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INTRODUCTION

1.1 THE PURPOSES OF CUSTOMS VALUATION

1.1.1 What is customs valuation?

Governments have collected customs duties since the beginnings of international trade. It is recorded that Athens applied 20 percent import duties on corn and other goods, while the Romans, from well before the time of Julius Caesar, depended upon customs revenues to support the expansion and maintenance of their empire. And, where a tax must be collected, there will be disputes over rates and methods – the Roman customs collector was accused of "unfair conduct and vexatious proceedings" against the Roman merchants who, in all fairness, were said to have been commonly engaged in smuggling to avoid customs duties.[1]

Customs valuation – the subject of this book – becomes an issue where import duties are calculated on an "*ad valorem*" basis. An "*ad valorem*" duty rate is one that is expressed as a percentage of the value of the imported goods. Duties may also be assessed on "specific" basis, where a fixed amount is charged on the quantity of goods imported – such as 0.2 cents per liter of imported alcohol. Or, a duty rate on a particular import might be a combination of *ad valorem* and specific rates (a "compound rate"). Nevertheless, *ad valorem* rates are the most prominent in international trade, as they are used by WTO Members against all but a small percentage of goods in their tariff schedules.[2]

For a particular import, the amount of an *ad valorem* duty is determined by multiplying the rate (for example, 17 percent on imports of chocolate milk, in Figure 1) by the ***customs value*** of the imported goods. Thus, how customs officials determine the customs value is as important to the importer as the rate of duty specified in the tariff schedule for the goods, as both the basis – the customs value – and the rate together determine the amount of duty the importer must pay.

[1] W. Smith (ed.), *Dictionary of Greek and Roman Antiquities* (Boston: Little Brown & Co. 1859), 944–45; J. R. McCulloch, *A Treatise on the Principles and Practical Influence of Taxation and the Funding System*, third edition (Edinburgh: Adam and Charles Black 1863), 240.

[2] On average, WTO Members use *ad valorem* rates for more than 97 percent of all tariff lines in their schedules. A notable exception is Switzerland which uses specific type rates for 80 percent of its tariff. WTO, *Trade Profiles 2007*.

Harmonized Tariff Schedule of the United States (2007)
Annotated for Statistical Reporting Purposes

IV
22-3

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2201		Waters, including natural or artificial mineral waters and serated waters, not containing added sugar or other sweetening matter nor flavoured; ice and snow:				
2201.10.00	00	Mineral waters and serated waters	liters	0.25 liter	Free (A, AU, BH, CA, CL, E, IL, MX, P, S)	2.5 ¢/liter
2201.50.00	00	Other	t	Free		Free
2202		Waters, including mineral water and aerated waters, containing added sugar or other sweetening matter or flavoured and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2003:				
2202.10.00		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured		0.3 liter	Free (A, AU, BH, CA, CL, E, IL, J, JO, MA, MX, P, SG)	4 ¢/liter
		Carbonated soft drinks:				
	20	Containing high-intensity sweeteners (e.g., aspertame and/or saccharin	1 liters			
	40	Other	1 liters			
	60	Other	1 liters			
2202.50		Other:				
		Milk-based drinks:				
2202.50.10	00	Chocolate milk drink	liters	17%	Free (A+, CA, D, E, IL, J, JO, MX, P, CL) 8.5% (8G) 13.6%(MA) 13.6%(BH) 14.1% (AU)	20%

Specific Duty Rate

Ad Valorem Duty Rate

Figure 1 US harmonized tariff schedule: *ad valorem* and specific rates

Today, the rules for valuing imports for purposes of assessing customs duties are well settled. They are defined in the WTO Customs Valuation Agreement (the formal name of which is the **Agreement on Implementation of Article VII of the GATT**), a system that is designed to promote fairness, neutrality and uniformity in customs duty assessment, and which is used by more than 150 WTO Member countries worldwide.

1.1.2 The importance of customs valuation

In 1947 – before the GATT – the average tariff rate applied by industrial countries was between 20 and 30 percent.[3] Fifty years and eight GATT rounds of tariff negotiations later, the average tariff rate applied by industrial countries on non-agricultural goods is about 5.5 percent.[4] With implementation of the 1994 Uruguay Round, for example, the US average tariff on non-agricultural goods is just 3.2 percent, and nearly half the tariff lines applicable to such goods are duty free.[5] Given these diminishing tariffs, one might ask how important is customs valuation? If import duties are reduced to trivial levels or

[3] WTO, *World Trade Report 2007*, at 207.
[4] WTO, *World Trade Profiles 2008* (simple average of applied MFN rates).
[5] *Ibid.*

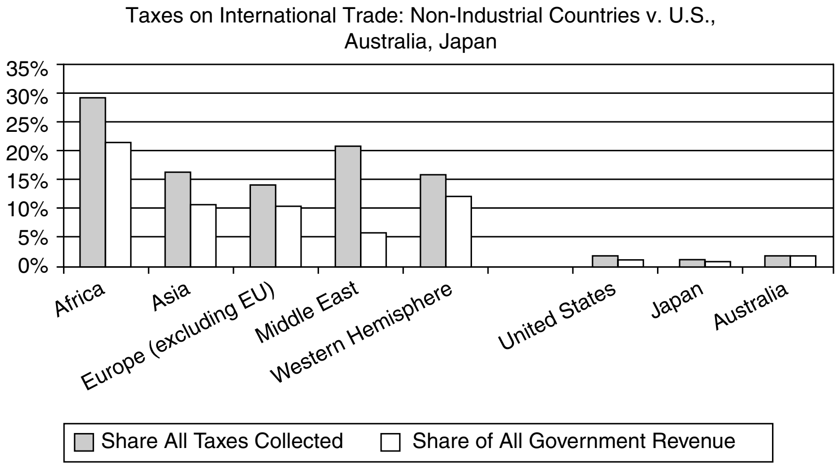

Figure 2 Taxes on international trade (IMF, *Government Finance Statistics Yearbook 2007*)

disappear altogether, what use will remain for the rules that are used for their calculation?

Despite the successes of the GATT rounds, import duties stubbornly remain a factor in international trade. This is particularly true in developing countries, where the average applied rate for all goods is 16.9 percent.[6] Even in industrial countries, where average rates are low, some industrial products and sectors, and many agricultural products, remain protected by tariffs of 20 percent or higher.[7] Moreover, a number of developing countries continue to depend upon import duties for a significant portion of the national budget (see Figure 2).

Even if import duties were completely eliminated, the need for customs valuation rules likely would still exist. One important reason is the use by a number of countries of value added tax (VAT), excise, or sales taxes on imported products; these taxes, unlike customs duties are not subject to GATT/WTO tariff reductions.[8] Customs authorities commonly apply the same customs valuation rules to calculate these kinds of taxes on imports as they do for customs duties, although they are not obligated by GATT rules to do so.[9]

[6] *Ibid.*

[7] For example, the simple average duty rate applied by the European Union is just over 5%, among the lowest of WTO Members. However, the average rates applied to selected products exceeds 20% (i.e. dairy products (62.4%); sugars and confectionery (29.8%); animal products (25.4%)).

