

# CUSTOMS VALUATION IN THE EUROPEAN ECONOMIC COMMUNITY

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## I. INTRODUCTION

The GATT Tokyo Round Agreement to liberalize world trade was signed on April 12, 1979, in Geneva by the major trading nations, ending five and a half years of negotiations among ninety-nine nations. The trade package includes provisions calling for reform of tariffs, subsidies, customs procedure, and methods of government purchasing.<sup>1</sup> Discussion took the form of multilateral trade negotiations (MTN),<sup>2</sup> which developed into a separate MTN Agreement or Code for each of the various areas of trade difficulty. The importance of these MTN Agreements is illustrated by the amount of time participating nations remained at the bargaining table to settle hundreds of legal, economic, and political issues and obstacles. At stake was the life blood of many nations' economic stability and potential prosperity—free trade. It is hoped that the MTN restructures accepted international trade rules that inhibit national protectionism of markets and domestic goods, and that it will encourage the use of consultation and negotiation as common denominators for trading practices and disputes.

The General Agreement on Tariffs and Trade (GATT) has been the cornerstone of trade policy for its contracting parties since its rules were formulated in 1947. The series of over 100 agreements and protocols that make up the GATT system create a body of law that influences significantly the practical operation of international trade. The consensus in adoption and a risk of trade retaliation both serve to encourage adherence to the rules. A series of major tariff and trade negotiations have been sponsored by

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<sup>1</sup> For full discussion and background on the Tokyo Round, see Graham, *Reforming the International Trading System: The Tokyo Trade Negotiations in the Final Stage*, 12 CORNELL INT'L L.J. 1 (1979), and Wolff, *The U.S. Mandate for Trade Negotiations*, 16 VAND. J. INT'L L. 505 (1976).

<sup>2</sup> These negotiations are referred to as the MTN. The actual round consisted of a form of bartering proposed changes and existing methods, with each nation trying to attain an advantageous result.

GATT, which until the last two rounds had focused on the reciprocal lowering of tariff barriers.<sup>3</sup> Recently, it has been recognized that more subtle "nontariff barriers" can be used as effective obstacles to international trade. Nontariff barriers include, *inter alia*, quotas or quantitative restrictions, buy-national government purchasing policies, exclusionary product standards, and methods of customs valuation that artificially inflate import duties.<sup>4</sup> New protective devices appear to be limited only by the creativity of legislators and domestic business policymakers.

This article focuses on one MTN nontariff barrier—customs valuation. Implementation of the MTN Customs Agreement<sup>5</sup> by the European Economic Community (EEC) is emphasized. Customs valuation, an administrative mechanism that appraises or establishes a value for goods upon which the import duty rate (usually *ad valorem*)<sup>6</sup> may be imposed, is one of the most important nontariff trade barriers. Difficulties with customs valuation methods in use prior to the MTN agreements centered on the lack of uniformity among importing nations and the use by some countries of schemes that artificially-inflated the value of certain imported products. The MTN negotiations in this area developed a comprehensive and readily implemented system of rules designed to harmonize varying national valuation laws and to reduce the potential for artificially-inflated customs appraisals. It is likely that adoption of these rules by the EEC<sup>7</sup> and other trading entities will enable commercial traders to predict more accurately the likely valuation of their imported goods for customs purposes.

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<sup>3</sup> The Kennedy Round of the mid-1960s first noted the importance of nontariff trade barriers. Earlier rounds had been held in 1949 at Annecy, France, in 1951 at Torquay, England, and in 1956 and 1960-61 at Geneva, Switzerland. Complete background information can be found in J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

<sup>4</sup> Quotas are prohibited by GATT. Together with subsidies and countervailing duties, the other three-mentioned nontariff barriers are covered in new MTN Agreements.

<sup>5</sup> GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 116-33 (26th Supp. 1979) [hereinafter cited as MTN Code].

<sup>6</sup> Rates of duties may be *ad valorem*, specific, or compound. An *ad valorem* rate imposes a percentage (the tariff rate) to the appraised value of the imported goods as determined by a customs officer. Specific rates impose a given amount of duty per quantitative unit, for example, 15 units of account (u.a.) per bushel, or 100 u.a. per kilo. Compound rates combine *ad valorem* and specific, that is, 10% of the appraised value plus 10 u.a. per kilo.

<sup>7</sup> *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade*, adopted by the Council Decision of 10 Dec. 1979 concerning the conclusion of the Multilateral Agreements. 23 O.J. EUR. COMM. (No. L 71) 107 (1980) [hereinafter cited as EEC Agreement on Implementation]. Representatives of the Member States chose to apply the resulting Regulation, *infra* note 25, to the Coal and Steel Community. 23 O.J. EUR. COMM. (No. C 130) 1 (1980).

## II. CUSTOMS VALUATION IN GATT (ARTICLE VII) AND THE 1979 MTN CODE

### A. *Principles of Article VII*

GATT article VII provides that the standards of valuation used by each contracting state should conform with certain principles. It states that the "actual" value of the goods is to be used as the fundamental standard, and prohibits assessment "based on the value of merchandise of national origin or on arbitrary or fictitious values."<sup>8</sup> The actual price is the price at which the imported or similar foreign merchandise is sold or offered for sale under fully competitive conditions. Where quantity is a factor (*e.g.*, discounts given for large orders), the price should be related either to comparable quantities or to quantities no less favorable to the importer than the greater volume coming from the country of exportation to the country of importation.

The importing country is given the legislative discretion to specify the "time and place" of determining the price. Likewise, no particular methods of valuation are required, leaving the contracting parties free to establish differing valuation systems. Such freedom, in which the time and place of valuation could vary and an open field of methods could be employed, did not create the uniformity needed to overcome domestic protectionist instincts. Even where the invoice price was chosen (as many business interests might prefer), such price may be *c.i.f.* or *f.o.b.*<sup>9</sup> Although using the invoice price for the valuation might result in the actual price in some instances, such a rule, inapplicable to related parties, would lead to collusion in pricing and would evade the intent of article VII that methods used reflect the "actual" value, within certain confining limits. Despite article VII's prohibition of valuation bases that rely on arbitrary or fictitious values, its impact on international practices was not entirely successful. Obviously, fic-

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<sup>8</sup> *Opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194. Modified in several respects since 1947, the current version is found at GENERAL AGREEMENT ON TARIFFS AND TRADE, IV BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969).

