationship of the parties might influence the price and the means of redressing that distortion.

8. But so, too, is the purpose served by the adjustments made under Art. 8. When one analyzes Art. 8, one sees a common underlying theme. Each of these are off-invoice or separately invoiced charges that could be/should be and normally would be included in a price for the imported goods. The Valuation Agreement holds that these costs must be added to what is in fact an artificially lowered PAPP so as to arrive at the customs value of imported goods.

9. The definition of the PAPP articulated in Art. 1 and its Notes was “amplified” by Annex III, para. 7 (to use the phrase employed in Commentary 20.1, at para. 8 and in Case Study 6.1, at para. 5). Other instruments assign an elaborating rile (EN 5.1) or an elaborating role (AO 19.1). Art. 1 was NOT replaced by the Annex III, para. 7 text. Art. 14 instructs that the two sources are on equal footing—as well as the what we may term the “other” Interpretative Notes.

10. This means that the PAPP must still be shown to have been for the imported goods and the payment was made to the seller or to a third party to satisfy an obligation of the seller. What then is the role of Annex III, para. 7? Why is it there and what use are we to make of it?

11. As will be demonstrated below, we submit that only the timing of its introduction to the GATT (October 22, 1979), coming months after the close of negotiations and the promulgation of the main body of the Agreement and Annex I, prevented its inclusion (as well as that of the para. 6 text) as an Interpretative Note. Its clarifying and amplifying role is that of an Interpretative Note.

12. Annex III, par. 7 tells us the PAPP includes all payments made to the seller as a condition of sale. This “all payments” tells us that we are dealing with more than one

payment. In other words, we are in an Art. 8-type situation, where there is most likely an invoice price but there are other payments being made. We may say “like Art. 8” because these payments do not fall within an Art. 8 definition.

13. But there could be, and in fact there have been situations, where a separate payment is being made for goods or services that have such a close connection to the imported goods that they should be properly dutiable. A good example would be a seller charging a price for the goods and also separately invoicing for certain production costs. A formulistic approach would lead to the production charge being nondutiable, as it is not a part of the invoice price for the goods nor would it fall under Art. 8. Another example would be for the strictures of Art. 8.1 (b) being avoided by the buyer paying the seller for the needed tooling rather than providing the tooling for free or at a reduced cost. In both of these examples, the subject payments would be indirect payments for the imported goods

14. We submit that in those examples from para. 13, and in myriad others as well, the authority for adding those separated charges in order to find the PAPP lies in Art. 1 and its Notes, read in conjunction with Annex III, para. 7. We conclude that Annex III. Para. 7 should have no independent status in this or other customs valuation analyses; rather, its role is to take into account and to provide the authority to deal with these artificially bifurcated payments, which are indirect payments for the imported goods.

15. If the payment is for "something else," as established, the payment may become a part of the PAPP or as an addition to value under Article 8, even if it is not part of the PAAP for the imported good. When a second payment is not for a separately identified good, service, or intangible asset, then it would follow that that the second payment is actually further consideration for the imported good. In such a case, the buyer is implicitly required to make the payment as a condition of sale of the imported good to the buyer. Such an analysis is only relevant when the second payment is not identified as being for "something else."

16. We might add that the mere fact that the invoicing for any charges at issue—whether optional or not—may be on a per-unit-of- imported-product basis is NOT enough to make the payment one for the imported goods under an Art. 1 and Annex III, para. 7 study. A foreign seller’s explicit requirement that the importer/buyer store imported goods in facilities located in the country of importation owned by the seller, with a separate payment for that storage being imposed on a per-unit charge, is but one of countless examples of a nondutiable payment.

17. It bears emphasis that there is a role in this discussion for the goods being or not being related to the goods. Annex III, para. 7 does not itself refer to payments being related to the goods. After a reference to the price for the imported goods, the Interpretative Note to Art. 1, at para. 4 establishes that payments that are not related to the goods are not part of the customs value.

18. We submit that the proper interpretation for this “related to the goods criterion” is the same as that employed in Art. 8 (a) and 8(c) of the Agreement. A bifurcated or separate

payment which falls within the PAPP is one that has such a relationship to the production or sale of the goods that it should have been "included in" the PAPP in the first instance. In other words, as discussed in para. 11 above, such an artificially split payment will not avoid dutiable status. Instead, Annex III, para. 7 serves to clarify the central point of the Interpretative Note to Art. 1, at para. 1 that the PAPP is the "total payment" for the goods. (For our purposes, perhaps a better phraseology here would have been to "the total of all payments.") The Annex III, para. 7 reference to "all payments" is entirely consistent with Art. 1. Taken together, "all payments" comprise the "total payment." This indeed is a useful clarification.

19. Whether there is such an innate connection between the separate payments and the PAPP as to dictate dutiable status might be gauged by accepted industry or trade practice or convention or by reference to such governing trade rules as the INCOTERMS. The INCOTERMS describe which ancillary costs (such as consular or export license fees) will be borne by the seller or by the buyer depending on the specific sales term governing the sales transaction.

20. In the same vein, the Annex III, para. 7 criterion of condition of sale may also be seen as being implicit in a payment related to the goods that would comprise a part of the total payment for the goods. But a payment with only an attenuated connection to or relationship with the production or sale of the imported goods would fall outside the ambit of this discussion. We can apply the teaching of Advisory Opinion 4.17. The "franchise" fees there were not related to the production or sale of the imported goods.

21. The commercial reality is that a separate payment by the buyer for a truly separate right is a condition of that buyer's acquisition of that right and is not a condition of sale of the imported goods. Simply put, such a payment remains separate and apart from and is not a payment for the imported goods and is therefore not dutiable.