

行政院所屬各機關因公出國人員出國報告書

(出國類別：出席國際會議)

出席 WCO 關稅估價技術委員會第 29 屆會議報告

出國人員：

服 務 機 關	職 稱	姓 名
財政部關政司	稽 核	王舉正
財政部關稅總局	科 員	李成致

出國地點：比利時布魯塞爾

出國期間：98 年 10 月 19 日至 10 月 23 日

報告日期：99 年 1 月 8 日

行政院所屬各機關出國報告提要

出國報告名稱：

出席 WCO 關稅估價技術委員會第 29 屆會議報告

頁數：59

含附件：是 否

出國人員：

財政部關政司 稽核 王舉正 電話：(02)23228225

財政部關稅總局 科員 李成致 電話：(02)25505500

出國類別：1 考察 2 進修 3 研究 4 實習 5 其他

出國日期：98 年 10 月 19 日至 10 月 23 日

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分類號/目：

關鍵詞：世界關務組織，關稅估價技術委員會，關稅估價

內容摘要：

世界關務組織(WCO)關稅估價技術委員會(TCCV)第 29 屆會議於 2009 年 10 月 19 至 23 日於比利時布魯塞爾 WCO 總部舉行，本屆會議由烏拉圭籍主席 Guzmán MAÑES 先生主持，計有秘書處工作團隊與 57 個會員代表團，以及來自世界貿易組織 (WTO)、國際商會 (ICC)、經濟合作暨發展組織 (OECD)、國際報關協會 (ASPRA) 等觀察團與會。

本屆會議共舉行 5 天，內容包括採認第 28 屆會議報告、休會期間各項發展、世界貿易組織估價協定管理措施、技術協助／能力建構等項目。另外關於估價技術方面，則延續上屆會議，繼續討論第三方權利金(Third Party Royalties and License Fees)、特殊關係人間交易(Related Party Transactions)等熱門議題。其中 OECD 於會中並對銷售淨利法(Transactional Net Margin Method, TNMM)此一移轉訂價方式作出報告；而 ICC 亦同意在下屆會期中，提出其對權利金與授權金的意見。

鑑於全球化與貿易自由化的趨勢，海關所面臨的關稅估價問題日益複雜與多元，因此如何因應衍生的問題並有效利用關稅估價技術之工具，無疑是將來努力的方向，謹建議：

- 一、 我國可藉提供疑義案例，積極參與技術委員會活動並吸收新知。
- 二、 實施關稅估價預先審核制度，與 21 世紀海關之 10 大基石密切相關。
- 三、 充實關稅估價資料庫內容，並分析其資料以供風險管理。
- 四、 注意權利金與授權金在關稅估價上的發展。

五、 注意關稅估價與特殊關係人之交易估價與移轉訂價之發展。

六、 傳承估價經驗，積極參與國內外相關會議。

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壹、會議概況

一、會議時間

98年10月19日至10月23日

二、會議地點

比利時布魯塞爾世界關務組織（WCO）總部

三、出席人員

秘書處工作團隊、57個會員代表團、世界貿易組織（WTO）、國際商會（ICC）、經濟合作暨發展組織（OECD）、國際報關協會（ASPRA）等觀察團與會。

四、我國與會代表

財政部關政司 稽核 王舉正

財政部關稅總局 科員 李成致

貳、會議議程

- 一、 議程確認 (Adoption of Agenda)
 - (一) 議程草案 (Draft Agenda)
 - (二) 建議計畫 (Suggested Programme)
- 二、 採認第28屆技術委員會報告(Adoption of the Report on the Technical Committee's 28th Session)
- 三、 休會期間各項發展報告 (Reports on Intersessional Developments)
 - (一) WCO 稅則暨貿易事務處處長報告 (Director's Report)
 - (二) WTO 關稅估價委員會報告 (WTO Committee on Customs Valuation Report)
- 四、 世界貿易組織估價協定之管理措施實務執行 (Administrative measures for the application of WTO Valuation Agreement)
 - (一) 新增參照資料索引報告 (Report on new additions to the Index of Reference materials)
 - (二) 新增關稅估價資訊交換聯絡點報告 (Report on new additions to the List of Contact Points for

Exchange of Customs Valuation Information)

- (三) 新增估價事務聯絡點報告 (Report on new additions to the List of Contact Points on Valuation Matters)
- (四) 估價技術大綱問題之回顧 (Review of the Conspectus Questions)
- (五) 運用國際估價資料庫之準則 (Report on the use of the Guidelines on National Valuation Database)
- (六) 運用關稅估價資訊交換之準則 (Report on the use of the Guide to the Exchange of Customs Valuation information)

五、 技術協助/能力建構 (Technical Assistance/Capacity Building)

- (一) 秘書處從事技術協助/能力建構之計畫報告
(Report on the technical assistance/capacity building undertaken by the Secretariat)
- (二) 會員國從事技術協助/能力建構之活動報告
(Report on Technical Assistance/Capacity Building Activities undertaken by Members)

- (三) 會員國應用 WTO 估價協定之進展報告(Progress report on Members' Application of the WTO Valuation Agreement)

六、 特殊技術問題 (Specific Technical Questions)

- (一) 專利權權利金及特許權利金之研究 (Study on Royalties and Licence Fees)
- (二) 進口電力估價 (Customs Valuation of Imported Electricity)
- (三) 關稅估價協定及移轉定價對於特殊關係人之交易估價 (Related party transactions under the Agreement and Transfer Pricing)

七、 休會期間提出之問題 (Questions raised during the intersession)

- (一) 關稅估價協定條文第 8.1(b)之應用

八、 未來工作計畫 (Programme of Future Work)

九、 其他事項 (Other business)

- (一) 21 世紀海關 (Customs in 21st Century)
- (二) 稅收套件 (Revenue package)
- (三) 第 30 屆技術委員會會議主題之建議 (Suggestions

for the Theme Meeting for the 30th Session of the
Technical Committee)

十、 下次會期(Dates of next meeting)

參、議程摘要及討論

議程 I：議程確認 (Adoption of Agenda)

(一) 議程草案 (Draft Agenda)

草案內容：

議程	內容
I	議程確認 (a) 議程草案 (b) 建議計畫
II	採認第 28 屆技術委員會報告
III	休會期間各項發展報告 (a) WCO 稅則暨貿易處處長報告 (b) WTO 關稅估價委員會報告
IV	實施 WTO 關稅估價協定之行政措施 (a) 新增參考資料索引報告 (b) 關稅估價資訊交換新增聯絡人報告 (c) 關稅估價事務新增聯絡人報告 (d) 檢視關稅估價技術問題大綱 (e) 使用關稅估價資料庫綱要報告 (f) 使用關稅估價資訊交換指南報告
V	技術協助/能力建構 (a) 秘書處從事協術協助/能力建構計畫報告 (b) 會員國從事技術協助/能力建構之活動報告 (c) 會員國應用 WTO 估價協定之進展報告
VI	特殊技術問題 (a) 權利金之研究 - 加拿大及日本之提案 - 巴西之提案 - 哥倫比亞之提案 (b) 進口電力估價 - 巴西之提案 (c) 協定及移轉訂價之特殊關係人交易
VII	休會期間提出之問題 關稅估價協定 8.1(b) 之應用
VIII	未來工作計畫
IX	其他事項 (a) 21 世紀海關

X	(b)稅收套案 (c)關稅估價技術委員會第 30 次會議建議討論之主題 下次會期
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討論摘要

- 一、主席致詞歡迎參與技術委員會第 29 屆會議代表團後，便請技術委員會斟酌議程草案內容，對需要適度調整之處提供建言。
- 二、歐盟建議在議題九、其他事項(c)，第 30 次會議之討論主題，增列紅利議題、關稅估價資料彙編上網及使用付費的議題。
- 三、稅則暨貿易處處長就上述建議，請歐盟提出紅利議題之書面資料，俾列入議題九項下討論。另關稅估價資料彙編上網及使用付費的議題，將安排時間先請負責承製的 GMD 公司於會中說明。

結論

技術委員會採認此議程草案，並將歐盟執委會 (EC) 代表團員所提之意見列入考慮。

(二) 建議計畫 (Suggested Programme)

日期	議程
2009/10/19	I 議程確認 (a)議程草案 (b)建議計畫 II 採認第 28 屆技術委員會報告

	III 休會期間各項發展報告 (a)WCO 稅則暨貿易處處長報告 (b)WTO 關稅估價委員會報告 IV 實施 WTO 關稅估價協定之行政措施 (a) 新增參考資料索引報告 (b) 關稅估價資訊交換新增聯絡人報告 (c) 關稅估價事務新增聯絡人報告 (d) 檢視關稅估價技術問題大綱
2009/10/20	(e) 使用關稅估價資料庫綱要報告 (f) 使用關稅估價資訊交換指南報告 V 技術協助/能力建構 (a)秘書處從事協術協助/能力建構計畫報告 (b)會員國從事技術協助/能力建構之活動報告 (c)會員國應用 WTO 估價協定之進展報告
2009/10/21	VI 特殊技術問題 (a)權利金之研究 - 加拿大及日本之提案 - 巴西之提案 - 哥倫比亞之提案 (b)進口電力估價 - 巴西之提案
2009/10/22	(c)協定及移轉訂價之特殊關係人交易 VII 休會期間提出之問題 關稅估價協定 8.1(b)之應用
2009/10/23	VIII 未來工作計畫 IX 其他事項 (a)21 世紀海關 (b)稅收套案 (c)關稅估價技術委員會第 30 次會議建議討論之主題 X 下次會期

討論摘要

- 一、主席說明議題六(c) 協定及移轉訂價之特殊關係人交易
 議題，由於 OECD 觀察員將於 10 月 20 日進行報告，爰
 將該議題由 10 月 22 日提前至 10 月 20 日討論。另 WTO
 觀察員也將於 10 月 20 日與會，議題三(b)WTO 關稅估

價委員會報告也將延至 20 日進行。

二、主席建議議題四(c) 檢視關稅估價技術問題大綱由 10 月 19 日延至 10 月 22 日討論，俾處理技術議題後利於討論。

結論

技術委員會通過經修正之工作計畫。

議程 II：採認第 28 屆技術委員會報告 (Adoption of the Report on the Technical Committee' s 28th Session)

討論摘要

主席報告休會期間，秘書處接獲阿根廷、歐盟及日本對第 28 屆技術委員會報告草案之書面評論，並感謝上述會員的貢獻。

結論

技術委員會通過對第 28 屆技術委員會報告進行小幅文字修正。

議程 III：休會期間各項發展報告 (Reports on Intersessional Developments)

(一) WCO 稅則暨貿易事務處處長報告 (Director's Report)

處長報告

1、稅則暨貿易處處長 Mr. Antoine Manga 向出席技術委員會第 29 屆代表團表示歡迎之意。他提及 2009 年 6 月舉行之 WTO 政策委員會(Policy committee)及貨品貿易理事會會議，曾討論下列海關重要議題：全球海關網路、全球貿易安全與便捷標準架構(SAFE)、美國港口法案(100%掃描)、哥倫布計畫、修訂京都公約、WTO 談判、區域貿易協定之影響、打擊仿冒及盜版商品、能力建構、稅收套案以及 21 世紀海關扮演之角色等。

2、處長在報告中提及下列與關稅估價有關的活動：

- (1) WCO 與私人企業之夥伴計畫第 4 次研討會，已於 2009 年 5 月 12 日至 13 日舉行，會議主題係討論關稅估價與移轉定價的問題。下次會議訂於同年 11 月 24 日至 25 日舉行。

- (2) WCO 第 50 屆夥伴計畫、實習計畫及法語系海關首長會議分別於 2009 年 6 月在巴黎舉行。
- (3) WCO、OECD 及各會員的關稅估價專家於 2009 年 9 月在巴黎舉辦移轉定價的研討會。

討論摘要

1. 若干與會代表就處長報告內容，提出相關問題諸如：「移轉定價與關稅估價」一書的出版問題、關稅估價及移轉定價與回溯調整、處理移轉定價的行政命令議題、任命關稅估價訓練員、關稅資料庫、實習計畫，並建議將關稅估價協定實施 30 週年的慶祝活動列入下次議程之主題。
2. 處長就上述問題提出答復如下：
 - (1) 「移轉定價與關稅估價」一書之出版，業經 WTO 秘書處同意後實施。
 - (2) 有關關稅估價、移轉定價與回溯調整等重大議題，前經召開 2 次會議並經各會員、WTO、OECD 等代表熱烈討論討論後，業由負責移轉定價議題的專案小組就會議結論研議處理中。惟上項議題仍將列入技術委員會之議題繼續討論。

- (3) 處長說明為開發中國家能力建構計畫，已完成任命新的關稅估價訓練員。另外夥伴計畫與實習計畫基本上也是加強開發中國家海關關員之專業技術，培養其海關人力資源。
- (4) 有關舉辦關稅估價協定實施 30 週年的慶祝活動，處長認為係回顧過去並展望將來的一個良好機會。各會員對於實施關稅估價協定的經驗與遭遇的困難，也可列為技術委員會第 30 次會議的討論主題。

結論

技術委員會記錄處長的報告。

(二) WTO 關稅估價委員會報告 (WTO Committee on Customs Valuation Report)

WTO 觀察員在會中報告指出，WTO 爭端解決小組裁決，哥倫比亞以指標價格(Indicative Price)作為關稅估價參考價業違反關稅估價協定。該小組認為交易價格應為關稅估價之首選，至於以指標價格作為控管關稅估價之機制或以其作為貨物放行之擔保價格，業違反 WTO 關稅估價之協定。

討論摘要

1. 阿根廷、加拿大及歐盟等代表向 WTO 觀察員提問，諸

如關稅估價參考價、最低價格保留時間表、擔保價格及 WTO 會員未向秘書處提報執行協定情形等問題。

2. WTO 觀察員回復上述問題指出，會員對 WTO 應負的義務若有實施的困難，可依協定規定向貨品貿易委員會提出豁免要求。對於保留關稅估價最低價格制度，會員雖有 5 年的調適期，然限期一到即無任何理由再繼續實施。另外，該員指出 WTO 尚有 46 個會員未依規定向秘書處提報協定執行的情況。
3. 處長認為哥倫比亞以指標價格作關稅估價協定第 13 條規定之擔保價格，引起相當大的爭議，技術委員會如能同意，秘書處願將其納入研究之議題。

結論

技術委員會記錄 WTO 秘書處所屬關稅估價委員會的口頭報告及相關議案之進展情形。

議程 IV：世界貿易組織估價協定之管理措施實務執行

(Administrative measures for the application of WTO Valuation Agreement)

- (一) 新增參照資料索引報告 (Report on new additions to the Index of Reference materials)

背景說明

因應技術委員會之指示，秘書處持續更新與擴充參照資料索引，以增進對會員國之必要性與實用性。於休會期間，加拿大與烏拉圭海關當局已提供其更新之參照資料。共計 49 個會員國及 2 個地區與國際組織，已經提供其相關參照資料，參照資料索引已公布於 WCO 網站。

討論摘要

主席感謝會員國提供相關更新資訊，並鼓勵未提供相關資料之會員國提供參照資料。

結論

技術委員會記錄該內容於相關文件。

- (二) 新增關稅估價資訊交換聯絡點報告 (Report on new additions to the List of Contact Points for Exchange of Customs Valuation Information)

背景說明

因應技術委員會之要求，秘書處努力更新並擴充關稅估價資訊交換聯絡點，於休會期間，馬拉威與巴拉圭海關當局已提供其更新之資訊，另亞美尼亞與烏拉圭亦提供其新的聯絡點資訊。更進一步，愛沙尼亞當局於會議期間提出其非正式文件關於其聯絡點更新資訊。

討論摘要

主席感謝會員國提供相關更新資訊，並鼓勵未提供相關資料之會員國提供其聯絡點資料於秘書處。

結論

技術委員會記錄會員所提出之資料及該非正式文件之資料。

- (三) 新增估價事務聯絡點報告 (Report on new additions to the List of Contact Points on Valuation Matters)

背景說明

因應技術委員會之指派，秘書處致力更新並擴充估價事務聯絡點。於休會期間，印度、塞爾維亞、美國與烏拉圭已提供其更新之估價事務聯絡點資訊。另亞美尼亞、干比亞、馬拉威與巴拉圭皆提供其相關資訊。更進一步，愛沙尼亞與瑞士亦於會議期間提出其估價事務聯絡點資訊之非正式文

件。目前為止，共計 131 個會員國海關當局已經提供其估價事務聯絡聯絡資訊，完整之資訊已登載於 WCO 會員網站上。

討論摘要

主席感謝會員國提供相關資訊，並鼓勵會員國提供相關資訊予秘書處。

結論

秘書處將估價事務聯絡相關資訊列為記錄。

(四) 估價技術大綱問題之回顧 (Review of the Conspectus Questions)

背景說明

依據慣例，秘書處已更新估價技術問題之大綱。惟於休會期間，對於估價技術問題之大綱回顧並無相關意見與建議。

討論摘要

主席邀請各會員國提供意見，其中阿根廷代表感謝秘書處對於估價技術問題大綱之努力，並提議修訂大綱的部分內容（惟其提案為採定使用 GATT 1994 年關稅及貿易總協定第 7 條執行協定之相關時間、名稱等次要內容之修訂，於此不再贅述）。其中主席感謝阿根廷代表，並建議秘書處參考其意見對相關大綱作適度之修訂。

結論

技術委員會記錄下阿根廷代表之意見，主席要求秘書處對相關估價技術問題大綱作適度修訂。

(五) 運用國際估價資料庫之準則(Report on the use of the Guidelines on National Valuation Database)

背景說明

於第 26 屆會期，技術委員會同意保留此項提案於議程內，並訂於每年秋季之會期予以討論，藉此觀察會員國對於估價技術資料庫之目前發展。於休會期間，秘書處完成其工作文件，藉以邀請會員國提供其關於建置及發展估價資料庫之有關經驗。於此，會員國土耳其、馬拉威與印度同意在此次會議中進行此議題的有關報告。

討論摘要

主席邀請會員國土耳其、馬拉威與印度代表對於其各自之估價資料庫發展與運用，進行報告。

土耳其報告內容概要

土耳其代表介紹其用於鑑別風險但非用於規定進口貨物完稅價格的估價資料庫。因此，於該國皆使用同一資料庫於評估進口貨物之風險與價格正確性。於該資料庫中，包含進口

貨物之申報資料、進口人的概況與犯罪記錄等資訊，皆於該國的關貿網路（Customs Computerized System，BILGE）中建檔。而於該國關貿網路中建檔之相關資料，再轉換至關務資料系統（Customs Data Warehouse System，GUVAS）之中，以供風險評估之用。

馬拉威報告內容概要

馬拉威代表完整地介紹該國關稅估價資料庫（national valuation database）之沿革，包括建置資料庫的背景、發展狀況、特色、功能、優缺點以及其未來的更新計畫。於 2007 年 2 月，馬拉威當局為了進口貨物之預先審查系統（Pre-Shipment Inspection，PSI），發展並執行其關稅估價資料庫使用。另外，馬拉威代表亦稱，該國之估價資料庫亦用於評估貨物申報價格正確性之有效工具。

印度報告內容概要

印度代表介紹該國關稅估價資料庫（national valuation database）之執行與使用狀況。該國並進一步發展出一套軟體用於分析進口貨物以進行風險評估之用。另外，該國關稅估價資料庫亦每日根據進口資料進行更新其內容，而且相關資訊也可用於事後稽核（Post Clearance Audit，PCA）使用。此

外，印度代表介紹該國亦推廣該資料庫作為技術協助之用。

綜合討論

與會代表對於土耳其、馬拉威以及印度代表所作的報告，表示感謝。並且提出許多意見與報告人討論。

其中部分代表表示，對於審核部分進口商品的價格是否有低報問題，在執行面上，各國的確遭遇許多困難。

然而，部分代表亦重申關稅估價協定第 7 條之精神，在於禁止使用最低、任意或者臆測之價格作為完稅價格。因此，關稅估價資料庫建置的目的，不可用於決定進口貨物之完稅價格的替代價格或最低價格。

更進一步，部分代表亦強調，關稅估價資料庫應該僅限於作為風險評估之用，藉此幫助各國關務當局鑑別進口貨物申報價格之真實性與正確性。大會並確認，進口貨物完稅價格必需利用有效的資訊依照關稅估價協定加以核定。

處長鼓勵會員國與進口商發展良好的合作夥伴關係，並且建置有效的事後稽核系統，藉此達到有效的估價以及貿易便捷化之目的。

最後，主席建議保留此項議題於議程中，於第 31 屆會議時繼續討論。並藉此分享關稅估價資料庫之發展狀況與其在於

風險評估上的應用。

結論

技術委員會將會員國土耳其、馬拉威與印度之報告，列入紀錄；並同意保留此項議題於議程中，於第 31 屆會議時繼續討論。

- (六) 運用關稅估價資訊交換之準則 (Report on the use of the Guide to the Exchange of Customs Valuation information)

背景說明

於第 26 屆會期，技術委員會同意保留此項提案於議程內，並訂於每年秋季之會期予以討論。於休會期間，秘書處完成其工作文件，藉以邀請會員國提供其關於建置及應用關稅估價資訊交換準則之有關經驗。

討論摘要

主席重申以項議程之背景，然而對於此議題，並無相關之意見與建議，因此主席鼓勵會員國對此項議題提供相關資訊予秘書處並於 2010 年舉辦之第 31 屆會議中討論。

結論

技術委員會同意保留此項提案於議程中，另於第 31 屆會議

時繼續討論，以分享各會員國間對於此項議題之觀點與經驗。

議程 V：技術協助 / 能力建構 (Technical Assistance/Capacity Building)

- (一) 秘書處從事技術協助/能力建構之計畫報告 (Report on the technical assistance/capacity building undertaken by the Secretariat)

背景說明

秘書處備妥第 28 屆會期以來所舉辦的技術協助/能力建構活動的資料，彙編在附件 Doc. VT0696E1a 內。

討論摘要

1. 處長向委員會報告 2 項重要的計畫：
- (1) 秘書處已研擬計畫，使各區域能負起更多的技術協助/能力建構計畫、活動，並能善用各區域現有的訓練資源。
- (2) 技術協助/能力建構計畫包括提供海關官員電腦網路之訓練。

結論

技術委員會紀錄 Doc. VT0696E1a 的資料並提供本會期出席會員使用。

- (二) 會員國從事技術協助/能力建構之活動報告 (Report on Technical Assistance/Capacity Building Activities)

undertaken by Members)

背景說明

1. 為配合技術委員會之決議，並為提供資訊及防範資源浪費，在秘書處從旁觀察及聯繫下，已將技術協助/能力建構之活動交由會員計畫及實施。
2. 在休會期間，印度與日本海關協助提供技術協助/能力建構的資訊，已載於附件 Doc. VT0696E1a 內。

討論摘要

主席向印度與日本海關協助提供技術協助/能力建構的資訊表示感謝。

結論

技術委員會紀錄 Doc. VT0710E1a 的資料。

(三) 會員國應用 WTO 估價協定之進展報告 (Progress report on Members' Application of the WTO Valuation Agreement)

1. 科威特代表在會中報告該國實施關稅估價協定的內容。加拿大代表向科威特詢及擔保價格、商業文書機密、訴願、海關資料發布及訓練等問題。
2. 科威特代表回復加國，科國訂有擔保價格、機密文書及訴

願等法規，且已成立訴願委員會及關稅估價特別委員會，並設有關稅估價訓練中心。

3. 阿根廷代表對科國能迅速實施關稅估價協定深表感佩，並說明 MERCOSUR 貿易中心(會員包括阿根廷、巴西、智利、烏拉圭及巴拉圭)正在草擬關稅估價手冊，俟完成後將通知技術委員會備案。

議程 VI：特殊技術問題 (Specific Technical Questions)

(一) 權利金及授權金之研究 (Study on Royalties and Licence Fees)