<sup>9</sup> The *c.i.f.* sale (cost, insurance, and freight) basically includes costs of delivery, which an *f.o.b.* valuation (free on board) would exclude. The MTN Code, in article 8(2), leaves to domestic legislation whether to include charges for transport, handling, and insurance in the customs value. The 1980 EEC Regulation, *infra* note 25, continues the EEC's preference for the *c.i.f.* basis and includes charges up to the point of introduction into Community territory. The United States Trade Agreements Act of 1979, however, assumes the *f.o.b.* approach, taking the value "when sold for exportation to the United States." 19 U.S.C. § 1401a(b)(1) (Supp. III 1979).

titious values are incompatible with the standard of actual value. However, the use of the value of merchandise in the country of destination, thereby barring valuation by comparison with goods from the importing country, also contradicts the intent of article VII. The prime example of such a valuation method is the much criticized American Selling Price mechanism.

### B. *The MTN Code on Customs Valuation*

The MTN Code on Customs Valuation is the culmination of the Tokyo Round negotiations. The signatory states were obliged to implement the code provisions into their domestic legislation to be effective by January 1, 1981. The EEC legislation essentially incorporated the provisions contained in the MTN Code.<sup>10</sup> The MTN Code, accepted by the major trading nations,<sup>11</sup> employs a "transaction value"—defined as the price actually paid or payable with adjustments for certain costs that may not be reflected in that price—as the primary method of valuation to be used whenever possible. When the transaction value cannot be used, for example, in dealings between a parent and a subsidiary, the MTN Code presents alternative bases of valuation to be utilized in sequential order: identical goods from a different transaction, similar goods, deductive value, and a computed or constructed value.<sup>12</sup> In this manner, a uniform system of customs valuation is created for those countries adopting the MTN Code. A number of methods of customs valuation are expressly prohibited, including the use of any minimum customs values, arbitrary or fictitious values, market price of goods in the country of exportation, and the selling price in the country of importation.<sup>13</sup> This last proscription is aimed primarily at the American Selling Price (ASP) system, by which certain products are valued for tariff purposes at the level of the domestically-produced articles with which they compete.<sup>14</sup>

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<sup>10</sup> See Part III *infra* for discussion of these provisions. Developing countries are given preferential time extensions for domestic implementation. See Part VI *infra*.

<sup>11</sup> GATT sources as of October 1980, reported that 18 countries, in addition to those of the EEC, have accepted the MTN Customs Valuation Code provisions and were committed to domestic implementation. These are Argentina, Australia, Austria, Bulgaria, Canada, Czechoslovakia, Finland, Hungary, India, Japan, Korea, New Zealand, Norway, Poland, Romania, Sweden, Switzerland, and the United States.

<sup>12</sup> MTN Code, *supra* note 5, at arts. 2-6.

<sup>13</sup> *Id.* art. 7.

<sup>14</sup> See 19 U.S.C. § 1401a(e) (1976), *repealed by* the Trade Agreements Act of 1979, 19 U.S.C. 1401a (Supp. III 1979). At the conclusion of the Kennedy Round (30 June 1967), it was agreed that the ASP should be abolished, although it took Congress years to act.

The ASP was adopted in 1922 by the United States Congress to protect certain chemical products from German imports. Subsequently, it was extended to include footwear, canned clams, and wool-knit gloves. The ASP method inflates the base price rather than the duty. Although the rates appear to be reasonable, the protective effect is enormous. Protection is achieved under ASP not only by the fact that a higher price is found in the United States market as compared with the import price, but also because related products can obtain protection by the mere fact that they are in competition with the imported product. An industry decision to raise the price of a single domestic product that is identical to an imported product secures protection. In practice, the ASP has led to protection equal to more than a 100% rate of duty, although generally it is applied to less than one percent of total United States imports.

Because the ASP antedated the "arbitrary and fictitious" prescription in article VII of GATT, its legality was preserved under the "grandfather" clause.<sup>15</sup> However, recent United States legislation, considered and approved under rules that limited debate and barred amendments, implemented the MTN Code and maintained compliance with MTN commitments.<sup>16</sup> The ASP was repealed by the Trade Agreements Act of 1979, which banned the appraisal of imported merchandise on the basis of "the selling price in the United States of merchandise produced in the United States."<sup>17</sup> Nonetheless, at least one source has stated that the new tariffs were designed to provide the same protection afforded under the ASP.<sup>18</sup>

### III. EEC CUSTOMS LEGISLATION AND THE 1980 CUSTOMS VALUATION REGULATION

Customs valuation constitutes a part of customs legislation which, together with tariff regulations, provides standards for the description of goods for classification into tariff headings, rules governing the classification into tariff headings and sub-headings, and the application of customs duties.<sup>19</sup> International regulation in

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<sup>15</sup> GATT Protocol of Provisional Application, ¶ 1(b).

<sup>16</sup> See 37 CONG. Q. WEEKLY REP. 1370 (July-Sept. 1979).

<sup>17</sup> 19 U.S.C. § 1401a(f)(2)(A) (Supp. III 1979).

<sup>18</sup> See 37 CONG. Q. WEEKLY REP. 1516 (July-Sept. 1979).

<sup>19</sup> Van der Burg, *The Customs Tariff and Customs Legislation in the European Communities*, 7 COMMON MKT. L. REV. 184 (1970). Thus, customs legislation aims at harmonizing elements of external trade, with the theory behind customs valuation being a fair and

this area was advanced by the work of the Customs Cooperation Council, founded in 1950 at Brussels by twenty-six nations.<sup>20</sup> Two conventions created by the Council, the Convention on the Nomenclature for the Classification of Goods in Customs Tariffs, and the Convention on the Valuation of Goods for Customs Purposes, standardized the technical classification systems and established a flexible method of valuation (the "normal price"). The provisions of these Conventions are replaced by the MTN Code.

