ADVISORY OPINIONS

LIST OF ADVISORY OPINIONS

- 4.5 Ditto (Royalty that the importer is required to pay to a trademark holder for making and selling under that trademark six types of cosmetics irrespective of whether he uses the ingredients imported from the trademark holder or not.) _210

(Adopted, 3rd Session, 23 March 1982)

- 4.6 Ditto (Royalty that the importer is required to pay to a seller (the trademark holder), as a condition of sale, when he resells the imported goods (the concentrate) with the trademark.) _212

(Adopted, 5th Session, 11 March 1983)

- 4.7 Ditto (Royalty that the importer is required to pay to a seller, who has been assigned world-wide reproduction, marketing and distribution rights by a rights holder, for the marketing and distribution rights in the country of importation.) _214

(Adopted, 26th Session, 8 October 1993)

- 4.8 Ditto (Royalty that the importer is required to pay to a third party the licence holder) for the right to use the trademark.) _216

(Adopted, 26th Session, 8 October 1993)

- 4.9 Ditto (Royalty that the importer is required to pay to a seller (the trademark holder) for the right to manufacture, use and sell the "licensed preparation" in the country of importation and for the right and licence to use the trademark in connection with the manufacture and sale of licensed preparations in the country of importation) _218

(Adopted, 26th Session, 8 October 1993)

- 4.10 Ditto (Licence fee that the importer is required to pay to a seller(the trademark holder)for the right to resell the imported garments containing trademarked material.) _222

(Adopted, 26th Session, 8 October 1993)

ADVISORY OPINION 1.1
The concept of “sale” in the Agreement

The Technical Committee on Customs Valuation expressed the opinion that :

(a) The Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade 1994, hereinafter called the “Agreement”, contains no definition of “sale”. Article 1, paragraph 1, merely stipulates a specific commercial operation satisfying certain requirements and conditions.

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

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

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

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

Ⅰ. Free consignments

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

Example

gifts, samples, promotional items.

Ⅱ. Goods imported on consignment

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

Example

Producer P in the country of exportation E sends his agent X in the country of importation I a consignment of 50 carpets for sale by auction. The carpets are sold in the country of importation at a total price of 500,000 c.u. The sum to be transferred by X to producer P in payment of the imported goods will be 500,000 c.u., less the costs incurred by X in connection with the sale of the goods and his remuneration on the transaction.

Importations on consignment should not be confused with profit-sharing transactions. In the latter cases the goods are imported following a sale and provisionally invoiced at a certain price to which must be added part of the profit made when the goods are sold on the market in the country of importation. Transactions of this kind must be regarded as sales with a clause reserving determination of the final price; the nature of the transaction does not preclude valuation under Article 1, but of course particular attention has to be paid to the condition laid down in paragraph 1 (c) of that Article.

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

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

Example

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

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

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

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

Ⅴ. Goods imported under a hire or leasing contract

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

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

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

Example

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

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

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

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

ADVISORY OPINION 2.1
Acceptability of a price below prevailing market prices for identical goods

1. The question has been asked whether a price lower than prevailing market prices for identical goods can be accepted for the purposes of Article 1 of the Agreement on implementation of Article VII of the General Agreement on Tariffs and Trade 1994.

2. The Committee considered this question and concluded that the mere fact that a price is lower than prevailing market prices for identical goods should not cause it to be rejected for the purposes of Article 1, subject of course to the provisions of Article 17 of the Agreement.

ADVISORY OPINION 3.1
Meaning of "are distinguished" in the Interpretative Note to Article 1 of the Agreement : duties and taxes of the country of importation

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

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

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

ADVISORY OPINION 4.1
Royalties and licence fees under Article 8.1 (c) of the Agreement

- **(Royalty that the seller requires the importer to pay to a third party (the patent holder).)**

1. When a machine manufactured under a patent is sold for export to the country of importation at a price exclusive of the patent fee, which the seller has required the importer to pay to a third party who is the patent holder, should the royalty be added to the price paid or payable under the provisions of Article 8.1 (c) of the Agreement?

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

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

ADVISORY OPINION 4.2
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the laws of the country of importation require the importer to pay to a third party (the copyright holder) when he resells the imported records.)**

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

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

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

ADVISORY OPINION 4.3
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a third party (the patent holder), under a separate contract, for the right to use a patented process for the manufacture of certain products.)**

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

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

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

ADVISORY OPINION 4.4
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a seller (the patent holder), as a condition of sale, for the right to incorporate or use the patented concentrate in products intended for resale.)**

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

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

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

ADVISORY OPINION 4.5
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a trademark holder for making and selling under that trademark six types of cosmetics irrespective of whether he uses the ingredients imported from the trademark holder or not.)**

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

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

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

ADVISORY OPINION 4.6
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a seller(the trademark holder), as a condition of sale, when he resells the imported goods (the concentrate) with the trademark.)**

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

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

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

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

ADVISORY OPINION 4.7
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a seller, who has been assigned world-wide reproduction, marketing and distribution rights by a rights holder, for the marketing and distribution rights in the country of importation.)**

1. An agreement is entered into between record company R and artist A, both established in country of export X. According to the agreement, A is to receive a royalty payment for each recording sold at retail in consideration for A's assignment of worldwide reproduction, marketing and distribution rights. R subsequently enters into a distribution and sales agreement with importer I to supply I with records which reproduce a performance by the artist A for resale in the country of importation. As a part of that agreement, R subassigns the marketing and distribution rights to I and requires from I, in return, a royalty payment of 10% of the retail selling price of each record purchased and imported into the country of importation. I submits the 10% payment to R.

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

   The royalty payment is a condition of sale because I is required to pay this amount as a consequence of the distribution and sales agreement with R. In order to protect his commercial interests R would not have sold the records to I if I had not agreed to those terms.

   The payment is related to the goods being valued as it is made for the right to market and distribute the particular imported goods and the amount of the royalty will vary according to the actual selling price of a particular record.

   The fact that R is obliged, in turn, to pay a "royalty" amount to A in respect of worldwide sales of A's performances, is not relevant vis-a-vis the contract between R and I. I is making the payment directly to the seller and it is of no concern or interest to I how R allocates his gross income receipts. The 10% royalty payment, therefore, should be added to the price actually paid or payable.

ADVISORY OPINION 4.8
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a third party the licence holder) for the right to use the trademark.)**

1. Importer I enters into a licence/royalty agreement with licence holder L established in country X under which I agrees to pay L a fixed sum of royalty for each pair of shoes bearing the trademark of L imported into the country of importation. Licence holder L provides art and design work relating to the trademark. Importer I concludes another agreement with manufacturer M of country X for the purchase of shoes bearing the trademark of L affixed to the shoes by M, supplying M with the art and design work provided by L. Manufacturer M is not licensed by L. This sales agreement does not contain any reference to the payment of royalty. The manufacturer, the importer and the licensor are all unrelated.

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

   The importer is required to pay a royalty to obtain the right to use the trademark. This obligation results from a separate agreement unrelated to the sale for export of the goods to the country of importation. Goods are purchased from a supplier under another contract and payment of royalty is not a condition of sale of these goods. Therefore, the royalty payment in this case is not to be added to the price actually paid or payable.

   Whether the supply of the art and design work relating to the trademark would qualify as dutiable under the provisions of Article 8.1 (b) is a separate consideration.

ADVISORY OPINION 4.9
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a seller (the trademark holder) for the right to manufacture, use and sell the "licensed preparation" in the country of importation and for the right and licence to use the trademark in connection with the manufacture and sale of licensed preparations in the country of importation)**

1. An agreement is entered into between the manufacturer/ trademark holder of certain veterinary preparations and an import company. Under the agreement, the manufacturer grants the importer the exclusive right to manufacture, use and sell in the country of importation, "Licensed Preparation". These licensed preparations containing imported cortisone in a form suitable for veterinary use, are made from bulk cortisone supplied to the importer by or on behalf of the manufacturer. Cortisone is a standard, non-patented, anti- inflammatory agent, available from different manufacturers and is one of the main ingredients of the licensed preparations.