日本與加拿大之個案研究

背景說明

在上一屆會期，技術委員會針對秘書處所提出的關於支付第三方權利金(Royalties to third parties)的一般評論草稿(Draft general commentary)，加以討論。此項議題的原由加拿大與日本所提出之個案研究，並由大會選為持續討論之工作。第 28 屆會議後，由秘書處針對此議題提出有關之一般評論草稿，並且邀請各會員國提供意見。其中澳洲、加拿大、以色列、日本與美國皆提出其看法，秘書處接將接獲之意見增列於一般評論草稿之附註(Annex)中，以供討論。

討論摘要

主席表示對於此一議題，技術委員會已自個案研究的討論，目前進展至探討其一般評論，並介紹接下來需要討論的項目。因個案研究的結論部分，大會並無共識；技術委員會同意發展針對此第三方權利金議題之一般評論，藉此將個案研究的分析具體化，以期達成日後處理此類議題的方針。

主席強調美國對於此一般評論持保留意見，並且反對將此項議題移轉至大綱討論之下。然而，部分會員國傾向對此議題繼續而非放棄討論。但美國稍後表示，雖然對於目前的文件中尚有許多重要的項次，但這並不表示反對繼續討論此議題。另外，美國再次表示，根據該國之立法沿革，關於此類因使用商標或版權需要，而付予第三方之權利金與授權金皆視為買方所支付的廣告費用，而不應該包含於海關認定的進口貨物完稅價格內。因為此類費用的發生，多半不是明確的交易條件，而多出現在一些不相關的文件之中。美國並再次建議，請國際商會針對所謂授權合約之目的為何做出報告，這將可使技術委員會對此議題有更深入的瞭解。國際商會回應為其很樂意在下屆會議中對此議題發表看法。

然而，阿根廷並不同意美國的看法，其不認為這項費用可以視為所謂廣告支出，而可不依照關稅估價協定條文 8.1 (c) 對完稅價格加以調整。因此，主席建議大會對於此一般評論，會議中應該要一段段地討論，以確認各會員國是否有其他的意見。稅則暨貿易處處長支持主席的觀點，並認為最好是經由討論而確認此支付予第三方之權利金的角色為何？並藉此維護估價協定對此認定的一致性。部分會員國代表亦希望

大會能夠對此項議題提供有關文件，藉以作為現有協議中的方針。大會最後仍希望即使部分會員國對於此一般評論仍有保留意見下，仍能整份文件加以夠充分討論。

接下來的討論中，有與會代表提議在一般評論之後，附註此評論之敘述僅限於賣方與商標所有人(Licensors)兩造並不存在特殊關係。但部分代表傾向此項文件應該為一般化之評論。同樣地，對於此一評論是否應僅限縮於討論商標權利金，如果如此，則在文字上應該更清楚地描述。

另外，針對一般評論的細部內容，許多與會代表均有表示其意見。最後大會同意將此些討論內容，作為修訂文件之參考，以便於下屆會議中討論。

最後，部分會員亦表示將對於此一般評論的議題之討論，列置於個案研究的議程之下，會產生名實不符的誤解。對此，秘書處表示未來將會對此議題應歸屬何項議程，加以考慮。

結論

綜上，主席請大會秘書處根據上述討論並邀請各會員國提出有關意見，修訂此議題的一般評論草稿。技術委員會將於下屆會議，就秘書處修訂之新文件，繼續討論此項議題。另外，國際商會亦將於下屆會議，對此相關議題提出報告，以協助

委員會的討論。技術委員會同意保留此 3 件個案研究於議程內，並將其視為繼續討論的工作項目。

巴西之個案研究

背景說明

於第 28 屆會議，因為時間的關係，技術委員會決議將此個案研究延後至本屆會議討論。

於休會期間，秘書處完成本項個案研究的工作文件，且請巴國提供此項主題於先前會議討論的問題，提出其的觀點，以茲於本屆會議中討論。巴國最後直到本屆會議將開始之際，方提出其意見文件予大會，但因時間關係，該文件僅列為非正式文件供大會討論。

討論摘要

為呈現此個案研究之癥結，巴西代表對此作出口頭報告，此個案研究之交易內容整理如下：

- 進口人／被授權人（IMP）透過權利人（OWNER）向製造商／賣方（MAN）訂購進口貨品，其中權利人對於此類其子公司向其採購之模式，採取集中處理模式。
- IMP 如非 OWNER 之子公司或非 OWNER 授權之附屬公司（代理商），則 IMP 不准購買此經授權之物品。

- MAN 為 OWNER 授權之供應商，IMP 僅可以向 MAN 購買此經授權之產品。另外，MAN 被禁止販售此經授權之產品予非 OWNER 之子公司（或代理商）。

對於巴西代表的報告，澳洲代表提出下列問題與觀點：

- 於之前數屆會議中，均有討論到此個案研究之「貿易條件」(TRADING)，然此次報告中並未對此加以描述，其原因為何？
- 如果 IMP 未支付 OWNER 權利金，IMP 是否會因此失去成為 OWNER 代理商之資格？
- 此類產品之供應合約條文 4.1 與此報告內容之交易方式不一致；亦即，IMP 是向 MAN 直接下訂，或是 IMP 需要透過 OWNER 才可以訂購此授權貨品。

巴西代表對上述問題與觀點回應為：

- 「貿易條件」(TRADING) 在此個案研究中，非必要也非重要之討論事項。於此個案中，「貿易條件」即為符合一般程序之進口。
- 如同供應合約所述，MAN 僅可販售此授權物品予經 OWNER 授權之代理商；如 IMP 未支付相關權利金予 OWNER，則 IMP 將無法向 MAN 購買此授權商品。

- 姑且不論供應合約條文 4.1 之內容，於此一個案研究，交易實況即為，IMP 向 OWNER 下訂購買此一授權產品，經由 OWNER 集中管理訂單，由 OWNER 再向 MAN 下訂此授權產品交予 IMP。

最後，日本代表建議秘書處於下屆會議中，應參據巴西當局所提供之資訊與說明，製作相關之工作文件以供大會討論。倘如本屆由非正式文件之形式，會議將沒有足夠的時間來做討論。此提議亦獲得美國代表之支持。

稅則及貿易處處長重申並提醒各國代表關於提交各項文件的程序規則，並鼓勵各會員國在期限內踴躍提供其觀點與意見。

結論

大會同意於第 30 屆會議中繼續針對此個案研究加以討論，並請秘書處參據巴國提供的資訊以及相關的回答，準備相關的工作文件。

哥倫比亞之個案研究

背景說明

於第 28 屆會議中，因哥倫比亞代表並未出席該屆會議，因此大會決定將此項個案研究延後至本屆會議討論。大會另要

求秘書處於休會期間主動與哥國代表聯繫，並且同意在本屆會議中加以討論。

於休會期間，秘書處完成本項個案研究的工作文件，且邀哥國提供此項主題的觀點，以茲於本屆會議中討論。但哥國直至本屆會議開始時，方提出相關資訊。

討論摘要

對於此議題，主席介紹哥國關於權利金與授權金的個案研究，並總結先前技術委員會之討論。並告知大會哥國於會議進行中方提供本議題之相關文件。另外，稅則暨貿易處處長並提醒各國代表關於提交各項文件的程序規則。

最後，哥國代表對於未能於會議開始前提出文件感到抱歉，並請技術委員會同意將此議題之討論再次延後至第 30 屆會議；同時亦請秘書處參考其提供之資料撰寫新版的工作文件，以供會議討論。

結論

大會同意於第 30 屆會議中繼續討論，並請秘書處參據哥國提供的資訊準備相關的工作文件。

(二) 進口電力估價 (Customs Valuation of Imported Electricity)

背景說明

於第 28 屆會議，巴西代表同意將於本屆會議對此議題做出重點的整理報告，而技術委員會依據巴西代表的建議，決定將此項議題延後至第 29 屆會議繼續討論。於休會期間，大會秘書處完成相關文件，並歡迎各會員國提供意見。然而，各國並未對此議題有提出其看法。

討論摘要

主席告知與會代表，巴西代表於會議開始前一星期以電子信件告知大會秘書處，其希望將此議題的討論再次展延至第 30 屆會議討論。技術委員會同意此項提議。

結論

技術委員會決議將此議題的討論，延至第 30 屆會議中進行。

- (三) 關稅估價協定及移轉定價對於特殊關係人之交易估價 (Related party transactions under the Agreement and Transfer Pricing)

背景說明

第 28 屆會議時，技術委員會已對美國提出之本主題的個案研究，加以討論。並於休會期間，秘書處亦針對此個案研究新完成了一份工作文件以供大會討論；並諮詢經濟合作暨發

展組織（OECD）已確保該文件確實符合該組織所提出之移轉定價準則。另外，澳洲、以色列、日本與美國等會員國，均對此個案研究，提出其意見。

討論摘要

應第 28 屆技術委員會之邀請，主席請經濟合作暨發展組織之觀察員對移轉訂價對與會代表進行報告。

該組織之觀察員介紹何謂移轉訂價。並因應本個案研究有關的移轉訂價方式為銷售淨利法(Transactional Net Margin Method, TNMM)，其報告中亦作出其詳細介紹。另外，該觀察員亦稱 TNMM 為目前最為普遍使用的移轉訂價方式。

在聽完 OECD 的報告之後，許多會員均對於該組織對此議題的貢獻表示感謝。並且提出許多技術問題，如為何使用國外公司之利潤率作為比較基準？如何使用 TNMM 調整公司的利潤分配？以及如何使用 TNMM 於年終時對於價格等項目予以調整等？該觀察員對這些問題均提供回復。

之後，主席先總結先前技術委員會對此議題的討論，並且重申此一議題已從原先的「移轉訂價」放寬至「移轉訂價與特殊關係人交易」。

相對於探討此議題的個案研究，一些代表對於有關此議題的

原則以及關稅估價與移轉訂價的相互關係等問題更有興趣。在另外一方面，又有部分代表認為，應該藉由對此議題的個案研究討論中來處理上述的問題。但雙方多同意如藉分析個案研究的方式，將有助於辨別此議題的一般原則與相關重點。

對於此個案研究，部分與會代表對於利用 TNMM 方法來檢驗估價協定條文 1.2 (a)中所稱之交易條件(Circumstances of sale)的可行性，尚有疑問。並提出下列的疑慮及問題之處：

- 估價協定條文 1.2 (a)中所稱之交易條件，應該經由買／賣雙方的交易行為來檢視；而非藉由分析公司利潤的方式來檢視。
- 包含 TNMM 在內，且滿足 OECD 移轉訂價準則的相關利潤分配之移轉訂價方法，是否符合估價協定條文 1.2 (a)所稱之交易條件。由其 TNMM 方法中，被測試的公司 (Tested party)為進口商，而銷售淨利也是基於進口地銷售貨物的實際結果。

提出此個案研究的美國代表回應稱，估價協定條文 1.2 (a)所載之交易條件應該更寬廣地解釋，正如估價協定註釋 (Interpretative Notes)對條文 1.2 的解釋即提供了有關的範例。

然而，美方的解釋並未獲得全體代表的認同，部分代表建議技術委員會在下屆會議中對此項議題繼續討論。大會並建議於第 30 屆會議時，對於下列主要的關注事項加以討論：

- 對於符合 OECD 準則下的傳統移轉訂價方法，如比較未控制價格法(Comparable uncontrolled price, CUP)、成本加價法(Cost Plus)及再銷售扣減法(Resale price minus)等方式，探討其檢視估價協定第 1.2 (a)所稱的交易條件的適用性。
- 探討運用上述傳統移轉訂價方式的個案研究。
- 澳洲當局所提供之一簡化版的個案研究。

部分代表強調，技術委員會應該從關稅估價的觀點來審視移轉訂價。亦即，移轉訂價應為檢視買賣雙方因特殊關係而訂定的交易價格是否受影響的一項工具。

本屆技術委員會提及，任何工具均可用以檢視估價協定第 1.2 (a)下所稱之交易條件。對於買賣雙方因特殊關係訂定的交易價格是否可接受，並不需要限定其檢驗的方法(如移轉訂價應僅視為考慮的項目之一)。

綜上討論，稅則暨貿易處處長建請秘書處於休會期間，參酌上列的意見製作有關工作文件，藉以協助會員國對此議題有

更多之瞭解，亦可供下屆會議中討論。技術委員會對處長的建議支持，並表示文件內容應包含下列項次：

- 關於特殊關係人交易與移轉訂價，應包含基本的背景資料與其主要的原則。
- 歷屆技術委員會討論過的一般關鍵爭議處與提出的特定問題。
- 修訂個案研究。

結論

技術委員會同意對此議題於下屆會議時繼續討論；並且請秘書處根據本屆會議的討論內容，製作此主題的工作文件。

議程 VII：休會期間提出之問題 (Questions raised during the intersession)

(一) 關稅估價協定條文第 8.1(b)之應用

背景說明

休會期間，日本提交秘書處 1 份議題，諮請技術委員會表示意見，該議題已列入附件 Doc. VT07131a 內。

討論摘要

1. 日本建議將本議題列入特殊技術問題，於下次會期討論。

2. 日本代表簡要說明其內容如下：

(1)A 進口商免費提供 B 出口商零件與工具，俾用以生產進口之貨物。

(2)該免費提供之零件與工具，係由進口國之 C 廠商製造，而 A 進口商與 C 製造商並無特殊關係。

(3)又 A 進口商免費提供生產模具予生產零件與工具之 C 廠商，爰生產模具並未列入生產零件與工具之成本。

(4)問題焦點是生產模具之價格是否該依關稅估價協定第

8.1(b)所規定之實付或應付價格，進行關稅評估。

結論

技術委員會通過將日本提交議題列為特殊技術問題，並於下

次會期討論，並要求秘書處將日本提供之資訊列入會議文件。

議程 VIII：未來工作計畫 (Programme of Future Work)

稅則及貿易部副處長提出關於第 30 屆技術委員會，目前所選定之相關議程如下：

- 一、採認第 29 屆技術委員會報告
- 二、休會期間各項發展報告
 - (一) WCO 稅則暨貿易事務處處長報告 (Director's Report)
 - (二) WTO 關稅估價委員會報告 (WTO Committee on Customs Valuation Report)
- 三、世界貿易組織估價協定之管理措施實務執行
 - (一) 秘書處從事技術協助/能力建構之計畫報告
(Report on the technical assistance/capacity building undertaken by the Secretariat)
 - (二) 會員國從事技術協助/能力建構之活動報告
(Report on Technical Assistance/Capacity Building Activities undertaken by Members)
 - (三) 會員國應用 WTO 估價協定之進展報告 (Progress report on Members' Application of the WTO Valuation Agreement)

四、 特殊技術問題

- (一) 專利權權利金及特許權利金之研究 (Study on Royalties and Licence Fees)
- (二) 進口電力估價 (Customs Valuation of Imported Electricity)
- (三) 關稅估價協定及移轉定價對於特殊關係人之交易估價 (Related party transactions under the Agreement and Transfer Pricing)
- (四) 關稅估價協定條文第 8.1(b)之應用

五、 其他事項

- (一) 21 世紀海關 (Customs in 21st Century)
- (二) 稅收套件 (Revenue package)

副處長並表示，如在休會期間有新的問題提出，則上列項目視需要亦可增加。

議程 IX：其他事項 (Other business)

(一) 21 世紀海關 (Customs in 21st Century)

背景說明

1. 主席說明，休會期間，沒有會員就本議題提供書面文件。
2. 2008 年 6 月 WTO 理事會(Council)採認的 21 世紀海關文件 (C21)，是以 10 個基石做為願景，目的係強化 WCO 在 21 世紀所扮演的角色。理事會責成秘書處於 2009 年 6 月前結合 WCO 策略計畫以擬訂策略及執行計畫。該 10 項基石說明如下：

- (1)建構全球關務網絡(Globally networked Customs)；
- (2)加強協調邊境管理(Better co-ordinated border management)；
- (3)實施情資導向的風險管理(Intelligence-driven risk management)；
- (4)建立海關與貿易業者的夥伴關係(Customs-trade partner)；
- (5)採行現代化工作方法、程序及技術(Implementation of modern working methods, procedure and techniques)；
- (6)善用新興科技與工具(Enabling technology and tools)；
- (7)強化執行能力(Enabling power)；
- (8)培養以專業、知識為基礎的服務文化(A Professional, Knowledge-based Service Culture)；

(9)能力建構(Capacity Building)；

(10)廉政海關(Integrity)。

討論摘要

- 1.處長說明，該 10 項基石與關稅估價關係密切的有實施情資導向的風險管理、採行現代化工作方法、程序及技術及能力建構等 3 項。
- 2.處長進一步說明，現有關稅估價協定、估價相關文件、工具及計畫等是否切合 21 世紀海關文件(C21)的要求條件，請技術委員會表示意見。另政策委員會期望 C21 能與 WCO 策略計畫融合，並請理事會於 2009 年 6 月前設立建構全球關務網絡(GNC)專案小組。
- 3.處長強調，C21 具有強烈的願景，未來將是政策委員會與理事會及 WCO 相關論壇與委員會的討論議題。
- 4.歐盟想了解 C21 與「策略計畫」文件是否融合後由 GNC 取代，因 GNC 計畫係專注在電子資訊的聯結與分享。處長澄清，GNC 與「加強協調邊境管理」係 C21 所含 10 項基石中的 2 項基石，因此，C21 與「策略計畫」不能由 GNC 取代，但 GNC 對 C21 與「策略計畫」都很重要。

結論

主席感謝處長與所有參與討論本議題的會員，並請各會員於 2010 年 4 月會期前，踴躍提供本議題的意見與建議。

(二) 稅收套件 (Revenue package)

討論摘要

主席邀請秘書處對此項議題作出報告。秘書處先解釋稅收套件的歷史背景，並強調此議題的三個支柱如下：

- 列出與稅務徵收有關的所有工具與措施之發展與推動的時程。
- 經由區域工作小組以及 WCO 技術委員會，向會員國諮商其需求。
- 如有需要，進一步發展新增的工具與措施，並編纂稅收套件的輔助文件。

歐盟執委會表示稅收套件這項議題相當地重要；歐盟將會注意這項議題在 WCO 政策委員會(Policy commission)中的發展。

結論

技術委員會列此報告於會議紀錄中，並同意於下一屆會議中再次討論。

(三) 第 30 屆技術委員會會議主題之建議(Suggestions for

the Theme Meeting for the 30th Session of the
Technical Committee)

討論摘要

主席總結第 28 屆會議中對於第 30 屆會議所提出之會議主題，於此，會員國並未有進一步的意見。其中下屆會議 3 項重要的主題為：

- 一、WTO 估價協定 30 週年紀念。
- 二、價格預先審核。
- 三、裁決系統。

部分與會代表支持價格預先審核及 WTO 估價協定 30 週年紀念此二項主題。其中歐盟執委會代表並提議，其中第 2 項議題時程應該安排大於一天的會期，並且建議秘書處要對於此一嶄新的議題架構與內容多加考慮。但秘書處表示，為預留足夠的時間予委員會討論其他的議題；價格預先審核及 WTO 估價協定 30 週年紀念此二項主題，其時程不應超過一天半。最後，主席建議 WTO 估價協定 30 週年紀念以安排一天議程；另外價格預先審核部分，安排半天議程討論。

結論

技術委員會同意主席對於下屆會議的議程建議，而秘書處亦

同意於此架構下排定議程，另在休會期間，秘書處亦會與會員國以及有關團體保持聯繫，用以計畫確定之內容。

議程 X：下次會期 (Dates of next meeting)

主席宣布第 30 屆關稅估價技術委員會訂於 2010 年 4 月 12 日至同年月 16 日假布魯塞爾 WCO 總部舉行。

肆、心得與建議事項

一、我國可藉提供疑義案例，積極參與技術委員會活動並吸收新知

鑒於貿易交易型態日新月異，跨國企業間之交易佔全球貿易量日趨增多，不乏跨國企業藉由交易價格的安排，意圖逃漏應繳的關稅，致近年來關稅估價的疑義案例屢屢發生；而巴西、阿根廷、哥倫比亞等開發中國家，勇於會中提供其疑義案例供委員會討論，從中獲取客觀、衡平的見解。我國如能提供自身的疑義案例供技術委員會討論，不僅能客觀、深入、全面的審視案例之性質，亦能防範行政疏失。另一方面，可與各會員國密切往來、建立友誼，從中吸取國際新知，大幅提昇關稅估價之能力與國際觀。

二、實施關稅估價預先審核制度，與 21 世紀海關之 10 大基石密切相關

WCO 2008 年所揭櫫之 21 世紀海關 10 大基石，係未來世界各國海關之要求條件與發展之方向，其中包括：(1)建構全球關務網絡、(2)加強協調邊境管理、(3)實施情資導向的風險管理、(4)建立海關與貿易業者的夥伴關係、(5)採行現代化工作方法、程序及技術、(6)善用新興科技與工具、(7)強化執行能

力、(8)培養以專業、知識為基礎的服務文化、(9)能力建構、(10)廉政海關。惟查關稅價格預先審核制度之成功與否，似與前述 10 大基石之實施成效密切相關。鑒於關稅估價技術委員會已一致決議，將關稅估價預先審核制度列為未來重大討論議題，爰我海關如何實施關稅估價預先審核制度，將是未來不可避免之挑戰與目標。

三、充實關稅估價資料庫內容，分析其資料以供風險管理

建置關稅估價資料庫已為世界之趨勢，WCO 亦積極輔導並協助其會員國完成架設資料庫。我國的估價資料庫，其內容以關稅總局驗估處之核定完稅價格為主，另輔以各通關單位以人工輸入其他未經查價但具參考價值之進口申報價格。我國資料庫的架構與內容，都尚稱完整；使用者可輕易地設定查詢的內容與條件，亦可即時取得資料庫中存放的價格資訊。但我國的資料庫亦僅限於提供條列式的訊息，目前並不提供有關資料的分析，可能造成使用上的障礙或風險管理上的盲點。因此建議可考慮規劃設置有關的資料分析工具，並改進以人工建檔的方式以擴大資料庫內容，如此便可萃取資料中的有價值資訊，俾使資料轉換成資訊以發揮更大的效用，亦可確保國課。

另外，對於關稅估價資料庫的運用，大會秘書處暨各國代表均重申，資料庫中的資料應僅限用於分析、風險管理以及事後稽核篩選之用；依照估價協定，不可藉此訂定進口貨物完稅價格的最小價格或替代價格。

四、注意進口貨物完稅價格之核定與支付予第三方之權利金之相關發展

按估價協定條文 8.1 (c) 「依交易條件由買方直接或間接支付與該進口貨物有關之權利金及報酬」應加計至進口貨物之交易價格，用以作為完稅價格之核定。但對於支付予第三方（非買賣雙方）的權利金，是否屬估價協定 8.1(c)所列之調整加計項目，會員國間仍存有相當大的歧異。如美國代表於會議中表示，此類支付予第三方之款項，多出現在與交易無關的文件之中，若據此要求將相關價款加計至完稅價格中或不採其交易價格為完稅價格，似有未妥。但另有其他會員國表示，協定 8.1(c)明訂權利金需視為進口貨物完稅價格之一部分，若因其支付的對象不是賣方即予以免計，似有違該協定之意旨。

然在我國關稅估價實務上，傾向依照估價協定之附件 III 7(Annex III 7)所稱「實付或應付價格包含進口貨物之銷售條

件而由買方支付給賣方，獲由買方支付給第三人以抵充賣方債務，所為之實際或即將支付之款項」，將此類第三方之權利金視為支付予第三方藉此使賣方能履行交易之義務之款項，當屬完稅價格之一部分，而予以加計。