The creation of a customs union within the European Economic Community, the principles of which are set forth in article 9 of the EEC treaty,<sup>21</sup> has required the harmonization of legislative customs provisions. Legislation has created a common customs tariff, described the customs territory of the Community, defined the origin of goods and their value for duty purposes, and established rules relating to nomenclature, warehousing, free zones, and deferred payment of customs duties.<sup>22</sup> The nomenclature and valuation provisions of EEC legislation were based upon and supplemented the Brussels Conventions. This should not be surprising in view of the fact that all Member States were parties to the Conventions. The Brussels Convention of the Valuation of Goods presented general principles for valuation, including an obligation for parties to introduce the definition of value into domestic laws. However, the discretion left to domestic legisla-

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standard treatment of merchandise imported into the customs territory. Usually the customs authority is concerned with preventing undervaluation, a result of which would be a loss of revenue. A recent preliminary ruling of the European Court of Justice involved the unusual situation of an overvaluation of imported goods. The Court rejected the attempt by the French government to use customs valuation legislation to establish that the alleged overvaluation of the goods was by its nature "a false declaration of value for customs purposes," in order to prove an illegal transfer of capital abroad. The Court ruled that, under Community customs valuation legislation, France could not reduce the invoice price of goods imported from a non-member country (Switzerland), but that the valuation (or overvaluation) so determined for customs purposes would not have the effect of requiring the fiscal and financial authorities of the Member States to accept that valuation for purposes other than application of the customs tariff. Preliminary Ruling, *France v. Rene Chatain*, Manager of Laboratories Sandoz, E. Comm. Ct. J. No. 65/79, 24 April 1980.

<sup>20</sup> Convention Establishing the Customs Cooperation Council, opened for signature in Brussels on 15 December 1950.

<sup>21</sup> Article 9 of the Rome Treaty encompasses the classic definition of a customs union in which sovereign states agree to establish and apply their customs in common, forming a single country in relation to third states. Within the common territory, customs duties are abolished and free movement of goods is the rule.

<sup>22</sup> See, e.g., Council Directive of 24 July 1979 on the Harmonization of Procedure for the Release of Goods for Free Circulation, 22 O.J. EUR. COMM. (No. L 205) 19 (1979). See also Council Reg. No. 1430 of 2 July 1979 (repayment or remission of import or export duties), 22 O.J. EUR. COMM. (No. L 175) 1 (1979).

tures was so great, and the resultant discrepancies so large, that EEC authorities believed they could not leave implementation to the domestic bodies in light of the customs union objective.<sup>23</sup> In reliance on the Brussels definition, EEC Regulation No. 803/68<sup>24</sup> detailed the concept of valuation for duty purposes and the conditions needed for its uniform application. However, this system has been superseded by the 1980 EEC Customs Valuation Regulation.<sup>25</sup> This Regulation was prepared and adopted by the Community under its exclusive competence in external relations for the conclusion of tariff and trade agreements. The individual Member States took no direct role in discussions or negotiations.

The EEC Treaty does not specify the instruments or the legal bases for the application of customs regulation. Regulation 803/68 was based on article 235, which empowers the Council to take unanimous measures, upon proposals of the Commission and after consulting the Assembly, in the interests of the Common Market where the Treaty has not provided the necessary powers. The consensus between the Commission and most of the Member States was to base the 1980 Regulation on article 113, which contains provisions relating to the common commercial policy. However, several delegations were concerned about the use of article 113 in the absence of references to articles 99, 100, and 235, especially since article 113 was used simultaneously to repeal and replace a Regulation based on article 235.<sup>26</sup> Indeed, the final agreement to rely on article 113 represents a change in the basis of

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<sup>23</sup> Amphoux, *Customs Legislation in the EEC*, 6 J. WORLD TRADE L. 133 (1972). Amphoux states that

the coming into being of this customs union has transformed the very foundations of the definition of value, particularly with regard to the geographical element of that concept. In so far as the determination of the value of a product depends on an appraisal of market conditions for the product, that appraisal cannot be limited to the domestic market of the country of valuation. It must be extended to the whole of the Community.

*Id.* at 149.

<sup>24</sup> 8 O.J. EUR. COMM. (No. L 148) 6 (1968), Special Edition (I), 170 (1968).

<sup>25</sup> Council Regulation No. 1224/80 of 28 May 1980 on the Valuation of Goods for Customs Purposes, 23 O.J. EUR. COMM. (No. L. 134) 1 (1980) [hereinafter cited as 1980 EEC Regulation].

<sup>26</sup> Although the Commission adopted and implemented the customs valuation provision under its exclusive competence, the Council [of Ministers], composed of representatives of each Member State, was responsible for final approval of the legislation. Reservations were made by the Italian and French delegations on this point of legal basis. A compromise was eventually reached and the legal basis was officially established as article 113, but a declaration was read into the Council minutes to the effect that the action taken would not be a precedent for future actions in the customs field.

such legislation, broadening the notion of common commercial policy to support the harmonization of customs legislation.<sup>27</sup>

The customs territory of the 1980 Regulation remains unchanged from previous law. It provides that goods are included within the Regulation if they are imported into the customs territory of the Community. The territory is defined as comprising the whole of the territories of the Member States, as well as limited additional territories with which Member States have binding conventions or treaties.<sup>28</sup> The definition of the term "goods" is also left unanswered by the 1980 Regulation. Therefore, the ruling of the Court of Justice in *Robert Bosch GmbH v. Hauptzollamt Hildesheim*<sup>29</sup> remains relevant. In that case, the Court stated that goods were tangible property and that customs values do not apply to importation of incorporeal property such as processes, service, or know-how.<sup>30</sup> Furthermore, *Bosch* held that in determining value for customs purposes it is only the intrinsic value of the article which must be determined; the value of processes in which the article may be used (which may be patentable) should be disregarded.<sup>31</sup>

Once goods are imported into the customs territory of the Community, the importer must pay the applicable duties on the goods as valued at the place of introduction into the customs territory. The value generally will include the cost of transport only to that place of introduction.<sup>32</sup> In practice, this will be the port of unloading, the port of transshipment, the first port where unloading can take place for goods carried by sea, the place where the first

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<sup>27</sup> But see Amphoux, *supra* note 23, at 144.