   The manufacturer also grants the importer the exclusive right and licence to use the trademark in connection with the manufacture and sale of licensed preparations in the country of importation.

   The payment provisions of the agreement provide for the importer to pay the manufacturer a royalty at the rate of 8% of the first 2 million c.u. net sales of licensed preparations in any one calendar year, and 9% of the next 2 million c.u. net sales of licensed preparations in the same calendar year. A minimum royalty of 100,000 c.u. per year is also provided for. Under various circumstances outlined in the agreement, both parties could convert the importer's exclusive rights to non-exclusive rights. In which case, the minimum royalty would be reduced by 25% or, in some cases by 50%. Royalties based on sales could also be reduced under certain circumstances.

Finally, royalties based on sales of licensed preparations are payable within 60 days following the end of each quarter of the calendar year.

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

   The royalty payment is made for the right to manufacture the licensed preparations containing the imported product and eventually for the use of the trademark for the licensed preparation. The imported product is a standard, non-patented anti-inflammatory agent. The use of the trademark, therefore, is not related to the goods being valued. Payment of royalty is not a condition of the sale for export of the imported goods but a condition for manufacture and sale of the licensed preparations in the country of importation. Accordingly, it would not be appropriate to add this payment to the price actually paid or payable.

ADVISORY OPINION 4.10
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Licence fee that the importer is required to pay to a seller(the trademark holder)for the right to resell the imported garments containing trademarked material.)**

1. Outer garments are purchased by importer I in country P from manufacturer M located in country X. M is also the holder of a trademark related to certain comic strip characters. According to the provisions of the licence agreement between I and M, M would produce the garments only for I and affix the comic strip characters and the trademark before the importation and I would resell these garments in country P. In consideration of this right, I agrees to pay M, in addition to the price for the garments, a licence fee calculated as a percentage of the net selling price of the garments to which the comic strip characters and the trademark are affixed.

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

   The payment of the licence fee for the right to resell the imported garments containing trademarked material is made a condition of the sale and relates to the imported goods. The imported goods can not be bought and resold without the comic strip characters and the trademark. Therefore, this payment should be added to the price actually paid or payable.

ADVISORY OPINION 4.11
Royalties and licence fees under Article 8.1 (c) of the Agreement.

▪ **(Royalty that the importer is required to pay to a related party(the trademark holder), who is also related to a seller (manufacturer), for the right to use the trademark which is affixed to the imported goods.)**

1. Sportswear manufacturer M and importer I are both related to parent company C which owns the rights of a trademark which is affixed to the sportswear. In the sales contract between M and I there is no requirement for the payment of royalty. I, however, in accordance with a separate agreement with C, is obliged to pay a royalty to C in order to obtain the right to use the trademark which is affixed to the sportswear I purchased from M. Is the royalty payment a condition of sale of, and related to, the imported sportswear?

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

   The sales contract between M and I covering trademarked goods does not contain specific conditions with respect to royalty payments. However, the payment in question is a condition of sale as I is obliged to pay the royalty to the parent company as a result of buying the goods. I does not have the right to use the trademark without payment of the royalty. The fact that there is no written contract with the parent company does not detract from the obligation of I to make a payment as required by the parent company. For reasons stated above, payments for the right to use the trademark are related to the goods being valued and the amount of the payments should be added to the price actually paid or payable.

ADVISORY OPINION 4.12
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Licence fee that the importer is required to pay to a seller for the right to use the patented process, which is performed through a technology incorporated in the imported goods.)**

1. Importer I and seller S enter into a sales contract for the supply of rolling mill equipment. This equipment is to be incorporated into a continuous copper rod plant already existing in the country of importation. Incorporated in the rolling mill equipment is technology involving a patented process which the rolling mill is intended to perform. The importer, in addition to the price of the equipment has to pay 15 million c.u. as licence fee for the right to use the patented process. Seller S will receive payment for the equipment and the licence fee from the importer, and will then transfer the entire amount of the licence fee to the licensor.

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

   The licence fee is for a technology incorporated in rolling mill equipment which enables it to perform the patented process. The rolling mill equipment has been purchased specifically to carry out the patented production process. Thus, since the process for which the 15 million c.u. licence fee is paid is related to the goods being valued and is a condition of the sale, it should be added to the price actually paid or payable for the imported rolling mill equipment.

ADVISORY OPINION 4.13
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty that the importer is required to pay to a related party (the trademark holder) for the right to use the trademark.)**

1. Importer I purchases sports bags from foreign manufacturer M, as well as from other suppliers. Importer I, manufacturer M and other suppliers are all unrelated.

   Importer I, on the other hand, is related to company C which holds the right of a trademark. Under the terms of a contract between I and C, C transfers the right to use the trademark to I against a royalty payment.

   Importer I furnishes manufacturer M and other suppliers with labels bearing the trademark which are affixed to the sports bags before the importation.

   Is the royalty related to the goods being valued? Does the payment from I to C form part of a condition of sale between M and I and I and other suppliers?

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

   Although the importer is required to pay a royalty to obtain the right to use the trademark, this results from a separate agreement unrelated to the sale for export of the goods to the country of importation. The imported goods are purchased from various suppliers under different contracts and the payment of the royalty is not a condition of the sale of these goods. The buyer does not have to pay the royalty in order to purchase the goods. Therefore, it should not be added to the price actually paid or payable as an adjustment under Article 8.1 (c).

   Whether the supply of labels evidencing a trademark would qualify as dutiable under the provisions of Article 8.1 (b) is a separate consideration.

ADVISORY OPINION 4.14
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty or licence fees that are paid to the licensor in the country of importation.)**

1. Does the fact that royalties or licence fees are paid to the licensor in the country of importation preclude such royalties or licence fees from falling within Article 8.1 (c)?

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

   Article 8.1 (c) requires the addition to the price actually paid or payable for the imported goods of "royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable".

   Article 8.1 (c) draws no distinction between royalties paid elsewhere than in the country of importation and royalties paid in the country of importation. Article 8.1 (c) imposes no conditions with regard to the location of the licensor or the place where the royalties or licence fees are paid and does not require an international transfer of such payments.

   Neither the location of the licensor nor the place where the royalties are paid has any bearing or impact on a determination under Article 8.1 (c). Therefore, the mere fact that royalties or licence fees are paid to a licensor who is a resident in the country of importation would not preclude such royalties or licence fees from falling within Article 8.1 (c).

ADVISORY OPINION 4.15
Royalties and licence fees under Article 8.1 (c) of the Agreement.

- **(Royalty paid to a third party licensor)**

1. Importer I of country S enters into a licence agreement with licensor L established in country R under which I is required to pay to L, for the right to use its trademark in connection with manufacture and importation of the goods, a royalty consisting of a fixed percentage calculated on the net income obtained by I from sales in country S of the products bearing such trademark. In the event that I fails to pay L the royalty, L will have the right to terminate the licence agreement. L and I are related under the terms of the Valuation Agreement.

   Additionally, L has signed a supply agreement with company M of country X in order for M to manufacture the goods bearing its trademark and then to sell them to I. Under this agreement, M must follow the specifications relating to quality, design and technology provided by L. The agreement specifically states that M undertakes to produce and to sell products with this trademark exclusively to I or to other companies determined by L. Company M is not related to L or to I.