[8] VAT systems are now used in over 120 countries; they are said to have been adopted by some countries to replace the trade tax revenues lost as a consequence of GATT tariff reductions. IMF, *Dealing with the Revenue Consequences of Trade Reform* (February 15, 2005).

[9] GATT Article VII, Interpretative Note *Ad* Paragraph 1.

Apart from tax and duty assessment, customs valuation rules are used by customs authorities in their administration of non-revenue measures, such as:

- Import quotas based on customs value.
- Rules of origin. For example, a country may allow goods from a specific foreign country to enter free of duty if 50 percent of the customs value of the import is contributed by operations carried out in that foreign country.
- Collection of trade statistics.

Customs valuation and GATT tariff bindings

GATT Article II:3 states "no contracting party shall alter its method of determining dutiable value … so as to impair the value of any [tariff] concessions" negotiated among GATT parties.

Under this prohibition, a country may not change its "method of determining dutiable value" to avoid tariff bindings. But this does not prevent a country from maintaining a valuation method that itself allows arbitrary assessments. In the absence of common rules, valuation could thus be (mis)used for trade protection purposes.

"It seems inequitable that while certain countries … apply a liberal [valuation] system, others continue to apply systems which may raise the actual incidence of the duties shown in the tariff and carry many uncertainties because of elements which are arbitrary from the point of view of interested exporters in third countries. *Indeed, the global reciprocity achieved in tariff reductions might be gravely jeopardized*."*

To illustrate the point, consider the following scenario: if the invoice value of an imported product is \$100, and the bound tariff rate agreed by the country is 10%, then traders might expect a tariff barrier equivalent to \$10 (\$100 × 10% = \$10). However, customs officials, applying a method of valuation that allows arbitrary uplifts, assign a value to the product of twice that amount. In that case, the actual tariff barrier is \$20 (\$200 × 10% = \$20). In practical effect, the importing country has raised its tariff rate from the 10% tariff ceiling agreed in GATT tariff negotiations to 20%.

Benefits to trade that the exporting country expects from negotiated tariff binding are considerably diminished by such uncertain or arbitrary valuation methods.

* TN.64/NTB/26 (July 7, 1964) (Statement of the European Community) (emphasis added).

1.2 HISTORY

The WTO Customs Valuation Agreement is a result of the 1986–1994 Uruguay Round negotiations, but its terms largely repeat the 1979 GATT Valuation Code. Therefore, to understand the intent underlying the terms of the Agreement, it is useful to recall the conditions of the pre-1979 trading environment (see Figure 3). As will be apparent from the retelling, this history also demonstrates that many of the difficulties of customs valuation that are discussed

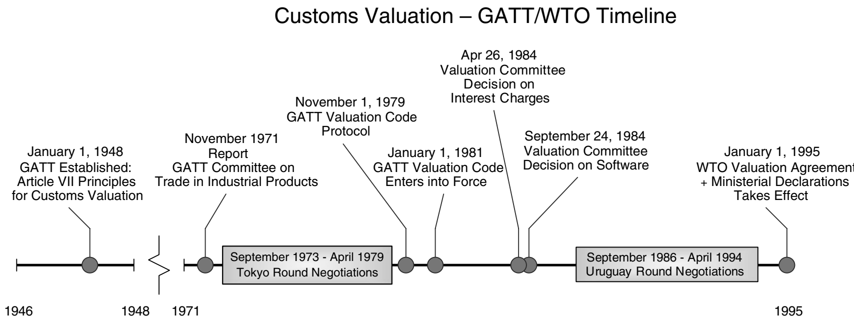

Figure 3 GATT/WTO customs valuation timeline

today – valuation of used goods, questionable invoices, (mis)use of alternative valuation methods, etc. – are by no means new or unique.

1.2.1 Before common valuation rules

GATT Article VII establishes general principles for national customs valuation systems. However, it does not mandate a specific valuation method, but allows countries to develop their own system, subject to these principles.

GATT Article VII Principles

- Customs value shall be based on "**actual value**", which is the price of the imported merchandise, or like merchandise, in sales in the ordinary course of trade under fully competitive conditions
- If "actual value" cannot be determined, Customs shall use the nearest ascertainable equivalent
- Customs value shall not be based on value of merchandise of national origin, or arbitrary or fictitious values
- Customs value shall not include internal taxes on a product that the country of origin or export refunds or exempts
- Currency conversion shall reflect effectively current value of currency in commercial transactions
- Where price of imported merchandise is determined by the quantity purchased, customs value shall be based on prices for comparable quantities or, as long as the result does not disadvantage the importer, prices involving larger quantities in sales in trade between the exporting and importing countries
- Governments shall publicize their valuation methods
- Governments shall report on steps they have taken to implement Article VII and to review the operation of their value methods, upon request of other GATT parties.

In fact, there was a large diversity and inconsistency when it came to customs valuation practices among countries before 1979. Customs valuation systems generally followed one of two conceptually different approaches: those based on a "notional" concept of value, and those based on a "positive" concept.

(a) Brussels Definition of Value

The "notional" concept is represented by the 1950 Convention on the Valuation of Goods for Customs Purposes, commonly known as the Brussels Definition of Value (BDV).[10] The BDV was drafted by customs experts of the European Customs Union Study Group, and was given to the Customs Co-operation Council – now known as the World Customs Organization (WCO) – to administer.[11] The BDV had more adherents than any other valuation system. At its peak, it was applied by as many as one hundred countries, including members of the (then) European Economic Community (EEC) and most other countries in Western Europe, as well as Japan and a number of developing countries.

Under the BDV, goods are valued on the basis of their "normal price":

> that is to say, the price which [the imported goods] would fetch at the time when the duty becomes payable on a sale in the open market between buyer and seller independent of each other.[12]

Customs officials would consider the buyer's actual invoice price paid for the goods, but were free to reject it in favor of the notional "open market" price for goods of the same kind.

(b) Positive value systems

A positive system of value was used by the United States and Australia, among other countries. Under these systems, customs value was generally based on the *actual* price paid for the goods, rather than an abstract or notional price that might be paid under perfect competitive conditions. Typically, these systems provided for use of secondary valuation methods, in a ranking order, where the

[10] December 15, 1950, 171 U.N.T.S. 307 (entered into force on July 28, 1953).

[11] Convention Establishing a Customs Co-operation Council, December 12, 1950, 157 U.N.T.S. 130; GATT Working Party I on the International Chamber of Commerce Resolutions, *Statement by Mr. F. Redmond-Smith, Representative of the European Customs Union Study Group*, W.7/8 (October 7, 1952). The CCC Convention was also drafted by the European Union Customs Union Study Group, a body established in 1947 to consider freer intra-European movement of goods and services in the context of European recovery from the Second World War. GATT Contracting Parties, *The Work Undertaken by the European Customs Union Study Group on Customs Nomenclature and Questions of Customs Regulations: Statement Made by the French Representative*, GATT/CP.4/45 (April 20, 1950).

[12] Annex I, Convention on the Valuation of Goods for Customs Purposes, note 10, above.

actual invoice price could not be found or used (such as where the goods were imported under a lease, and therefore a sale price did not exist).