<sup>28</sup> Reg. No. 1496/68 of the Council of 27 September 1968, 11 O.J. EUR. COMM. (No. L 66) 39 (1968), identifies the additional territories for the original six Member States as the Austrian territories of Jungholz and Mittelberg (Germany), Monaco (France), and San Marino (Italy). Article 133 (1) of the EEC Treaty provides for abolition of customs duties on imports of goods into the Member States originating in the territories of the Member States. Provisions at 16 O.J. EUR. COMM. (No. L 2) 11 (1973) list eligible territories of new Member States. Thus, for example, French Overseas Departments such as Martinique and Guadeloupe are included, but Overseas Territories like French Polynesia and New Caledonia are not within the customs territory.

<sup>29</sup> [1977] E. Comm. Ct. J. Rep. 1473, [1977] 1 Comm. Mkt. L.R. 680.

<sup>30</sup> The Court concluded that under Reg. No. 803/68 of the Council, the price of goods includes the value of the patented process that is inseparably embodied in and constitutes the only economically viable use of the goods. *Id.* at 1481.

<sup>31</sup> *Id.* Under 1980 EEC Regulation, *supra* note 25, art. 8 (b)(iv), the value of engineering, development, artwork, design work, as well as plans and sketches carried out other than in the Community is presumed to have contributed to the intrinsic value of the imported goods, and is to be added to the price actually paid or payable to determine the base for valuation. United States law labels this addition as an "assist" and also includes such cost in the transaction value. 19 U.S.C. § 1401(h)(1)(A) (Supp. III 1979).

<sup>32</sup> 1980 EEC Regulation, *supra* note 25, art. 15.



customs office is located for goods carried by rail, inland waterway or road, or the place where the frontier of the Community is first crossed for goods carried by air.<sup>33</sup> The place where the goods are introduced into the customs territory must also take into account geographical disparities, which make it necessary, at times, to carry goods by sea or through the territory of a third country on the way to another part of the Community. This would occur during normal commercial passage from Italy to Germany, for example, or from a French overseas department, such as Guadeloupe, to one of the Member States. The 1980 EEC Regulation permits the normal place of introduction (for example, first port of unloading) to be effective for disregarding transport costs in the valuation of goods introduced and carried directly from Greenland or from a French overseas department to the Community proper or vice versa. New measures in this area are relegated to future legislation,<sup>34</sup> leaving intact the current rule that dutiable value is determined by reference to the first place of introduction.<sup>35</sup>

The effective date of the 1980 EEC Regulation was July 1, 1980, although the MTN Code did not enter into force for the Community until January 1, 1981.<sup>36</sup> The six month gap was designed to

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<sup>33</sup> *Id.* art. 14. Article 14(1) states that for goods carried by sea, the place of introduction will usually be the port of unloading. If transshipment can be certified by the customs authorities at the port of unloading, the port of transshipment shall be the place of introduction. If goods come into the territory and continue by inland waterway without transshipment, then the first port further inland where unloading can take place will apply if freight to that port is less than to the port of unloading. The technical aspects of this system result in a flexible regime whereby an importer is under no obligation to clear imported goods at their place of introduction into the customs territory. The choice of the place of customs clearance is left to the importer. The place of destination may be chosen with all its practical advantages for both the importer and the administration.

<sup>34</sup> Article 14(2) of the 1980 EEC Regulation, *supra* note 25, leaves to future legislation, in accordance with article 19 "regulation committees" procedures, the further harmonization of these rules of transit. Current rules exist under Regulation No. 1025/77 of the Commission of 17 May 1977, which specify that where goods pass by sea after introduction into the territory of the Community and are carried to another part of that territory, the first place of introduction shall be used to determine the value for customs purposes only in the event that the goods are carried direct by one of the usual routes to the destination. Otherwise, the value is determined by reference to the last place of introduction into the customs territory of the Community. 20 O.J. EUR. COMM. (No. L 124) 5 (1977). Regulation No. 1150/70 of the Commission of 18 June 1970, 10 O.J. EUR. COMM. (No. L 134) 33 (1970), Special Edition (II), 386 (1970), as amended by Regulation No. 1490/75, of 11 June 1975, states a similar "usual route" standard for goods passing through the countries of Austria, Switzerland, or the German Democratic Republic, if transport begins and ends in the customs territory of the Community. 18 O.J. EUR. COMM. (No. L 151) 7 (1975).

<sup>35</sup> *Id.*

<sup>36</sup> This anomaly has caused at least one administrative difficulty. The 1980 EEC Regulation was drafted with the objective of total compliance to the MTN Code, including a provi-

ensure that the laws, regulations, and administrative rules of the Community conformed fully with the Code provisions by the date of its entry into force. With respect to "certain perishable goods" (i.e., citrus fruits, apples, and pears), usually delivered on consignment, the former valuation procedures remain in force, although a Regulation amending the 1980 EEC Regulation is expected to provide for the establishment of simplified procedures for valuing such goods.<sup>37</sup>

#### IV. DETERMINATION OF CUSTOMS VALUE

The 1980 Customs Valuation Regulation sets out in sequential order, following the MTN Code, the acceptable methods of valuation. Article 2 of the Regulation, which establishes the order in which the various methods must be employed and lists the prohibited methods of alternative valuation, is crucial to the choice of the proper method to be used.<sup>38</sup>

##### A. *Transaction Value*

The primary method of customs valuation is set forth in article 3 of the 1980 Regulation. Imported goods must be valued in conformity with this method whenever possible. The customs value is stated to be the "transaction value," which is basically the price actually paid or payable for the goods when sold for export to the customs territory of the Community.

##### 1. *Price Actually Paid or Payable*

This concept is defined as the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods.<sup>39</sup> Thus, the full consideration or transfer envi-

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sion in article 3(2)(b)(iv) regarding one acceptable close approximation value, which had been subsequently deleted by an MTN Protocol. This provision is likely to be annulled by an amending Regulation.

<sup>37</sup> Written Procedure No. E/1180/80 (internal Commission document). Proposal for a Regulation of the Council Modifying Regulation 1224/80, dated 1 October 1980.