   I enters into a sales contract with M under which M sells to I goods bearing the trademark of L. There is no requirement in that contract to pay the corresponding royalty. The price actually paid by I to M for the imported goods does not include the royalty payable from I to L.

   Is the payment of the royalty from importer I to licensor L a condition of sale of the goods that I purchases from supplier M, and is this royalty related to the goods being valued?

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

Since the goods imported by I bear the trademark of L, it can be stated that the royalties in question are related to the goods being valued.

Furthermore, in this case, pursuant to the supply agreement, L controls the production relating to the goods bearing its trademark by authorizing the manufacture of the licensed goods, determining which companies M may sell to, and directly providing the designs and technology for manufacturer M. Since L authorizes I to use the trademark in connection with the manufacture and importation of the goods pursuant to the provisions of the license agreement, L further influences and controls the transaction between M and I by selecting what party may use the trademark and purchase the imported goods.

The sales contract between M and I does not contain any clause requiring payment of a royalty. However, payment of the royalty is made as a condition of sale of the goods, because I would not be able to buy them if it failed to make that payment to L. Non-payment of the royalty to L by I would cause not only the termination of the licence agreement but also the withdrawal of the authorization given to M to manufacture and sell to I the goods bearing such trademark.

The royalties in question, therefore, should be added to the price actually paid or payable for the goods under Article 8.1(c) of the Agreement.

ADVISORY OPINION 4.16
Royalties and licence fees under Article 8.1 (c) of the Agreement.

1. Importer B of country of importation I enters into a licence agreement with supplier S of country of exportation X for use of a trademark. As part of this arrangement the parties also agree that the royalty payable by B to S for the commercial use of the trademark licensed in the agreement will be calculated by applying a rate of five per cent (5%) of the net sale price in the country of importation of the trademarked goods.

2. Subsequently, S and B enter into a contract for the international sale of product P at a price of 1,000 currency units. Under the contract, product P has to be marketed bearing the aforementioned trademark, such that the corresponding royalty may be considered to be related to the goods. In addition, the price does not include the royalty, which is paid as a condition of sale of the goods. Accordingly, all the requirements provided for in Article 8.1(c) of the Agreement are met.

3. Given that the net sale price of product P in country I is 2,000 currency units, the licence fee which B owes S for use of the trademark is 100 currency units.

4. In accordance with the domestic tax rules in force in country of importation I, the 100 currency units paid by way of royalty for use of the trademark are subject to a special tax on this type of income, the amount of which is derived by applying a nominal rate of 25% of the total sum payable. The importer B pays this income tax of 25 currency units on behalf of seller S under a requirement to withhold tax at source.

5. However, none of the clauses in the licence agreement refers to payment by B of the tax prescribed in the domestic legislation of country I, on income derived from the royalty for use of the trademark.

6. Accordingly, B pays out a total of 1,100 currency units: 1,000 currency units corresponding to the price of product P, and 100 currency units by way of royalty for use of the trademark. However, S receives only 1,075 currency units as B transfers to him 75 currency units for the royalty and, in parallel, a receipt for 25 currency units to confirm payment of the income tax in country of importation I.

7. The issue brought before the Technical Committee is whether the 25 c.u. paid by Importer B is part of the Customs value under Article 8.1(c).

   The Technical Committee on Customs Valuation expressed the following view:

8. In the present case, the royalty which the buyer is required to pay under the relevant contract provisions is 100 currency units, as this is the amount obtained by applying the rate of 5% of the net sale price of the goods in the country of importation.

9. The licensor receives a lesser amount - 75 currency units instead of 100 currency units. The difference of 25 currency units does not constitute a reduction in the royalty amount, but a cost which is generated by applying income tax in the country of importation and which, as previously stated, is borne by the licensor. Moreover, it had not been agreed in the licence agreement that income from the royalty was to be received without deduction of a possible income tax.

10. Article 8.1 (c) of the Agreement provides that, in determining the Customs value, there shall be added to the price actually paid or payable royalties and licence fees “that the buyer must pay, either directly or indirectly [……]”.

11. At no point does the Agreement refer to tailoring this adjustment to the royalties that the licensor will receive. Indeed, Article 8.1 (c) provides that, to the extent that the requirements therein are met, the royalties payable by the buyer are part of the Customs value, and does not specify that they are the royalties that the licensor will ultimately receive.

    In this case, there is a difference between the royalty that the buyer pays and the royalty that the licensor receives. For the reasons already given, in order to comply with Article 8.1 (c) it is necessary to abide by what it says and, consequently, in this case, the amount of money which the importer pays, not that which the licensor ultimately receives, should be added to the Customs value of the goods.

12. Paragraph 3 (c) of the Interpretative Note to Article 1 ("Price Actually Paid or Payable") excludes from the Customs value the "duties and taxes of the country of importation". This relates to domestic taxes which may be levied on the import of goods rather than taxes which may apply to royalty income. The solution proposed does not involve including in the Customs value of the goods the amount of a tax of the type referred to in paragraph 3 (c) of the Interpretative Note to Article 1, applicable in the country of importation, but the amount of a royalty agreed between the licensor and the licensee.

13. In conclusion, the 25 currency units paid by importer B are part of the Customs value of the imported goods under Article 8.1 (c).

Advisory Opinion 4.17
Royalties and licence fees under Article 8.1 (c) of the Agreement

1. Company A (importer, buyer and franchisee) in country I entered into a franchise agreement with company B (exporter, seller, franchisor) of country E to operate stores under the brands of the Franchisor in country I. Under the franchise agreement, company A may buy only from company B, or from those authorized by company B, the inputs it must use in order to manufacture in country I the products which company A sells in its stores. The inputs are unpatented and are not protected by any intellectual property rights. In addition, company A may purchase the inputs from third party suppliers selling at lower prices, where duly authorized by company B to meet the quality requirements. As a condition of the franchise agreement, company A pays company B for the use of the brands and system, royalties which are calculated as a percentage of company A's gross sales of final products manufactured using inputs imported by company A.

   In this case, when the imported inputs are not protected by patent or by any intellectual property rights as mentioned above, 'brands' means the registered brands or service marks and other commercial symbols in the operation of the stores. 'System' refers to business systems and processes connected to the operation of the stores.

   The issue is whether the royalties paid under the franchise agreement are to be added to the price actually paid or payable under Article 8.1(c) of the Agreement for the imported goods.

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

   In the determination of the Customs value under the provisions of Article 1 of the Agreement, there shall be added to the price actually paid or payable for the imported goods royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable, as provided in Article 8.1(c) of the Agreement.

   In this case, the imported goods (inputs) being valued, though necessary and essential to the manufacture of the products and required to be purchased from the franchisor or from a third party authorized by the franchisor to meet the quality requirements, are not branded goods nor are they patented, or manufactured under a patented process, for which a payment is made.

   The payment of royalties is not related to the imported goods but is related to the use of the brands and system of the franchisor in the manufacture and sale of the products bearing the intellectual property (brand) of the franchisor.

   The royalties paid by the franchisee are not to be added to the price actually paid or payable for the imported goods under the provisions of Article 8.1(c).

Advisory Opinion 4.18
Royalties and licence fees under Article 8.1 (c) of the Agreement

1. Importer/buyer/licensee B of country of importation I enters into a license agreement with supplier/seller/licensor S of country of exportation X for the use of a patent. As part of this arrangement, the parties agree that:

   - the royalty payable by B to S for the commercial use of the patent licensed in the agreement will be calculated by applying a rate of five percent (5%) of the net sale price of the patented goods in the country of importation;

   - in addition to the royalty payment, B must pay the royalty income tax on behalf of S to the Tax Authority in the country of importation in accordance with the domestic tax rules;

   Accordingly, the royalty payment of five per cent (5 %) agreed between licensee B and licensor S is a tax-exclusive royalty, otherwise known as a net royalty. In other words, licensee B must pay both the royalty payment of five per cent (5 %) to licensor S, and the royalty income tax obligation of S to the Tax Authority.