For example, the US system, which strongly influenced the structure of the WTO Valuation Agreement, generally required customs to appraise goods first on the basis of the "export value" or price at which the goods were sold or offered for sale for export to the United States or, second, on the basis of the "United States value", which was the selling price of imported goods in the US market; and finally, if the preceding methods failed, on the basis of a "constructed value" or cost of production of the imported goods.[13]

There was also diversity in the application of both of these systems. The BDV was subject to varying interpretations in different countries. Positive systems were equally diverse: for example, the US primary valuation method was based on the export value (the price of the goods at the time of exportation to the United States), whereas Australia used the price paid by the importer *or* the price at which the same goods are sold in the export country market, whichever was higher. Moreover, as noted in the discussion below of the American Selling Price valuation method, some of the "secondary" valuation methods employed by these countries were at best complex and at worst explicitly protectionist.

(c) Early GATT initiatives on common valuation rules

In the early GATT years, a few attempts were made toward creation of a common valuation system. Although ultimately inconclusive, these initiatives triggered the GATT contracting parties to begin to assess the conformity of the different valuation systems then in use with Article VII principles.[14] The results of this early work on valuation led to and informed the GATT's later valuation initiatives. There is also a direct link in the present WTO Valuation Agreement to this early history: the "prohibited methods" listed in Article 7 of the Agreement (the "fall back" method of valuation) references one or another of these older valuation systems. (More on the prohibited methods of valuation under the WTO Valuation Agreement at section 3.4.)

The earliest attempt at a harmonized valuation system within the GATT came in 1951, when the International Chamber of Commerce (ICC) proposed that the GATT contracting parties develop standard worldwide valuation rules. This ICC proposal was a reaction to the BDV which, at that time, had just been completed and opened for signature. The ICC – as the representative of business – had opposed the BDV, because it was based on the use of a "normal"

[13] See GATT Committee on Trade and Development, *Trade Barriers Arising in the Field of Customs Valuation: Note on Implications for Developing Countries of Ad Referendum Solutions*, COM. TD/W/195 (August 2, 1973).

[14] Because the GATT was a treaty and not a legally established organization (in contrast to the World Trade Organization), GATT signatories were called "contracting parties." See WTO, *Understanding the WTO* (2007), at 3.

price as determined by customs administrations. Instead, the ICC favored a simpler "rule-of-thumb method," whereby customs would be required to use the invoice price for the goods presented by the trader, absent a reason to suspect fraud.[15]

This ICC proposal was rejected as premature. With only limited information about the valuation methods used by governments, the GATT contracting parties were, apparently, unwilling to upset the *status quo*. Moreover, it was felt that the GATT should not "pass judgment" on the BDV by developing an alternative international system along the lines suggested by the ICC before the BDV had been given a reasonable time to operate.[16]

However, the ICC proposals did have one positive result. They inspired the GATT contracting parties to obtain detailed information concerning the methods governments used to determine value and the extent to which these methods conformed to Article VII principles.[17] The results of this study, published three years later, suggested that there was a significant amount of diversity in valuation practices among GATT contracting parties. In particular, it was found that governments generally used one of three different criterion to assess value:

(1) the price at which goods comparable with the exported goods are sold in the internal markets of the exporting country ("current domestic value");
(2) the price at which the imported goods are sold from the exporting country to the importing country ("transaction value");
(3) the price at which goods comparable with the imported goods are sold in the markets of the importing country ("import market value").[18]

[15] GATT Executive Secretary, *Resolutions Submitted by the International Chamber of Commerce on Valuation, Nationality of Manufactured Goods and Formalities Connected with Quantitative Restrictions (GATT/CP/123)*, G/22 (August 29, 1952). In addition to international valuation rules, the ICC proposed that the GATT contracting parties issue "general recommendations" to governments based on the following four principles: (i) "systems of valuation should not be used as a method of increasing protection"; (ii) "primary consideration should be given to the price shown on commercial invoices when determining the dutiable value of goods"; (iii) "regulations should state clearly and fully the basis of dutiable value, with adequate publicity"; and (iv) "internal duties or taxes from which exported goods were exempted should not be included in the dutiable value." GATT contracting parties did not accept this proposal, largely on grounds that these ICC principles were largely incorporated in GATT Article VII. GATT, *Report of Working Party I on the International Chamber of Commerce Resolutions*, G/28 (November 1, 1952).

[16] G/28.

[17] GATT, *Methods of Valuation for Customs Purposes: Request for Information*, L/81 (March 12, 1953); GATT, *Valuation for Customs Purposes: Questionnaire for the Ninth Session*, L/228 (September 20, 1954).

[18] GATT Contracting Parties 9th Session, *Comparative Study of Methods of Valuation for Customs Purposes* G/88 (March 2, 1955). The study also found that "apart from the nine countries which are operating a common definition of value under the Brussels Convention, there are numerous differences in practice even between countries which are using the same criterion for establishing value for customs purposes."

In late 1954 and early 1955, governments submitted a number of proposals to amend Article VII in connection with a general review of the operation of the GATT Treaty. Most of these Article VII proposals were technical in nature or narrowly targeted to overcome specific valuation problems.

One proposal did have a broader reach. The Scandinavian countries proposed that the GATT "work toward the standardization as far as practicable, of definitions of value and of procedures for determining the value of products." Under the proposal, this work would have been based upon studies and recommendations of a new "Organization for Trade Co-operation" – which was then being discussed as the permanent body to administer the GATT.[19] However, as that new trade body never came into being, neither did the Scandinavian proposal for a unified valuation system.[20]

The last major GATT initiative on valuation in these early years came in the Kennedy Round of 1964–1967. In that round, for the first time, non-tariff barriers were included in negotiations.[21] One such non-tariff barrier nominated for negotiation by a number of countries was "customs valuation including use of arbitrary or excessive values."[22] The "arbitrary" valuation practice that attracted most criticism was the use by the United States of its "American Selling Price" (ASP) method of valuation.[23] The ASP, explicitly protectionist

[19] "Members shall work toward the standardization, as far as practicable, of definitions of value and of procedures for determining the value of products subject to customs duties or other charges or restrictions based upon or regulated in any matter by value. With a view to furthering co-operation to this end, the Organization may study and recommend to Members such bases and methods for determining value for customs purposes as would appear best suited to the needs of commerce and most capable of general adoption." GATT Contracting Parties 9th Session, Review Working Party II on Tariffs, Schedules and Customs Administration, *Proposals Affecting Customs Administration*, W.9/46 (November 29, 1954).

[20] The Scandinavian proposals were referred to the working party responsible for developing the agreement on the Organization for Trade Co-operation (OTC). GATT Contracting Parties 9th Session, Review Working Party IV on Organizational and Functional Questions, *Scope of the Agreement: Proposals Referred from Working Party II to Working Party IV*, W.9/98 (December 14, 1954). The draft agreement on the OTC included a provision authorizing the OTC to undertake a "study of international trade and commercial policy and where appropriate make recommendations thereon." This provision was explicitly intended to cover the valuation studies foreseen by the Scandinavian proposal. GATT Contracting Parties 9th Session, *Report of Review Working Party IV on Organizational and Functional Questions*, L/327 Rev. 1 (April 4, 1955). However, the Agreement on the Organization for Trade Co-operation, done at Geneva on March 10, 1955, never entered into force.