<sup>38</sup> Pursuant to the order established by article 2 of the 1980 EEC Regulation, the transaction value of article 3 must be employed first, if possible. Then the methods contained in articles 4, 5, 6, and 7 must be turned to in that order. The order of application of articles 6 and 7 may be reversed, but only upon request of the importer. If none of these methods results in the proper valuation of the goods, article 2(3) permits use of any means consistent with the GATT provisions, provided they are not proscribed by the article 2(4) list of forbidden methods of customs valuation.

<sup>39</sup> The payment must be made under arms-length conditions of free and open competition. Restrictions as to the disposition or use of the goods, other than those required by law or

sioned need not take the form of money and may be either direct or indirect. The transaction value method is expected to cover the great majority of imports into the Community, for example, those concluded in arms-length negotiations under conditions of free competition. This method will not apply where there are restrictions on the buyer's disposition of the goods, where "sweetheart" deals are evidenced, or where the deal is affected by an influential party relationship. Conditions or considerations that cause rejection of the transaction value specifically exclude those imposed by the Community or by national law, as well as those that limit the geographical area in which the goods may be resold. In addition, the Interpretative Notes to the MTN Code would not disallow the transaction value when conditions or other restrictions exist that relate to the production or marketing of the imported goods. However, if a tying arrangement requires the buyer to purchase other goods in specified quantities, or if the price is made dependent upon prices of other goods sold by the buyer of the imported goods to the seller, then the transaction value method is not available for the subject goods and resort must be made to alternative methods.<sup>40</sup>

## 2. *Notion of Close Approximation*

Special rules were formulated in the 1980 EEC Regulation to cover the sale between two persons (natural or legal)<sup>41</sup> who are deemed to be related.<sup>42</sup> Although the mere fact that the buyer and

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by the public authorities in the Community, which substantially affect the value of the goods or which place a geographical limitation upon the resale of the goods, preclude use of the transaction value method. Such a restriction would encompass the situation where a buyer is contractually obligated to use the goods only in a certain process or to sell only to certain parties and the restriction substantially affects the value of the goods. A further restriction makes alternative measures of valuation necessary if the sales contract includes consideration or remuneration, such as goodwill or trademark rights, for which a value cannot be determined with adequate specificity. Where such remuneration consists in whole or in part of a percentage of resale profits or other immediately unascertainable benefit to the seller, the transaction value is also inapplicable.

<sup>40</sup> Interpretative Notes to the EEC Agreement on Implementation, *supra* note 7, at 118.

<sup>41</sup> 1980 EEC Regulation, *supra* note 25, art. 1 (4).

<sup>42</sup> Under 1980 EEC Regulation, *supra* note 25, art. 1 (2), two persons are deemed to be related only if

- a) they are officers or directors of one another's business;
- b) they are legally recognized partners in business;
- c) they are employer and employee;
- d) any person directly or indirectly owns, controls, or holds five percent or more of the outstanding voting stock or shares of the seller and the buyer;
- e) one of them directly or indirectly controls the other;

seller are related is not in itself a ground for finding the transaction value unacceptable, the customs authorities will examine all surrounding circumstances and available information to ascertain whether reasonable belief exists for determining that the relationship influenced the price. If such grounds are found, the importer is informed (in writing upon request) and given a reasonable opportunity to respond. However, the importer may seek to have the transaction value accepted by presenting to the customs authorities documentation indicating that the value of the goods under the related sale "closely approximates" the customs value of goods of a similar nature. The instances for which the close approximation may be employed include non-related sales of identical or similar goods for export to the Community,<sup>43</sup> the computed value of identical or similar goods, and the transaction value between non-related parties if it would be identical except for different countries of origin, and if the seller is not related to the seller in the present transaction. These methods are explained below. At this point, it is sufficient to note that the related parties can use the transaction value of the subject imported goods by showing that such value closely approximates one in potentially analogous situations. In applying these tests, consideration should be given to differences in commercial levels and in quantitative levels, as well for any additional costs incurred.

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f) both of them are directly or indirectly controlled by a third person;

g) together they directly or indirectly control a third person; or

h) they are members of the same family.

These tests obviously are quite inclusive, and put the burden on the importer to show an arms-length price if any of the above relationships exist.

A recent judgment of the European Court, decided under former Regulation 803/68 of the Council, the interpretation of which has generated many cases, and Regulation 603/72 of the Commission, concerned transactions among related companies, including a branch office in Belgium, a subsidiary organized in Switzerland, and a United States parent. Belgian customs authorities challenged the use of the price actually paid, claiming that use of a deductive method would result in a 20% higher value, representing the true value of the parts imported by these related companies. The Court ruled that the price paid or payable would be acceptable (and thus correspond to prices on a sale in the open market) only if that price is not influenced by commercial, financial, or other relationships that may exist between the seller and the buyer, other than those created by the sale itself. Anticipating provisions of the 1980 EEC Regulation, the Court found that the determination of whether such influence exists must take into account the commercial independence of the buyer from the seller and whether the price agreed upon between them is not appreciably lower than the price at which identical or similar goods are freely sold at that time to any buyer operating at the same commercial level within the customs territory of the Community. The use of the deductive method was thereafter accepted by the Court. *S.A. Caterpillar Overseas v. Belgian State*, [1980] E. Comm. Ct. J. Rep. 773, [1980] 3 Comm. Mkt. L.R. 597. In June 1980, the Commission, in a transitional measure, extended for six months the validity of Regulations based on 803/68. 23 O.J. EUR. COMM. (No. L 154) 1 (1980).

<sup>43</sup> See notes 47 & 48 *infra* for definitions of identical and similar goods.

Whenever the transaction value is employed under any of the above situations, a number of charges must be added to the price actually paid or payable to the extent that they are not included in the price. These charges include shipping charges (cost of transport, insurance, handling, and loading), cost of incorporated goods and services (for example, components, molds, design work, and sketches), and royalties and license fees.<sup>44</sup> To insure that every licensing agreement need not be reexamined at the Community frontier, adding a percentage of the royalty or license fee to the value of the goods, two important exemptions are provided. First, charges to reproduce the imported goods are not to be considered in the price actually paid or payable; thus, a manufacturer who also imports the same goods will not be liable for license fees associated with the manufacture of those goods. Second, payments made by the licensee for the right to distribute or resell the goods are not to be included as long as the sale to the licensee is not conditioned upon such payments.<sup>45</sup> These exceptions are intended to preserve, as additions to the value for customs purposes, only the royalties and license fees that are connected closely to the actual sale of the goods.