第三方權利金是否屬於交易的一部份，通常需要考慮此項支付金額是否與貨物有關以及是否為交易條件兩項因素決定；但國際貿易實務上，常有諸多細節與例外狀況，因此前開二項因素是否成立，常需檢視個案之有關交易文件才可歸納出結論。技術委員會對於此第三方權利金是否與貨物有關以及是否為交易條件的檢驗方式，正嘗試將各會期的討論結果作出一般性評論(General Commentary)，供會員國作為核定完稅價格之參考。因此建議我國應注意此議題之後續發展，如需要則適時調整觀念，俾利與國際之觀點銜接。

五、注意關稅估價協定對於特殊關係人之交易估價及移轉

訂價之發展

由於全球化與自由化，大型跨國企業為追求其獲利最大化，為因應其本身的需要，因此常在不同的國家地區設置其生產基地、銷售中心、發貨中心等機構。因此，特殊關係人之間的貨物交易行為，在國際貿易上的比重則日益頻繁。又此類

特殊關係人間的交易，多以其集團的整體利潤為考量；所以交易貨品價格的決定，也多依照其希冀的利潤分配方式來加以訂定。

為規範此類集團之間的受控制交易，經濟合作暨發展組織(OECD)提出的移轉訂價基本原則就是依據常規交易原則來決定受控交易的移轉訂價結果。按照目前 OECD 指導原則下，移轉訂價的常規交易方法分為二大類，即為「傳統交易法」(Traditional Transactional Methods)與「交易利潤法」(Transactional Profit Methods)。其中傳統交易法中，又可分成(1)比較未控制價格法、(2)成本加價法與(3)再銷售扣減法；其中比較未受控價格法係以價格做為比較基礎，而成本加價法則是以利潤率做為比較基礎。又交易利潤法中，目前 OECD 指導原則中列有(1)利潤分割法與(2)銷售淨利法二者；此類方法乃運用利潤的分割與比較，作為制訂貨物價格之原則。

一般而言，移轉訂價的精神多以利潤為導向，作為貨物的訂價策略；反觀現行國際上的關稅估價，多以估價協定為主，且該協定對於完稅價格之定義，是以貨物的價格為基礎，處分或使用貨物所產生的利潤或報酬並非關稅估價之主要考量。因移轉訂價與關稅估價二者的原始精神與意旨明顯不

同，且按我國關稅法第 30 條第 1 項「進口貨物之交易價格，有下列情事之一者，不得作為完稅價格之根據」第 4 款「四、買賣、雙方具特殊關係，致影響交易價格」，又關稅估價協定條文 1.2 (a)「…如買賣雙方之特殊關係並不影響其交易價格，則其交易價格應予接受…」。

因此，對於海關在是否接受進口人採用移轉訂價所訂定的交易價格作為完稅價格，常造成徵納雙方的爭議之處。

又實施移轉訂價之廠商中，有時亦會於會計年度結算時，重新檢視其貨品訂價以符合相關的規範，進而向關稅機關申請更新其價格資料並補繳(退)稅款。澳洲代表於會議中表示，該國有關於移轉訂價的案件，多是屬於上揭申請的性質。另外，我方出席人員向美國代表詢問該國對此類申請案件之態度時，美方則稱需參考申請時間、內容等，再決定是否同意接受其申請。我國現行關稅法第 18 條規定，如有應退、應補稅款者，應於貨物放行之翌日起 6 個月內，核與美國的作法相近。我方代表於此次會議上，亦向大會提議建置檢驗移轉訂價是否符合常規交易之準則，以茲會員國遵循。

綜上，關於移轉訂價、特殊關係人之交易與關稅估價，近年來在國際上始終是一項重要的議題。而且，世界各國對此多

未達成共識，亦無統一的作法；又此議題涉及關稅及內地稅之課徵。雖然歐、美等大型經濟體，對於此移轉訂價的問題自有其處理與檢驗方式，但其使用的方法常因經濟規模、國情的不同，而無法視為通則而直接引用其他地方。因此建議對此項議題，我國應積極參與國際上之相關研討會議，吸取新知與國際案例，其中經濟規模與我國相當地區的案例，可能較歐、美、日等大型經濟體的案例更具參考價值；並與內地稅機關橫向聯繫協調，以期於作法上取得共識。

六、傳承關稅估價經驗，積極參與國內外相關議程會議

關稅估價係屬一高度專業性之技術，而關稅估價技術委員會乃司此類技術之意見、解釋與個案研究之探討。會中討論之議題多具有連續性，常跨越數個會期；又許多活躍的與會代表，如阿根廷、加拿大、歐盟執委會、日本等代表，多為專任或多次出席者，亦因此可對相關議題深入瞭解並作出評論。我國出席同仁參與此類國際會議，在會議內容的瞭解以及與各國代表相意見交換上，並無困難。因此建議培養專精關稅估價技術與法規的專門人才，並積極參與此類國內外相關會議，於會前詳閱會議資料，會中與各國加強討論並適時提供評論，將我國的見解與實務充分交流，藉以提昇我國之

關稅估價技術，並與世界接軌。

伍、後記

此次奉派出席第 29 屆 WCO 關稅估價技術委員會會議，感謝財政部及財政部關稅總局提供相關經費，並承蒙各級主管之厚愛與指導，以及歷屆出席人員之協助。另感激我國駐歐盟兼比利時代表處經濟組張組長光裕熱忱接待，陳秘書高煌接送機，僅此一併申致謝意。

陸、附件

- 一、 與會人員名單 (List of Delegates)
- 二、 議程 (Agenda)
- 三、 國際估價資料庫之準則
 - 1、土耳其報告內容
 - 2、馬拉威報告內容
 - 3、印度報告內容
- 四、 權利金及授權金之研究
 - 1、第三方權利金之秘書處一般評論初稿
 - 2、本議題之會員意見
- 五、 移轉定價對於特殊關係人之交易估價
 - 1、OECD 報告內容 (移轉訂價與 TNMM)
 - 2、本議題之個案研究暨工作文件
- 六、 關稅估價協定條文第 8.1(b)之應用
- 七、 稅收套件報告內容

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LIST OF DELEGATES
LISTE DES DELEGUES
LISTA DE DELEGADOS

CHAIRPERSON/
PRESIDENT/
PRESIDENTE

Mr. Cr. Guzmán Mañes
Administrador de Aduanas de Carrasco
Dirección Nacional de Aduanas
gmanes@aduanas.gub.uy

WCOWTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
--	--

ANGOLADelegate/Délégué/Delegado

Ms. Leonilde SOUSA
Customs Officer

ldesousa@alfandegas.gv.aoAlternate/Suppléant/Suplente

Mr. M. CRUZ
Customs Officer

mfcruz@alfandega.gv.aoANGOLAAdvisers/Conseillers/Consejeros

Ms. E. BURITY
Customs Officer

eburity@alfandegas.gv.ao
eveburity@hotmail.com

Ms. T. LOPES

teloma1@yahoo.com
tlopes@alfandegas.gv.ao

ARGENTINA/ARGENTINEDelegate/Délégué/Delegado

Mr. H. O. VICENTE
Director de Técnica y Valoración Aduanera

hvicen@mecon.gov.arAlternate/Suppléant/Suplente

Mr. M. A. GALEANO
Jefe de Departamento Estrategia del Valor

mgaleano@afip.gov.ar

Annex B to Doc. VT0715
Annexe au
Anexo al

(VT/29/Oct. 2009)

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---	--

AUSTRALIA/AUSTRALIE

Delegate/Délégué/Delegado

Ms. S. LEE
Director, Valuation and Origin

stephanie.lee@customs.gov.au

BANGLADESH

Delegate/Délégué/Delegado

Mr. A. KHONDAKER
Minister Customs
Embassy of Bangladesh, Brussels

rahman_toffee@yahoo.com

BELARUS

Delegate/Délégué/Delegado

Mr. K. PETROVSKY
Deputy Head of the Department of tariff
regulations & Customs payments of the State
Customs Committee

petrovsky@tut.by

BELGIUM/BELGIQUE/BÉLGICA

Delegate/Délégué/Delegado

M. P. DEVOLDER
Expert fiscal

patrick.devolder@minfin.fed.be

BENIN

Delegate/Délégué/Delegado

M. M. LAOUROU
Inspecteur des douanes

marcellini2002@yahoo.fr

BOSNIE & HERZEGOVINA/BOSNIE-
HERZEGOVINE/BOSNIA Y HERZEGOVINA

Delegate/Délégué/Delegado

Ms. L. OSMANCEVIC
Customs expert

lejla.osmancevic@uino.gov.ba

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WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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BRAZIL/BRESIL/BRASIL

Delegate/Délégué/Delegado

Mr. M. OLIVEIRA
Customs Administration

marcelo.f.oliveira@receita.fazenda.gov.br

Alternate/Suppléant/Suplente

Mrs. A. EJCHEL
Auditora Fiscal da Receita Federal

adriana.ejchel@receita.fazenda.gov.br

BURKINA FASO

Delegate/Délégué/Delegado

Mme C. ZOURE
Conseiller

clazoure1@yahoo.fr

CANADA

Delegate/Délégué/Delegado

Mr. P. TRUDEL
Manager – Valuation Program

pierre.trudel@cbsa-asfc.gc.ca

CHILE/CHILI

Delegate/Délégué/Delegado

Mr. A. TORRES
Jefe Dpto. Tecnico

atorress@aduana.cl

Alternate/Suppléant/Suplente

Mr. G. VILLARROEL
Jefe Dpt. Valoración Aduanera

gvillaroel@aduana.cl

CHINA/CHINE

Delegate/Délégué/Delegado

Ms. Q. LIN
Valuation management

qianyu.lin@163.com

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
---	--

Alternate/Suppléant/Suplente

Mr. Y. SONG
Valuation management

songyankui@customs.gov.cn

Adviser/Conseiller/Consejero

Ms. Z. ZHANG
Valuation Management

zhangzheng@skynet.be

COLOMBIA/COLOMBIE

Delegate/Délégué/Delegado

Ms. C. GAVIRIA
Director

cgaviria.mincomercio@numericable.be

Adviser/Conseiller/Consejero

Ms. M. BOTERO
Commercial advisor

mbotero.mincomercio@numericable.be

CONGO

Delegate/Délégué/Delegado

M. B. ONDAMA-ANTSA
Directeur de la Législation et du Contentieux

Alternate/Suppléant/Suplente

M. G. DIAOUA
Chef de Service de la Valeur et du
Contentieux

M. C. N. HELAULT
Représentant du Congo auprès de l'OMD
Ambassade du Congo

chrisnarhelault@yahoo.fr

CÔTE D'IVOIRE

Delegate/Délégué/Delegado

M. K.J. N'DRI
Conseiller
Ambassade de Côte d'Ivoire

jacquesndri@yahoo.fr

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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CZECH REPUBLIC/REPUBLIQUE TCHEQUE/
REPÚBLICA CHECA

Delegate/Délégué/Delegado

Mrs. S. MATUŠOVÁ
Customs Counsellor

s.matusova@cs.mfcr.cz

DEMORATIC REPUBLIC OF THE CONGO/
REPUBLIQUE DEMOCRATIQUE DU
CONGO/REPÚBLICA DEMOCRÁTICA DEL
CONGO

Delegate/Délégué/Delegado

Mme. W.J.B. KAWANDA
Attachée douanière
Ambassade de la Rép. dém. du Congo

blandinekawanda@hotmail.com

DOMINICAN REPUBLIC/REPUBLIQUE
DOMINICAINE

Delegate/Délégué/Delegado

Mr. C. DÍAZ GARCIA
Gerente de Fiscalización

cadiaz@dga.gov.do

AlternateS/SuppléantS/SuplenteS

Mr. SANTA MARIANELA MARTE
Enc. Empresas Vinculadas

s.marte@dga.gov.do

Ms. B. MORRISON
Counsellor

bmorrison@gmail.com

FINLAND/FINLANDE/FINLANDIA

Delegate/Délégué/Delegado

Mr. M. SUVES
Senior Customs Inspector

Miiika.Suves@tulli.fi

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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GAMBIA/GAMBIE

Delegate/Délégué/Delegado

Mr. M. SANYANG
Director Technical Services

Sanyang.mala@gmail.com

GERMANY/ALLEMAGNE/ALEMANIA

Delegate/Délégué/Delegado

Mr. G. STICKER
Diplom Finanzwirt

Guido.sticker@bmf.bund.de

HAITI

Delegate/Délégué/Delegado

M. H.V. SAINT LOUIS
Directeur

vhsaintlouis@yahoo.fr

Alternate/Suppléant/Suplente

M. R. JEUNE
Directeur-adjoint

ramoj2006@yahoo.fr

HONG KONG, CHINA/HONG KONG, CHINE

Delegate/Délégué/Delegado

Mr. C.-M. LEUNG
Senior Trade Controls Officer
Hong Kong Customs

cm_leung@customs.gov.hk

Alternate/Suppléant/Suplente

Mr. K.-I. POON
Senior Trade Controls Officer
Hong Kong Customs

ki_poon@customs.gov.hk

INDIA/INDE

Delegate/Délégué/Delegado

Mr. V. CHATURVEDI
First Secretary (Trade)
Embassy of India

fst@indembassy.be

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
---	--

Alternate/Suppléant/Suplente

Mr. S.D. CHAND
Deputy Commissioner (Valuation)

sdchand@gmail.com; fst@indembassy.be

Mr. S. GANGER
Second Secretary (Trade)
Embassy of India

ss.trade@indembassy.be

INDONESIE/INDONESIA

Delegate/Délégué/Delegado

Mrs. A. ISKANDAR
Customs Attaché
Embassy of Indonesia

anitaiskandar@yahoo.com

ISRAEL

Delegate/Délégué/Delegado

Mrs. S. BITTON
Valuation Chief Coordinator

sarab@customs.mof.gov.il

ISRAEL

Alternate/Suppléant/Suplente

Ms. D. HAGAY-SAADON
Legal adviser

dganith@customs.mof.gov.il

JAPAN/JAPON

Delegate/Délégué/Delegado

Mr. N. SHOKAI
Deputy Director, Customs Clearance Division
Ministry of Finance

nobuyuki.syokai@mof.go.jp

Alternate/Suppléant/Suplente

Mr. S. KOMURE
Valuation Specialist

hyoka-center@tokyo-customs.go.jp

Annex B to Doc. VT0715
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Anexo al

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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Adviser/Conseiller/Consejero

Mr. T. HIRATA
First Secretary
Embassy of Japan

hiratat@hotmail.com

KOREA (Republic of)/COREE (République de)/
COREA (República de)

Delegate/Délégué/Delegado

Mr. Seo Young joo
Senior Valuation Specialist

djcustoms@customs.go.kr

KUWAIT/KOWEIT

Delegate/Délégué/Delegado

Mr. Sultan M. ALIMILY
Director Assistant of the South Ports
Department

sultankwc@hotmail.com

MALAWI

Delegate/Délégué/Delegado

Mr. N. LEMUSON KAYENDA
Valuation & Origin Section

kayendannl@mra.mw

MALAYSIA/MALAISIE/MALASIA

Delegate/Délégué/Delegado

Ms. R. FATAHUDIN
Assistant Director (Valuation)
Royal Malaysian Customs

rosmila.fatahudin@customs.gov.my

Alternates/Suppléants/Suplentes

Ms. J. HUSSIN
Second Secretary (Customs)
Embassy of Malaysia

customsmy@skynet.be

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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MOROCCO/MAROC/MARRUECOS

Delegate/Délégué/Delegado

M. O. AOUI
Chef du Service du Contrôle de la Valeur

o.aoufi@douane.gov.ma

NETHERLANDS/PAYS-BAS/PAÍSES BAJOS

Delegate/Délégué/Delegado

Mr. K. BIRKHOFF
Policy Adviser
Ministry of Finance

j.i.birkhoff@minfin.nl

NIGERIA

Delegate/Délégué/Delegado

Mr. F. ALLANAH
Assistant Comptroller of Customs

frankallanah@yahoo.com

Alternate/Suppléant/Suplente

Mr. P. OCHIBA
Deputy Comptroller of Customs

ochibapa@yahoo.com

NORWAY/NORVEGE/NORUEGA

Delegate/Délégué/Delegado

Mr. J. ERIKSRUD
Adviser

jon.eriksrud@toll.no

PARAGUAY

Delegate/Délégué/Delegado

Mrs. M.M. CABALLERO
Jefe del Dpt de Analisis y Gestion de Riesgos

mcaballero@aduana.gov.py

QATAR

Delegate/Délégué/Delegado

Mr. M. AL-HAGRI
Qatar Customs

ghm55@hotmail.com

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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RUSSIAN FEDERATION/FEDERATION DE
RUSSIE/FEDERACIÓN RUSA

Delegate/Délégué/Delegado

Ms. L. BONDAR
Head of Division
Alternate/Suppléant/Suplente

p1470-bl@minfin.ru

Mr. A. ARTEMIEV
Consultant

p1470-bl@minfin.ru

SAUDI ARABIA/ARABIE SAOUDITE/ARABIA
SAUDITA

Delegate/Délégué/Delegado

Mr. AL HARBI

valdep@customs.gov.sa

SERBIA/SERBIE

Delegate/Délégué/Delegado

Mrs. N. NENADIC
Senior Customs Advisor

nenadicn@carina.rs

SRI LANKA

Delegate/Délégué/Delegado

Mr. I. DARANAGAMA

daranagama@hotmail.com

Alternate/Suppléant/Suplente

Mr. V.S. SUDUSINGHE

sudusinghe@sltnet.lk

SWEDEN/SUEDE/SUECIA

Delegate/Délégué/Delegado

Mr. J.B. OLSSON
Customs Adviser
Customs Value and Taxes

Jan.olsson@tullverket.se

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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SWITZERLAND/SUISSE/SUIZA

Delegate/Délégué/Delegado

M. P. KRAUER
Adjoint à la Direction générale des douanes

peter.krauer@ezv.admin.ch

CHINESE TAIPEI/TAIPEI CHINOIS/TAIPEI CHINO

Delegate/Délégué/Delegado

Mr. D. J.J. WANG
Auditor

jjwang@mail.mof.gov.tw

Alternates/Suppléants/Suplentes

Mr. C.-C. LI
Officer

ccli@webmail.customs.gov.tw

Mr. K.-H. CHEN
Second Secretary

khchen@taipei-office.be

THAILAND/THAILANDE/TAILANDIA

Delegate/Délégué/Delegado

Mr. C. EKAROHIT
Minister (Customs)

thai-customs@skynet.be

THAILAND/THAILANDE/TAILANDIA

Alternate/Suppléant/Suplente

Mr. T. CHOOMCHAIYO
Counsellor (Customs)

thai-customs@skynet.be

TOGO

Delegate/Délégué/Delegado

M. B. W. BAMANA
Directeur du Contentieux, des Enquêtes
Douanières et de la Valeur

bamanabaroma@hotmail.com

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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TUNISIA/TUNISIE/TÚNEZ

Delegate/Délégué/Delegado

M. M.A. GHACHEM
Directeur de la Valeur

bci@douane.gov.tn

TURKEY/TURQUIE/TURQUÍA

Delegate/Délégué/Delegado

Mrs. D. YILMAZ
Expert

aktekind@gumruk.gov.tr

Alternate/Suppléant/Suplente

Mr. E. OYAL
Customs Expert

eoyal@gumruk.gov.tr

UKRAINE/UCRANIA

Delegate/Délégué/Delegado

Mr. Y. BIELKIN
Counsellor (Customs Matters)

e.belkin@ukraine-eu.be

UNITED ARAB EMIRATES/EMIRATS ARABES
UNIS/EMIRATOS ÁRABES UNIDOS

Delegate/Délégué/Delegado

Mr. H. AL ALI
Senior Controller Valuation

hamad.alali@dof.abudhabi.ae

Alternates/Suppléants/Suplentes

Mr. K. AL MAZROOEI
Valuation Manager

khalfan.almazrooei@dubaicustoms.ae

Mr. K.S. AL SUWAIDI
Senior Controller

ksuwaidi@dof.abudhabi.ae

(VT/29/Oct. 2009)

WCO/WTO MEMBERS MEMBRES DE L'OMD/OMC MIEMBROS DE LA OMA/OMC	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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UNITED KINGDOM/ROYAUME-UNI/REINO UNIDO

Delegate/Délégué/Delegado

Mr. J. MITCHELL
Policy Manager

john.mitchell1@hmrc.gsi.gov.uk

UNITED STATES/ETATS-UNIS/ESTADOS UNIDOS

Delegate/Délégué/Delegado

Ms. Y. GULIS
Attorney

Yuliya.Gulis@dhs.gov

Alternate/Suppléant/Suplente

Mr. C. STEUART
Attorney

charles.Steurart@dhs.gov

VIETNAM

Delegate/Délégué/Delegado

Ms. QUYNH CHI NGO
Expert

icd@customs.gov.vn

EC/CE

(EUROPEAN COMMISSION/COMMISSION
EUROPENNE/COMISIÓN EUROPEA)

Delegates/Délégués/Delegados

Mr. J. MALONE
Administrator

John.Malone@ec.europa.eu

Mme. U. KRAMPE
Assistant Policy Advisor

Ursula.Krampe@ec.europa.eu

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° °

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INTERNATIONAL ORGANIZATIONS ORGANISATIONS INTERNATIONALES ORGANIZACIONES INTERNACIONALES	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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ASAPRA

(INTERNATIONAL ASSOCIATION OF CUSTOMS
BROKERS/ASSOCIATION AMERICAINE DES
AGENTS EN DOUANE/ASOCIACION
INTERNACIONAL DE AGENTES PROFESIONALES
DE ADUANA)

Mr. G. FERNANDEZ - Uruguay

Sec.tecnica@mail.adau.com.uy

Mr. H. GALVAN - Uruguay

Sec.tecnica@mail.adau.com.uy

ICC – CCI - INTERNATIONAL CHAMBER OF
COMMERCE/
CHAMBRE DE COMMERCE INTERNATIONALE/
CAMARA DE COMERCIO INTERNACIONAL

Mme. R. STEIN
ICC Representative – U.S.A.
Microsoft Corp.

uhqvwC_p_lfurvrwiwfrp

M. R. BARAZZA
Avocat à la Cour
Douane, transports et commerce international -
France

barazza@dsavocats.com

Mr. J. PITT
ICC Representative – Netherlands
Adidas International

john.pitt@adidas-group.com

Mr. M. K. NEVILLE
Attorney at Law
ICC Representative – U.S.A.

mneville@sgrlaw.com

OECD – OCDE
ORGANIZATION FOR ECONOMIC COOPERATION
AND DEVELOPMENT/ORGANISATION DE
COOPERATION ET DE DEVELOPPEMENT
ECONOMIQUES / ORGANIZACIÓN DE
COOPERACIÓN Y DESARROLLO ECONOMICOS

Mrs. C. SILBERZSTEIN

Caroline.SILBERZSTEIN@oecd.org

(VT/29/Oct. 2009)

INTERNATIONAL ORGANIZATIONS ORGANISATIONS INTERNATIONALES ORGANIZACIONES INTERNACIONALES	E-MAIL ADDRESSES ADRESSES ELECTRONIQUES DIRECCIONES ELECTRÓNICAS
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WTO/OMC – WORLD TRADE ORGANISATION/
ORGANISATION MONDIALE DU COMMERCE/
ORGANIZACIÓN MUNDIAL DE COMERCIO

Mme. J. CHAKARIAN-RENOUF
Conseillère, Division de l'accès aux marchés

janet.chakarian-renouf@wto.org

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Annex B to Doc. VT0715
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SECRETARIAT/SECRETARIA

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

Director

M. A. MANGA

Deputy Director

Mr. C. CLARK

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

Technical Officers

Mr. K. SINGH
Mr. I. CREMER

Technical Attachés

Ms. M. KITaura
Mr. T. SUVRANAMANI

INTERPRETERS/INTERPRETES/INTÉRPRETES

Mr. G. GILLOT
Mrs. P. MANIN
Mme. P. LÓPEZ NOVELLA
Mme. U. BÖSS
Mme. S. LORENZO VAZQUEZ
M. J. REGUERAS
M. S. BOUAYAD
M. M. RAMDANI
Mme. D. ZUGRAVESCU



TECHNICAL COMMITTEE
 ON CUSTOMS VALUATION

VT0687E1c

-
 29th Session
 -

O. Eng.

Brussels, 17 September 2009.