[21] GATT Meeting of Ministers, May 16–21, 1963, *Agreements for the Reduction of Elimination of Tariffs or Other Barriers to Trade and Related Matters and Measures for Access to Markets for Agricultural and Other Primary Products: Resolution Adopted 21 May 1963*, MIN 63(9) May 22, 1963.

[22] GATT Sub-Committee on Non-Tariff Barriers, *Non-Tariff Measures to be Brought within the Scope of the Negotiations: Note by the Secretariat*, TN.64/NTB/8 (November 15, 1963).

[23] GATT Sub-Committee on Non-Tariff Barriers, *The Use of Arbitrary or Excessive Values in Levying Customs Duties (American Selling Price): Note by the United Kingdom Delegation*, TN.64/NTB/21 (June 19, 1964); see also GATT Sub-Committee on Non-Tariff Barriers, *Valuation for Customs Purposes: Note by the Delegation of the EEC Commission*, TN.64/NTB/26 (July 7, 1964); GATT Sub-Committee on Non-Tariff Barriers, *The Arbitrary or Excessive Valuation for Customs Purposes: Note by the Japanese Delegation*, TN.64/NTB/32 (July 15, 1964); GATT Sub-Committee on Non-Tariff

in design, required certain imports – benzenoid chemical products, rubber footwear, canned clams and knitted woolen gloves – to be valued on the basis of the price at which similar *US-origin* products were sold in the US market, rather than the actual invoice price for the goods. The use of this method was said to result in import duties well in excess of the price of the goods themselves – reportedly as much as 172 percent in the case of yellow-vat dye, for example.[24] Apart from the prohibitive effect of such rates, the ASP method was directly contrary to the GATT Article VII:2 proscription against use of customs valuation methods that are "based on the value of merchandise of national origin."[25]

The United States and European countries reached a conditional agreement in the Kennedy Round, which would have required the European countries to reduce their duties on US chemical exports if the United States ended the use of its ASP valuation method.[26] However, this agreement never entered into force. The US use of the ASP remained a major irritant in these contracting parties' trade relations until finally resolved through the Tokyo Round agreement.[27]

(d) Precursor to an agreement

In November 1967, following the successful conclusion of the Kennedy Round earlier that year, the contracting parties met to do a stocktaking of the first twenty years of the GATT, with a view of setting a work program to enable further expansion of world trade.

Barriers, *The Use of Arbitrary or Excessive Values in Levying Customs Duties: Note by the Danish Delegation*,TN.64/NTB/34 (July 22, 1964).

24 "Toward Agreement," *Time*, May 19, 1967, at www.time.com/time/magazine/article/0,9171,840930,00.html.

25 If the ASP was contrary to GATT Article VII, how could it have been used by the United States? The reason is that the ASP predated the GATT. Under the terms of the 1947 Protocol of Provisional Application of the GATT, by which the United States accepted the GATT Treaty, the United States was obliged to apply provisionally Part II of the GATT (which included Article VII) only "to the fullest extent not inconsistent with existing legislation." Thus, while the ASP contradicted GATT Article VII principles, as the United States itself freely acknowledged, its use was nonetheless permitted by this "existing legislation" exception. See GATT Contracting Parties Twenty-Second Session, *Definitive Application of the GATT: Note by the Executive Secretariat*, L/2375/Add.1 (March 19, 1965).

26 GATT, *Agreement Relating Principally to Chemicals Supplementary to the Geneva (1967) Protocol*, L/2819 (July 17, 1967).

27 The agreement was not implemented due to the failure by the US Congress to enact necessary domestic legislation to eliminate use of the ASP. The US rubber footwear industry opposed elimination as did the powerful US chemical industry, which was said to be "almost totally opposed to losing ASP protection and question[ed] the value of it of lower duties abroad." Memorandum from Secretary of State Rogers to President Nixon (March 24, 1969) in US Department of State, Foreign Relations, 1969–1976, *Foreign Assistance, International Development, Trade Policies, 1969–1972*, Vol IV, document 188, available at http://www.state.gov/r/pa/ho/frus/nixon/index.htm.

One outcome of that review was a recognition that more focus should be given to the use of non-tariff, trade-restrictive measures, as these had the potential to offset the gains that had been made over the years by the GATT tariff reductions. The contracting parties thus ordered the GATT Secretariat to establish an "inventory" of non-tariff barriers affecting international trade, based on information supplied by governments. Once the inventory was complied and analyzed, working groups under the GATT Committee on Trade in Industrial Products were appointed to "explor[e] … the possibilities for concrete action … both with regard to reducing or removing such barriers and to developing possible rules of conduct." [28]

Customs valuation practices figured prominently in that inventory of non-tariff barriers: more than thirty valuation complaints were registered against over twenty countries.[29] According to the working group that analyzed the inventory, the valuation problems notified were primarily the result of the different "special valuation" or secondary valuation methods that countries applied where valuation could not be taken from the invoice price:

> the great majority of countries currently follow the practice of the Brussels Convention on Valuation (BCV), which is based on c.i.f. values [that is, costs of international transport are included in customs value] and that another smaller group of countries, including some important trading countries, use systems varying from one to another but based upon f.o.b. values of mixed in character [international transport costs not included in customs value]. Both groups use invoice values in most cases. In cases where no invoice can be produced (for example, where there is no sale) or where the invoice price appears to be unacceptable or it is not accepted, the value for custom purposes is established by the two groups according to widely differing methods.[30]

Some of the important specific valuation problems listed in the GATT inventory were the following:

1. Use of domestic prices in the country of export as a basis for valuation.
   Certain countries valued imported goods on the basis of invoice price or the price of similar goods in the export country market, whichever was higher. This system made it difficult for traders to estimate in advance their duty liability; it presented particular problems where

[28] GATT, *Review of the Work of the Contracting Parties through the Last Two Decades and Conclusions on their Future Work Programme*, L/2943 (November 28, 1967); GATT Committee on Trade in Industrial Products, *Report to the Council*, L/3298 (December 22, 1969).

[29] GATT, Multilateral Trade Negotiation, *Part 2 of the Inventory of Non-Tariff Measures, Customs and Administrative Entry Procedures: Note by the Secretariat*, MTN/3B/2 (February 12, 1974).

[30] GATT Committee on Trade in Industrial Products, *Report to Council*, L/3496, at 33 (February 10, 1971).

the goods were not sold in the exporting country market; and it was said to require exporters to divulge confidential business information in course of customs price investigations.