2. Subsequently, S and B enter into a contract for the international sale of product P at a price of one thousand (1000) currency units. Under the contract, the patent has been incorporated in product P, such that the corresponding royalty may be considered to be related to the goods. In addition, the price does not include the royalty, which is paid as a condition of sale of the goods. Accordingly, all the requirements provided for in Article 8.1 (c) of the Agreement are met.

3. Given that the net sale price of product P in country I is two thousand (2000) currency units, the net royalty which B owes S for use of the patent is one hundred (100) currency units.

4. In accordance with the domestic tax rules in force in the country of importation I, the income derived from the royalty payment is subject to income tax, which is referred to as a "non-resident income tax". The income tax amount is calculated by applying a nominal rate of ten percent (10%) of the total royalty income. The taxpayer is licensor S, and licensee B is the withholding agent who pays the income tax on behalf of licensor S under a requirement to withhold tax at source. The tax base for calculating the royalty income tax is the total royalty income generated by licensor S in the country of importation, which is known as gross royalty inclusive of income tax.

5. Therefore, the royalty income subject to income tax shall be the sum of the net royalty received by licensor S and the royalty income tax paid to the Tax Authority by licensee B; with the royalty income tax as part of the licensor's gross royalty income. According to the calculation method established by the domestic tax rules: the withholding royalty income tax = net royalty / (1−income tax rate %) × income tax rate%. Based on the information above, the royalty income tax = 100/(1−10%)×10%≈11.11 currency units.

6. Accordingly, B pays out a total of one thousand one hundred and eleven and eleven-hundredths (1111.11) currency units: one thousand (1000) currency units corresponding to the price of product P, one hundred (100) currency units for the net royalty remitted to S, and eleven and eleven-hundredths (11.11) currency units for the income tax payment remitted to the Tax Authority. However, S receives only one thousand and one hundred (1100) currency units, including one thousand (1000) currency units for product P, and one hundred (100) currency units for the net royalty.

7. The issue brought before the Technical Committee is whether 11.11 currency units of income tax paid by buyer/licensee B is part of the Customs value for the imported goods under Article 8.1(c).

The Technical Committee on Customs Valuation expressed the following view:

8. Based on the facts, the royalty fees (paid by buyer/licensee B under the license agreement) are related to the imported goods, have been paid as a condition of sale of the imported goods and have not been included in the price actually paid or payable. Therefore, the royalty payment should be added to the price actually paid or payable under Article 8.1 (c) of the Agreement.

9. In accordance with the domestic tax rules in force in country of importation I, the income derived from the royalty payment is subject to income tax, with the taxpayer being the licensor and the licensee being the withholding agent. Additionally, the license agreement also requires B to pay the income tax on behalf of S to the Tax Authority and the net royalty payment should be made without any deduction. As a result, buyer/licensee B pays 11.11 currency units to the Tax Authority together with 100 currency units to S, the sum of which form the licensee's gross royalty payment.

10. Therefore, in satisfying its gross royalty obligation, inclusive of income tax, the buyer/licensee B makes two payments for the commercial use of the patent. The first is in the amount of 100 currency units for the net royalty calculated by applying the fixed rate of the net sale price of the patented goods as set out in the license agreement. The second is in the amount of 11.11 currency units for the withholding royalty income tax. Both payments are made for the right to use the patent under the license agreement.

The 11.11 currency units are paid by the licensee to the Tax Authority on behalf of the licensor, and this royalty income tax is considered as part of the licensor's royalty income for tax purposes. Consequently, as the 11.11 currency units form part of the licensor's gross royalty income, they likewise form part of the licensee's gross royalty payment for Customs valuation purposes.

11. Article 8.1 (c) of the Agreement provides that, in determining the Customs value, there shall be added to the price actually paid or payable royalties and license fees "that the buyer must pay, either directly or indirectly". Given that all the requirements provided for in Article 8.1 (c) of the Agreement are met in this case, the entire gross royalty payment, inclusive of income tax, totaling 111.11 currency units should be added to the Customs value of the imported goods.

12. Similar to the conclusion in paragraph 12 of Advisory Opinion 4.16, which addresses a gross royalty payment inclusive of income tax, the solution proposed in this case does not involve including in the Customs value of the goods the amount of a tax of the type referred to in Paragraph 3 (c) of the Interpretative Note to Article 1, i.e. duties and taxes of the country of importation, but rather the total amount of royalty payments inclusive of income tax agreed between the licensor and the licensee.

13. According to Article 8.1 (c) of the Agreement, the 11.11 currency units paid by the buyer/licensee to the Tax Authority on behalf of licensor should be regarded as part of the royalty payment, and thus the total gross payment of royalty inclusive of income tax – in the amount of 111.11 currency units – should be added to the Customs value. Therefore, the Customs value for the imported goods in this case is 1111.11 currency units.

Advisory Opinion 4.19
Royalties and licence fees under Article 8.1 (c) of the Agreement

1. A patented concentrate is purchased by importer ICO from manufacturer XCO who is also the patent holder. The imported concentrate is simply diluted with ordinary water, not using a patented process, and is consumer-packed with a trademark owned by XCO for its sale in the importing country as a soft drink.

2. In addition to the price of the goods, ICO is required to pay to manufacturer XCO, as a condition of sale, a single royalty for the right to incorporate or use the patented concentrate in products intended for resale and for use of the trademark. The amount of the royalty was set at 15% of the sale price of the finished product, the soft drink.

3. XCO sells to ICO at a price of 30 c.u. each 0.10 litre of concentrate, which is used to produce one litre of soft drink. The production costs per litre of finished soft drink, in line with the generally accepted accounting principles of the country of importation, are :

   (a) Cost of imported concentrate (price actually paid or payable to XCO per 0.10 litre): 30 c.u.

   (b) Import cost of imported concentrate (port charges, customs duties, inland transport and other costs per 0.10 litre): 6 c.u.

   (c) Cost of other inputs: 4 c.u.

   (d) Labour costs: 3 c.u.

   (e) Other production costs: 7 c.u.

   Total cost of production per litre of finished soft drink: 50 c.u.

4. ICO subsequently sells the soft drink to retailers in the country of importation at a price of 100 c.u. per litre, of which it pays to XCO a single royalty of 15 c.u. as compensation for (a) incorporation or use of the imported concentrate in the production of the soft drink and (b) for use of the trademark of the soft drink.

5. With the other conditions imposed under Article 8.1(c) of the Agreement having been fulfilled, as indicated in paragraph 2, the issue is to determine whether the royalty is related to the imported goods and if so, what amount of royalty payment is to be added to the price actually paid or payable for the imported concentrate.

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The Technical Committee on Customs Valuation expresses the following view.

6. Advisory Opinions 4.4 and 4.6 address royalties paid for the right to incorporate or use a patented concentrate and for the right to use a trademark, respectively. The royalties in each case are considered as dutiable.

7. The royalty payment is a condition of a sale as provided in the facts and the entire royalty is related to the imported goods because the imported concentrate is simply diluted with the ordinary water, not using a patented process, and is consumer packed with trademark of XCO for sale in the importing country as a soft drink.

8. The amount of the royalty to be added to the price actually paid or payable will result from the corresponding final amount of the royalty generated from the sale of the soft drink, per unit of imported concentrate. For this purpose, objective and quantifiable data should be used to relate the royalty payable on the soft drink produced to the price actually paid or payable for the imported concentrate used.

9. Under the facts presented in the case, and given that payment of the royalty is not based on other factors which are totally unrelated to the imported goods, as contemplated in the Interpretative Note to paragraph 3 of Article 8 of the Agreement, it is appropriate to include it in the Customs value.