### 3. *Excludable Costs*

Any costs to the buyer undertaken after importation of the goods generally are not included under the transaction value method. Examples include charges for construction, assembly, maintenance, or technical assistance. This exclusion, which is most important for importers of heavy industrial machinery and equipment, is relevant to all importers. Logically, all charges payable in the Community on account of the importation or sale of the goods, including the customs duties owed, are excludable.<sup>46</sup>

### B. *Identical Goods*

Where the transaction value proves unacceptable, the first valuation alternative is the sale of identical goods<sup>47</sup> that have been accepted previously under the transaction value. The sale must be

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<sup>44</sup> 1980 EEC Regulations, *supra* note 25, at art. 8 (1).

<sup>45</sup> *Id.* art. 8 (5).

<sup>46</sup> *Id.* art. 3 (4)(b).

<sup>47</sup> Identical goods are defined as those "goods produced in the same country which are the same in all respects, including physical characteristics, quality and reputation, but minor differences in appearance shall not preclude goods otherwise conforming to the definition from being regarded as identical." *Id.* art. 1 (c).

at the same commercial level and in substantially the same quantities as the goods being valued. If such a sale is not found, then the sale of identical goods at a different commercial level or in different quantities may be used. Adjustments are made if the evidence indicates reasonableness and accuracy. For example, if the imported goods being valued consist of a quantity of 950 units and the only identical goods for which a transaction value exists concerned a sale of 100 units, an adjustment may be made by consulting the seller's price list, if quantity discounts are usually granted. This alternative is possible if the price list parallels sales made at other quantities, even though not involving a quantity of 950.

### C. *Similar Goods*

If identical goods are not found for purposes of comparison, a parallel method is employed using similar goods.<sup>48</sup> The only difference in this method and the use of the identical goods method is that the quality of likeness rather than duplicity is considered. However, comparison with identical or similar goods is not possible with goods that incorporate or reflect engineering, design work, or other artistic additions to the intrinsic value of the goods due to the fact that these are additions which were carried out in the Community, for which adjustments were not already made. This reflects the general aim of GATT article VII to establish as the customs value the value of goods upon their importation into the relevant customs territory.

### D. *Unit Price in Greatest Aggregate Quantity*

Unless the importer personally requests that the computed value be used, the next method is the unit price at which the greatest number of units is sold in sales to non-related persons at the first commercial level after importation.<sup>49</sup> This means that if

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<sup>48</sup> *Id.* art. 5. Similar goods are:

goods produced in the same country which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable; the quality of the goods, their reputation, and the existence of a trademark are among the factors to be considered in determining whether goods are similar.

*Id.* art. 1 (d).

<sup>49</sup> *Id.* art. 6. This means, for example, that if 100 units are imported and 45 are sold at eight currency units each, 40 are sold at 10 currency units each, and 15 at 12 currency units, then the greatest number of units sold at a particular price is 45. Therefore, the unit price in the greatest aggregate quantity is eight.

goods are sold at varying prices depending on the quantity purchased (for example, discounts provided by a price list), then the price at which the greatest number of units were sold will be operative as the valuation figure for all the imported goods. This method is attractive to importers who sell to many customers in small quantities but who have enough sales to big buyers (at a lesser price) to result in a lower valuation. The sale used for computation purposes must occur, if not at the time of the actual importation, within ninety days thereafter. The restriction excludes use of this method for importers who cannot find a buyer and who finally unload the goods at a low price after a long delay.

#### E. *Computed Value*

The computed or constructed value method is new to the EEC and was included in the MTN Code as a result of negotiations in which the United States abandoned its American Selling Price. Under the 1980 EEC Regulation, the computed value is the sum of (a) the cost or value of materials and fabrication or processing, (b) an amount for profit and general expenses usual for such goods in the country of export, and (c) transport, insurance, and handling charges.<sup>50</sup> This value, comprising the cost of production with general expenses and profit, usually will be permissible in cases where the buyer and seller are related and the use of identical or similar goods methods is not feasible. Its operation depends upon acceptance by customs authorities of information relating to the production costs of the goods being supplied by or on behalf of the producer. In practice, this can present problems in obtaining needed information for constructing a value from outside the country of importation. Usually, the producer is the party who will supply the information, and in most cases it will be beyond the jurisdiction of the authorities in the country of importation. The EEC Regulation concedes this point, expressly barring any forced disclosure of information from a non-Community resident.<sup>51</sup> Further, verification of the information supplied by the producer

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<sup>50</sup> *Id.* art. 7. United States law provides that the profit and general expenses used in the computed value shall be based upon the producer's profits and expenses unless these figures are inconsistent with other U.S. imports of the same class and kind from the country of importation, in which case the "usual" profit will be determined from sufficient information. 19 U.S.C. § 1401a(e)(2)(B) (Supp. III 1979). The EEC Regulation does not state the preference to be given to consistent producer's figures, perhaps in part because they do not wish to rely on the "American" method.

<sup>51</sup> 1980 EEC Regulation, *supra* note 25, art. 7 (2).

may be undertaken only with agreement of the producer, as well as notice and non-objection by the government in question.

Once the producer has supplied the needed information concerning the computed parts, the customs authorities of the Member State will consider two factors to determine acceptability: (1) whether the data are consistent with the generally accepted accounting principles of the country of production,<sup>52</sup> and (2) whether the "profit and general expense" amount is consistent with that usually reflected in sales of goods of the same class or kind. The latter consideration must be based on full analysis of the particular sale and the relevant market. It is left to the producer to justify the profit figures with valid commercial reasons and to show that the pricing policy reflects usual policies in the branch of industry concerned. If the profit is inconsistent with the normal figures under such circumstances, the customs authorities may (with the agreement of the producer) base the amount of profit and general expenses upon other relevant information or use other acceptable methods of valuation.