It also, apparently, worked to the disadvantage of exporters in developing countries where, it was claimed, prices could be higher than in international markets due to "structural imbalances and the supply scarcities" and "inflationary pressures to which their economies were often subject."[31]

2. Use of arbitrary values determined at the discretion of customs authorities.
   Under certain valuation systems which used the invoice price or price in the export country market, whichever was higher, customs or other governmental authorities were authorized to determine the value where the current price in the exporting country market could not be ascertained. The claim was made that these determinations of value were arbitrary or, at the least, not transparent.
3. Valuation based on prices for similar domestic-origin goods in the country of import.
   The US ASP valuation method, discussed previously, was identified as the main example of this problem.
4. Use of "official" or "minimum" values.
   Certain countries established, by decree or regulation, minimum prices for specified products or range of products. For example, a number of countries were said to set a minimum value for imports of used clothing, based on weight. The justification of these practices, which were more commonly found in developing countries than developed, has been explained as follows:

   > The developing countries maintaining "official indicative values" for a limited number of products have stated that they have found it necessary to adopt such a system to curb "underinvoicing" of goods or similar unfair practices. It has been stated that apart from such cases, fixing official values on the basis of "average prices of imports" may be necessary for commodities which are subject to wide fluctuations in prices … In regard to "minimum values", developing countries fixing such values have explained that they were being determined for a limited number of products, in order *inter alia*, to protect their nascent industries from competition from well-established industries in other countries.[32]

   Duty is levied on the basis of the "minimum value" or invoice price, whichever is higher. The complaint of exporters, however, was that

[31] *Ibid*.

[32] GATT, *Non-Tariff Measures Affecting Trade of Developing Countries: Note by the Secretariat*, MTN/3B/23 (December 31, 1974), at 24.

the minimum values set exceeded the actual market values of the goods, to the extent that import became economically prohibitive.

5. Use of customs valuation to combat dumping.
   For example, Australia applied a system of "support values" to a number of industrial chemicals. If the duty-paid price of the imported product fell below this value, an extra customs duty was collected equal to 90 percent of the difference between the two prices. Exporting countries claimed that this was, in effect, a dumping measure applied without following the dumping procedures.
6. Lack of transparency in valuation methods and procedures.
7. Inadequate facilities for appeal against decisions by customs authorities.[33]

How to resolve these barriers? A group of countries proposed harmonization of valuation systems based on the BDV, which was then applied by most of the GATT contracting parties. This proposal was, however, opposed by the non-BDV countries – *viz.* the United States, Canada, Australia, New Zealand – who believed that their valuation systems were as consistent as the BDV with GATT Article VII. These non-BDV countries also found objectionable the "extensive discretion" that the BDV allowed customs officers to reject the invoice price in favor of a notional value. Moreover, they were concerned about the "extensive distortion of existing competitive relationships among trading partners" that would result in shifting from a f.o.b.-based system to the BDV's c.i.f. system, which would mean that transportation costs would be included in customs value. On this last point, it was said that increasing the dutiable basis of imported goods by including costs of international transport would particularly impact traders in North America due to the large overland distances between ports of entry and market centers and greater distances from overseas suppliers.[34]

Accordingly, rather than unified valuation rules based on the BDV, the working group agreed to develop "draft principles" and "draft interpretative notes" for the guidance of governments. It was hoped that these would help to move existing valuation systems into closer alignment and thereby resolve the specific problems identified in the inventory.[35] These "draft principles" and "draft interpretative notes," were released to GATT contracting parties in 1971 for their consideration, and later became a starting point of negotiations in the Tokyo Round. A number of these principles thus surfaced again in the preamble to the Tokyo Round Agreement (and now the current WTO Valuation Agreement).

[33] GATT, *Part 2 of the Inventory of Non-Tariff Measures: Customs and Administrative Entry Procedures*, MTN/3B/2 (February 12, 1974).

[34] L/3496, at 37–40.

[35] GATT Committee on Trade in Industrial Products, *Group 2 On Valuation: Report by Chairman*, COM.IND/W/64 (November 5, 1971).

Committee on Trade in Industrial Products

Draft Valuation Principles

1. Valuation systems should be neutral in their effect and in no case be used as a disguised means of providing additional protection by artificially increasing the value to which the rate of duty is to be applied.
2. Valuation systems should not be used to combat dumping.
3. Valuation systems should protect trade against unfair competition arising from undervaluation.
4. Valuation systems should be of general application without distinction as between sources of supply.
5. Dutiable value should be based on equitable and simple criteria which do not conflict with commercial practice.
6. Valuation systems should keep formalities to a minimum and valuation should be based to the greatest possible degree on commercial documents.
7. Valuation systems should not prevent the quick clearance of goods.
8. The legal and administrative provisions concerning customs valuation should be accessible to the general public and be sufficiently clear and precise to enable traders to estimate in advance, with a reasonable degree of certainty, the value of their goods for customs purposes.
9. Valuation systems and practices should take into account the need to safeguard business secrets.

1.2.2 Tokyo Round negotiations

In the 1973–1979 Tokyo Round, the GATT contracting parties negotiated a common customs valuation system. Although harmonization on the basis of the Brussels Definition of Value was again proposed,[36] the GATT parties instead began negotiation of text on the basis of a proposal put forward by the European Community, which was said to combine the "best features" of the US, Canadian and European systems. The basic structure of the proposed agreement was a "positive" concept of value with methods of valuation placed in a hierarchy – the "good features of the United States valuation system."[37]

[36] See e.g. GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Customs Matters: Communication from the Customs Co-operation Council*, MTN/NTM/W/17 (August 26, 1975); GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Customs Matters: Background Note by the Secretariat*, MTN/NTM/W/7 (April 29, 1975).

[37] GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Statement Made by the Commission of the European Communities at the Meeting of the Sub-Group of November 15, 1977*, MTN/NTM/W/126 (November 21, 1977). In the following chapters, we have noted some of the more obvious influences of the US value law on the text of the WTO Valuation Agreement, such as the definition of related parties and restrictions on use of transaction value (see section 2.3) and deductive value (see section 3.2).

The final result was the GATT Valuation Code, which is substantially identical in its terms to the present WTO Customs Valuation Agreement. Like other "codes" negotiated in the 1979 Tokyo Round, the GATT Valuation Code bound only those GATT Members that elected to accept its terms. As it turned out, while all developed countries signed the GATT Valuation Code, the large majority of developing countries chose not to do so.[38]

Differences between developed and developing countries were apparent during the negotiations. For example, there was reportedly "strong opposition" from developing countries to the treatment of transactions between related companies under the proposed GATT Valuation Code which, they argued, favored firms and enterprises from the developed countries. Developing countries wanted customs authorities to have greater authority to reject related-party prices where they found the prices to differ substantially from values in transactions involving like goods and for reasons that could not be justified. Also, difficulties were foreseen in the use of the deductive and computed value methods, and there was "outright opposition" to the idea that an importer, rather than the customs authorities, could choose whether to apply the deductive or computed value method.[39]

These differences could not be resolved by the end of the negotiations in April 1979. Two "competing" versions of a valuation code were thus presented to the GATT contracting parties for consideration – one favored by developed country delegations, and a modified version proposed by developing countries containing "special provisions to meet [their] trade, financial and development needs."[40]

In the end, however, the developing and developed countries compromised their differences, and in November 1979 adopted a Protocol to the Agreement on Implementation of Article VII.[41] In the Uruguay Round, the terms of this Protocol were incorporated into the WTO Valuation Agreement itself, where they now appear as Annex III.

[38] Seventeen GATT Members (the (then) EEC counting as one) had signed or accepted the Tokyo Round Agreement at the time that it entered into force, January 1, 1981. Seven of the original signatories were developing countries. GATT Consultative Group of Eighteen, *MTN Agreements: Legal Status as of 2 March 1981*, CG.18/W/46/Supp.1 (March 6, 1981). Over time, however, additional developing countries would sign onto the GATT Valuation Code.