10. In this case, 0.10 litre of concentrate is used to finally produce one litre of soft drink. Accordingly, the Customs value per 0.10 litre of imported concentrate will be the price actually paid or payable for the imported concentrate, plus the required adjustment for royalties generated from the sale of a litre of soft drink.

11. In other words, the Customs value will be a total of 45 c.u. per 0.10 litre of concentrate: 30 c.u. which is the price actually paid or payable, plus 15 c.u. arising from an adjustment to that price under Article 8.1 (c) of the Agreement for the subsequent payment of the corresponding royalty.

ADVISORY OPINION 5.1
Treatment of cash discount under the Agreement.

- **(The case that payment for the goods has been made before the time of valuation.)**

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

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

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

ADVISORY OPINION 5.2
Treatment of cash discount under the Agreement.

- **(The case that payment for the goods has not yet been made at the time of valuation : the requirements of Article 1.1 (b) of the Agreement.)**

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

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

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

ADVISORY OPINION 5.3
Treatment of cash discount under the Agreement.

- **(The case that payment for the goods has not yet been made at the time of valuation : the transaction value under Article 1 of the Agreement.)**

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

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

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

ADVISORY OPINION 6.1
Treatment of barter or compensation deals under the Agreement

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

2. The Technical Committee on Customs Valuation expressed the following opinion.

   International barter takes various forms. In its purest form, it consists of an exchange of goods or services of approximately equal value, without recourse to a common unit of measurement (money) to express the transaction.

   Example

   X tons of product A from country E are exchanged for Y units of product B from country I.

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

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

Example

Manufacturer F in the country of importation I has the opportunity of selling electrical equipment in country E provided an equivalent value of goods produced in country E is bought and exported from that country. After an arrangement between F and X trading in plywood in country I, X imports into country I a quantity of plywood from country E and F exports electrical equipment to country E, the equipment being invoiced at 100,000 c.u.

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

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

Example

Importer X in country I imports from country E two machines priced at 50,000 c.u. on the understanding that only one fifth of this sum is to be the subject of a financial settlement, the rest being offset by the delivery of a specified quantity of textile products.

The invoice presented on importation shows a value of 50,000 c.u.; however, the financial settlement between X and the seller in country E involves only 10,000 c.u., the balance being covered by the delivery of the textile products.

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

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

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

Example

Manufacturer F in country of exportation E has an agreement with importer X in country I to supply specialized equipment designed by F, at a unit price of 10,000 c.u., on condition that importer X supplies him with relays used in the production of the equipment, at a unit price of 150 c.u.

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

Example

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

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

ADVISORY OPINION 7.1
Acceptability of test values under Article 1.2 (b) (i) of the Agreement

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

2. The Technical Committee on Customs Valuation expressed the following opinion.

   When a price between unrelated parties has satisfied the conditions prescribed in Article 1 and, with any necessary adjustments in accordance with the provisions of Article 8, has been accepted by Customs as a transaction value, that value can be used as a test value. That is not of course the case where a price is still the subject of an enquiry or where the final determination of the customs value otherwise remains provisional (see Article 13 of the Agreement).

ADVISORY OPINION 8.1
Treatment under the Agreement of credits in respect of earlier transactions

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

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

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

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

ADVISORY OPINION 9.1
Treatment of anti-dumping and countervailing duties when applying the deductive method

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

2. The Technical Committee on Customs Valuation expressed the following opinion.

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

ADVISORY OPINION 10.1
Treatment of fraudulent documents

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

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

   Imported goods have to be valued under the Agreement on the basis of actual facts. Therefore any documentation which contained false information as to the facts would be contrary to the intention of the Agreement. In this respect it is noted that Article 17 of the Agreement and paragraph 6 of Annex Ⅲ underline the right of Customs administrations to satisfy themselves as to the truth and accuracy of any statement, document or declaration presented to them for customs valuation purposes. It follows that an administration cannot be required to rely on fraudulent documentation. Further, should documentation prove to be fraudulent subsequent to the determination of a Customs value, invalidation of that value would be a matter for national legislation.

ADVISORY OPINION 11.1
Treatment of inadvertent errors and of incomplete documentation

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

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

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

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

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

ADVISORY OPINION 12.1
Flexible application of Article 7 of the Agreement

1. In the application of Article 7, can methods other than those set out in Articles 1 to 6 be used, if they are not prohibited by Article 7.2 (a) to (f) and are consistent with the principles and general provisions of the Agreement and of Article VII of the GATT 1994?

2. The Technical Committee on Customs Valuation expressed the following opinion.

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

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

   In determining the Customs value under Article 7, the method used must be consistent with the principles and general provisions of the Agreement and of Article VII of the GATT 1994.

ADVISORY OPINION 12.2
Hierarchical order in applying Article 7

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

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

   There is no provision in the Agreement that specifically provides that the hierarchical order of Articles 1 to 6 should be followed when Article 7 is applied. However, Article 7 requires the use of reasonable means consistent with the principles and general provisions of the Agreement and this indicates that where reasonably possible, the hierarchical order should be followed. Thus where several acceptable methods can be used to determine Customs value under Article 7, the hierarchy should be maintained.

ADVISORY OPINION 12.3
Use of data from foreign sources in applying Article 7

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

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

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

ADVISORY OPINION 13.1
Scope of the word "insurance" under Article 8.2 (c) of the Agreement

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

2. The Technical Committee on Customs Valuation expressed the following opinion.

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

ADVISORY OPINION 14.1
Meaning of the expression "sold for export to the country of importation"

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

2. The Technical Committee on Customs Valuation expressed the following opinion.

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

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

   The following examples illustrate the above principles :

   Example 1

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

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

Example 2

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

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

Example 3

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

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

Example 4

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

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

Example 5

The head office of a multinational hotel chain located in country X purchases supplies for its operation. At the beginning of each year, chain hotels in countries I, I2 and I3 submit purchase orders to the head office for their supplies. The head office then adds up all the orders from each hotel in the chain and issues purchase orders to various suppliers in country X. The supplies are either sent directly by the suppliers to each of the hotels in the chain or are shipped to the head office and subsequently shipped to those hotels. In either case, the suppliers bill the head office in country X which then separately bills each hotel in the chain.

In the above example, the sale between the head office and the suppliers both located in country X does not involve an international transfer of goods but is a domestic sale in the country of exportation since the head office purchases the supplies from the suppliers and then sells them to each separate hotel in the chain for export to the country where each separate hotel is located. In this case, the transactions between the head office and each separate hotel would constitute sales for export to the country of importation. Provided that the relationship did not influence the price, these sales would be the basis for valuation of the goods under Article 1.

Example 6

Buyer A in country I purchases 500 chairs from seller S in country X at a price of 20 c.u. per unit. Buyer A instructs seller S to ship 200 chairs to him for his own use in country I and 300 chairs to a warehouse in country X. Buyer A subsequently agrees to sell the remaining 300 chairs to buyer B in country I for 25 c.u. per unit. Buyer A then instructs his warehouse in country X to ship the goods directly to buyer B in country I.

In this example, there are two cases where the goods must be valued. In the first instance, the transaction between seller S and buyer A at 20 c.u. per unit would constitute a sale for export to the country of importation and would be the basis for the valuation of the 200 chairs under Article 1. In the second instance, the selling price of 20 c.u. of the goods placed in warehouse is not relevant for valuation purposes since the subject goods were not sold for export to country I. The sale between buyer A and buyer B at 25 c.u. per unit, which involves an actual international transfer of goods would constitute the sale for export to the country of importation and would be the basis for valuation under Article 1.