**DRAFT AGENDA FOR THE 29th SESSION
 OF THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION**

(from Monday 19 October (starting at 10.00 a.m.) to Friday 23 October 2009)

<u>Agenda Item number</u>	<u>Subject</u>	<u>Documents</u>
I.	<u>Adoption of Agenda</u>	
(a)	Draft Agenda.....	VT0687E1c
(b)	Suggested programme.....	VT0688E1a
II.	<u>Adoption of the Technical Committee's 28th Session Report</u>	VT0686E1b
III.	<u>Reports on intersessional developments</u>	
(a)	Director's report.....	VT0689E1a
(b)	WTO Committee on Customs Valuation report.....	Oral report
IV.	<u>Administrative measures for the application of the WTO Valuation Agreement</u>	
(a)	Report on new additions to the Index of Reference materials.....	VT0690E1a VT0707E1a
(b)	Report on new additions to the List of Contact Points for Exchange of Customs Valuation Information.....	VT0691E1a VT0708E1a
(c)	Report on new additions to the List of Contact Points on Valuation Matters.....	VT0692E1a VT0709E1a
(d)	Review of the Conspectus of Technical Valuation Questions....	VT0693E1a

<u>Agenda Item number</u>	<u>Subject</u>	<u>Documents</u>
(e)	Report on the use of the Guidelines on National Valuation Database.....	VT0694E1a
(f)	Report on the use of the Guide to the Exchange of Customs Valuation information	VT0695E1a
V.	<u>Technical assistance/Capacity building</u>	
(a)	Report on the technical assistance/capacity building programme undertaken by the Secretariat.....	VT0696E1a
(b)	Report on the technical assistance/capacity building activities undertaken by Members.....	VT0697E1a VT0710E1a
(c)	Progress report on Members' application of the WTO Valuation Agreement.....	VT0698E1a
VI.	<u>Specific technical questions</u>	
(a)	Study on royalties and licence fees :	
	- Study based on cases submitted by Canada and Japan- Draft Commentary.....	VT0699E1a VT0711E1a
	- Case Study submitted by Brazil.....	VT0700E1a
	- Case Study submitted by Colombia.....	VT0701E1a
(b)	Customs Valuation of imported electricity: Proposal from Brazil.....	VT0702E1a
(c)	Related party transactions under the Agreement and Transfer Pricing.....	VT0703E1a VT0712E1a
VII.	<u>Questions raised during the intersession</u>	
	Application of Article 8.1(b) of the Agreement	VT0713E1a
VIII.	<u>Programme of future work</u>	
IX.	<u>Other business</u>	
(a)	Customs in 21 st Century.....	VT0704E1a
(b)	Revenue package.....	VT0705E1a

Agenda
Item
number

Subject

Documents

(c) Suggestions for the Theme Meeting for the 30th Session of the Technical Committee..... VT0706E1a

X. Dates of next meeting



29TH SESSION OF THE WCO/TCCV

CUSTOMS CONTROL & WCO'S GUIDELINES ON THE DEVELOPMENT AND USE OF A NATIONAL VALUATION DATABASE AS A RISK ASSESMENT TOOL

TURKISH CUSTOMS ADMINISTRATION



CUSTOMS CONTROL & WCO'S GUIDELINES ON THE DEVELOPMENT AND USE OF A NATIONAL VALUATION DATABASE AS A RISK ASSESMENT TOOL

- The basis for the valuation of goods is, to the greatest extent possible, the transaction value.
- Transaction value is the price actually paid or payable for the goods when sold for export to the country of importation, adjusted in accordance with the provisions of Article 8 of the Agreement.
- When accepting the declared value as the basis for the transaction value, Customs always has the right to satisfy itself as to the truth or accuracy of that value. (Art 17)
- Exercising this right Customs can make use of risk assesment and management tools.
- In the Revised Kyoto Convention, Guidelines to Chapter 6 of General Annex; the risk assesment and risk management is defined as follows:
 - Risk assessment : The systematic determination of risk management priorities by evaluating and comparing the level of risk against predetermined standards, target risk levels or other criteria.
 - Risk management : The systematic application of management procedures and practices which provide Customs with the necessary information to address movements or consignments which present a risk.



CUSTOMS CONTROL & WCO'S GUIDELINES ON THE DEVELOPMENT AND USE OF A NATIONAL VALUATION DATABASE AS A RISK ASSESMENT TOOL

A national valuation database is one of the risk assessment tools which may be used by a Customs Administration to assess potential risk regarding the truth or accuracy of the declared Customs value.

Therefore, it should be designed to assess the "potential risk" regarding the truth or accuracy of the declared value for the imported goods by enabling Customs Administrations to compare the declared value to previously accepted Customs value(s).

- **Development of a Database:**
Valuation database should form part of a more extensive database linked to other aspects of export/import operation, such as origin, HS code number, importer's profile, exporter's profile...etc.

It should have "search" functions to find the information on "importers / exporters / goods / country / date or specific period of import and export".
- **Data to be included in the Database:**
Data to be included in the database is the data found on the import declarations and supporting documents and other data for risk assessment purposes (ex, history of physical examination, PCA, irregularities...etc)



CUSTOMS CONTROL & WCO'S GUIDELINES ON THE DEVELOPMENT AND USE OF A NATIONAL VALUATION DATABASE AS A RISK ASSESMENT TOOL

Use of a Database:

- The value should not be used;
 - as a substitute value for the imported goods,
 - as a mechanism to establish minimum values, or
 - as a reason to reject the declared value solely on the basis of a difference between the declared value and the database values.
- The valuation database should not be employed;
 - to disregard the requirements of Article 13 of the WTO Valuation Agreement (concerning release of imported goods upon sufficient guarantee) and,
 - to substitute for other techniques, such as post-importation audit, to assess the truth or accuracy of the declared value.
- A difference between the declared value and the database does not by itself directly constitute a potential risk for the truth or accuracy of the declared value but must be considered along with other potential risk factors, such as the lack of supporting documentation, prior problems with the importer, ...etc



CUSTOMS CONTROL
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AS A RISK ASSESSMENT TOOL



In Turkish Customs Administration, Department of Risk Analysis and Strategy engages in risk assessment and management with the help of computerised customs system (BİLGE) and the use of IT technologies.

There is no separate valuation database to assess the risk on the goods in respect of the truth and accuracy of the value. Assessing the risk on the goods imported, Turkey uses an extensive database (GÜVAŞ) by the help of which the risk is not only defined in terms of the value but also in other aspects of the goods imported.



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What is BİLGE?

The Customs Computerised System through which the data on customs declaration (SAD) is submitted electronically is called BİLGE. Entry of the data is done by the operators either at their offices (EDI) or in the kiosks at the custom offices. Data gathered at BİLGE are transferred to GÜVAŞ for integration and consolidation.

What is GÜVAŞ?

GÜVAŞ is the Custom Data Warehouse System which is located at the center building of Turkish Customs Administration and reprocesses statistically the data in BİLGE. The data is updated on regular basis.



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All the relevant data with regard to the importation and exportation of the goods (import, export, transit, data on smuggling, value, tariff, paid customs duties up to three years, operators tax number) is stored in GÜVAŞ through the electronic customs declarations submitted to BİLGE. Search for every information in the SAD boxes can be done in GÜVAŞ. There is no external and manual data entry into GÜVAŞ.

In GÜVAŞ, one can find data on,

1. Foreign trade statistics,
2. The performance of customs offices in general and customs officers in particular, and also the operators
3. The companies' activities
4. The customs value and its analysis
5. Risk analysis
6. Performance analysis
7. Cases of smuggling



CUSTOMS CONTROL
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- The data in GÜVAŞ is used for determination of the risk.
- The risk assessment is accomplished in relation to goods as well as to economic operators.
- Risk assessment is performed by risk analysis programme and risk parameters are defined within the central system of the Department of Risk Analysis and Strategy.
- Risks parameters identified by the Department are processed and transmitted in an electronic message to the customs clearance offices through BİLGE. The message in the system determines what type of control the goods will go through (red/yellow/blue line control) or just alerts the customs officers against the identified risk or does both.
- The control and examination findings must be entered by the customs officers into the system before goods can be released. The feedback entered is also stored in GÜVAŞ. Risk assessment system is continually updated and enhanced by the feedbacks.



CUSTOMS CONTROL
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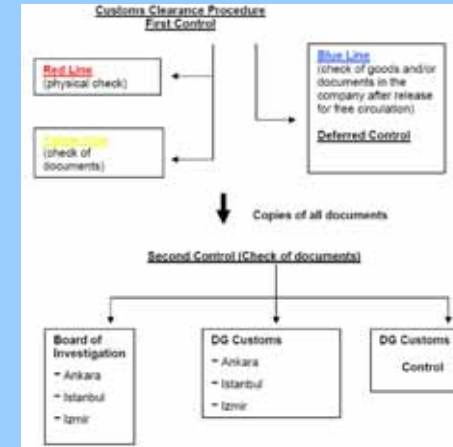


There are sources other than electronic customs declaration where the data necessary for risk assesment comes from.

1. The database that stores the information of persons and companies who have the authorisation to perform electronic customs clearance procedures.
2. The database where the criminal or administrative penalties of the persons or companies are stored. Data is entered for the penalty points given as a result of criminal or administrative offences against customs legislation which is incorporated into a risk profile for the person and/or the company.
3. The database on smuggled goods detected by the enforcement units comprises the information on persons who involved in smuggling and the information on how smuggling was performed (information about the vehicles and goods).
4. GÜVAŞ also has an interface to a database which stores companies' tax liabilities and history. This database to which Turkish Customs Administration has a read-only access is operated and maintained by the Turkish Finance Administration.



CUSTOMS CONTROL
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AS A RISK ASSESMENT TOOL



CUSTOMS CONTROL
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WCO'S GUIDELINES ON THE DEVELOPMENT
AND USE OF A NATIONAL VALUATION DATABASE
AS A RISK ASSESMENT TOOL



684 companies have been granted simplified procedures. These companies have carried out about 45% of imports nationwide and about 40 % exports.

Companies with simplified procedure use "Blue Line" on the BILGE system, which means they have an immediate release of goods without waiting for document or physical checks. After the release of the goods, the control is done on documents and if the result of the document control deems it necessary, physical (is possible) and further document checks are done at the premises of the company.

The degree of the physical inspection (Red Line / Inspection) constitutes around 29 % of the goods presented to Customs. The degree of document checks is around 50 % (Yellow Line).

Around 79% of imports undergoes a physical examination or a document check. "A second control" which is a deferred control, done on the SADs and supporting documents, is rendered by the DG for Control, established at the headquarter of Turkish Customs Administration.



CUSTOMS CONTROL
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Post -Clearance Audit is another type of control which makes use of risk assesment.

The PCA in Turkish Customs Administration is done in a systemetic and planned manner in accordance with an annual post clearance audit plan which is programmed taking into consideration the risk analysis/assesment of the companies and import operations. If necessary, PCA is done randomly.

The final reports prepared by the post clerance audit teams are evaluated by the relevant unit and each company/person subjected to PCA is given a risk grade. The grades are used for risk assesment by Department of Risk Analysis and Strategy.

When risk is graded;1 stands for low risk, 2 is for medium and 3 stands for high risk. Risk grades given also refer to the risk areas such as origin, value, tariff..etc.



CUSTOMS CONTROL
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WCO'S GUIDELINES ON THE DEVELOPMENT
AND USE OF A NATIONAL VALUATION DATABASE
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THANK YOU FOR YOUR ATTENTION

MALAWI PRACTICES AND EXPERIENCES IN SETTING UP A NATIONAL VALUATION DATABASE

- -General introduction
- -Pre-Shipment Inspection (PSI)
- -Preparation of PSI Phase out
- -Purpose of setting up the National Valuation Database
- -The legislation and WTO ACV

DEVELOPMENT OF THE VALUATION DATABASE SOFTWARE

- -ITS valuation database
- -Development process
- -ITS VDB software
- -In-house development
- -Performance

FEATURES AND FUNCTIONIONALITY OF THE SOFTWARE

- -Functionality
- -Main valuation information queried
- -Reference values
- -Freight data
- -Reports

SECURITY AND QUALITY CONTROL

- -Valuation data sources
- -Screening of information
- -Updating database
- -Editing
- -Archive

RETRAEVAL OF VALUATION INFORMATION

- -Users of VDB
- -Location of central server
- -Connectivity of field work station

EXPERIENCES

- -Development of the software
- -Manual updating of the database
- -Sources of information
- -Incorrect application of VDB
- -Connectivity using WAN

FUTURE PLANS

- Purchase Oracle Database
- Capacity building in IT Department
- -Redesigned and convert to web based database

BENEFITS AND DRAWBACKS

- -Provides guidance to solve valuation problems
- -Facilitates speedy processing of declarations
- -Assist in detection of undervaluation
- -Incorrect information misleads officers
- -Conflict with the legislation and WTO ACV

THE END
Thank you very much

ZIKOMO KWAMBIRI



INDIAN CUSTOMS

DIRECTORATE GENERAL OF VALUATION (DGOV)
(CENTRAL BOARD OF EXCISE & CUSTOMS, INDIA)

PRESENTATION ON NATIONAL VALUATION DATABASE

S.D.CHAND

DEPUTY COMMISSIONER (VALUATION)

1

USES OF DATABASE

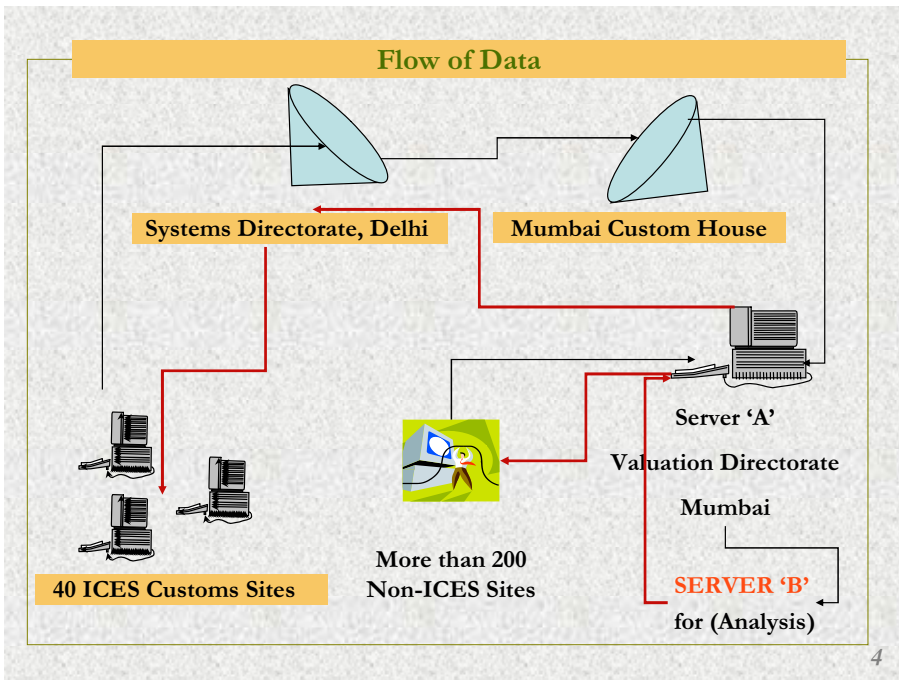
- At present, with the ever increasing volume of trade, it is neither possible nor desirable for any tax administration to scrutinize all the transactions. Database backed RMS provides a solution for this.
- A National Valuation Database helps in identifying transactions to be facilitated and focusses closer scrutiny for a limited number. This facilitates quicker clearance of consignments. Such database also forms the bedrock for determination of value for assessment purpose in a fair and transparent manner.
- It can be equally useful for scrutinizing the cases of transfer pricing and other similar issues related to tax administration.
- Database also helps select transactions for Post Clearance Audit (PCA) and conduct an effective audit.

2

Design of NIDB Project

- Daily receipt of data in a flat file format through Wide Area Network
- Flat file format is compatible with any platform and minimises data loss and can accommodate large data.
- Updating the data received to a database on a stand alone server.
- Periodical analysis of data using a customised software.
- Certain commodities are identified as “sensitive” for a detailed analysis.
- The out put is generated in the form of DVF files. For sensitive commodities separate DVS files are generated containing more details.
- Transmission of analysed data to field formations.

3



FLAT FILE CONTAINS FOLLOWING DATA FIELDS

S.No	Data Fields	S.No	Data Fields
1	Custom House	15	Quantity
2	Reporting Date	16	Unit Quantity Code
3	Bill of Entry Number	17	Declared Value (Total)
4	Bill of Entry Date	18	Retail Sale Price
5	Mode of Transportation	19	Assessed Value
6	Bill of Lading Date	20	Date of Payment of Duty
7	Description of Goods	21	EDI or Manual
8	Custom Tariff Heading	22	Duty Paid
9	Brand	23	Anti-Dumping Duty
10	Model	24	Whether Importer and Supplier are related
11	Country of Origin	25	Custom House Agents Code Number
12	Name of the Importer	26	Assessment Group
13	Importer Exporter Code	27	Valuation Method
14	Name of the Supplier	28	Final or Provisional acceptance of Bill of Entry

SCREENSHOT OF DVF FILE

The screenshot shows a Microsoft Excel spreadsheet with the following columns: COUNTRY, BRNO, SEDATE, COO, CTH, DESCRIPTION OF GOODS, MODEL, BRAND, CITY, MON, UNIT, and VAL. The data includes various import entries for goods like PISTACHIOS and LANKAN ARECANUTS.

DVF FILE

DVF files contains all details of imports including sensitive commodities.

Analyzed output is arranged in order of Tariff heading, Customs station and Country of Origin for each item.

Unit values are reflected in Indian currency.

International prices for whichever commodities is available, are also provided.

Out put is in excel format. So data can be sorted on the basis of desired parameters such as Importer wise, Grade / Model wise etc by the end user.

Query module has been provided for sorting.

QUERY MODULE

8

DVS FILE

DVS file contains import data for items listed as sensitive commodities.

The list of sensitive commodity is dynamic list which is regularly updated.

The clusters are formed for importation of similar / identical goods to the extent possible.

For each item distinct clusters are formed based on Country of Origin, Brand / Model / Grade / Specification etc and other particulars.

Weighted average for each cluster is calculated.

Whenever transaction value of sensitive commodities is found to be 90% or less than weighted average, such transactions are identified and flagged.

9

SOFTWARE INTERFACE FOR MANAGING SENSITIVE COMMODITIES

10

Clustering Algorithm - 2 ADDING OR EDITING A COMMODITY

11

Clustering Algorithm - 3 KEYWORDS DENOTING A SENSITIVE COMMODITY

Item Profile

Keywords

GRANULES
HDPE
POLYETHYLENE

Add
Replace
Remove

Back << Cancel Save Next BM Next Grade

POLYETHYLENE (8917)
HDPE (6491)
DENSITY (6377)
HIGH (5466)
MARLEX (2880)
GRADE (2692)
HD (2449)
EXXONMOBIL (2331)

Query

[[DESCR like "%GRANULES%"] OR [DESCR like "%HDPE%"] OR [DESCR like "%POLYETH-

12

Clustering Algorithm - 4 GRADES OF THE SENSITIVE COMMODITY

Item Profile

Grade

BORSTAR
EGDA
EXXONMOBIL
HOSTALEN
MARLEX
SABIC

Add
Replace
Remove

Back << Cancel OK

DENSITY (5951)
HIGH (5130)
MARLEX (2735)
HD (2216)
HXM (2065)
GRADE (2053)
(HDPE) (1905)
EXXONMOBIL (1885)

Query

[[DESCR like "%GRANULES%" AND DESCR like "%EXXONMOBIL%"] OR [DESCR like "%HC-

13

SAMPLE FILE

LIST OF MOST SENSITIVE COMMODITIES FOR RMS

SR.NO.	DESCRIPTION	CTH	KEY WORDS	Unit Quantity Code	COO	Weighted average price in Rs./MTS
1	LLDPE	39019090	BORSTAR	MTS	AE	57180
2	LLDPE	39019090	BYNEL	MTS	CA	75630
3	LLDPE	39019090	DOWLEX	MTS	CA	59700
4	LLDPE	39019090	DOWLEX	MTS	DE	74540
5	LLDPE	39019090	DOWLEX	MTS	ES	59990
6	LLDPE	39019090	ELITE	MTS	DE	61020
7	LLDPE	39019090	ELITE	MTS	NL	62290
8	LLDPE	39019090	ENABLE	MTS	SG	68210
9	LLDPE	39019090	ENABLE	MTS	US	69410
10	LLDPE	39019090	ENGAGE	MTS	US	93720
11	LLDPE	39019090	EVOLUE	MTS	JP	67600
12	LLDPE	39019090	EXACT	MTS	BE	106290
13	LLDPE	39019090	EXACT	MTS	NL	113160
14	LLDPE	39019090	EXCEED	MTS	FR	70600
15	LLDPE	39019090	EXCEED	MTS	IT	67390
16	LLDPE	39019090	EXCEED	MTS	KR	64200
17	LLDPE	39019090	EXCEED	MTS	NO	59730

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USES OF NIDB

- Current Assessments – The valuation database is a very user friendly tool for an Assessing Officer.
- Post - Clearance Audit
- Statistical analysis for tax planning
- Monitoring by higher authorities
- Transparency
- Indian customs had introduced RMS.
- About 60% of consignment are facilitated, cleared without assessment and without examination, facilitation is based on various risk parameters.
- VRAM – Valuation Risk Assessment Module - for providing value bands for RMS. Valuation Database helps RMS to identify transaction to be facilitated and focusses close scrutiny for a limited number.

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Role of Database in PCA

- Along with RMS, PCA has also been introduced.
- PCA is done for 15 - 20% of total transactions.
- Database helps in identifying documents for PCA and framing rules of selection.
- During PCA Database helps in verifying various declared parameters including valuation.
- When an import entry document is taken up for PCA normally after a fortnight, by that time contemporaneous data is available in NIDB for comparison.

16

Assistance In Capacity Building And Set up of National Data Base

- Visits to Different Member Administration Like
- Tanzania ,
- Kenya,
- Ethiopia
for development of Import Database.
- Interest shown by various Administration including South Africa, Brazil, Maldives, Democratic Republic of Congo.

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Assistance from Indian Customs in setting up Valuation Database

Steps Involved In Setting Up Of Database

- Visit by team of Valuation and Technical Experts from DGOV, Indian Customs to the requesting member Administration to study their Valuation System and existing Automation Levels.
- Submission of report indicating roadmap for development of database. Assistance in identifying a Software Developer and hardware requirement.
- Coordinating the project including training of staff.

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Cost of setting up Valuation Database

- DGOV offers to act as project coordinator and will provide domain knowledge.
- DGOV, Indian Customs, shall provide its services FREE OF CHARGE as it is committed to help member Administrations of WCO in Capacity Building.
- The approximate Hardware cost will be 5000 - 6000 USD.
- The Software Developer charges approximately 120,000- 150,000 USD.

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DGOV



❧ *Thank You* ❧

TECHNICAL COMMITTEE
ON CUSTOMS VALUATION-
29th Session
-VT0699E1a
(+ Annex)

O. Eng.

Brussels, 26 June 2009.