[39] GATT, *The Tokyo Round of Multilateral Trade Negotiations: Report by the Director-General of GATT*, 72–74 (April 20, 1979).

[40] GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Customs Valuation*, MTN/NTM/W/222/Rev.1 (March 27, 1979); GATT Trade Negotiations Committee, *Proceedings of the Session Held at the International Labor Office Geneva, 11 and 12 April 1979*, MTN/P/5 (July 9, 1979); GATT Multilateral Trade Negotiations Committee, *Proces-Verbal*, MTN/28 (April 11, 1979).

[41] GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Customs Valuation: Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade*, MTN/NTM/W/229/Rev.1/Add.1 (October 22, 1979).

Certain of the developing countries' proposed "special provisions" were accepted in the Protocol, at least in some form. The Protocol thus allowed developing countries the possibility to delay the application of the Code beyond five years (to ease their transition to the new valuation rules); it gave developing country customs administrations some flexibility in use of the deductive and computed value methods; and it permitted developing countries to continue use of minimum value systems on a "limited and transitional" basis.

Other "special provisions," which were *not* made part of the Protocol compromise, would have given developing countries greater leeway to reject declared transaction values in various circumstances where under-invoicing is suspected. These included, for example, provisions to put the burden of proving the validity of a related-party price on the importer; to disallow price discounts if found to be not "freely available" to other buyers under the same conditions; to treat sole agents and distributors as related parties; and to allow customs to reject declared prices, even in transactions involving unrelated parties, if found not to be consistent with prices in prior transactions of like goods.

As will be seen, these developing-country concerns about the ability of Customs under the Code to deal with under-invoicing resurface during the Uruguay Round negotiations.

1.2.3 Uruguay Round negotiations

The goal of the Uruguay Round negotiations, as it related to customs valuation, was to "improve, clarify, or expand, as appropriate," the Tokyo Round Code, and thereby win it wider acceptance among the GATT parties.[42] At the time that the Uruguay Round was formally launched, less than one-third of the GATT contracting parties had signed the GATT Valuation Agreement.[43]

The limited participation in the valuation and other Tokyo Round Codes, particularly by developing countries, had been a concern to GATT contracting parties and became an important focus of GATT activity in the years leading up to the Uruguay Round.[44] Both in the GATT Valuation Committee and the

[42] GATT Multilateral Trade Negotiations, The Uruguay Round, *Ministerial Declaration on the Uruguay Round*, MIN.DEC (September 20, 1986).

[43] GATT, *Report (1986) of the Committee on Customs Valuation*, L/6094 (November 20, 1986) (reporting that twenty-six countries were parties to the Valuation Agreement); GATT, *GATT Membership as at 1 June 1986*, GATT/1386 (ninety-one GATT contracting parties).

[44] The 1982 Ministerial Declaration, which defined the GATT work program and priorities for the 1980s, mandated a review of the operation of the Tokyo Round Codes, with a focus on "adequacy and effectiveness … and the obstacles to acceptance of these [codes] … by interested parties." GATT Contracting Parties Thirty-Eighth Session, *Ministerial Declaration Adopted on 29 November 1982*, L/5424 (November 29, 1982). Two years later, the GATT contracting parties "invited" each GATT committee responsible for administering a Tokyo Round Code to examine these issues in a special

The 35 GATT Valuation Agreement signatories (1994)

Argentina	Hong Kong	Poland
Australia	Hungary	Romania
Austria	India	Slovak Republic
Bolivia	Japan	Slovenia
Botswana	Korea, Republic of	South Africa
Brazil	Lesotho	Sweden
Canada	Malawi	Switzerland
Colombia	Mexico	Turkey
Cyprus	Morocco	United States
Czech Republic	New Zealand	Yugoslavia
EC	Norway	Zimbabwe
Finland	Peru	

Technical Committee in the early 1980s, GATT contracting parties and observers were consulted, special meetings were held, and surveys were produced on the "obstacles" developing countries foresaw in adopting the Valuation Code.[45]

Broadly speaking, three main factors were said to influence the decision of countries not yet signatories to the Valuation Code:

1. the need to take the decision collectively or in a coordinated fashion in the framework of a regional grouping
2. concern that the Agreement might not give customs adequate possibilities to deal with false invoicing and to maintain government revenue and
3. the legal and administrative requirements to be fulfilled by signatories, for example the need to adapt national legislation and procedures and to train staff.[46]

That second point (false invoicing and government revenue) became the main focus of the discussions in the Uruguay Round negotiating group on valuation.

meeting, open to non-signatories, and to report the results to a working group specially created to carry out an overall review. GATT, *MTN Agreements and Arrangements: Fortieth Session of the Contracting Parties, Action taken on 30 November 1984*, L/5756 (December 20, 1984).

45 See Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *MTN Agreements and Arrangements: Special and Differential Treatment for Developing Countries, Note by the Secretariat*, MTN.GNG/NG8/W/2 (May 4, 1986).

46 GATT Working Group on MTN Agreements, *Adequacy and Effectiveness of the MTN Agreements and Arrangements and Obstacles to their Acceptance: Consolidation of the Observations Made and Conclusions Reached in the Committees and Councils*, MDF/12 (June 11, 1985).

The negotiations on valuation were very much driven by developing-country concerns. It was made clear at the outset by some members within the negotiating group that a new customs valuation agreement or complete overhaul of the existing Tokyo Round Code was not on the table.[47] Rather, countries were asked to identify their particular difficulties with the existing agreement (taking into account the work that had been done in the preceding years in the GATT Valuation Committee), and to come forward with proposals for change to the existing text.[48]

In the end, the main subjects of negotiations on valuation were largely defined by two proposals. One, which was tabled by India, concerned the burden of proof in cases of suspected importer fraud.[49] The second, submitted by Kenya on behalf of the members of the Preferential Trade Area for Eastern and Southern African States (PTA), sought to allow the continued use by developing countries of certain valuation practices of the BDV system.[50]

(a) Burden of proof

The India proposal was motivated by a concern about the efficacy of the GATT Valuation Code in dealing with valuation fraud, a concern that had been voiced before by developing country members in the early GATT Valuation Committee meetings.[51] The proposal was supported by Brazil – who had a particular difficulty with the fraudulent *over*-invoicing by importers to avoid hard currency controls – and by a number of other developing countries.[52]

[47] Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Meeting of 6 March 1987: Note by the Secretariat*, MTN.GNG/NG8/1 (March 23, 1987).

[48] Group of Negotiations on Goods (GATT), *Fifth Meeting of the Group of Negotiations on Goods: Record of Decisions Taken*, MTN.GNG/5 (February 9, 1987) (negotiating plan set out in annex).

[49] Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Communication from India*, MTN.GNG/NG8/W/9 (September 30, 1987); Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Customs Valuation Agreement: Justification for India's Proposal on Burden of Proof*, MTN.GNG/NG8/W/54 (October 9, 1989).

[50] Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Proposal Submitted by Kenya on behalf of the Member States of the Preferential Trade Area for Eastern and Southern African States (PTA)*, MTN.GNG/NG8/W/73 (March 19, 1990).