ADVISORY OPINION 15.1
Treatment of quantity discounts

1. How are quantity discounts to be treated with reference to Article 1 of the Agreement?

2. The Technical Committee on Customs Valuation expressed the following opinion.

   Quantity discounts are deductions from the price of goods allowed by the seller to customers according to the quantities purchased over a given basic period.

   The WTO Valuation Agreement makes no reference to a standard 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.

   It therefore follows that for Customs valuation purposes it is the quantity which has determined the unit price of the goods being valued when they were sold for export to the country of importation that is relevant. Thus quantity discounts arise only when it is shown that a seller sets the price for his goods according to a fixed scheme based upon the quantity of the goods sold. Such discounts fall into two broad categories :

   i) those established prior to the importation of goods, and

   ii) those established subsequent to the importation of goods.

   These considerations are illustrated by the following examples.

▪ General Facts

There is demonstrated evidence that the seller offers the following quantity discounts on the goods purchased within a given specified period e.g. a calendar year.

1 to 9 units – no discount

10 to 49 units – 5% discount

Over 50 units – 8% discount

In addition to the above discounts a further discount of 3% is granted at the end of the specified period calculated retrospectively by reference to the total quantity purchased in that period.

Example 1

First situation :
Importer B in country X purchases and imports 27 units in a single shipment. The invoice price reflects a 5% discount.

Second situation :
Importer C in country X purchases 27 units in a single transaction at a price which reflects a 5% discount but imports them in 3 separate shipments each comprising 9 units.

✓ Valuation treatment

In both situations, the Customs value is to be determined on the basis of the price actually paid or payable for the imported goods, i.e. those prices reflecting a 5% discount which contributed to the setting of those prices.

Example 2

Subsequent to the purchase and importation of the 27 units, importers B and C purchase and import within the same calendar year a further 42 units (i.e. a total of 69 units each). The price charged to both B and C for the second purchase of 42 units reflects an 8% discount.

First situation :
Importer B's first purchase of 27 units and the second purchase of 42 units are the subject of two separate contracts which are entered into in the context of an Initial General Agreement which provides for the cumulative progressive discounts between the buyer and the seller.

Second situation :
The position is as in the first situation above except that importer C's purchases are not the subject of an initial general agreement. The cumulative progressive discounts are however offered by the seller as a feature of his general terms of sale.

✓ **Valuation treatment**

With respect to both situations the 8% discount on the 42 units is a feature of the seller's price; it contributed to the setting of the unit price of the goods when they were sold for export to the country of importation. It therefore follows that it should be allowed in determining the Customs value of those goods.

In this respect the fact that the quantity discount is granted by the seller taking into account quantities purchased previously by the buyer does not mean that the provisions of Article 1.1 (b) apply.

Example 3

In this example, the position is as in example 2 above except that the discounts are also granted retrospectively. In each case the importer purchases and imports 27 units and a further 42 units within the same calendar year.

For the first shipment of 27 units B is charged a price which reflects a 5% discount and for the second shipment of 42 units, the price charged reflects an 8% discount with an additional reduction representing a further discount of 3% on the first shipment of 27 units.

✓ **Valuation treatment**

The 8% discount on the 42 units should be allowed in determining the Customs value of the imported goods. However, the additional 3% discount granted retrospectively should not be allowed for the second importation as it did not contribute to the setting of the unit price of 42 units being valued but relates to the previously imported 27 units. As to the treatment to be accorded by Customs to the 27 units, guidance is already provided in Advisory Opinion 8.1 on credits in respect of earlier transactions and Commentary 4.1 on price review clauses.

Example 4

After all importations during the specified period have been completed, an accounting is taken. On the basis of the total quantity which had been imported during the period, the importer qualifies for an additional 3% discount.

✓ **Valuation treatment**

The discount of 3% granted retrospectively cannot be taken into account for the reasons set out in paragraph 16. However, it should be noted that the Committee has already provided guidance in Advisory Opinion 8.1 on credits in respect of earlier transactions and in Commentary 4.1 on price review clauses

ADVISORY OPINION 16.1
Treatment of a situation where the sale or price is subject to some condition or consideration for which a value can be determined with respect to the goods being valued

1. What treatment should be given to the situation where the sale or price is subject to some condition or consideration for which a value can be determined with respect to the goods being valued?

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

   According to clause (b) of Article 1.1 the Customs value of the imported goods cannot be established on the basis of the transaction value if the sale or price is subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued.

   The provision of clause (b) of Article 1.1 should be interpreted to mean that if the value of a condition or consideration can be determined with respect to the goods being valued, the Customs value of the imported goods should, subject to the other provisions and conditions of Article 1, be the transaction value as determined under that Article. Interpretative Notes to Article 1 and Annex III make it very clear that the price actually paid or payable is the total payment made by the buyer to or for the benefit of the seller, that the payment may be made directly or indirectly and that the price includes all payments actually made or to be made by the buyer to the seller, or by the buyer to a third party. Thus the value of the condition, when it is known and relates to the imported goods, is a part of the price actually paid or payable.

   It should rest with individual administrations as to what they consider would be sufficient information to specifically determine the value of a condition or consideration.

ADVISORY OPINION 17.1
Scope and implication of Article 11 of the Agreement

1. Does the phrase “without penalty”, which is used in respect of the appeal provisions contained in Article 11, prohibit Customs from requiring the full payment, prior to the appeal, of any penalties imposed as a result of valuation fraud and other forms of contravention of valuation law?

   The question arises because paragraph 3 of the Interpretative Note to Article 11 refers to the full payment, prior to the appeal, of assessed Customs duties but does not address cases involving fines and penalties.

2. The Technical Committee on Customs Valuation concluded that paragraph 2 of the Interpretative Note to Article 11 is explicit in its definition of the words “without penalty” which “means that the importer shall not be subject to a fine or threat of fine merely because he chose to exercise his right of appeal”.

   Furthermore, the importer's right of appeal under this Article is in respect of decisions taken by the Customs administration with regard to the determination of Customs value within the provisions of the Agreement.

   It follows that cases of fraud fall outside the scope of this Article : in such cases, appeal procedures would be governed by national legislation which could provide for prior payment of penalties as well as of the duty.

ADVISORY OPINION 18.1
Implications of Article 13 of the Agreement

1. The question has been asked whether the guarantee to be provided by the importer for the withdrawal of goods under Article 13 covers only the Customs duties, leaving the Customs without adequate security to recover fines and penalties that may be leviable on the goods and persons.

2. The Technical Committee on Customs Valuation concluded that Article 13 comes into operation only in those cases where, in the course of determining Customs value of imported goods, it becomes necessary to delay the final determination of such Customs value. An example of this situation is where adjustments are necessary under Article 8 but the relevant information is not available at the time of importation. Numerous cases of this nature could, in fact, arise in the course of determining Customs value under the Agreement. In these circumstances, the terms of this Article provide for the release of the goods if a guarantee or security sufficient to cover the ultimate payment of the Customs duties is furnished.

   Article 13 is not intended to cover cases which involve violations of Customs laws or fraud; in such situations, the release of the goods or the provision of guarantee in relation to fines or penalties should be governed by national legislation.

ADVISORY OPINION 19.1
Application of Article 17 of the Agreement and paragraph 6 of Annex III

1. The question has been asked whether Article 17 read with paragraph 6 of the Annex III gives sufficient powers to the Customs administration to detect and establish valuation offences including fraud, and whether the burden of proof in the course of determination of the Customs value is on the importer?

2. The Technical Committee on Customs Valuation concluded that in examining this matter, it has to be noted that Article 17 states that the Agreement does not restrict nor call into question the rights of the Customs administration. Paragraph 6 of Annex III elaborates on those rights, referring specifically to the right of national administrations to expect the full co-operation of importers in enquiries concerning the truth or accuracy of any statement, document or declaration. This position is reiterated in Advisory Opinion 10.1.