STUDY ON ROYALTIES AND LICENCE FEES : STUDY BASED ON CASES SUBMITTED
BY CANADA AND JAPAN - DRAFT COMMENTARY

(Item VI (a) on the Agenda)

Reference documents :

VT0433E1a (TCCV/20)	VT0576E1a (TCCV/25)
VT0440E1c (TCCV/20 Report)	VT0589E1a (TCCV/25)
VT0465E1a (TCCV/21)	VT0590E1a (TCCV/25)
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VT0481E1a (TCCV/22)	VT0609E1a (TCCV/26)
VT0491E1a (TCCV/22)	VT0619E1a (TCCV/26)
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VT0544E1a (TCCV/24)	VT0655E1a (TCCV/27)
VT0545E1a (TCCV/24)	VT0656E1a (TCCV/27)
VT0557E1a (TCCV/24)	VT0663E1c (TCCV/27)
VT0558E1a (TCCV/24)	VT0670E1a (TCCV/28)
VT0564E1c (TCCV/24 Report)	VT0678E1a (TCCV/28)
VT0575E1a (TCCV/25)	VT0686E1b (TCCV/28 Draft Report)
VT0575E1a (TCCV/25)	

1. At its 28th Session, the Technical Committee continued its discussions on the study on royalties and licence fees. As agreed at the 27th Session, the Technical Committee focused on the draft Commentary which was based on the work carried out to date on the cases submitted by Canada and Japan. It was also agreed that the draft Case Studies which had been developed by the Technical Committee, but not finalised, were to be carried forward as part of the ongoing work. The draft Case Studies are contained in Annexes I, II and III to Doc. VT0670E1a.

For reasons of economy, documents are printed in limited number. Delegates are kindly asked to bring their copies to meetings and not to request additional copies.

2. During the discussions at the 28th Session, a number of specific amendments were agreed by the Technical Committee which have been incorporated into a revised version of the draft Commentary, attached as an Annex to this document. The Secretariat has also redrafted certain sections reflecting the views of Members and made minor editorial changes. Certain text is shown in square brackets where Members have expressed particular reservations on the text in question.
3. The Technical Committee is invited to submit written comments on the draft Commentary, in particular any specific redrafting proposals and opinions on whether the text in square brackets should be maintained, amended or deleted. The Secretariat will then integrate the comments into a further draft of the Commentary for consideration at the next Session.
4. Written comments should reach the Secretariat at the latest by 4 September 2009. To assist the Secretariat, Members are invited to send their comments in electronic format where possible (e-mail address : valuation@wcoomd.org).

* * *

THIRD PARTY ROYALTIES AND LICENCE FEES - GENERAL COMMENTARY

1. The purpose of this document is to provide guidance regarding the interpretation and application of Article 8.1 (c) in cases where a royalty or licence fee is paid to a third-party licensor.
2. Under Article 8.1 (c) of the Agreement, royalties and licence fees (licence fee) are to be added to the price actually paid or payable for the imported goods where they are 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 licence fees are not included in the price actually paid or payable.
3. A common issue occurring in international trade is where the licence fee is paid to a third party, that is, a party other than the seller of the imported goods. Typically in these scenarios, the buyer/importer enters into a sales contract with the seller/manufacturer and also enters into a licence agreement with a third party licensor. In some cases, a licence agreement also exists between the licensor and seller/manufacturer.
4. For the purpose of making a determination under Article 8.1 (c), it is important to examine the relevant licence and sales agreements. These agreements often contain crucial information needed to determine whether a licence fee meets the criteria under Article 8.1 (c). The licence agreement pertaining to the payment of the fee will generally specify what the licence covers and the terms and conditions thereof. It thus provides pertinent information needed to determine whether the fee relates to the imported goods and, in some cases, whether payment of the fee is a condition of sale of the imported goods. The sales agreement will specify the terms and conditions related to the sale for export and may give some indication of whether the payment of the fee is a condition of sale.
5. In situations where a licence fee is paid to a third party it is considered unlikely that the fee would be included in the price actually paid or payable under Article 1. In view of this, the licence fees are deemed not to be included in the price actually paid or payable for the purposes of this Commentary. The analysis therefore focuses on the two main questions regarding the application of Article 8.1 (c) :
 - (a) is the royalty related to the goods being valued; and,
 - (b) is the royalty paid as a condition of sale of the goods being valued ?

Determining whether a licence fee is related to the goods being valued

6. There are various circumstances in which a licence fee may be considered to relate to the goods being valued. The most common is when the imported goods incorporate the intellectual property and/or are manufactured using the intellectual property covered by the licence. For example, if the imported goods incorporate the trademark for which the royalty is paid, this would indicate that the royalty relates to the imported goods. Another indication would be where rights conferred under the royalty agreement relate to the production or sale for export of the imported goods. An example of this would be a payment for the right to manufacture, import or distribute

the licensed goods.

7. A further indication is that the amount of the licence fee is calculated based on the buyer's/importer's net sales price of the imported goods within the territory of the country of importation. Also, the fact that the licence fees are paid as a fixed annual amount cannot indicate that the licence fee is not related to the goods being valued.

Determining whether a licence fee is paid as a condition of sale of the goods being valued

8. With regard to the issue of whether the buyer must pay the licence fee as a condition of sale of the imported goods, a key question is whether the buyer could not purchase the imported goods without paying the licence fee. When the licence fee is paid to the seller of the imported goods or to a party related to the seller of the imported goods, it is more likely that it can be demonstrated that the fee is paid as a condition of sale than when it is paid to a third party unrelated to either the buyer or seller. [See Advisory Opinion 4.11 in which payment of a royalty by the buyer to a party related to the seller was considered a condition of sale]. However, there can be various situations where royalties are considered a condition of sale even when they are paid to a third party. Therefore, each situation must be analyzed based on all the facts presented; including the sales and licence agreements, related documents and relevant legal elements.
9. The clearest indication that the buyer could not purchase the imported goods without paying the licence fee would be where the sales documentation for the imported goods includes an explicit statement that the buyer must pay the licence fee as a condition of sale. Such a reference would be determinative in deciding whether a licence fee was paid as a condition of sale. The Technical Committee recognizes, however, that it is unlikely for the sales documentation to include such an explicit provision, particularly where the licence fee is paid to a party unrelated to the seller, and does not consider such an omission to be determinative. It is therefore usually necessary to consider other factors to determine whether payment of the licence fee is made as a condition of sale, as follows:

a) Review of facts surrounding the transaction and licence agreement

The Technical Committee is of the view that whether the buyer could not purchase the imported goods without paying the licence fee depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales and licence agreements and other pertinent information.

Various factors can be considered to establish whether the buyer could not purchase the imported goods without paying the licence fee. These may include, inter alia :

- A reference to the licence fee in the sales agreement or related documents
- A reference to the sale of the goods in the licence agreement
- The licence and sales agreements were executed on the same date.
- The sales agreement can be terminated as a consequence of breaching the licence agreement because the buyer does not pay the licence fee to the licensor. This would indicate the linkage between the royalty payment and the sale of the goods being valued and the royalty payment is a condition of sale.
- There is a stipulation in the royalty agreement indicating that if royalties are not paid,

the manufacturer is forbidden to manufacture goods incorporating the licensor's intellectual property for the importer.

- [It is more likely that the buyer could not purchase the imported goods without paying the royalty where the licence agreement includes the right to manufacture and import those goods than when it covers only the right to distribute the goods in the country of importation.]
- Where a buyer has not been granted the licence to manufacture the goods by the licensor and purchases the goods from a seller who has been authorized by the licensor to manufacture the goods, it is highly likely that the seller is allowed to sell the goods only to the buyer who has been approved by the licensor. In such a case the seller will not sell the goods to the buyer if the buyer does not pay the royalty.

The existence of one or more of these factors can be indicative in determining whether the payment of the royalty is considered to be a condition of sale.

b) Degree of control exercised by the licensor over the manufacturing process and/or sale of the imported goods

The degree of control exercised by the licensor over the manufacturing process and/or sale of the imported goods is another factor which may be considered in order to determine whether the royalty is paid as a condition of sale. Such control could be evaluated by considering all the facts surrounding the functions undertaken by the licensor in relation to the manufacturing process and sale of the goods. The degree of control exercised by the licensor in this regard would be regarded as a significant factor which has a determining effect.

It is common for a licensor to exercise some quality control over the manufacture and sale of goods that bears its trademark, e.g. the right to review samples and prototypes selected from production, the right to set quality standards, etc. In general, such quality control does not, by itself, necessarily mean that the payment of the royalty is a condition of the sale. If the licensor exercises substantial control over certain aspects of the manufacture and/or sale of the imported goods, then the Technical Committee is of the view that such control could be an indication that the payment of the royalty is a condition of the sale of the imported goods.

Another indicator that can point to the involvement of the licensor in the sale of the imported goods is when the licensor authorizes the terms of the agreement between the manufacturer and the importer.

[In contrast, an indicator which may determine that the royalties are not paid as a condition of the sale is when the licensor declares that he has no interest in the imported goods including their manufacturing process, quality, design etc.]

10. [If, in analyzing the above factors, it is determined that the payment of the royalty is a condition of sale of the goods being valued, the payment should be included in the transaction value as an addition to the price actually paid or payable.]
11. [On the other hand, if, in analyzing the above factors, it is determined that the payment of the royalty is not a condition of sale of the goods being valued, the payment should not be included in the transaction value as an addition to the price actually paid or payable.]

12. [A further consideration in determining the transaction value of sales involving royalties is whether or not any designs, specifications, plans etc. used in the manufacture of the licensed products should be included in the customs value as “assists” under Article 8.1 (b). Further analysis may be necessary to examine this point].
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TECHNICAL COMMITTEE
 ON CUSTOMS VALUATION

-
 29th Session
 -

VT0711E1a
 (+ Annex)

O. Eng.

Brussels, 25 September 2009.

STUDY ON ROYALTIES AND LICENCE FEES : STUDY BASED ON CASES SUBMITTED

BY CANADA AND JAPAN - DRAFT COMMENTARY

(Item VI (a) on the Agenda)

Reference documents :

VT0433E1a (TCCV/20)	VT0576E1a (TCCV/25)
VT0440E1c (TCCV/20 . Report)	VT0589E1a (TCCV/25)
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VT0481E1a (TCCV/22)	VT0609E1a (TCCV/26)
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VT0564E1c (TCCV/24 . Report)	VT0678E1a (TCCV/28)
VT0575E1a (TCCV/25)	VT0686E1b (TCCV/28 . Draft Report)
VT0575E1a (TCCV/25)	VT0699E1a (TCCV/29)

I. SECRETARIAT COMMENTS

1. Following the 28th Session, the Secretariat issued a revised version of the draft General Commentary, based on discussions at that Session. This document was issued in Doc. VT0699E1a and Members were invited to submit written comments accordingly.
2. In response, written comments have been received from Australia, Canada, Israel, Japan and the United States. These comments are reproduced below. The Secretariat thanks those Members for their comments.

For reasons of economy, documents are printed in limited number. Delegates are kindly asked to bring their copies to meetings and not to request additional copies.

VT0711E1a

3. To assist consideration by the Technical Committee, a revised version of the draft General Commentary has been prepared indicating in **bold** specific drafting proposals made by Members and the Secretariat and is attached as Annex I to this document.
4. It was agreed at the 28th Session that the draft Case Studies which had been developed by the Technical Committee, but not finalised, were to be treated as part of the ongoing work. For purposes of economy, the draft Case Studies are not reproduced in this document. The relevant current versions are contained in Annexes I, II and III to Doc. VT0670E1a.

II. MEMBERS' COMMENTS

COMMENTS BY AUSTRALIA

5. Australia thanks the Secretariat for its work in preparing the new working document (Doc. VT0699E1a) and offers the following comments.

Paragraph 9(b)
6. Paragraph 9(b) of the draft commentary states that a licensor authorising the terms of the sales agreement between the manufacturer and an importer points to the involvement of the licensor in the sale of the imported goods. The draft commentary suggests that this indicates that the payment of the royalty may have been a condition of sale of the goods.
7. Australia does not consider the licensor's authorisation of the terms and conditions of the agreement between the manufacturer and importer as implying that the payment of a royalty is a condition of the sale. The authorisation of the terms of the sale agreement by a third party normally takes place prior to the signing of the agreement. The agreement will be signed by the parties after the authorisation of the terms by the licensor. Once the agreement has been executed by the manufacturer and importer, the licensor does not necessarily exercise any control over the sale or the manufacture of the imported goods.
8. Australia anticipates that it will have additional comments to make in respect of this matter at the 29th Session.

COMMENTS BY CANADA

9. The Secretariat notes that the comments from Canada are all drafting suggestions and have therefore incorporated them directly into the revised draft General Commentary in Annex I. They are reproduced in full in Annex II.

COMMENTS BY ISRAEL

10. The Israeli Customs Administration would like to submit the following comments to doc VT0699E1a:

Paragraph 9(a)
11. The indents in this paragraph were written under the assumption that the sales documentation does not include an explicit statement that the buyer must pay the license fee as a condition of sale. Thus, Indent 4 can be mistakenly understood as referring to the sales

2.

contract. Therefore we propose to clarify indent 4 by beginning with the words: "According to the facts,".

Paragraph 9(b)

12. The last sentence added to the first section: "The degree of control exercised by the licensor in this regard would be regarded as a significant factor which has a determining effect." (hereinafter – "the sentence") gives a new meaning to the commentary in a sense that if there is no control exercised by the licensor, then the license fee is not a condition of sale and vice versa. This approach leaves the rest of the commentary unnecessary since the only factor to be considered is the degree of control.
13. Moreover, the degree of control is a factor that is problematic for customs administrations to verify, since the control is practiced by foreign parties outside the country of importation. Therefore, the Israeli Customs Administration is reluctant to regard the control factor as the only factor to be considered.
14. With regard to the wording of the sentence, it is not compatible with the rest of the section, in the second sentence it is indicated that "the degree of control may be considered in order to determine whether the royalty is paid as a condition of sale." In the sentence it is indicated that "the degree of control exercised by the licensor in this regard would be regarded as a significant factor which has a determining effect."
15. In light of the above, we suggest revising the sentence, as follows: "The control exercised by the licensor in this regard may be regarded as a significant factor which has a determining effect, i.e. if such control exists then the royalty is paid as a condition of sale. If such control does not exist, other factors will be examined."

COMMENTS BY JAPAN

16. Japan thanks the Secretariat for its work in revising the draft commentary.

General comments

17. Cases submitted by Canada and Japan should be annexed.

Specific comments

Paragraph 8

18. The expression "relevant legal elements" in the last sentence should be more specific.

Paragraph 9(a)

19. The third hyphen should make it clear by adding explanation of why it can establish whether the buyer could not purchase the imported goods without paying the licence fee.
20. The sixth hyphen could be deleted because the type of rights, by themselves, does not necessarily establish whether the buyer could not purchase the imported goods without paying the license fee. Regardless of the type of rights, License fees for any of the rights should be added to the price actually paid or payable as long as they are paid as a condition of sale.

VT0711E1a

21. The last hyphen could be deleted. Instead, the following factors should be added to this section :

- The licensor allows a buyer to purchase licensed goods only from the particular seller designated by the licensor;
- The licensor allows a seller to sell licensed goods only to licensee(s);
- A buyer cannot submit purchase orders of licensed goods directly to a seller, and all the purchase orders must be submitted to the seller through the licensor.

Paragraph 9(d)

22. The last paragraph in square brackets could be deleted. The text should list factors that could establish/support the payment of the license fee being made as a condition of sale.

COMMENTS BY UNITED STATES

23. The United States thanks the Secretariat for its work in revising the draft Commentary and the members for their efforts in attempting to shed additional light on the definition of the term “condition of sale” for purposes of Article 8.1(c) of the Agreement. However, it is our position that the control provisions discussed in the draft Commentary and the case studies annexed thereto do not constitute a condition of sale.

24. As a general matter, the U.S. considers that royalties and license fees paid to unrelated third parties for use in the country of importation of copyrights or trademarks related to the imported goods represent selling expenses of the buyer and, consequently, are not included in transaction value. This position is set forth in the legislative history of the U.S. implementation of the Agreement and in numerous administrative rulings.

Paragraph 9

25. The penultimate sentence of paragraph 9 states that it is unlikely that the sales documentation will include an explicit provision requiring payment of the license fee, particularly where the license fee is paid to a party unrelated to the seller, and notes that such an omission is not considered to be determinative. The use of the word “omission” in the draft implies that the absence of an explicit provision was error. Given that the seller and licensor are unrelated we regard this inference as unwarranted.

Paragraph 9(a)

26. This paragraph identifies factors to be considered in determining whether the buyer could purchase the goods without paying the fee. Among these is the situation where the buyer has not been licensed to use the mark but, instead, purchases the imported goods from a seller that is authorized to manufacture goods bearing the mark. The draft notes that “[i]n such a case, the seller will not sell the goods to the buyer if the buyer does not pay the royalty.” The U.S. questions this assumption. If the buyer does not have a license to use the mark there would be no question of it paying a royalty in the first instance. If the buyer is licensed to sell – but not manufacture – goods bearing the mark, then in accordance with the Note to Article 8.1(c) the royalty should not be added.

Paragraph 9(b)

27. Paragraph 9(b) of the draft Commentary states that the degree of control exercised by the licensor over the manufacturing process and/or the sale of the goods is a factor to be

considered in determining whether a royalty is paid as a condition of sale. The U.S. does not share this view. Rather, we consider that there would have to be a contractual nexus between the payment of the royalty and the sale of the imported goods in order for an addition to be made under Article 8.1(c), e.g., a reference in the sales agreement to the payment of the royalty.

28. In certain countries – and particularly in common law countries where trademark rights derive primarily through “use” rather than by registration – trademark law¹ imposes a duty on the trademark owner to control the quality of the goods sold under the mark. It is generally insufficient merely to possess the right to control quality; the licensor must have actual control, or control in fact. A licensor who does not exercise sufficient quality control over all aspects of the manner in which goods reach the ultimate consumer risks abandoning or losing the mark. In order to guard against this possibility, trademark licenses often include a number of specific clauses through which the licensor exercises control over the licensee’s use of the mark. Viewed from this perspective, the U.S. considers the quality control provisions described in the draft Commentary and the underlying case studies to be standard features of trademark licensing agreements. Moreover, given a trademark owner’s duty to exercise control, it is extremely unlikely that in licensing its mark it would disclaim any interest in the quality of the goods as currently suggested in the fourth subparagraph of 9(b). In view of this, we consider that the subparagraph should be deleted.
29. The U.S. is therefore unclear as to what is meant by “substantial control” inasmuch as trademark law typically requires a licensor to exert control over the licensee and the use of the mark. Such control, while often substantial, is necessary to protect the mark. For this reason we submit there is no basis for distinguishing between degrees of control. Control is a fundamental element of trademark licensing agreements. Control over quality ensures that the licensor is the “source” of the goods that is needed to protect the mark, and the question of how much control is required will depend on the circumstances of the particular case. To the extent that licensing agreements are becoming increasingly complex, the “substantial control” theory would render virtually all royalties and license fees a condition of sale. It is surely inconsistent with the principle, set forth in the Agreement, of “simple and equitable criteria consistent with commercial practices,” to include a royalty or license fee in customs value simply because the licensor exerts “substantial” control, when control is compelled by the legal requirement to protect the mark.
30. Further, quality control exercised by a licensor does not constitute “control” for purposes of Article 15.4(e). In this regard, Explanatory Note 4.1 provides in pertinent part that “Article 15.4(e) must normally be taken to apply to situations which go beyond usual buyer/seller or distribution arrangements and involve a position to exercise restraint or direction in respect of essential aspects relating to the management of the activities of the other person.” Quality control exercised by a licensor in respect of a trademark does not constitute restraint or direction over the management of the seller.
31. We are also of the view that in a situation involving unrelated parties, the licensee’s obligation to pay the royalty cannot be imputed to the seller absent some contractual nexus. If the buyer/licensee failed to pay the royalty, the licensor would have an action for breach of the license agreement. However, the seller is not a party to the license agreement and the royalty is not due until the goods are resold in the country of importation. Thus, while the licensor could sue the licensee for breach of the license agreement it could not sue the seller. Similarly, absent an express provision in the sales agreement conferring an obligation on the seller to pay the royalty in the event of the buyer/licensee’s default, the licensor would have no basis in commercial or contract law to sue the seller for the payment of the royalty.

¹ Since all three of the underlying case studies concern trademarks we refer specifically to trademarks for purposes of this discussion.

32. Accordingly, we think it is unambiguous that where a royalty is paid by the buyer to a third party unrelated to the seller and there is no provision in either the sales agreement or the license agreement that would require the seller to pay the royalty, the royalty is not a condition of the sale between the buyer and seller. We also find no support in the Agreement for the proposition that that quality control exercised by an unrelated third party licensor constitutes a condition of sale between the buyer and seller. Absent some nexus between the payment of the royalty and the sale of the imported goods this suggests a notional concept of value.
33. Given the breadth of views that exists in respect of the issue raised by the draft Commentary, we suggest that the Technical Committee may wish to consider whether further work on this matter is warranted. However, we note that while there may not be consensus in respect of the particular issue, the Technical Committee has provided considerable guidance regarding the addition for royalties and license fees under Article 8.1(c). In view of this, we suggest that no further guidance is necessary and that, consequently, this matter be moved to part III of the Conspectus.
34. The U.S. may have additional comments in respect of this matter at the 29th Session.

III. CONCLUSION

35. The Technical Committee is invited to examine the draft document and continue its discussions on this issue, taking into account the written comments of Members.

* * *

THIRD PARTY ROYALTIES AND LICENCE FEES - GENERAL COMMENTARY

1. The purpose of this document is to provide guidance regarding the interpretation and application of Article 8.1 (c) in cases where a royalty or licence fee is paid to a third-party licensor.
2. Under Article 8.1 (c) of the Agreement, royalties and licence fees (licence fee) are to be added to the price actually paid or payable for the imported goods where they are 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 licence fees are not included in the price actually paid or payable.
3. A common issue occurring in international trade is where the licence fee is paid to a third party, that is, a party other than the seller of the imported goods. Typically in these scenarios, the buyer/importer enters into a sales contract with the seller/manufacturer and also enters into a licence agreement with a third party licensor. In some cases, a licence agreement also exists between the licensor and seller/manufacturer.
4. For the purpose of making a determination under Article 8.1 (c), it is important to examine **[all]** the relevant **[documents, including royalty,]** licence and sales agreements. These agreements often contain crucial information needed to determine whether a licence fee meets the criteria under Article 8.1 (c). The **[royalty or]** licence agreement pertaining to the **[terms agreed to between the licensor and licensee and the]** payment of the fee will generally specify what the **[royalty or]** licence covers and the terms and conditions thereof. It thus provides pertinent information needed to determine whether the fee relates to the imported goods and, [in some cases], whether payment of the fee is a condition of sale of the imported goods. The sales agreement will specify the terms and conditions related to the sale for export and may give some indication of whether the payment of the fee is a condition of sale. **(Canada)**
5. In situations where a **[royalty or]** licence fee is paid to a third party it is considered unlikely that the fee would be included in the price actually paid or payable under Article 1. In view of this, the **[royalty or]** licence fees are deemed not to be included in the price actually paid or payable for the purposes of this Commentary. **(Canada)** The analysis therefore focuses on the two main questions regarding the application of Article 8.1 (c) :
 - (a) is the royalty related to the goods being valued; and,
 - (b) is the royalty paid as a condition of sale of the goods being valued?

Determining whether a licence fee is related to the goods being valued

6. There are various circumstances in which a **[royalty or]** licence fee may be considered to relate to the goods being valued. **(Canada)** The most common is when the imported goods incorporate the intellectual property and/or are manufactured using the intellectual property covered by the licence. For example, if the imported goods incorporate the trademark for which the royalty is paid, this would indicate that the royalty relates to the imported goods. Another indication would be where rights conferred under the royalty agreement relate to the production or sale for export of the imported goods. An example of this would be a payment for the right to manufacture, import or distribute the licensed goods.

7. A further indication is that the amount of the licence fee is calculated based on the buyer's/importer's net sales price of the imported goods within the territory of the country of importation. Also, the fact that the licence fees are paid as a fixed annual amount cannot indicate that the licence fee is not related to the goods being valued.