[51] See GATT Committee on Customs Valuation, *Report by the Technical Committee on Customs Valuation Concerning the Effects of False Invoicing on Customs Valuation*, VAL/W/32 (November 7, 1985).

[52] Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Agreement on Implementation of Article VII: Submission by Brazil*, MTN.GNG/NG8/W/57 (November 22, 1989); Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Minutes of Meeting 16–18 October 1989*, MTN.GNG/NG8/13 (November 15, 1989).

Early practical concerns about transaction Value

"[T]he price involved may be fictitious. What is known as 'double-invoicing' for Customs purposes is a common example. Such a price, if it were declared to be the actual price under [the transaction value method], would not be rejected by the Customs unless they were in a position to prove its falsity by establishing the true actual sale price. *No Customs Administration could accept the onus of such proof*."

Customs Co-operation Council, Different Systems of Valuation and their Comparative Advantages and Disadvantages 18 (1963).

The general concern was that the GATT Valuation Code placed too great a burden on customs to prove that a declared price was false before it could reject the transaction value, particularly in cases where importers and their suppliers acted in collusion to hide the fraud. This problem was particularly acute for developing countries, it was said, because they did not have access to comparative price information, the automated processes and databases, or the technical expertise needed to detect false declarations. Therefore India proposed that customs administrations be given more flexibility under the Valuation Agreement to reject suspect declared values.

The India proposal and the subsequent negotiation in the Uruguay Round are covered in greater detail in section 4.3, which deals with customs verifications under the Agreement. In short, however, while India's proposal did not result in any alteration of the terms of the Agreement itself, it did produce the important WTO Ministerial Decision clarifying the burden of proof issue, namely the **Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value**.

(b) Sole agents and minimum values

The main concern of the African PTA countries was the impact that use of the Agreement would have on their government revenue, more than half of which, it was said, was derived from customs duties. The BDV concept of value – some form of which all of these countries then used – was considered more protective of this revenue than the GATT Agreement because it allowed customs officers greater flexibility to establish or "uplift" customs values when they found that the importer's declared transaction price was not consistent with open market prices.

The PTA countries thus proposed that developing countries should be permitted to include in customs value those discounts that foreign sellers allow to "sole agents, distributors and concessionaires" or other parties in special trading relationships, as they were under the BDV.

The PTA countries also proposed to extend the right of developing countries under the GATT Valuation Agreement to continue to apply "minimum values," such as official lists of minimum prices for specific goods. The GATT Valuation Code protocol allowed developing countries the possibility to continue such practices, but on a limited and transitional basis only, and subject to terms and conditions agreed by the other Code signatories in *ad hoc* negotiations. To ensure the utility of this concession to developing countries, the PTA proposed that minimum value reservations "should not be limited in scope nor subject to the imposition of restrictive terms and conditions."

The Uruguay Round response to the PTA proposal was the second of two WTO Ministerial decisions on customs valuation, the **Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires**. Essentially, this decision requires the WTO Valuation Committee to give "sympathetic consideration" to developing country requests to retain officially established minimum values for a limited period, and to take into account the "development, financial and trade needs of the developing country concerned."

With regard to treatment of sole agent or distributor discounts, the WTO Ministerial decision makes no change to the text of the Agreement.[53] Rather, the decision asks the WTO Valuation Committee to recommend to the Customs Co-operation Council (now known as the World Customs Organization) that it "assist developing country members … to formulate and conduct studies in areas identified as being of potential concern, including those relating to importations by sole agents, sole distributors and sole concessionaires."

The question of "sole agents" is discussed further in section 2.3.4 in connection with the treatment of "related parties" under the Agreement.

(c) A "single undertaking"

What was given by developing countries in exchange for developed countries' agreement to these two decisions? To the extent there was a *quid pro quo* requested, it was only this: the negotiating group insisted that it should be explicitly recognized that these decisions were agreed "in the expectation that consideration of accession to the Customs Valuation Code will be facilitated and therefore participation in the Code will be increased."[54]

[53] "With respect to sole concessionaires and discounts, while understanding the revenue concerns and that the Code might provide an unfamiliar method of valuation for those who had been used to the [BDV], [one delegation] believed strongly that it was not possible to combine elements of those two fundamentally different systems. A number of delegations shared these views." Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Meeting of 1 June 1990*, MTN.GNG/NG8/18 (June 14, 1990).

[54] Group of Negotiations on Goods (GATT), Negotiating Group on MTN Agreements and Arrangements, *Meeting of 29–30 October 1990*, MTN.GNG/NG8/22 (November 1, 1990).

In fact, the "increased participation" in the Customs Valuation Agreement sought by the valuation negotiating group was ultimately achieved by the successful conclusion to the Uruguay Round overall. This was the implication of the "Single Undertaking" principle that was agreed at the outset of the Uruguay Round by the GATT contracting parties as the basis for their negotiations on goods.[55] Whereas the Tokyo Round allowed GATT contracting parties to pick and choose the multilateral agreements they wished to sign, the Uruguay Round's "Single Undertaking" principle required WTO Members to accept or reject the results of the negotiations as a whole, including *all* of the multilateral agreements.[56]

The Uruguay Round Customs Valuation Agreement – set out as an annex to the **Marrakesh Agreement Establishing the World Trade Organization –** was formally agreed on April 15, 1994 by the 123 governments that participated in the negotiations. The Agreement entered into force on January 1, 1995 and is, therefore, binding on each WTO Member (subject, of course, to any reservation they might have made under the terms of the Agreement; see section 4.4, below).

(d) Dispute settlement

The text of the GATT Valuation Code was not changed in any substantive respect in the Uruguay Round, with the important exception of the dispute settlement provisions.

The GATT Valuation Code included a self-contained, elaborate mechanism for resolution of disputes between signatories on valuation matters. It provided the GATT Valuation Committee with authority to investigate and establish panels of experts to adjudicate parties' disputes, to obtain advice from the Technical Committee where technical issues were presented, as well as to enforce panel recommendations. The efficacy of this procedure was never tested, as the GATT valuation signatories brought no disputes to the GATT Valuation Committee during the lifetime of the code.[57]

The dispute procedures defined under the GATT Valuation Code were largely replaced by the Uruguay Round's **Understanding on Rules and Procedures Governing Settlement of Disputes**, which WTO Members have agreed shall apply to all WTO agreements, valuation included. Some additional

[55] "The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking." GATT, *Ministerial Declaration on the Uruguay Round*, Min.Dec. (September 20, 1986).

[56] "The [Customs Valuation and other Multilateral Agreements] … are integral parts of this Agreement, binding on all Members." Marrakesh Agreement Establishing the World Trade Organization, Article II:2.

[57] This is according to the GATT Secretariat's Annual Review of Implementation and Operation of the Agreement recorded from 1981 until the termination of the Tokyo Round code in 1996.

provisions that are specific to valuation dispute processing do remain part of the WTO Valuation Agreement; these mainly concern the role of the Technical Committee and its use by WTO panels in the dispute settlement process.

The WTO dispute settlement process is further discussed in section 5.3.