   It would be incorrect to suggest that any other rights of the Customs administrations which are not mentioned in Article 17 or paragraph 6 of Annex III are, by implication, excluded.

   Other than those which are specifically mentioned in the Agreement, the rights and obligations of importers and Customs in the determination of the Customs value would depend on national laws and regulations.

ADVISORY OPINION 20.1
Conversion of currency in cases where the contract provides for a fixed rate of exchange

1. The question has been asked whether conversion of currency is necessary in cases in which the contract of sale of the imported goods provides for a fixed rate of exchange.

2. The Technical Committee on Customs Valuation considered this question and advised that the conversion of currency is not necessary if the settlement of the price is made in the currency of the country of importation.

   Therefore, what is important in this matter is the currency in which the price is settled and the amount of the payment.

Example 1

The commercial invoice shows an amount in the currency of the country of exportation (MX). It specifies that the settlement is to be made however in the currency of the country of importation (MY). The amount to be paid is arrived at by conversion of the amount invoiced at a fixed rate of exchange. This rate is 1 MX (export currency) = 2 MY (import currency).

✓ Question

Should the invoiced amount be converted to the currency of the country of importation on the basis of the contracted rate of exchange or that in effect (in the country of importation) at the time of exportation or the time of importation of the goods (see Article 9.2 of the Agreement)?

✓ Answer

The conversion of currency, as provided for in Article 9, is not necessary. The contract of sale provides for the payment of a fixed amount in the currency of the country of importation. The amount to be paid in the currency of the country of importation is determined by multiplying the amount invoiced by two, i.e. the rate agreed upon by the buyer and the seller.

Example 2

The commercial invoice shows an amount in the currency of the country of importation (MY) but it specifies that the settlement is to be made in the currency of the country of exportation (MX). The amount to be paid is arrived at by conversion of the amount invoiced at a fixed rate of 1 MX = 2 MY.

✓ **Question**

Is the amount invoiced (in the currency of the country of importation) to be accepted without further conversion?

✓ **Answer**

The amount invoiced cannot be accepted as the Customs value. The contract of sale provides for the payment of a fixed amount in the currency of the country of exportation. It is this amount which must be converted. The amount contracted to be paid in MX should first be arrived at by dividing the invoiced amount by two. The resultant sum should then be converted to MY in accordance with Article 9 at the appropriate rate published by the competent authority in the country of importation.

Example 3

The commercial invoice shows an amount in the currency of the country of exportation (MX) but it specifies that the settlement is to be made in the currency of a third country (MZ). The amount to be paid is arrived at by conversion of the amount invoiced at a fixed rate of 1 MX = 6 MZ.

✓ **Question**

Which foreign currency amount (i.e. MX or MZ) is to be converted to the currency of the country of importation?

✓ **Answer**

The currency of the third country is to be converted. The amount in that currency is to be arrived at by calculation of the invoiced amount at the contracted fixed rate of exchange (i.e. invoiced amount x 6 = amount actually payable in currency of third country). The resultant sum should then be converted to the currency of the country of importation in accordance with Article 9 at the appropriate rate published by the competent authority in the country of importation.

Example 4

The commercial invoice shows an amount in the currency of the country of importation (MY) but it specifies that the settlement is to be made in the currency of a third country (MZ). The amount to be paid is arrived at by conversion of the invoiced amount at a fixed rate of 1 MY = 3 MZ.

✓ **Question**

Is the invoiced amount (in the currency of the country of importation) to be accepted without further conversion?

✓ **Answer**

The invoiced amount cannot be accepted without conversion. The invoiced amount should be determined in the currency of the third country at the fixed rate of exchange (i.e. invoiced amount x 3 = amount to be paid in the currency of the third country). The resultant sum should then be converted to the currency of the country of importation in accordance with Article 9 at the appropriate rate of exchange published by the competent authority in the country of importation.

ADVISORY OPINION 21.1
Interpretation of the expression "partners in business" in Article 15.4 (b)

1. Are sole agents, sole distributors and sole concessionaires "legally recognized partners in business" in terms of Article 15.4 (b) of the Agreement?

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

   The Technical position in regard to sole agents, sole distributors and sole concessionaires is set out in Article 15.5 of the Agreement, which provides that persons associated in business as sole agents, sole distributors or sole concessionaires are only deemed to be related persons under the Agreement if they fall within the criteria of Article 15.4.

   Article 15.4 (b) deems persons to be related if "they are legally recognized partners in business". The Webster's Dictionary defines the word "partner" as :

   "One who is associated with one or more persons in the same business and shares with them its profits and risks; a member of a partnership".

   The word "partnership" is in turn defined as :

   "An association of two or more people who contribute money or property to carry on a joint business and who share profits and losses in certain proportions".

   In commercial law, the simple definitions set out above are usually backed up by a complex set of legal provisions and principles intended to define, interpret and codify through contract, tax and other laws the legal relationship implied in the term "partner".

An association would be a partnership only where the national legal requirements for the creation of a partnership are satisfied. Thus, persons are not related under the Agreement simply because one person is the sole agent, sole distributor or sole concessionaire of the other.

While it is true that sole agents, sole distributors, etc. may have a close association with their suppliers, this fact alone would provide no reason to treat them differently from any other unrelated party.

For the purpose of clarification, a Member may choose to incorporate or refer to its national law of partnership in the valuation provisions of its Customs law. However, it would not be appropriate for a Member to devise a different definition of partnership specifically for the interpretation of the valuation provisions of its Customs law.

ADVISORY OPINION 22.1
Valuation of imported technical documents relating to design and development of an industrial plant

1. Importer I in country P enters into a service contract with Engineering Firm E in country X for the construction of an industrial plant in country P. As a means of providing services needed to construct the industrial plant, the engineering designs and development plans are produced by E in paper form (“the documents”) and sent to I. In consideration for these services, I pays the contract price to E.

   How should the Customs value of the documents be determined under the Agreement?

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

   The documents in question, which are tangible, should be regarded as “goods” for which determination of the Customs value is required. No goods are imported other than the documents.

   In this case, the documents have not been sold for export to the country of importation. Accordingly, Article 1 of the Agreement cannot be applied.

   Based on the facts provided, Articles 2, 3, 5 and 6 are also not applicable. Consequently the Customs value of the imported goods should be determined under the provisions of Article 7 of the Agreement.

   The contract price which I pays to E is for the services performed for the construction of the industrial plant under the service contract and not in consideration for the imported documents. Therefore, that payment should not be taken into consideration when determining the Customs value of the documents.

Consequently, the Customs value of the documents in question could be determined in consultation with the importer by flexible application of Article 7 of the Agreement (see Advisory Opinion 12.1). For instance, the Customs value of the documents could be determined on the basis of the cost directly incurred in transcribing the engineering designs and development plans onto the paper and printing of such documents.

ADVISORY OPINION 23.1
Valuation of imported goods purchased in "flash sales"

1. The question raised was whether Customs should regard the highly discounted price for imported goods purchased during a flash sale as the basis for Customs valuation under Article 1 of the Agreement. If so, the second question was whether Customs should agree to this highly discounted price being used to determine the transaction value of identical or similar goods for which there is no transaction value.

2. The Technical Committee on Customs Valuation has set forth the following views :

   Under the Agreement, the Customs value of the imported goods "should be based on simple and equitable criteria consistent with commercial practices." Flash sales are promotional sales offered in the short term and at highly discounted prices to attract potential purchasers. Flash sales can be conducted on the traditional market or through e-commerce. The Agreement continues to be the only international legal framework for Customs valuation. Its provisions must be applied in respect of imported goods purchased both on the traditional market and through e-commerce.