Determining whether a licence fee is paid as a condition of sale of the goods being valued

8. With regard to the issue of whether the buyer must pay the **[royalty or]** licence fee as a condition of sale of the imported goods, a key question is whether the buyer could not purchase the imported goods without paying the **[royalty or]** licence fee. **(Canada)** When the licence fee is paid to the seller of the imported goods or to a party related to the seller of the imported goods, it is more likely that it can be demonstrated that the fee is paid as a condition of sale than when it is paid to a third party unrelated to either the buyer or seller. [See Advisory Opinion 4.11 in which payment of a royalty by the buyer to a party related to the seller was considered a condition of sale]. However, there can be various situations where royalties are considered a condition of sale even when they are paid to a third party. Therefore, each situation must be analyzed based on all the facts presented; including the sales and licence agreements, related documents and **[relevant legal elements (Japan comment) Secretariat proposal: relevant legal requirements and obligations]**.
9. The clearest indication that the buyer could not purchase the imported goods without paying the licence fee would be where the sales documentation for the imported goods includes an explicit statement that the buyer must pay the licence fee as a condition of sale. Such a reference would be determinative in deciding whether a licence fee was paid as a condition of sale. The Technical Committee recognizes, however, that it is unlikely for the sales documentation to include such an explicit provision, particularly where the licence fee is paid to a party unrelated to the seller, and does not consider **[such an omission (United States comment) Secretariat proposal: the absence of such a provision]** to be determinative. It is therefore usually necessary to consider other factors to determine whether payment of the licence fee is made as a condition of sale, as follows:

a) Review of facts surrounding the transaction and licence agreement

The Technical Committee is of the view that whether the buyer could not purchase the imported goods without paying the **[royalty or]** licence fee depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales and licence agreements and other pertinent information.

Various factors can be considered to establish whether the buyer could not purchase the imported goods without paying the **[royalty or]** licence fee. **(Canada)** These may include, inter alia :

- A reference to the licence fee in the sales agreement or related documents
- A reference to the sale of the goods in the licence agreement
- **[The licence and sales agreements were executed on the same date (Japan comment) Secretariat proposal: which is an indicator that their execution was coordinated and that they may be linked to one another]**
- **[According to the facts, (T)the] (Israel)** sales agreement can be terminated as a consequence of breaching the licence agreement because the buyer does not pay the licence fee to the licensor. This would indicate the linkage between the royalty payment and the sale of the goods being valued and the royalty payment is a condition of sale
- There is a stipulation in the royalty agreement indicating that if royalties are not paid,

the manufacturer is forbidden to manufacture goods incorporating the licensor's intellectual property for the importer

- ~~[It is more likely that the buyer could not purchase the imported goods without paying the royalty where the licence agreement includes the right to manufacture and import these goods than when it covers only the right to distribute the goods in the country of importation.] **Japan proposes deletion.**~~
- ~~[Where a buyer has not been granted the licence to manufacture the goods by the licensor and purchases the goods from a seller who has been authorized by the licensor to manufacture the goods, it is highly likely that the seller is allowed to sell the goods only to the buyer who has been approved by the licensor. In such a case the seller will not sell the goods to the buyer if the buyer does not pay the royalty. **Japan proposes deletion and addition of following points:**~~
 - **The licensor allows a buyer to purchase licensed goods only from the particular seller designated by the licensor;**
 - **The licensor allows a seller to sell licensed goods only to licensee(s);**
 - **A buyer cannot submit purchase orders of licensed goods directly to a seller, and all the purchase orders must be submitted to the seller through the licensor]**

~~[While not exhaustive, the] (Canada)~~ existence of one or more of these factors can be indicative in determining whether the payment of the royalty is considered to be a condition of sale.

b) Degree of control exercised by the licensor over the manufacturing process and/or sale of the imported goods

The degree of control exercised by the licensor over the manufacturing process and/or sale of the imported goods is another factor which may be considered in order to determine whether the royalty is paid as a condition of sale. Such control could be evaluated by considering all the facts surrounding the functions undertaken by the licensor in relation to the manufacturing process and sale of the goods. ~~[The degree of control exercised by the licensor in this regard would be regarded as a significant factor which has a determining effect. While it is incumbent on all licensors to protect and control their trademark or brand, how much control is exercised by the licensor can have a determining effect.] (Canada) [The control exercised by the licensor in this regard may be regarded as a significant factor which has a determining effect, i.e. if such control exists then the royalty is paid as a condition of sale. If such control does not exist, other factors will be examined.] (Israel)~~

It is common for a licensor to exercise some quality control over the manufacture and sale of goods that bears its trademark, e.g. the right to review samples and prototypes selected from production, the right to set quality standards, etc. In general, such quality control does not, by itself, necessarily mean that the payment of the royalty is a condition of the sale. If the licensor exercises ~~[substantial]~~ control over certain aspects of the manufacture and/or sale of the imported goods, **[by providing goods and services described in Article 8.1(b) or directs the purchaser to source goods and services from a particular supplier or manufacturer,]** then the Technical Committee is of the view that such control could be an indication that the payment of the royalty is a condition of the sale of the imported goods. **(Canada)**

Another indicator that can point to the involvement of the licensor in the sale of the imported goods is when the licensor authorizes the terms of the agreement between the manufacturer and the importer.

~~[In contrast, an indicator which may determine that the royalties are not paid as a condition of the sale is when the licensor declares that he has no interest in the imported goods including their manufacturing process, quality, design etc.] **Japan proposes deletion**~~

10. [If, in analyzing the above factors, it is determined that the payment of the royalty is a condition of sale of the goods being valued, the payment should be included in the transaction value as an addition to the price actually paid or payable.]
11. [On the other hand, if, in analyzing the above factors, it is determined that the payment of the royalty is not a condition of sale of the goods being valued, the payment should not be included in the transaction value as an addition to the price actually paid or payable.]
12. [A further consideration in determining the transaction value of sales involving royalties is whether or not any designs, specifications, plans etc. used in the manufacture of the licensed products should be included in the customs value as “assists” under Article 8.1 (b). Further analysis may be necessary to examine this point].

* * *

**Document VT0699E1a
Third Party Royalties and Licence Fees**

Comments by Canada

Drafting suggestions

4. For the purpose of making a determination under Article 8.1 (c), it is important to examine **all** the relevant **documents, including royalty**, licence and sales agreements. These agreements often contain crucial information needed to determine whether a **royalty or** licence fee meets the criteria under Article 8.1 (c). The **royalty or** licence agreement pertaining to the **terms agreed to between the licensor and licensee and the** payment of the fee will generally specify what the **royalty or** licence covers and the terms and conditions thereof. It thus provides pertinent information needed to determine whether the fee relates to the imported goods and, [in some cases], whether payment of the fee is a condition of sale of the imported goods. The sales agreement will specify the terms and conditions related to the sale for export and may give some indication of whether the payment of the fee is a condition of sale.
5. In situations where a **royalty or** licence fee is paid to a third party it is considered unlikely that the fee would be included in the price actually paid or payable under Article 1. In view of this, the **royalty or** licence fees are deemed not to be included in the price actually paid or payable for the purposes of this Commentary. The analysis therefore focuses on the two main questions regarding the application of Article 8.1 (c):
 - a. is the royalty related to the goods being valued; and,
 - b. is the royalty paid as a condition of sale of the goods being valued?
6. There are various circumstances in which a **royalty or** licence fee may be considered to relate to the goods being valued. The most common...
8. With regard to the issue of whether the buyer must pay the **royalty or** licence fee as a condition of sale of the imported goods, a key question is whether the buyer could not purchase the imported goods without paying the **royalty or** licence fee. When the licence fee...
9.
 - a) **Review of facts surrounding the transaction and licence agreement**

The Technical Committee is of the view that whether the buyer could not purchase the imported goods without paying the **royalty or** licence fee depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales and licence agreements and other pertinent information. Various factors can be considered to establish whether the buyer could not purchase the imported goods without paying the **royalty or** licence fee. These may include inter alia:

- A reference to the licence fee...
- Where a buyer has not been granted the licence to manufacture the goods by the licensor and purchase the goods from a seller who has been authorized by the

licensor to manufacture the goods, it is highly likely that the seller is allowed to sell the goods only to the buyer who has been approved by the licensor. In such a case the seller will not sell the goods to the buyer if the buyer does not pay the royalty. **While not exhaustive**, the existence of the one or more of these factors can be indicative in determining whether the payment of the royalty is considered to be a condition of sale.

b) Degree of control exercised by the licensor over the manufacturing process and/or sale of the imported goods

The ~~degree of control~~ exercised by the licensor over the manufacturing process and/or sale of the imported goods is another factor which may be considered in order to determine whether the royalty is paid as a condition of sale. Such control could be evaluated by considering all the facts surrounding the functions undertaken by the licensor in relation to the manufacturing process and sale of the goods. **While it is incumbent on all licensors to protect and control their trademark or brand, how much control is exercised by the licensor can have a determining effect.**

It is common for a licensor to exercise some quality control over the manufacture and sale of goods that bears its trademark, e.g. the right to review samples and prototypes selected from production, the right to set quality standards, etc. In general, such quality control does not, by itself, necessarily mean that the payment of the royalty is a condition of the sale. If the licensor exercises ~~substantial~~ control over certain aspects of the manufacture and/or sale of the imported goods, **by providing goods and services described in Article 8.1[b] or directs the purchaser to source goods or services from a particular supplier or manufacturer**, then the Technical Committee is of the view that such control could be an indication that the payment of the royalty is a condition of the sale of the imported goods.



The transactional net margin method ("TNMM")

www.oecd.org/ctp/tp

Caroline Silberstein
Head, Transfer Pricing Unit
OECD Centre for Tax Policy and
Administration

Background: the arm's length principle

- Article 9 of the OECD and UN Model Tax Conventions

Article 9 ASSOCIATED ENTERPRISES

1. Where

- an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or
- the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, (...)

Article 9 ASSOCIATED ENTERPRISES

(...) and in either case **conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises**, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.



The importance of “comparability analysis”

- The arm’s length principle is based on a comparison of the conditions of a controlled transaction with the conditions of a comparable uncontrolled transaction
- Comparability analysis is the corner stone of transfer pricing analyses
- “Comparable” means no material difference between the controlled and uncontrolled transactions – or differences can be adjusted through reasonably accurate adjustments



The comparability analysis:

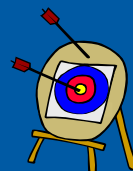
- 5 comparability factors:
 - A. Characteristics of products / services
 - B. Functions performed, assets used and risks assumed by each party to the transaction = « Functional analysis »**
 - C. Contractual terms
 - D. Economic circumstances
 - E. Business strategies



OECD transfer pricing methods:

3.1 Three « traditional » methods:

- Comparable Uncontrolled Price
- Resale Price Minus
- Cost plus



3.2 Transactional profit methods

- Transactional net margin method
- Profit split (contribution or residual profit split)

3.3 Other methods




OECD transfer pricing methods:

- In the 1995 TP Guidelines, preference for traditional transaction methods; transactional profit methods to be used in exceptional cases where traditional methods are not workable.
- In practice, however, increasing importance of profit methods:
 - » **TNMM**: due to a better reliability of net margin information on comparables than gross margin information / CUPs; and because it ensures an “appropriate” level of tax base in each country
 - » **Profit split**: for highly integrated transactions with valuable intangibles both sides




OECD transfer pricing methods:

- In the **proposed** revision of the TP Guidelines (discussion draft posted for public comment on www.oecd.org/ctp/tp/cpm on 9th September 2009), proposal to move away from the strict hierarchy towards a standard whereby the selected transfer pricing method should be the “**most appropriate method to the circumstances of the case**”.



The selection of the “most appropriate method to the circumstances of the case” would be based on 4 factors:

- Respective strengths and weaknesses of each of the OECD recognised methods;
- **Appropriateness of the method considered in view of the nature of the controlled transaction, determined in particular through a functional analysis;**
- Availability of reasonably reliable information (in particular on uncontrolled comparables) in order to apply the selected method and / or other methods; and
- Degree of comparability of controlled and uncontrolled transactions, including the reliability of comparability adjustments that may be needed to eliminate differences between them.



The selection of the “most appropriate method to the circumstances of the case” would be based on 4 factors:

- Where, based on the 4 above criteria, it is found that the Comparable Uncontrolled Price method and another method can be applied in an **equally reliable manner**
⇒ **CUP**
- Where, based on the 4 above criteria, it is found that a traditional transaction method and a transactional profit method can be applied in an **equally reliable manner**
=> **traditional transaction method**



OECD transfer pricing methods:

Other methods:

- MNE groups retain the freedom to apply methods not described in the TP Guidelines (but need explanation)

Use of more than one method:

- The arm's length principle does not require the application of more than one method for a given transaction (or set of aggregated transactions)

The “tested party”

- Cost plus, Resale price, TNMM are one sided methods i.e. a financial indicator is tested for one party to the transaction only.
- This party is “the tested party”.
- It is generally the one that has the less complex functional analysis (e.g. contract manufacturer, distributor, service provider, subject to an examination of the facts and circumstances of the case).

Selection of the most appropriate method to the circumstances of the case:		
If reasonably reliable CUP available	⇒CUP	
If no reasonably CUP available:		
One party to the transaction performs benchmarkable functions (e.g. manufacturing, distribution, services) with no valuable, unique intangible asset / risk	⇒One sided method ⇒Choice of the tested party (seller / purchaser)	
The tested party is the seller (e.g. contract manufacturing or provision of services)	⇒Cost plus ⇒Cost based TNMM ⇒Asset based TNMM	⇒ If Cost plus and TNMM can be applied in an equally reliable manner: Cost plus
The tested party is the buyer (e.g. marketing / distribution)	⇒Resale price ⇒Sales based TNMM	⇒ If Resale price and TNMM can be applied in an equally reliable manner: Resale price
Each of the parties to the transaction contribute valuable unique intangibles / risks	⇒ Two-sided method ⇒Profit split	

THE TRANSACTIONAL NET MARGIN METHOD

TNMM – Definition

- Examines the **net profit margin**
 - relative to an appropriate base (e.g.. costs, sales, assets)
 - that a taxpayer realizes from a controlled transaction
 - or transactions that are appropriate to aggregate.
- Can be ex ante (price setting) or ex post (outcome testing)

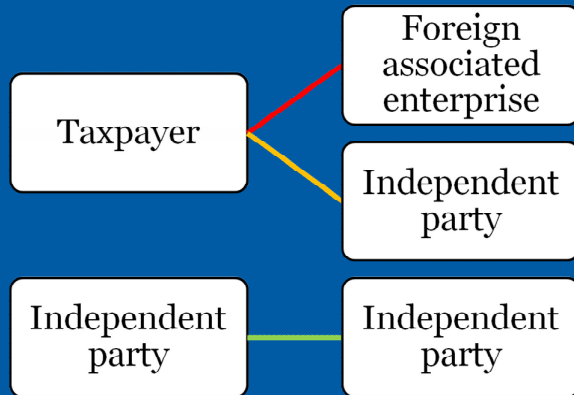
Profit & Loss Accounts

Sales
Costs of Goods Sold
Gross Profit
Operating Expenses
Net Operating Profit
Financial items
Exceptional items
Net profit before tax
Corporate income tax
Net profit after tax
(Reserve or dividend...)

net profit **margin**
 = net operating profit / appropriate base
 e.g.:
 • net operating profit/sales
 • net operating profit/ costs
 • net operating profit/ assets
 Etc.

Transactional net margin method:
 net profit margin **from the controlled transaction** (or set of transactions that can appropriately be aggregated)

TNMM: role of comparables



Controlled transaction

Internal comparable
 External comparable

TNMM: role of comparables

- The net profit margin that a taxpayer realises in a controlled transaction (i.e. in a transaction with an associated enterprise) is compared to the net profit margin from comparable uncontrolled transactions :
 - Either between the same taxpayer and an independent party (“internal comparable”);
 - Or between two independent parties (“external comparable”).

Cost Plus

Profit & Loss Accounts
Sales
Costs of Goods Sold
Gross Profit
Operating Expenses
Net Operating Profit

- Gross margin indicator
- Looks at gross profit relative to costs of goods sold

TNMM based on costs

Profit & Loss Accounts

Sales

Costs of Goods Sold

Gross Profit

Operating Expenses

Net Operating Profit

- Net profit margin indicator
- Looks at net operating profit relative to all operating expenses

Resale Price

Profit & Loss Accounts

Sales

Costs of Goods Sold

Gross Profit

Operating Expenses

Net Operating Profit

- Gross margin indicator
- Looks at gross profit relative to sales

TNMM - Resale Price

Profit & Loss Accounts

Sales

Costs of Goods Sold

Gross Profit

Operating Expenses

Net Operating Income

- Net profit margin indicator
- Looks at net operating profit relative to sales

TNMM – Profit margin indicator

- Examples on net profit margins:
 - Return on sales = net profit/sales
 - Return on costs = net profit/ total costs
 - Return on assets = net profit / operating assets



TNMM – Profit margin indicator

Selection of the denominator:

- Focused on the relevant indicator(s) of the value of the functions performed by the tested party in the controlled transaction, taking account of its assets and risks.
- Reasonably independent from TP formulation
- Capable of being measured in a reasonably reliable and consistent manner at the level of the taxpayers' controlled transactions and of the comparables

Selection of the most appropriate method to the circumstances of the case:		
If reasonably reliable CUP available	⇒CUP	
If no reasonably CUP available:		
One party to the transaction performs benchmarkable functions (e.g. manufacturing, distribution, services) with no valuable, unique intangible asset / risk	⇒One sided method ⇒Choice of the tested party (seller / purchaser)	
The tested party is the seller (e.g. contract manufacturing or provision of services)	⇒Cost plus ⇒Cost based TNMM ⇒Asset based TNMM	⇒ If Cost plus and TNMM can be applied in an equally reliable manner: Cost plus
The tested party is the buyer (e.g. marketing / distribution)	⇒Resale price ⇒Sales based TNMM	⇒ If Resale price and TNMM can be applied in an equally reliable manner: Resale price
Each of the parties to the transaction contribute valuable unique intangibles / risks	⇒ Two-sided method ⇒Profit split	



TNMM – Aggregation of taxpayer's transactions

- The arm's length principle should be applied on a transaction-by-transaction basis
- However, there are situations where separate transactions are so closely linked or continuous that they cannot be evaluated adequately on a separate basis.
- Example: licensing of manufacturing know how and supply of vital components to an associated manufacturer



TNMM – Aggregation of taxpayer's transactions

- Another example: portfolio approach, i.e. a business strategy consisting of a taxpayer's bundling certain transactions for the purpose of determining its transfer prices
- E.g. Vending machine and coffee capsules
- E.g. Printers and cartridges
- E.g. Drugs for hospitals and same drug conditioned for home care
- Etc.



TNMM – Aggregation of taxpayer's transactions

- This means that in practice the net profit margin in a TNMM is often tested at the level of a product line, business unit, division...
- In such cases, the transfer price invoiced for each individual transaction is not important. The focus is on the net profit margin earned from a basket of transactions. Often it is tested at the year end.



TNMM – Post-import adjustments

- TNMM can be used as a price setting mechanism.
- It is however more commonly used to test the outcome of the transaction at the year end.



TNMM – Post-import adjustments

- Example 1 :
- Transfer price charged to an associated distributor throughout Year N = 100
- Net profit margin of distributor at the end of Year N = 2%
- Net profit margin of comparable independent distributors = 5%
- A 3% adjustment is granted to the affiliated distributor



TNMM – Post-import adjustments

- Example 2:
- Transfer price charged to an associated distributor throughout Year N = 100
- Net profit margin of distributor at the end of Year N = 5%
- Net profit margin of comparable independent distributors = 2%
- A (-3%) adjustment is charged to the affiliated distributor

7. TNMM - Conclusion

- TNMM is a widely used TP method
- For customs purposes, the main difficulties with TNMM arise from :
- Aggregation of taxpayer's transaction for the purpose of testing the net profit margin,
- Post import adjustments,
- In some countries, possible disconnect between invoices and tax figures.

Thank you for your attention.

Any questions ?

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TECHNICAL COMMITTEE
ON CUSTOMS VALUATION-
29th Session
-VT0703E1a
(+ Annex)

O. Eng.

Brussels, 10 July 2009.

RELATED PARTY TRANSACTIONS UNDER THE AGREEMENTAND TRANSFER PRICING

(Item VI (c) on the Agenda)

Reference documents :

VT0587E1a (TCCV/25)	VT0663E1c (TCCV/27 – Report)
VT0598E1c (TCCV/25 – Report)	VT0675E1a (TCCV/28)
VT0604E1a (TCCV/26)	VT0676E1a (TCCV/28)
VT0626E1c (TCCV/26 – Report)	VT0682E1a (TCCV/28)
VT0647E1a (TCCV/27)	VT0683E1a (TCCV/28)
VT0662E1a (TCCV/27)	VT0686E1b (TCCV/28– Draft Report)

I. BACKGROUND

1. Following the decision of the Technical Committee at its 27th Session, the Secretariat prepared a working document summarizing key issues for discussion under this agenda item and providing information on the setting up of a working group, which was set out in Doc. VT0675E1a. In response to this, comments were received from Japan and the United States which were set out in Doc. VT0682E1a.
2. Moreover, the Secretariat prepared a further working document, which was set out in Doc. VT0676E1a, and included the draft case study submitted by the United States. In response to this, comments received from Japan were set out in Doc. VT0683E1a.
3. At its 28th Session, the Technical Committee examined the issue along with the case study submitted by the United States. The details of the Technical Committee's discussions can be found in paragraphs 117 to 134 of the draft Report of the 28th Session contained in Doc. VT0686E1b.
4. The Technical Committee adopted the following approach as a way forward for the 29th Session :
 - (1) During the intersession, the case study should be revised and presented at the next session;

For reasons of economy, documents are printed in limited number. Delegates are kindly asked to bring their copies to meetings and not to request additional copies.

- (2) The OECD is to make a presentation on Transfer Pricing, with specific reference to the Transactional Net Margin Method (TNMM) at the 29th Session since the case study related to TNMM;
 - (3) The other topics (key issues for discussion and establishment of a working group) would still remain on the agenda and would be discussed at a future session, if necessary.
5. The Technical Committee agreed to continue discussions at its 29th Session and asked the Secretariat to prepare a new working document based on the discussions at the 28th Session.

II. SECRETARIAT COMMENTS

6. The case study was revised by the Secretariat taking into account the discussions at the 28th Session, as well as additional suggestions from Members and the OECD, and is set out in the Annex to this document. The case study was simplified by deleting some elements which were not directly related to the issue. Furthermore, several references relating to Transfer Pricing were modified in consultation with the OECD in conformity with the OECD Transfer Pricing Guidelines.
7. The case study deals with an importer's net profit margin under TNMM for the purpose of examining the applicability of Article 1 under the Agreement. Accordingly, the Secretariat would like to invite Members comments, especially on the feasibility of applying TNMM for examining "circumstances of sale" under Article 1.2 (a) of the Agreement.
8. The Secretariat, on behalf of the Technical Committee, is inviting the OECD to make a presentation on Transfer Pricing at the 29th Session.
9. As regards other topics (key issues for discussion and establishment of a working group), the proposals from the Secretariat are contained in Annexes II and III to Doc. VT0675E1a.

III. CONCLUSION

10. Members are invited to submit their suggestions and comments to the Secretariat not later than **4 September 2009**. Comments received in response to this document will be published and circulated to Members of the Technical Committee for consideration at the 29th Session.
11. For the efficient work of the Secretariat, Members are invited to send their comments in electronic format to the extent possible. (E-mail address: valuation@wcoomd.org).

