



International Chamber of Commerce

The world business organization

Policy statement

The impact of customs duties on trade in intellectual property and services

Committee on Customs and Trade Regulations, 18 February 1997

The International Chamber of Commerce (ICC) wishes to comment on the impact of customs duties on trade in intellectual property and services, which can arise when such are transmitted across national frontiers by means of goods used as carrier media for this purpose.

Intellectual property and services (IP/services) transmitted internationally by goods subject to ad valorem customs duties can become subject to such duties whereas if transmitted by other means (e.g. by satellite, radio, telecommunications, goods free of duty or subject to specific duty only) they cannot.

This is because the rules of the General Agreement on Tariffs and Trade (GATT) for determining the value of goods for customs duty purposes (customs value) _ the Valuation Code _ are interpreted by some customs administrations as requiring the inclusion of the value of IP/services borne thereon in the customs value of goods used as carrier media, when such goods are subject to ad valorem customs duties.

Consequently, IP/services supplied by such means become burdened with the same customs duties as apply to the carrier medium. The direct effect of this is to create a tariff barrier to the importation of IP/services in such instances. This is not consistent with the overall objectives and principles of the World Trade Organization (WTO).

However, some customs authorities, recognising that the importation of the carrier medium is incidental to the supply of the IP/services, have adopted practices which have the effect of excluding from the customs value of the carrier medium, the value of the IP/services borne thereon. Consequently, the latter is not burdened with customs duties and the creation of a tariff barrier against their importation is avoided. But, at present, these are national practices not binding under any international agreement.

At present, in the absence of international agreement to the contrary, countries which raise additional revenue by including the value of IP/services in the customs value of goods used as carrier media, and thereby creating a tariff barrier to the IP/services supplied by such means, are free to do so. But the effects on trade in IP/services of such government action are to distort markets, increase costs for suppliers and buyers, depress commercial activity, and to impede the availability of IP/services in the country imposing the tariffs. Such effects are particularly severe where the supply of IP/services cannot be made other than by goods subject to ad valorem customs duties.

Because the value of IP/services is many times greater than the value of the carrier medium, even at low rates of duty the adverse effects of the additional duties is very considerable. At higher rates, they cripple business and trade.

In recent years, with the vast expansion in the volume of the world wide flow of information, data and instructions transmitted, reproduced, processed and handled by ever changing information technology, the present uncertainty and variability in the customs treatment of carrier media - such as

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tapes, disks, CDs, and integrated circuits (and media yet to be developed) has become a matter of increasing concern.

The dimensions of the problem will increase as the volume of IP/services traded among countries grows and more countries adopt the Valuation Code, particularly those for which customs duties provide a large, in some cases the biggest, part of government revenues.

The World Customs Organization (WCO) has advised that, although the situation with carrier medium stems from the Valuation Code, (the rules of which apply to all goods irrespective of the purpose for which the goods are imported or used), it is outside the remit of the WCO and must be taken up by the WTO, since it essentially involves trade policy considerations and not technical valuation issues.

The potential impact of the Valuation Code on carrier media was recognised only after it came into force, in connection with data and instructions (software) recorded on carrier media for data processing equipment and was addressed in the GATT Customs Valuation Committee.

The resulting 1984 decision (on the "Valuation of Carrier Media Bearing Software for Data Processing Equipment") is an ambivalent political compromise of very limited application which:

- rules that both the inclusion of the value of the software in the customs value of the medium and its exclusion therefrom are equally consistent with the GATT provisions and leaves it to individual countries to decide which option to adopt;
- excludes both sound cinematic and video recordings and integrated circuits and semi-conductor devices (and other carrier media yet to be developed) from its scope.
The Most Favoured Nation (MFN) principle requires countries which opt for the exclusion to apply this approach even to imports from countries which have opted for inclusion.
The decision negates the objective of creating a level playing field in international trade and is not consistent with the principles of the WTO.
Its coverage is restricted to data/instructions commonly known as "computer software"; the exclusion of sound and visual recordings inhibits its application to multi-media software. This is a matter currently causing difficulties in a number of countries.
The decision does not extend to any other forms of intellectual property, services, information, and it appears specifically to exclude such as relate for example to programme material for radio or TV broadcasting. The text of the written works translated into digitalised form, is also not covered.
- Currently, no international agreement exists on the customs treatment of goods used as carrier media, apart from the 1984 Decision referred to above. Practices vary from country to country. In some countries, the danger of IP/services becoming subject to customs duties because they are transmitted by goods has been avoided by customs techniques such as temporary importation or by such tariff measures as temporary suspension of duty. However, these are purely national measures which apply only in countries which have adopted them and which are not subject to any binding provisions of the WTO. Thus they can be withdrawn or varied at will by national governments. Also, the benefits of some of these measures are difficult to obtain because they are administratively burdensome for both importers and customs administrations and often lead unexpectedly to substantial penalties.
- There is no indication that the efforts currently being made to achieve zero for zero duty agreements for trade between countries in the products of the information technology industry will provide a complete solution to the problems concerning the valuation of goods used as carrier media for the international transmission of IP/services. We note, for example, that only

participating countries will undertake to eliminate tariffs on an MFN basis (for a specified number of products).

The current situation creates confusion and uncertainty for business interests engaged in international trade in intellectual property and services. It also discourages and distorts trade and hampers economic growth and development around the world.

In view of the above, the ICC urges WTO member governments:

(i) to accept the principle that all forms of tariff barriers to the dissemination and exchange of, and international trade in, intellectual property and services by whatever means should be eliminated; and

(ii) to include among the WTO's trade policy objectives a binding global agreement establishing that, where goods subject to ad valorem customs duties are used as carrier media for the transmission of intellectual property and services, the value of the latter shall not be included in their customs value.

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