#### F. *Other Acceptable Methods*

When none of the preceding methods enable customs value on the imported goods to be determined, reference may be made to data available in the Community if the means used are consistent with the general provisions of the MTN Code and article VII of GATT. Although the MTN Code anticipates that this alternative will be used primarily for flexible approaches to the five methods enumerated above, the wording of the EEC Regulation leaves open the possibility that a new method might be structured under unforeseen circumstances. Of course, use of a reasonable alternative method must avoid the prohibited bases for establishing values. Such bases are itemized in article 2(4) as being:

- a) the European equivalent of the American Selling Price, the sales price in the Community of goods produced in the Community;
- b) any system relying upon the higher of two alternative values for customs purposes;
- c) the price of goods on the domestic market of the country of exportation;
- d) any cost of production method except that of computed value;
- e) export prices to a non-Community country;

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<sup>52</sup> See Interpretive Notes to EEC Agreement on Implementation, *supra* note 7.



- f) setting of minimum customs values; or
- g) establishing arbitrary or fictitious values.

With the flexible alternative standards, the system for valuation under the 1980 Regulation is complete. The goods are valued in the manner provided by the first operable method. The time of such valuation shall be the "material time for valuation,"<sup>53</sup> usually the date of acceptance by the customs authorities of the statement of intention for the goods to enter into free circulation.

### G. *An Evaluation of Valuation Techniques*

Following implementation of the 1980 EEC Regulation, customs techniques in the EEC will be much more uniform and coherent. The rules are more specific than their predecessors, although they retain a certain degree of flexibility. Certainly, the use of these methods in practical situations will develop their true meaning and scope, in accordance with administrative practices and judicial precedents.<sup>54</sup> However, problems remain. Various Community officials have expressed the reservation that the obligatory use of the transaction value, in the absence of the listed conditions excluding its use, creates a loophole through which importers might arrange a low actual price paid or payable resulting in a low customs valuation. Community customs authorities have little leeway to challenge a low price between two non-related parties in the absence of certain licensing restrictions or evidence of additional compensation accruing to the seller. A sale at a very low transaction price, in addition to being commercially impracticable, could run afoul of Community antidumping laws.<sup>55</sup> Furthermore, if customs authorities can establish an additional payment to the seller, however indirectly (even involving a means other than

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<sup>53</sup> See 1980 EEC Regulation, *supra* note 25, art. 1(1)(g), which sets such "material time" as the date the customs authorities accept the statement of intent that goods enter into free circulation, or such time legislatively established after another customs procedure has been applied.

<sup>54</sup> The form incorporating the provisions of the 1980 EEC Regulation 1224/80 has been published as an Annex to Commission Regulation 1496/80 of 11 June 1980, 23 O.J. EUR. COMM. (No. L 154) 16 (1980). Entitled "Declaration of Particulars," this form must be completed by a person residing or doing business in the customs territory of the Community. *Id.* art. 1. This requirement may be waived by the Member State where the value of the imported goods does not exceed \$2,500, the goods are not of a commercial nature or the goods are part of a regular and continued traffic from the same seller to the same buyer under similar commercial conditions (in which case it is required at least once every three years). *Id.* art. 2.

<sup>55</sup> See Council Regulation No. 3017/79. O.J. EUR. COMM. (No. L 339) (1979).

money), goods already imported may be revalued and additional duties collected.

Another area of potential difficulty involves the charges to be added to the price actually paid or payable in arriving at the true valuation. The 1980 EEC Regulation includes, under article 8(1) (a)(i), all charges for commissions and brokerage, except buying commissions. This exclusion might prompt an importer, unsure of the precise nature of the commissions being charged, to label them as buying commissions on the invoice forwarded to the customs authorities. Although "buying commissions" are defined in the Regulation, other charges, such as for containers that are treated as part of the goods in question, make the subject of additional included charges subject to practical variation.<sup>56</sup>

Throughout the valuation procedure, Community authorities are bound to confidentiality and non-disclosure of all information which by its nature is confidential or which is provided on a confidential basis. The only exceptions are when disclosure has been agreed to by the person or government providing such information, or when disclosure is required by internal Commission investigations or by judicial proceedings.<sup>57</sup> Where the Commission has received such information, it also is bound to secrecy. This policy encompasses all information and documents required by any party directly or indirectly concerned with the import transactions for which a value for customs purposes must be determined. Accordingly, free disclosure to the customs authorities by the importer is encouraged, without hampering free trade and competitive conditions.

An important aspect of valuation methods is the establishment of a fair exchange rate amidst internal and external currency fluctuations. Often price or other monetary factors needed to determine accurately customs value will be expressed in a currency other than that of the Member State where the valuation is determined. Where this is the case, the rate of exchange to be used is that published by "the competent authorities for the Member State concerned."<sup>58</sup> A periodic exchange rate, which would

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<sup>56</sup> Under the United States Trade Agreements Act of 1979, a fee is included in the value of imported goods which is "any selling commission incurred by the buyer with respect to the imported merchandise." 19 U.S.C. 1401a(b)(1)(B) (Supp. III 1979). Other costs that meet the definition of an "assist" are included only if not performed by a domiciliary of the United States, not performed by an employee or agent of the buyer, or not incidental to other engineering or design work. *Id.* § 1401a(h)(1)(B).

<sup>57</sup> 1980 EEC Regulation, *supra* note 25, art. 10(2).

<sup>58</sup> *Id.* art. 9 (1)(a).

designate the acceptable authorities and the criteria needed for determining the periodic rates, is likely to be the subject of a new Regulation. The 1980 Regulation only stipulates that the rate must reflect the current value of the currency in question in commercial transactions for the period specified. Until the rate is established, the applicable rate is to be the latest selling rate reflected on the "most representative exchange market of the Member State" at time of valuation.<sup>59</sup>

## V. ADMINISTRATION, CONSULTATION AND DISPUTE SETTLEMENT

Dispute settlement mechanisms are gradually being developed within the Community legislation, although this responsibility has long been left to the administrative authorities of Member States. Questions involving the interpretation or validity of Community provisions that arise before national courts continue to be subject to preliminary ruling upon referral to the European Court of Justice. Under article 177 of the EEC Treaty, domestic courts are competent to decide, in accordance with their national laws, disputes involving customs valuation, provided that Community legislation is given its directly applicable effect and the appropriate judgments of the Court of Justice are taken into account. Yet the 1980 EEC Regulation, together with a proposed Council Directive, take significant steps to harmonize provisions involving dispute settlement of customs matters.