* * *

Case Study submitted by the United States

Facts of Transaction

1. ICO, a distributor of country I, purchases and imports relays from XCO, a related company of country X. XCO purchases the goods from an unrelated manufacturer in country Z. ICO does not purchase or sell any other products.
2. ICO of country I is a wholly-owned subsidiary of XCO of country X. ICO does not purchase relays from unrelated sellers. XCO does not sell relays or goods of the same class or kind to unrelated buyers. There is no indication of special circumstances set out in sub-paragraphs (a) to (c) of Article 1 of the Agreement.
3. ICO purchased from XCO 1,000 relays at 1.20 c.u. per unit, c.i.f. port of import, for the total invoiced price of 1,200.00 c.u. ICO entered its goods pursuant to transaction value, based on the value stated on the commercial invoice, which was submitted to Customs of country I.
4. Pending the final determination of customs value, Customs of country I released the goods to the importer in accordance with Article 13 of the Agreement.
5. After importation, ICO was selected for a post-clearance audit by Customs of country I. In the course of the post-clearance audit, Customs inquired whether any additional payments were made to XCO in connection with the imported goods. After reviewing additional documents submitted by ICO, Customs discovered that in addition to paying XCO for the price listed on the commercial invoice, ICO made additional payments of 50.00 c.u. to XCO for storage costs. The storage costs were paid by ICO directly to XCO for goods stored in country X at the time of the sale for export to country I. XCO invoiced the costs separately from the price of the goods.
6. Additionally, Customs discovered that ICO provided tools free of charge directly to the unrelated manufacturer in country Z, in order to produce the imported goods. The tools were acquired from a non-related company of country I and the cost which ICO incurred was 100.00 c.u. The value of these tools was not included in the invoiced price of the goods.
7. Furthermore, ICO provided Customs of country I various documents such as financial statements of ICO and XCO and detailed calculations in order to prove that the price charged in this particular transaction had not been influenced by the relationship of the parties.
8. The pertinent information received from ICO is as follows:

Sales (1,000 relays imported from XCO)	2,000.00
Cost of Goods Sold (invoice value)	<u>1,200.00</u>
Gross Profit	800.00
SG&A expenses for the sale in the country of importation	750.00
Of which	
(Tools expenses	100.00)
(Storage expenses	50.00)
 Operating Income	 50.00

Thus, ICO's operating margin is 2.50%.

9. Finally, ICO presented Customs with a transfer pricing study, prepared by an independent accounting firm on behalf of ICO. All of the products imported (relays) are included within the scope of the transfer pricing study. It is considered that the “Comparable Uncontrolled Price method”¹ does not apply because there are no comparable products sold between independent parties in comparable circumstances. Based on a “functional analysis”² of the transaction, it is found that ICO is acting as a simple distributor, performing standard distribution functions, not employing any valuable, unique intangible and not bearing any significant risk. On the other hand, it is found that, in this transaction, highly valuable intangible assets (patents and trademarks) are contributed by XCO. Furthermore, XCO is bearing the entrepreneurial risks in the transaction. On that basis, it is found that the most appropriate method to the circumstances of the case would be a “Transactional Net Margin Method”³ that would compare ICO’s operating margin with the same of comparable uncontrolled transactions. The transfer pricing study was prepared in accordance with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the Organization for the Economic Cooperation and Development (“OECD Transfer Pricing Guidelines”)
10. The transfer pricing study has not been considered by tax authorities of countries I or X. In selecting comparables for its analysis, the independent accounting firm, hired by ICO and XCO, performed a comparables search, including a review of publicly available databases.
11. The accounting firm searched for companies that perform similar functions, incur similar risks, use similar intangible assets, and sell similar products under the same or similar conditions as ICO. This search resulted in a number of potentially comparable companies chosen from the electrical apparatus and equipment, and electronic parts and equipment industries. After reviewing the companies to find the closest match possible, eight companies were selected as comparables. The eight selected distributors (the “Unrelated Distributors”) purchased the goods from unrelated sellers of country X (the “Unrelated Sellers”) and sold the goods of the same class or kind as the imported goods.
12. Additionally, the functional analysis showed that the functions performed by the eight unrelated distributors were similar to those of ICO in terms of their frequency, nature, and value. The functional analysis also identified and compared the assets employed by ICO and by the eight unrelated distributors and revealed that there is no significant levels of tangible or intangible assets among them. Furthermore, the functional analysis also showed that the risks assumed by ICO were substantially similar to those assumed by the eight distributors.
13. Based upon a comparability analysis, including a functional analysis (functions performed taking in account assets used and risks assumed), the transfer pricing study performed in accordance with the OECD Transfer Pricing Guidelines and the available data on comparable enterprises, concluded that the transfer price has to be established through a Transactional Net Margin Method (“TNMM”). Thus, ICO has a transfer pricing policy, and the company sets its prices according to the TNMM.

¹ A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

² An analysis of the functions performed (taking into account assets used and risks assumed) by associated enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions.

³ A transactional profit method that examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction.

14. With regard to eight unrelated distributors, the period for comparison was the most recent fiscal year. The arm's length range established was 0.64 to 2.79 percent, with a median of 1.93 percent (this is the arm's length range of operating margins of companies comparable to ICO). ICO's operating margin was 2.50 percent, thus, falling within the operating margin of eight external comparables.

Issues for Determination

15. What is the customs value of the imported goods as determined under Articles 1 and 8 of the Agreement?
16. Can the transfer pricing study prepared on the basis of the OECD Transfer Pricing Guidelines be used to ascertain whether the transaction value of the imported goods is not influenced by the relationship of parties under Article 1 of the Agreement?

Analysis

17. Article 1 of the Agreement states that the customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8.
18. Further, the Interpretative Note to Article 1 of the Agreement states that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The value declared by ICO at the time of importation was 1,200.00 c.u. However, based on the information provided by ICO to Customs of country I during the post-clearance audit, the price actually paid or payable for the shipment of 1,000 relays should be 1,250.00 c.u. Storage costs, in the amount of 50.00 c.u., are considered to be part of the price actually paid or payable since they are indirect payments made directly to or for the benefit of the seller at the time of the sale for export to country I.
19. Article 8 of the Agreement sets out the adjustments which are to be made to the price actually paid or payable for the imported goods when determining the transaction value. For example, the transaction value shall be adjusted for the value, apportioned as appropriate, of tools, dies, and molds and similar items used in the production of the imported goods, where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable, shall be part of the transaction value. Therefore, the value of the tools provided by ICO directly to the manufacturer to produce the imported goods, in the amount of 100.00 c.u., is included in the transaction value and constitute an addition to the price actually paid or payable under Article 8.1(b)(ii) of the Agreement.
20. Accordingly, the customs value in this case is 1,350.00 c.u., which includes the price actually paid or payable in the amount of 1,250.00 c.u. and the value of tools in the amount of 100.00 c.u.
21. However, given the concerns with the value declared at the time of importation, Customs advised ICO during the post-clearance audit that it had grounds for considering that the relationship influenced the price and that, in consultation with ICO, it would apply the tests set forth in Articles 1.2(a) and 1.2(b) in order to determine the acceptability of transaction value.

22. Based on the information obtained in the post-clearance audit, XCO does not sell to unrelated buyers; moreover, Customs does not have information about the customs value of identical or similar goods as determined under the provisions of Articles 5 and 6. Thus, the acceptability of transaction value cannot be established under Article 1.2(b). Similarly, because XCO sells only to related buyers, ICO is unable to demonstrate that the price was settled in the same manner as in sales to unrelated parties. Accordingly, ICO elects to demonstrate the acceptability of transaction value by showing that XCO's price is settled in a manner consistent with the normal pricing practices of the industry.
23. In an effort to justify the use of transaction value, ICO provided Customs with a copy of the transfer pricing study prepared in accordance with the OECD Transfer Pricing Guidelines. As discussed in the transfer pricing study, ICO uses the TNMM to set its prices.
24. As defined in OECD Transfer Pricing Guidelines, the TNMM examines the net profit margin relative to an appropriate base (e.g. costs, sales, and assets) that a related party realizes from a controlled transaction (or transactions that would be appropriate to aggregate under certain principles). The net margin of the related party from the controlled transaction should ideally be established by reference to the net margin that the same related party earns in comparable uncontrolled transactions. Where this is not possible, the net margin that would have been earned in comparable transactions by an independent enterprise may serve as a guide. The OECD Transfer Pricing Guidelines state that a functional analysis of the associated enterprise and the independent enterprise is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results.
25. In reviewing the transfer pricing study, one issue considered by Customs was whether the examination of external comparables discussed in the transfer pricing study could be regarded as being consistent with the process of examining normal industry pricing practices under the Note to Article 1.2(a), which allows Customs to conduct an analysis of profitability of similar companies in the industry. In this regard, it could be considered that the term "industry" includes the industry or industry sector that produces goods of the same class or kind as the imported goods. Customs reviewed the information contained in ICO's transfer pricing study and concluded that the products sold by comparable companies were of the same class or kind as the imported goods.
26. Further, in this case, because the transfer pricing study covered all products imported by ICO to country I, Customs determined that a breakdown of product line profitability for comparability purposes was unnecessary.
27. In this regard, Customs noted that comparable companies were chosen from the electrical apparatus and equipment, and electronic parts and equipment industries -- companies that sell the goods of the same class or kind as the imported goods. In other words, the operating margin comparison between ICO and the other comparable companies, as stated in the transfer pricing study, could be considered to be consistent with the market as a whole, thereby demonstrating that the price between ICO and XCO could have been settled in a manner consistent with the normal pricing practices of the industry.
28. Additionally, Customs was of the view that the language of Interpretative Note to Article 1.2 was broad enough to permit the use of the OECD Transfer Pricing Guidelines in determining whether the relationship influenced the price. In this instance, the functional analysis showed that there were no significant differences in functions, risks, and assets between ICO and the eight unrelated distributors. In addition, an adequate level of product comparability was observed. Thus, the operating margin on the resale of imported goods was shown to be generally the same as in the electrical apparatus and equipment and electronic parts and

equipment industries. On this basis, Customs was satisfied that ICO could meet the circumstances of the sale test based on the conclusions reached in the transfer pricing study in respect of the normal transfer pricing practices of the industry.

29. The transfer pricing study found that the arm's length range of the comparable companies' operating margins was 0.64 percent to 2.79 percent. As previously noted, ICO's operating margin was 2.50 percent. Thus, a comparison of the operating margins between ICO and other comparable companies show that the operating margin of ICO, as determined in the transfer pricing study, is equivalent or within the range of operating margin of other comparable companies. Accordingly, since all companies sell the goods of the same class or kind, the transfer pricing study supports a finding that ICO's price was settled in a manner that was consistent with the normal pricing practices of the industry.

Conclusion

30. As a result of the post-clearance audit, Customs determined that the additional payments formed part of the total payment for the goods and that an addition to the price actually paid or payable was required under Article 8. In addition, in examining the related party transactions between ICO and XCO, Customs confirmed by means of the transfer pricing study that the application of the TNMM specified in the OECD Transfer Pricing Guidelines satisfied the circumstances of sale test in the particular circumstances of this case.



TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

-
29th Session
-

VT0712E1a
(+ Annexes I to V)

O. Eng.

Brussels, 25 September 2009.

RELATED PARTY TRANSACTIONS UNDER THE AGREEMENT

AND TRANSFER PRICING

(Item VI (c) on the Agenda)

MEMBERS' COMMENTS

Reference documents:

VT0587E1a (TCCV/25)	VT0675E1a(TCCV/28)
VT0598E1c (TCCV/25 – Report)	VT0676E1a(TCCV/28)
VT0604E1a(TCCV/26)	VT0682E1a(TCCV/28)
VT0626E1c(TCCV/26 – Report)	VT0683E1a(TCCV/28)
VT0647E1a(TCCV/27)	VT0686E1b(TCCV/28- Draft Report)
VT0662E1a(TCCV/27)	VT0703E1a(TCCV/29)
VT0663E1c(TCCV/27 – Report)	

I. BACKGROUND

1. Following the decision of the Technical Committee at its 28th Session, the Secretariat prepared a working document on Related Party Transactions under the Agreement and Transfer Pricing, which was set out in Doc. VT0703E1a along with the Secretariat's comments.
2. In response to this, comments have been received from Australia, Israel, Japan and the United States. These comments are reproduced in Annexes I to IV to this document. The revised case study with Members' comments is in Annex V to this document.
3. The Technical Committee is invited to examine the issue taking into account Members' comments.

* * *

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COMMENTS BY AUSTRALIA

1. Australia would like to thank the Secretariat and the United States for the work it has undertaken in preparing paper VT0703E1A (+annex) and offers the following comments.

Simplification of case study

2. As the issue in this case study concerns the use of an importer's net profit margin under TNMM for the purpose of examining the applicability of Article 1 under the Agreement, that is, whether the relationship between the buyer and the seller has affected the price of the goods sold, Australia would like to reiterate the verbal comments made at the last meeting that elements such as storage costs and tools expenses have no relevance to the issue under consideration. It is considered that these elements could distract the Committee from the discussion of the related party transaction issue and dilute the focus on such issue. Also, the additional issues would add to the complexity of this case study.

3. Australia recommends that these extraneous issues be deleted from the case study to ensure that the case study clearly articulates whether a transfer pricing study using TNMM can be used to show that the relationship has not affected the price of the goods sold.

Australia's proposed deletions are:

4. Delete paragraphs 5 and 6.
5. From paragraph 8 delete "Of which (Tools expenses 100.00) (Storage expenses 50.00)".
6. From paragraph 18 delete "However, based on the information provided by ICO to Customs of country I during the post-clearance audit, the price actually paid or payable for the shipment of 1,000 relays should be 1,250.00 c.u. Storage costs, in the amount of 50.00 c.u., are considered to be part of the price actually paid or payable since they are indirect payments made directly to or for the benefit of the seller at the time of the sale for export to country I".
7. Delete paragraph 19 and 20.
8. From paragraph 30 delete "As a result of the post-clearance audit, Customs determined that the additional payments formed part of the total payment for the goods and that an addition to the price actually paid or payable was required under Article 8. In addition,".

Case study introduction

9. When a buyer and the seller have implemented a transfer pricing study, the initial price provided when the goods are sold is subject to possible adjustment as detailed in the transfer pricing study. This compensating adjustment may be made by a periodic and/or year-end adjustment to the customs value of imported goods. These adjustments are necessary to achieve the desired "profit target" indicated in the transfer pricing study. The post-importation adjustment may be either upward or downward.
10. This case study relates to a scenario which involves a transaction between related parties. However, the case study does not address a scenario which includes a compensating adjustment as outlined above.

11. As most of the transfer pricing matters we deal with in Australia relate to compensating adjustments as the consequence of transfer pricing, Australia considers that it may be beneficial to the Committee to address such a scenario in the introduction to the case study.
12. Australia therefore proposes the inclusion of the following paragraphs in the introduction to the case study:
13. "This case study details an importation where the importer makes a profit within the acceptable range as set by their transfer pricing study and therefore no adjustments are required.
14. There are circumstances in which importers may adjust the customs value of goods post importation when the importer of the goods makes a profit that is either greater than or less than the range agreed in the transfer pricing study. In such event, Customs is required to consider whether the transaction value method could be used to determine value of the goods after such adjustment.
15. If the transaction value method is found to be non-applicable then the other valuation methods should be considered in sequential order until an acceptable method is found."

Transactional Net Margin Method (TNMM)

16. At paragraph 24 a description of TNMM is provided. Australia considers that the case study would benefit from moving this paragraph up so that it comes after paragraph 9 where TNMM is first introduced and adding the following paragraph to precede this paragraph:
17. "TNMM is a method that requires a thorough examination of the company in question in order to determine the net profit margin relative to an appropriate base that the company realizes from a controlled transaction. As TNMM measures the relationship between net profit and an appropriate base, it is important to choose the appropriate base taking into account the nature of all the business activities."

Caveat to the case study

18. The focus of the WTO Valuation Agreement is on the valuation of imported goods, whereas transfer pricing deals with all business transactions or arrangements between associated enterprises. Therefore, the analysis undertaken for TNMM is usually on a broader basis.
19. Consequently, Australia would like to add the following caveat at the end of the case study to qualify the use of TNMM for valuation purposes:

"Caveat to the case study

20. "The problem for Customs when analyzing a transfer pricing study that uses TNMM is that the net profit of the comparable company may also come from activities other than importing goods, such as after-sales service or an inter-company loan, etc., making it difficult to accurately determine the net profit for only the imported goods.
21. The tasks of selecting comparable companies for TNMM are complex. The fact that tax authorities can take years to agree on the comparables when preparing an advanced pricing agreement illustrates the complexity of these tasks. As Customs is not involved in the preparation of the advanced pricing agreement, it will be difficult for Customs to determine whether the comparables used for the TNMM are suitable for customs valuation purposes.

22. As valuation of imported goods is governed by the requirements set out in the WTO Valuation Agreement and the tax value is determined in accordance with the OECD Guidelines, the operation of these two different sets of rules may sometimes result in different values being ascribed to imported goods for customs and taxation purposes. In such circumstances, the mere fact that a tax value differs from a customs value does not mean that one (or both) of the values are incorrect. It is important that each case be determined on a case-by-case basis and the values be assessed on their own merits by using the relevant rules or guidelines in the respective agreements.
23. This case study shows that the TNMM can sometimes be used to verify that the relationship has not affected the selling price of the goods in question.
24. However, it is evidently clear from the above that whether TNMM could be employed for valuation purposes is a question of fact that varies from case to case. Therefore, it is important that the facts of each case be thoroughly examined to determine whether TNMM could be used for valuation purposes.
25. It may not be suitable to employ the TNMM method where the comparable companies are not from the same industry or the same economy. Also, it is easier to find comparable companies for the purposes of TNMM in large economies. However, it may be difficult to find such comparables in smaller economies. Further, the transfer pricing study may use comparable companies that perform the same function. For example, the function could be importing and distributing goods, but the imported goods for this function may be different to the good considered for valuation purposes. Additionally, in some circumstances where there is no comparable company which performs the same functions, the transfer pricing study may use comparable companies from other countries. In such circumstances, it may not be suitable for Customs to use the TNMM method to determine whether the relationship has influenced the price of the goods.”
26. Attached to the end of this document is an updated version of the case study which includes all the amendments proposed by Australia.

* * *

COMMENTS BY ISRAEL

1. The Israeli Customs Administration would like to submit the following comments to Annex to Doc VT0703E1a:
2. The facts of the case study (Paragraph 11) state that the eight distributors selected to be comparables purchased the goods from unrelated sellers from country X and sold the goods of the same class or kind as the imported goods. It is assumed that the unrelated distributors sold the goods in the country I.
3. In countries that have relatively small markets, it is rare to find comparable enterprises that operate in the same countries.
4. Provision 1.30 to the OECD Transfer Pricing Guidelines,¹ states that comparables can be selected among enterprises that operate in different markets and geographic zones than the related party, assuming the markets in which they operate are comparable, differences do not have a material effect on the price, and if they do appropriate adjustments can be made.
5. Presuming customs administrations do not have information about the customs value of identical or similar goods including identical or similar goods determined under the provisions of articles 5 and 6, the Israeli Customs Administration is of the view that studies submitted to customs administrations can be based on comparable enterprises that operate in different countries.

* * *

¹ OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (1995-2000);1995, OECD publishing.

COMMENTS BY JAPAN

1. Japan appreciates the Secretariat's work in preparing the working document and revising the draft case study.

General comments on the feasibility of applying TNMM used in the case study

2. In the case study (Annex to Doc. VT0703E1a), ICO uses the TNMM to set its prices. The case concludes that Customs confirmed by means of the transfer pricing study that the application of the TNMM satisfied the circumstances of sale test. This conclusion seems to be supported by a finding that ICO's price was settled in a manner that was consistent with the "normal pricing practices of the industry". This finding seems to come from a comparison of the operating margins between ICO and other comparable companies.
3. The "normal pricing practices of the industry" mentioned above may be considered the practices of the industry in sales of goods taken place in the country of importation. However, Japan is of the view that the "normal pricing practices of the industry" set out in Note to Article 1.2 is to be considered the practices of the industry in the sale of imported goods for export to the country of importation. In light of this, Japan wonders whether the application of the TNMM used in the case can satisfy the examination of the circumstances surrounding the sale (of the imported goods for export to the country of importation) set out in Article 1.2(a).

* * *

COMMENTS BY THE UNITED STATES

1. The United States thanks the Secretariat for its work in preparing the amended case study attached as Annex to Doc. VT0703E1a.
2. The U.S. has the following changes to the text of the case study contained in Annex to Doc. VT0703E1a:

Paragraph 9: Finally, ICO presented Customs with a transfer pricing study, prepared by an independent accounting firm on behalf of ICO. In addition to relays, all of the products imported by ICO, such as relays, switches, and connectors are included within the scope of the transfer pricing study. Based on a “functional analysis¹ of the transaction, it is found that ICO is acting as a simple distributor, performing standard distribution functions, not employing any valuable, unique intangible and not bearing any significant risk. Furthermore, XCO is bearing the entrepreneurial risks in the transaction. Therefore, ICO is a tested party under this study because ICO (rather than its parent company, XCO) has less complex functions and assumes less risk. The transfer pricing study was prepared in accordance with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the Organization for the Economic Cooperation and Development (“OECD Transfer Pricing Guidelines”)

Paragraph 13: Based upon a comparability analysis, including a functional analysis (functions performed taking in account assets used and risks assumed), the transfer pricing study performed in accordance with the OECD Transfer Pricing Guidelines and the available data on comparable enterprises, concluded that the transfer price has to be established through a Transactional Net Margin Method (“TNMM”) that would compare ICO’s operating margin with the same of comparable uncontrolled transactions². Thus, ICO has a transfer pricing policy, and the company sets its prices according to the TNMM.

3. The U.S. may have additional comments in respect of this matter at the 29th Session.

* * *

¹ An analysis of the functions performed (taking into account assets used and risks assumed) by associate enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions.

² A transactional profit method that examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transactions.

Case Study submitted by the United States (with Members' comments)

[Introduction

1. This case study details an importation where the importer makes a profit within the acceptable range as set by their transfer pricing study and therefore no adjustments are required.
2. There are circumstances in which importers may adjust the customs value of goods post importation when the importer of the goods makes a profit that is either greater than or less than the range agreed in the transfer pricing study. In such event, Customs is required to consider whether the transaction value method could be used to determine value of the goods after such adjustment.
3. If the transaction value method is found to be non-applicable then the other valuation methods should be considered in sequential order until an acceptable method is found (Australia).]

Facts of Transaction

1. ICO, a distributor of country I, purchases and imports relays from XCO, a related company of country X. XCO purchases the goods from an unrelated manufacturer in country Z. ICO does not purchase or sell any other products.
2. ICO of country I is a wholly-owned subsidiary of XCO of country X. ICO does not purchase relays from unrelated sellers. XCO does not sell relays or goods of the same class or kind to unrelated buyers. There is no indication of special circumstances set out in subparagraphs (a) to (c) of Article 1 of the Agreement.
3. ICO purchased from XCO 1,000 relays at 1.20 c.u. per unit, c.i.f. port of import, for the total invoiced price of 1,200.00 c.u. ICO entered its goods pursuant to transaction value, based on the value stated on the commercial invoice, which was submitted to Customs of country I.
4. Pending the final determination of customs value, Customs of country I released the goods to the importer in accordance with Article 13 of the Agreement.
5. ~~[After importation, ICO was selected for a post-clearance audit by Customs of country I. In the course of the post-clearance audit, Customs inquired whether any additional payments were made to XCO in connection with the imported goods. After reviewing additional documents submitted by ICO, Customs discovered that in addition to paying XCO for the price listed on the commercial invoice, ICO made additional payments of 50.00 c.u. to XCO for storage costs. The storage costs were paid by ICO directly to XCO for goods stored in country X at the time of the sale for export to country I. XCO invoiced the costs separately from the price of the goods (Australia)].~~
6. ~~[Additionally, Customs discovered that ICO provided tools free of charge directly to the unrelated manufacturer in country Z, in order to produce the imported goods. The tools were acquired from a non-related company of country I and the cost which ICO incurred was 100.00 c.u. The value of these tools was not included in the invoiced price of the goods (Australia)].~~

7. Furthermore, ICO provided Customs of country I various documents such as financial statements of ICO and XCO and detailed calculations in order to prove that the price charged in this particular transaction had not been influenced by the relationship of the parties.