   Given that, under Article 1 of the Agreement, the basis for the transaction value is the price actually paid or payable for the imported goods, the discounted price for imported goods purchased during a flash sale is accepted as the basis for Customs valuation.

   It is noted that in accordance with Advisory Opinion 2.1, the mere fact that a price is lower than prevailing market prices for identical goods should not cause it to be rejected for the purposes of Article 1, subject of course to the provisions of Article 17 of the Agreement. Accordingly, the Customs value of goods purchased during a flash sale is the transaction value of the goods in question, provided the conditions of application laid down in Article 1 are met.

The discounted price of imported goods purchased during a flash sale will be used for the purpose of applying either the transaction value of identical goods or the transaction value of similar goods laid down in Articles 2 and 3 respectively of the Agreement only if these goods fall within a definition set out in Article 15.2 of the Agreement and all the requirements under Article 2 or Article 3 are met.

Articles 2 and 3 state that the Customs value shall be the transaction value of identical or similar goods, as the case may be, sold for export to the same country of importation and exported at or about the same time as the goods being valued. In addition to fulfilling the time criteria, it is necessary to ensure that the same commercial practices and market conditions apply as explained in paragraph 6 of Commentary 1.1 and paragraph 12 of Explanatory Note 1.1.

It is unlikely that the commercial practices and market conditions prevailing under flash sales would exist in situations other than flash sales.

Each case has to be considered on a case by case basis.

ADVISORY OPINION 24.1
Valuation treatment of imported goods bearing the buyer's own trademark

1. The question was raised whether a price for imported goods bearing the buyer’s own trademark can be accepted for the purposes of applying Article 1 of the Agreement in a situation where:

   (a) The trademark is owned by the buyer, and no royalty or licence fee has been paid to another entity for its use.

   (b) The trademark was provided free of charge by the buyer in the form of an image sent to the seller, e.g. electronically via the Internet, so that it might then be used in the production of the goods being imported.

   (c) The cost of reproducing the trademark’s image or logo on the imported goods is included in the price actually paid or payable to the seller.

   (d) The price of goods bearing the buyer’s trademark is different from the price of the same goods bearing the seller’s trademark when they are sold by the same seller to the same buyer or to other buyers from the same country of importation, and which have also been:

      i. produced in the same country;

      ii. exported at or about the same time; and

      iii. sold at the same commercial level and in the same quantities.

2. The Technical Committee on Customs Valuation considered this issue and reached the conclusion that the mere fact that a price is different to the prices of goods which are apparently the same but have different trademarks should not be grounds for its rejection under Article 1, albeit without prejudice to the provisions in Article 17 of the Agreement.

3. The General Introductory Commentary of the Agreement stipulates that the basis for valuation of goods for Customs purposes should be the transaction value of the goods being valued, and that the Customs value should be based on simple and equitable criteria consistent with commercial practices. Therefore, each importation of goods should be examined on its own merits and characteristics.

4. Based on the facts, there is no indication that special circumstances exist as set out in subparagraphs (a) to (d) of Article 1 of the Agreement that would prevent the use of transaction value. In particular, the provision in Article 1.1(b) of the Agreement is met; and it therefore cannot be construed that the existence of different trademarks on goods which are apparently the same constitutes some condition or consideration for which a value cannot be determined with respect to the goods being imported.

5. Additionally, although the definition of "similar goods" under Article 15.2(b) of the Agreement applies only in instances where the transaction value method is rejected, this definition does provide insights into the conclusion why the mere fact that a price is different between two similar goods bearing different trademarks is not a reason for rejecting the transaction value.

   Namely, two of the factors to be considered in determining whether two goods are similar include their reputation and the existence of a trademark. These factors demonstrate how the goods may not be similar and could explain a difference in the prices in the present case.

6. Furthermore, Article 8.1(c) of the Agreement would not be applicable, as the trademark is owned by the buyer, and no royalty or licence fee has to be paid to another entity for its use.

ADVISORY OPINION 25.1
Valuation treatment applicable to ancillary charges

1. ICO, a company located in country I, buys and imports goods from an unrelated foreign seller XCO at a specified price.

   (i) XCO offers different programmes to ICO against payment, as follows:

   a) Programme I
   Under the "savings program charges" programme, if the buyer purchases a predetermined minimum quantity of imported goods over a given time period, the seller provides the buyer a certain number of the same goods for free.
   If the importer opts to join Programme I, a fixed additional amount per unit of the imported goods becomes payable. This amount is not refundable whether or not the purchasing target is met.

   b) Programme II
   Under this programme termed as "club charges", hotel packages and gifts are offered to importers, depending on purchasing targets fixed by the seller in a given period of time. If the importer opts to join this programme, the latter pays an additional amount per unit of the imported goods. This amount is not refundable whether or not the purchasing target is met.

   (ii) An additional fee referred to as "currency surcharge" is charged by the seller per unit of the imported goods to all importers. This fee enables the seller to maintain the price of the product with regards to any change that might occur in the forex market. The currency surcharge remains payable even if ICO does not join Programmes I and II.

The savings program charges, club charges and currency surcharge referred to as "Ancillary Charges" by the seller are charged on a separate invoice to ICO.

(i) In the event ICO opts to join Programmes I and II, should "savings program charges" and "club charges" be included in the Customs value of the imported goods?

(ii) On the other hand, irrespective of whether or not ICO opts to join Programmes I and II, should the "currency surcharge" be included in the Customs value?

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

According to paragraph 1 of the Interpretative Note to Article 1 (Price actually paid or payable) , the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. Likewise, paragraph 4 of the Interpretative Note to Article 1(Price actually paid or payable) states that "The price actually paid or payable refers to the price for the imported goods. Thus the flow of dividends or other payments from the buyer to the seller that do not relate to the imported goods are not part of the customs value". Paragraph 7 of Annex III of the Agreement further provides 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."

In this case as presented, the savings program charges and club charges are payable only if the buyer opts to join Programmes I and II. These payments are not made for the imported goods but for the possibility to obtain free units of same goods or gifts or hotel packages when specific purchasing targets are met. Furthermore, the buyer may still purchase the goods at the same specified price and on the exact same commercial terms regardless of whether the buyer opts into either program.

As such, the savings program charges and club charges are not paid for the imported goods, as provided in paragraphs 1 and 4 of the Interpretative Note to Article 1(Price actually paid or payable), nor is the payment of these charges a condition of sale of the imported goods as provided in paragraph 7 of Annex III. Accordingly, the savings program charges and club charges should not be included in the "price actually paid or payable" under Article 1.

Article 8.4 of the Agreement states that no additions shall be made to the price actually paid or payable in determining the customs value except as provided in that Article. Since savings program charges and club charges cannot be regarded as equivalent to any of the elements mentioned in Article 8, they cannot be added to the price actually paid or payable for the imported goods.

In contrast to the savings programme and the club charges, which are optional, the currency surcharge is mandatory and charged to all importers. Although the stated purpose of the currency surcharge is to maintain the price of the imported goods with regards to any change that might occur in the forex market, XCO does not give ICO the option, for example, of assuming the foreign exchange risk or paying in a different currency to avoid payment of the currency surcharge. Accordingly, ICO cannot purchase the goods without paying this charge. Furthermore, the currency surcharge has not been shown to be a payment for something other than for the imported goods. As such, it can be concluded that this charge is for the imported goods and is likewise paid as a condition of sale of the imported goods. Therefore, the currency surcharge should form part of the "price actually paid or payable" when applying Article 1 of the Agreement.

As for the free units of the same goods and gifts provided by XCO to ICO, if they are imported and presented to Customs, their valuation treatment would be a separate consideration.