### A. *Customs Valuation Committee*

The 1980 EEC Regulation sets up a Customs Valuation Committee consisting of representatives of the Member States and a chairman from the Commission. The Committee is designed to examine questions pertaining to the application of the Regulation as well as to review future legislation proposed by the Commission. The Committee has the task of examining questions relating to the work of the Technical Committee on Customs Valuation, a group created by the MTN Code and which plays a part in the dispute settlement system set up therein. In anticipation of the proposed Directive, the 1980 EEC Regulation leaves the relevant laws of Member States in effect until the harmonization is complete.

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<sup>59</sup> *Id.* art. 9 (2)(a).

### B. *Draft Directive on Customs Dispute Settlement*

The provisions of a proposed Directive of the Council<sup>60</sup> would give an automatic right of appeal to all persons affected by a decision (any ruling having direct legal effect) applying customs rules, other than decisions relating to criminal matters. In most instances, failure to give a requested ruling for a period of four months also could be appealed.<sup>61</sup> This proposed Directive sets forth procedural rules for lodging the appeal (by written request), details the effect on the disputed decision (it is usually not suspended), and describes the inquiries and rulings of the administrative customs authority. A second stage of appeal is provided to a designated authority, independent of the customs authority, empowered to refer the matter to the European Court of Justice pursuant to article 177 of the Treaty. The framework of this Draft Directive, the right of appeal, guaranteed representation, and the right of a further appeal to an independent authority, are ideas pioneered by the Customs Cooperation Council and incorporated as an annex to the Kyoto Convention on the Simplification of Customs Procedures. The draft Directive would leave in place the right of recourse to domestic judicial bodies, to the extent that such customs rules may be invoked there. These provisions relate to internal remedies in the Community. Intergovernmental disputes are covered by provisions of the MTN Code.

### C. *MTN Provisions*

The Committee on Customs Valuation was established by the MTN Code to provide the members a forum for annual consultation on the operation of the customs valuation system. Any party to GATT may request private consultations for acts of another party, which it believes are contrary to the objective of the MTN Code. If private consultation does not reach a satisfactory solution, the Committee will meet upon request of either party to the dispute to investigate the matter and where necessary the committee may set up panels to ensure a thorough investigation. Final enforcement is left to the Committee in the form of: 1) recommendations, 2) further action considered appropriate, and 3) suspension of an application of a member party.

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<sup>60</sup> Proposal for a Council Directive on the harmonization of provisions laid down by law, regulations, or administrative action concerning the exercise of the right of appeal in respect of customs matters. Submitted by the Commission to the Council on 29 January 1981, 24 O.J. EUR. COMM. (No. C 33).

<sup>61</sup> *Id.* art. 2.

#### D. *Importers Rights under the EEC Regulation*

Until the adoption of the Draft Directive of the Council, the dispute settlement provisions within the EEC are left to the relevant laws, regulations, and administrative provisions of the Member States, along with the judicial remedies provided by the EEC Treaty. However, the EEC Regulation is not without its harmonizing elements. Each importer is afforded the right to an explanation as to how the customs value of his imported goods was determined by the country of importation.<sup>62</sup> Nevertheless, unless this information is provided under usual national procedures, the importer must request the explanation within one month of the date of the customs determination. If the final determination of customs value is delayed, the importer is permitted to withdraw the goods from customs upon provision of a sufficient guarantee in the form of a surety.<sup>63</sup> In addition, if the buyer and seller are found to be related and the customs authorities determine that the relationship influenced the price, the importer must be informed of the underlying grounds (in writing upon request) and must be given a reasonable opportunity to respond.<sup>64</sup> Taken together, these rules provide some fundamental guarantees of uniform fairness in the procedural steps taken by the customs authorities. They establish the central notion of Community-wide standards and give rights to individuals affected by customs valuation legislation.

### VI. DEVELOPING COUNTRIES AND CUSTOMS VALUATION

The developing countries, usually viewed as critical of GATT developments (for example, the nondiscriminatory reduction of trade barriers is regarded as maintaining the rich-poor gap), may not be receptive to the customs valuation provisions. Although the provisions do not contain privileges to the extent that they are included in the tariff measures, such as the Generalized System of Preferences, they do attempt to lessen the burden for developing nations.

The "Tokyo Declaration" of September 1973, which gave direction to the latest round of trade negotiations, recognized the need to adopt "differential measures" in order to give developing countries "special and more favorable treatment . . . in areas of the

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<sup>62</sup> 1980 EEC Regulation, *supra* note 25, art. 12.

<sup>63</sup> *Id.* art. 11.

<sup>64</sup> *Id.* art. 3(2)(a).

negotiation where this is feasible and appropriate."<sup>65</sup> However, this goal proved difficult to develop into specific proposals in most areas of negotiation, including customs valuation. The MTN Customs Valuation Code provides that developing countries may accept the Agreement and delay application of its provisions for five years and for up to eight years for those provisions relating to computed value.<sup>66</sup> Although delayed activation is one way to encourage wider acceptance by the developing countries, it has not been very successful.

The MTN Code calls upon the developed countries to furnish technical assistance to developing countries upon mutually agreed terms. Full programs of technical assistance are to be promulgated, including training of personnel and assistance in implementing the new provisions. Even though assistance could be extended beyond the narrow goal of helping the developing nations comply with the Code's provisions, there is no such obligation in the Code. Tools at the disposal of the developing countries, in addition to obtaining special treatment, include using and developing rules in various other areas of international trade, such as escape clause safeguards, subsidies, and dispute settlement.

## VII. CONCLUSION

This survey of customs valuation legislation, with emphasis on that of the EEC, does not purport to be exhaustive in analysis. The 1980 EEC Regulation, in full compliance with the 1979 MTN Customs Valuation Code, has established a comprehensive and apparently fair system of valuing goods imported into the Community. The Regulation offers assurance and predictability to international traders, while eliminating identifiably protective or other unfair methods of customs valuation.

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<sup>65</sup> Declaration of Ministers Approved at Tokyo, ¶ 5, in GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (20th Supp.) 21 (1973).

<sup>66</sup> EEC Agreement on Implementation, *supra* note 7, art. 21(1) & (2).

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