8. The pertinent information received from ICO is as follows:

Sales (1,000 relays imported from XCO)	2,000.00
Cost of Goods Sold (invoice value)	<u>1,200.00</u>
Gross Profit	800.00
SG&A expenses for the sale in the country of importation	750.00
[Of which	
 (Tools expenses	100.00)
 (Storage expenses	50.00)-(Australia)]
Operating Income	50.00

Thus, ICO's operating margin is 2.50%.

9. Finally, ICO presented Customs with a transfer pricing study, prepared by an independent accounting firm on behalf of ICO. [In addition to relays, Aall (the US)] of the products imported [~~(relays)~~ by ICO, such as relays, switches, and connectors (the US)] are included within the scope of the transfer pricing study. [~~It is considered that the "Comparable Uncontrolled Price method"¹ does not apply because there are no comparable products sold between independent parties in comparable circumstances (the US)]. Based on a "functional analysis"² of the transaction, it is found that ICO is acting as a simple distributor, performing standard distribution functions, not employing any valuable, unique intangible and not bearing any significant risk. [~~On the other hand, it is found that, in this transaction, highly valuable intangible assets (patents and trademarks) are contributed by XCO (the US)]. Furthermore, XCO is bearing the entrepreneurial risks in the transaction. [Therefore, ICO is a tested party under this study because ICO (rather than its parent company, XCO) has less complex functions and assumes less risk (the US)]. [~~On that basis, it is found that the most appropriate method to the circumstances of the case would be a "Transactional Net Margin Method"³ that would compare ICO's operating margin with the same of comparable uncontrolled transactions (the US)]. The transfer pricing study was prepared in accordance with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations of the Organization for the Economic Cooperation and Development ("OECD Transfer Pricing Guidelines")~~~~~~

[As defined in OECD Transfer Pricing Guidelines, the TNMM examines the net profit margin relative to an appropriate base (e.g. costs, sales, and assets) that a related party realizes from a controlled transaction (or transactions that would be appropriate to aggregate under certain principles). The net margin of the related party from the controlled transaction should ideally be established by reference to the net margin that the same related party earns in comparable uncontrolled transactions. Where this is not possible, the net margin that would have been earned in comparable transactions by an independent enterprise may serve as a guide. The OECD Transfer Pricing Guidelines state that a functional analysis of

¹ A transfer pricing method that compares the price for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances.

² An analysis of the functions performed (taking into account assets used and risks assumed) by associated enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions.

³ A transactional profit method that examines the net profit margin relative to an appropriate base (e.g. costs, sales, assets) that a taxpayer realizes from a controlled transaction.

the associated enterprise and the independent enterprise is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results (Australia)].

[TNMM is a method that requires a thorough examination of the company in question in order to determine the net profit margin relative to an appropriate base that the company realizes from a controlled transaction. As TNMM measures the relationship between net profit and an appropriate base, it is important to choose the appropriate base taking into account the nature of all the business activities (Australia)].

10. The transfer pricing study has not been considered by tax authorities of countries I or X. In selecting comparables for its analysis, the independent accounting firm, hired by ICO and XCO, performed a comparables search, including a review of publicly available databases.
11. The accounting firm searched for companies that perform similar functions, incur similar risks, use similar intangible assets, and sell similar products under the same or similar conditions as ICO. This search resulted in a number of potentially comparable companies chosen from the electrical apparatus and equipment, and electronic parts and equipment industries. After reviewing the companies to find the closest match possible, eight companies were selected as comparables. The eight selected distributors (the "Unrelated Distributors") purchased the goods from unrelated sellers of country X (the "Unrelated Sellers") and sold the goods of the same class or kind as the imported goods [in the country I (Israel)].
12. Additionally, the functional analysis showed that the functions performed by the eight unrelated distributors were similar to those of ICO in terms of their frequency, nature, and value. The functional analysis also identified and compared the assets employed by ICO and by the eight unrelated distributors and revealed that there is no significant levels of tangible or intangible assets among them. Furthermore, the functional analysis also showed that the risks assumed by ICO were substantially similar to those assumed by the eight distributors.
13. Based upon a comparability analysis, including a functional analysis (functions performed taking in account assets used and risks assumed), the transfer pricing study performed in accordance with the OECD Transfer Pricing Guidelines and the available data on comparable enterprises, concluded that the transfer price has to be established through a Transactional Net Margin Method ("TNMM") [that would compare ICO's operating margin with the same of comparable uncontrolled transactions (the US)]. Thus, ICO has a transfer pricing policy, and the company sets its prices according to the TNMM.
14. With regard to eight unrelated distributors, the period for comparison was the most recent fiscal year. The arm's length range established was 0.64 to 2.79 percent, with a median of 1.93 percent (this is the arm's length range of operating margins of companies comparable to ICO). ICO's operating margin was 2.50 percent, thus, falling within the operating margin of eight external comparables.

Issues for Determination

15. What is the customs value of the imported goods as determined under Articles 1 and 8 of the Agreement?

16. Can the transfer pricing study prepared on the basis of the OECD Transfer Pricing Guidelines be used to ascertain whether the transaction value of the imported goods is not influenced by the relationship of parties under Article 1 of the Agreement?

Analysis

17. Article 1 of the Agreement states that the customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8.
18. Further, the Interpretative Note to Article 1 of the Agreement states that the price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods. The value declared by ICO at the time of importation was 1,200.00 c.u. ~~[However, based on the information provided by ICO to Customs of country I during the post-clearance audit, the price actually paid or payable for the shipment of 1,000 relays should be 1,250.00 c.u. Storage costs, in the amount of 50.00 c.u., are considered to be part of the price actually paid or payable since they are indirect payments made directly to or for the benefit of the seller at the time of the sale for export to country I (Australia)].~~
19. ~~[Article 8 of the Agreement sets out the adjustments which are to be made to the price actually paid or payable for the imported goods when determining the transaction value. For example, the transaction value shall be adjusted for the value, apportioned as appropriate, of tools, dies, and molds and similar items used in the production of the imported goods, where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable, shall be part of the transaction value. Therefore, the value of the tools provided by ICO directly to the manufacturer to produce the imported goods, in the amount of 100.00 c.u., is included in the transaction value and constitute an addition to the price actually paid or payable under Article 8.1(b)(ii) of the Agreement (Australia)].~~
20. ~~[Accordingly, the customs value in this case is 1,350.00 c.u., which includes the price actually paid or payable in the amount of 1,250.00 c.u. and the value of tools in the amount of 100.00 c.u (Australia)].~~
21. However, given the concerns with the value declared at the time of importation, Customs advised ICO during the post-clearance audit that it had grounds for considering that the relationship influenced the price and that, in consultation with ICO, it would apply the tests set forth in Articles 1.2(a) and 1.2(b) in order to determine the acceptability of transaction value.
22. Based on the information obtained in the post-clearance audit, XCO does not sell to unrelated buyers; moreover, Customs does not have information about the customs value of identical or similar goods as determined under the provisions of Articles 5 and 6. Thus, the acceptability of transaction value cannot be established under Article 1.2(b). Similarly, because XCO sells only to related buyers, ICO is unable to demonstrate that the price was settled in the same manner as in sales to unrelated parties. Accordingly, ICO elects to demonstrate the acceptability of transaction value by showing that XCO's price is settled in a manner consistent with the normal pricing practices of the industry.
23. In an effort to justify the use of transaction value, ICO provided Customs with a copy of the transfer pricing study prepared in accordance with the OECD Transfer Pricing Guidelines. As discussed in the transfer pricing study, ICO uses the TNMM to set its prices.

24. ~~[As defined in OECD Transfer Pricing Guidelines, the TNMM examines the net profit margin relative to an appropriate base (e.g. costs, sales, and assets) that a related party realizes from a controlled transaction (or transactions that would be appropriate to aggregate under certain principles). The net margin of the related party from the controlled transaction should ideally be established by reference to the net margin that the same related party earns in comparable uncontrolled transactions. Where this is not possible, the net margin that would have been earned in comparable transactions by an independent enterprise may serve as a guide. The OECD Transfer Pricing Guidelines state that a functional analysis of the associated enterprise and the independent enterprise is required to determine whether the transactions are comparable and what adjustments may be necessary to obtain reliable results (Australia)].~~
25. In reviewing the transfer pricing study, one issue considered by Customs was whether the examination of external comparables discussed in the transfer pricing study could be regarded as being consistent with the process of examining normal industry pricing practices under the Note to Article 1.2(a), which allows Customs to conduct an analysis of profitability of similar companies in the industry. In this regard, it could be considered that the term "industry" includes the industry or industry sector that produces goods of the same class or kind as the imported goods. Customs reviewed the information contained in ICO's transfer pricing study and concluded that the products sold by comparable companies were of the same class or kind as the imported goods.
26. Further, in this case, because the transfer pricing study covered all products imported by ICO to country I, Customs determined that a breakdown of product line profitability for comparability purposes was unnecessary.
27. In this regard, Customs noted that comparable companies were chosen from the electrical apparatus and equipment, and electronic parts and equipment industries -- companies that sell the goods of the same class or kind as the imported goods. In other words, the operating margin comparison between ICO and the other comparable companies, as stated in the transfer pricing study, could be considered to be consistent with the market as a whole, thereby demonstrating that the price between ICO and XCO could have been settled in a manner consistent with the normal pricing practices of the industry.
28. Additionally, Customs was of the view that the language of Interpretative Note to Article 1.2 was broad enough to permit the use of the OECD Transfer Pricing Guidelines in determining whether the relationship influenced the price. In this instance, the functional analysis showed that there were no significant differences in functions, risks, and assets between ICO and the eight unrelated distributors. In addition, an adequate level of product comparability was observed. Thus, the operating margin on the resale of imported goods was shown to be generally the same as in the electrical apparatus and equipment and electronic parts and equipment industries. On this basis, Customs was satisfied that ICO could meet the circumstances of the sale test based on the conclusions reached in the transfer pricing study in respect of the normal transfer pricing practices of the industry.
29. The transfer pricing study found that the arm's length range of the comparable companies' operating margins was 0.64 percent to 2.79 percent. As previously noted, ICO's operating margin was 2.50 percent. Thus, a comparison of the operating margins between ICO and other comparable companies show that the operating margin of ICO, as determined in the transfer pricing study, is equivalent or within the range of operating margin of other comparable companies. Accordingly, since all companies sell the goods of the same class or kind, the transfer pricing study supports a finding that ICO's price was settled in a manner that was consistent with the normal pricing practices of the industry.

Conclusion

30. ~~[As a result of the post-clearance audit, Customs determined that the additional payments formed part of the total payment for the goods and that an addition to the price actually paid or payable was required under Article 8. In addition (Australia)],~~ in examining the related party transactions between ICO and XCO, Customs confirmed by means of the transfer pricing study that the application of the TNMM specified in the OECD Transfer Pricing Guidelines satisfied the circumstances of sale test in the particular circumstances of this case.

[Caveat to case study (Australia)]

[31. The problem for Customs when analyzing a transfer pricing study that uses TNMM is that the net profit of the comparable company may sometimes also come from activities other than importing goods, such as after-sales service or an inter-company loan, etc., making it difficult to accurately determine the net profit for only the imported goods (Australia)].

[32. The tasks of selecting comparable companies for TNMM are complex. The fact that tax authorities can take years to agree on the comparables when preparing an advanced pricing agreement illustrates the complexity of these tasks. As Customs is not involved in the preparation of the advanced pricing agreement, it will be difficult for Customs to determine whether the comparables used for the TNMM are suitable for customs valuation purposes (Australia)].

[33. As valuation of imported goods is governed by the requirements set out in the WTO Valuation Agreement and the tax value is determined in accordance with the OECD Guidelines, the operation of these two different sets of rules may sometimes result in different values being ascribed to imported goods for customs and taxation purposes. In such circumstances, the mere fact that a tax value differs from a customs value does not mean that one (or both) of the values are incorrect. It is important that each case be determined on a case-by-case basis and the values assessed on their own merits by using the relevant rules or guidelines in the respective agreements (Australia)].

[34. This case study shows that the TNMM can be used to verify that the relationship has not affected the selling price of the goods in question (Australia)].

[35. However, it is evidently clear from the above that whether TNMM could be employed for valuation purposes is a question of fact that varies from case to case. Therefore, it is important that the facts of each case should be thoroughly examined to determine whether TNMM could be used for valuation purposes (Australia)].

[36. It may not be suitable to employ the TNMM method where the comparable companies are not from the same industry or the same economy. Also, it is easier to find comparable companies for the purposes of TNMM in large economies. However, in smaller economies, this may be difficult to find such comparables in smaller economies. Further, the transfer pricing study may use comparable companies that perform the same function, for example import and distribute goods, but the imported goods for this function may be different to the good considered for valuation purposes. Additionally, in some circumstances where there is no comparable company which performs the same functions, the transfer pricing study will use comparable companies from other countries. In such circumstances, it may not be suitable for Customs to use the TNMM method to determine whether the relationship has influenced the price of the goods (Australia)].



TECHNICAL COMMITTEE
ON CUSTOMS VALUATION

-
29th Session
-

VT0713E1a
(+ Annex)

O. Eng.

Brussels, 25 September 2009.

QUESTIONS RAISED DURING THE INTERSESSION
APPLICATION OF ARTICLE 8.1 (b) OF THE AGREEMENT

REQUEST FROM JAPAN

(Item VII on the Agenda)

I. BACKGROUND

1. During the intersession, the Secretariat received a communication from Japan seeking the opinion of the Technical Committee on Customs Valuation on the application of Article 8.1 (b) of the Agreement.
2. The request of Japan is reproduced in the Annex to this document.
3. The Secretariat has identified no instrument in the Customs Valuation Compendium that addresses the particular issue raised by Japan. The Technical Committee is invited to examine the document and decide on what further action it wishes to take.

* * *

WCO TECHNICAL COMMITTEE ON VALUATION (WORKING DOCUMENT)

Title: Application of Article 8.1 (b) of the Agreement

Submitted by: Japan

The issue: (Give facts of the case) see the attachment

References: Article 1, Article 8.1 (b) (i) and (ii), note to Article 8.1 (b) (ii)

Analysis: (Including potential legal position) see the attachment

Member's view(s): See the attachment

Proposed outcome: Case Study or Advisory Opinion

APPLICATION OF ARTICLE 8.1(b) OF THE AGREEMENT

Facts of transaction

1. Importer B in country of importation I purchases and imports 500 accessories of precious metal, at a price of 200,000c.u., from exporter S in country of exportation X. There is no relationship between B and S within the meaning of Article 15.4. B and S agreed, in connection with the sale of the imported goods, to the following:
 - (1) 500 chains to be incorporated in the imported goods are supplied by B or a person, who is entrusted by B, to S free of charge; and
 - (2) 3 tools to be used in the production of the imported goods are supplied by B or a person entrusted by B to S free of charge.
2. The chains supplied by B free of charge were produced by manufacturer C in country I and sold by C to B at 100c.u. each. B purchased a mould at 2,000c.u. from manufacturer M in country I and supplied it to C. C used a mould which was supplied by B free of charge in producing the chains. There is no relationship between B, C or M within the meaning of Article 15.4. The mould was durable for the production of 500 chains only. Therefore, the mould had no residue value after the production and was disposed.
3. The tools supplied by B free of charge to S were produced by manufacturer D in country I. B purchased the tools from D at a total price of 9,000c.u. D produced the tools in accordance with B's specification by using 3 moulds supplied by B free of charge. The moulds were purchased by B from M at a total price of 1,500c.u. There is no relationship between B, D or M within the meaning of Article 15.4. These moulds were made of nondurable materials and used for the production of a tool. The moulds had no residue value after the production and were disposed.
4. D, in accordance with the request from B, shipped the 3 tools to S.
5. All the provisions of Article 1.1 (a) to (d) are satisfied and the Customs value is to be determined under the transaction value method.

Questions

- Should the value of the mould (2,000 c.u.) supplied to C by B constitute part of the value of components (chains) supplied free of charge to S by B under Article 8.1(b)(i)? or should the value of the mould be added to the price actually paid or payable for the imported goods as adjustment under Article 8.1(b)(ii)?
- Should the value of 3 moulds (1,500 c.u.) supplied to D by B constitute part of the value of the tools supplied free of charge to S by B under Article 8.1(b)(ii)? or should the value of the moulds be added to the price actually paid or payable for the imported goods as adjustment under Article 8.1(b)(ii)?

Analysis

The price actually paid or payable for 500 accessories is 200,000c.u. as this is the total payment made by the buyer to or for the benefit of the seller in respect of the accessories.

Chains incorporated in the imported goods and tools used in the production of the goods were supplied directly or indirectly free of charge to S by B. The value of the chains (50,000 c.u.) and the tools (9,000 c.u.) is to be added to the price actually paid or payable under Article 8.1 (b)(i) and (ii).

The Interpretative Note to Article 8.1 (b)(ii) contains two methods of determining the value of an item. First, if the importer acquires the element from a seller not related to him at a given cost, the value of the element is that cost. Second, if the element was produced by the importer or by a person related to him, its value would be the cost of producing it.

The Note is to provide the interpretation of Article 8.1 (b)(ii), but it could be considered that the above methods specified in the Note are applicable in determining the value of items under Article 8.1 (b)(i) and (iii).

In this case, B is not related to C or D. Therefore, the value of 500 chains and 3 tools to be added as adjustments would be B's costs to acquire them from C and D. In other words, B's purchase price of the chains (50,000 c.u.) and the tools (9,000 c.u.) would constitute the amount of the adjustments.

B purchased moulds from M and supplied them free of charge to C and D for the production of the chains and the tools. B's purchase price of the moulds, however, was not included in B's purchase prices of the chains and the tools. Therefore, B's purchase price of the moulds should not be considered part of the value of the chains and the tools supplied free of charge to S.

Another consideration concerns whether or not the value of the moulds used in the production of the chains and the tools constitute adjustments under Article 8.1 (b) (i) and (ii).

The mould supplied free of charge to C by B was used in the production of the chains. The chains constitute the imported goods as component. Considering that the mould was used in the production of part of the imported goods, the value of the mould should be an adjustment under Article 8.1 (b)(ii).

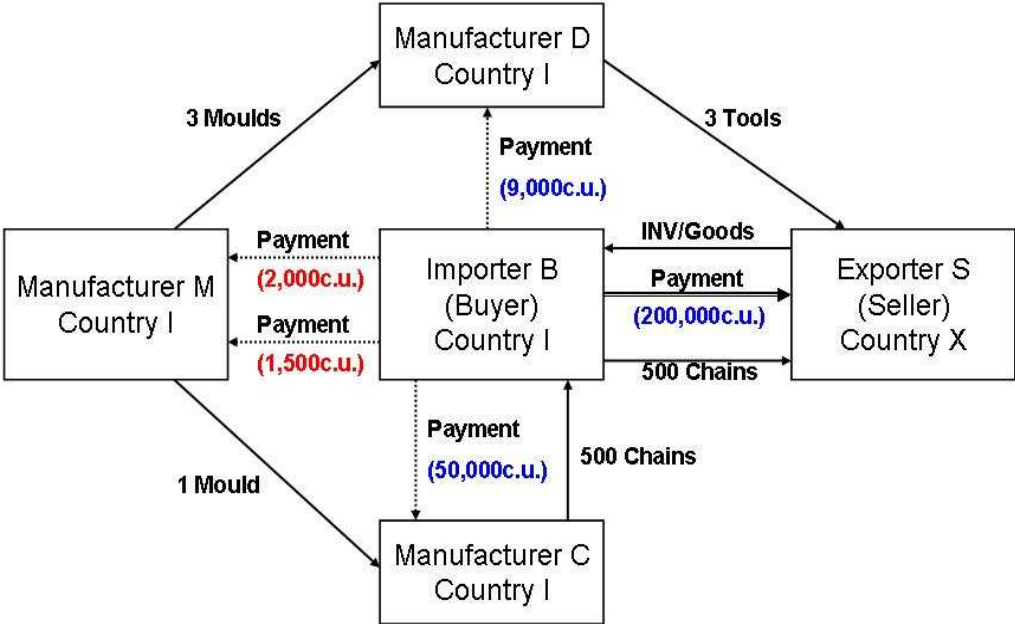
The moulds supplied free of charge to D by B, however, were not used in the production of the imported goods, but in the production of the tools. The value of the moulds, therefore, should not be an adjustment under Article 8.1 (b)(ii).

Member's Views

In view of the above analysis, Japan is of the view that:

- The value of the mould (2,000 c.u.) supplied to C by B does not constitute part of the value of components (chains) supplied free of charge to S by B under Article 8.1 (b)(i). The value of the mould, however, should be added to the price actually paid or payable for the imported goods as adjustment under Article 8.1 (b)(ii) because it is considered that the mould was supplied by B free of charge and used in the production of the imported goods.
- The value of 3 moulds (1,500 c.u.) supplied to D by B does not constitute part of the value of the tools supplied free of charge to S by B under Article 8.1 (b)(ii). In addition, the value of the moulds should not be added to the price actually paid or payable for the imported goods as adjustment under Article 8.1 (b)(ii).

Transaction Chart



Revenue Package

“The pathway to fair and efficient revenue collection”

1



Background to Revenue Package

- Concerns expressed by WCO Members regarding revenue collection
- Reasons include:
 - Global financial crisis
 - Declining duty rates
- Announced at Dec 2008 Policy Commission
- WCO Council Resolution – June 2009 ...

2



WCO Council Resolution – June 2009

“The WCO Secretariat and Members should enhance even further the delivery of effective capacity building, especially as a response to declining revenue collection and obstacles to trade facilitation caused by the global economic downturn”.

3



High level aim:

- To help Members to improve the efficiency and effectiveness of revenue collection, in compliance with rules, standards and guidelines laid down in relevant international agreements, conventions and supporting tools and instruments.

4



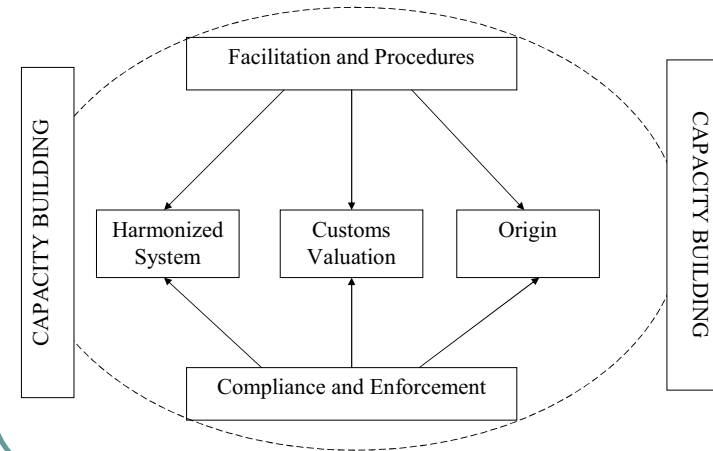
First Pillar - Schedule of current tools and instruments

- Collation of all WCO tools, instruments etc. relevant to revenue collection
- Presented as a package to provide comprehensive overview
- Key messages identified in each area
- Chance for Members to ensure they are aware of/ utilising key material

5



Overview



6



Second Pillar

- Conduct Regional Workshops
 - To present schedule of tools and instruments
 - To discuss Members needs re revenue collection
- Carry out research in key areas based on Members needs. Areas include informal trade sector, transfer pricing, valuation databases
- Raise at WCO Committees
- Discuss at Policy Commission, December 2009

7



Third Pillar

- Develop further tools, guidelines etc. as necessary
- Produce package of materials and guidance etc.

8