1.3 AGREEMENT OVERVIEW

1.3.1 The WTO standard – transaction value

The WTO Customs Valuation Agreement is based on a "positive" as opposed to a "normative" economic principle: what the value of the goods is, rather than what the value of the goods should be, is taken as the correct customs value. Thus, the Agreement's primary basis of valuation is "transaction value" which is "the price actually paid or payable" by the buyer for the imported goods. If the sale was freely negotiated (and the Agreement contains rules for valuation of sales that are not), the price the buyer pays the seller can be said to best represent the actual, market value of the product, and should be used for customs purposes. In other words, it is the buyer and seller, each acting in their own self-interest to maximize their profit, who will determine the customs value of the imported goods.

Apart from economic principle, customs valuation based on the price negotiated by the buyer and seller provides certain practical advantages for both traders and for customs authorities:

- it is transparent, predictable in application, and less open to discretion
- it conforms closely to real commercial practice
- it can be administered based on ordinary commercial records, normally available in the country of importation, without requiring importers and exporters to create and keep additional records only for customs.

1.3.2 Structure of the Agreement

The WTO Valuation Agreement is comprised of twenty-four articles plus three annexes.

The technical rules of customs valuation are set out in Articles 1–8 of the Agreement. The remaining articles of the Agreement mainly concern the implementation in national legislation and practice (e.g. rights of appeal and publication requirements, importer's rights to notifications and release of goods pending valuation, etc.), as well as the settlement of valuation disputes between WTO Members, and the administration and review of the Agreement by the WTO Valuation Committee and Technical Committee.

Agreement outline

Articles 1–8 – Valuation methods
Article 9 – Rules for converting currency
Article 10 – Confidentiality of valuation information
Article 11 – Importer's rights of appeal against customs decisions
Article 12 – Publication requirement
Article 13 – Importer's right to release of imported goods, pending customs final decision
Article 14 – Legal effect of Interpretative Notes (Annex I) and other annexes
Article 15 – Definitions
Article 16 – Importer's right to an explanation from customs
Article 17 – Customs right to question importers on value
Article 18 – Establishes WTO and WCO Committees
Article 19 – Dispute settlement
Article 20 – Special/differential treatment available to developing countries
Article 21 – No reservations without Member's consent
Article 22 – National legislation to conform to Agreement
Article 23 – WTO Committee annual review
Article 24 – Appoints WTO Secretariat
Annex I – Interpretative Notes
Annex II – Technical (WCO) Committee responsibilities and procedures
Annex III – Reservations and concessions allowed developing countries

Annex I of the Agreement contains the important **Interpretative Notes**. These, as well as the **General Introductory Commentary** elaborate the meaning of key terms of the Agreement (e.g. "price actually paid or payable," "identical goods," "similar goods," "related parties"), provide examples of how valuation methods should be applied to particular cases, and provide a general explanation of the overall purposes of the Agreement.

The commentary and interpretative notes were negotiated during the Tokyo Round at the same time as the articles of the Agreement itself[58] and thus may be said to indicate a contemporaneous view of the drafters' intentions. By virtue of **Article 14** of the Agreement, the Interpretative Notes are to be considered an "integral" part of the Agreement, and the articles of the Agreement are to be read and applied in conjunction with these notes.

Annex II of the Agreement defines the role, responsibility, and working procedures of the Technical Committee *vis-à-vis* the administration of the

[58] See e.g. GATT Multilateral Trade Negotiations Group "Non-Tariff Measures" Sub-Group "Customs Matters," *Customs Valuation: Revision*, MTN/NTM/W/175/Rev.1 (November 6, 1978) (draft code circulated by delegations).

Agreement. **Annex III** of the Agreement contains provisions that define rights of developing country Members to delay or make reservations against application of certain provisions of the Agreement. As noted above, this Annex III restates the Protocol to the Agreement on Implementation of Article VII that was negotiated in the Tokyo Round.

1.3.3 Primacy of transaction value

The **General Introductory Commentary** to the Agreement states that "the primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1." The Agreement's **Preamble** further states that Members should recognize "that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued."

In fact, many customs administrations apply the transaction value method to more than 90 percent of their imports.[59]

1.3.4 Alternative methods of value

In addition to transaction value, the Agreement defines five alternative valuation methods:

- transaction value of identical goods (Article 2)
- transaction value of similar goods (Article 3)
- deductive value (Article 5)
- computed value (Article 6)
- residual or fallback method (Article 7).

Because transaction value is "primary," these methods should be used only if it is not possible to establish a customs value under Article 1.

Unlike some valuation systems of the past, the WTO Agreement's six valuation methods are to be applied strictly in sequential order rather than concurrently. That is, customs authorities must attempt to appraise imports first using the transaction value method. If – and only if – a transaction value cannot

[59] See GATT Committee on Customs Valuation, *First Annual Review of the Implementation and Operation of the Agreement: Background Document by the Secretariat*, VAL/W/4/Rev.1 (November 17, 1981) (use of various valuation methods by seven GATT Members, including the countries of the EEC); GATT Committee on Customs Valuation, *Use of Valuation Methods by Parties: Addendum (Norway)*, VAL/W/5/Add.8 (March 25, 1982); GATT Committee on Customs Valuation, *Minutes of the Meeting Held on 10–11 November 1983*, VAL/M/8, (January 18, 1984) (paragraph 49).

be determined for reasons defined in Article 1, then appraisement must be attempted under Article 2 – transaction value of identical merchandise. If that is not possible, then valuation under the Article 3 method must be tried, and so on, through to Article 7.

There is one exception to this sequence: under Article 4 of the Agreement an importer may request customs to apply Article 6 (computed value) before Article 5 (deductive value). See section 3.2, below.

1.3.5 Limits of the Agreement

Although the general principles expressed in **GATT Article VII** – which the WTO Customs Valuation Agreement implements – refer to imports <u>and</u> exports, the valuation methods defined in the Agreement refer only to *imported* goods.

> **<u>GATT Article VII</u>**
>
> The CONTRACTING PARTIES recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges or restrictions on **importation and exportation** based upon or regulated in any manner by value.
>
> **<u>WTO Customs Valuation Agreement Article 1</u>**
>
> The customs value of **imported** goods shall be the transaction value …

Incidentally, what if there is a conflict between the terms of the WTO Valuation Agreement and the terms of GATT Article VII? Which has priority? An interpretative note to the 1994 Agreement Establishing the World Trade Organization indicates that the WTO Valuation Agreement "shall prevail to the extent of the conflict."[60] This question, however, has not yet been examined in WTO panel or appellate body decisions.

Finally, as stated in the Preamble to the Agreement, Customs administrations may ***not*** use the WTO valuation rules to "combat dumping." Imports are "dumped" when a company exports at a price lower than the price it charges in its home market, and causes injury to competing industries in the importing country.

A separate WTO agreement – the Agreement on Implementation of Article VI of the GATT (otherwise known as the Agreement on Anti-Dumping) – defines the rights and obligations of WTO Members who wish to take action

[60] General Interpretative Note to Annex 1A, Marrakesh Agreement Establishing the World Trade Organization.

against dumped imports. A country should not misuse the WTO Customs Valuation Agreement (by, for example, rejecting the declared price) to deal with dumping, rather than following the detailed procedures laid out in the WTO Anti-Dumping Agreement. As strange as it may seem, for purposes of customs valuation, the price of a dumped import may be in fact an acceptable transaction value!