Valuation of goods in international transactions: diverging interpretations among national agencies

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Abstract

This article examines the derivation of an object's value and identifies three levels for analysing the concept of value: subjective valuation by whoever values such items individually; intersubjective valuation limited to the parties of the transaction that determines the price of the goods involved; and a supposedly objective valuation based on an ideal transaction pattern. It concludes that the fragmentation that results from the multiplicity of international treaties representing sectoral interests, which is later translated into soft law that member states apply at the local level through their government agencies, affects the rule of law. In reaching this conclusion it affirms that the value of an object in a transaction depends on the individual situation and the circumstances in which whoever the person performing the valuation is in, because value does not belong to the object itself, but rather, it is a perception of whoever is putting a value on it.

1. Value, valuation and price

1.1 One might say that the true value of goods is known only to God, the buyer and the seller (Alsina 1982). This highlights how hard it is for Customs to analyse the usual wheeling and dealing of a sales agreement in order to reach a price. This situation is faced not only by Customs when setting import or export values, but also by other government agencies, or even by any judge ruling on a dispute between parties.

1.2 The valuation of an object starts off with the subjectivity it impresses on us (Barreira 2014, p. 21). Value does not belong to the object, although it is a quality attributed to it. The concept of value, usually used to refer to a tax base, is based on a utility criterion. It is a measure of how useful an object is for an individual under certain circumstances (Gonnard 1930, p. 254). This leads to a first conclusion: ***The valuation of an object is subjective, insofar as it is a value judgement, and it does not emanate from the object under consideration but from the subject making the valuation.***

1.3 In a traditional bilateral exchange agreement, one of the parties may estimate or value a good differently from the other party. This depends on: (a) the utility of the object to the seller and the potential utility the buyer estimates the object has; (b) how convenient it is for the seller to keep the object or the buyer's urgency to have it; (c) the ease or difficulties the buyer has to go through to acquire an identical or similar object from another seller, or the higher or lower cost this implies; (d) what the final use of the object is in the purchasing party's business plan at a specific time and the role that it plays in the seller's business plan at that very same moment; (e) the opportunity that might be lost for either of the parties if they do not possess the object within a certain time frame (depending on the perspectives for scarcity or abundance of the product in the future), and the potential variation of future prices; (f) the buyer's financial capacity at the time; (g) implicit conditioning, transportation, and storage costs; and, finally, (h) the seller's financial urgency (if any) and to what extent the buyer wishes to have the object, or even, the fantasies in the buyer's mind that shapes the buyer's ideas of a future possession of the object, or the

seller's thoughts on what to do with the money from the sale. This leads to a second conclusion: ***There may be a valuation of the object by the buyer that is different from the seller's, although it is the same object at the same moment in time.***

1.4 The psychological motivations of each operator are affected by the utility that each party gives to the object, together with how abundant or scarce the object is. In a negotiation, there is a struggle between these expectations, culminating in an agreement reflecting a price agreed under certain terms of payment and delivery. The subjectivities surrounding each party's valuation lead to intersubjectivities in third parties. Through an agreement, and within the framework of business dealings, there is relative objectivity in the valuation, as it only encompasses the parties to the transaction and materialises into a valid price for this unique transaction. A price, one of the essential elements of a contract, is the valuation made of an object, measured in monetary terms (Bacigalupo 2011, p. 310; Rohde Ponce 1999, vol. II, p. 281). This distinction between price and the 'value' for customs purposes is particularly relevant in a breach known as an inaccurate customs declaration (Sarli 2007, pp. 376–8). A third conclusion may be drawn: ***An intersubjective valuation, translated into a price agreed in a transaction, is a direct outcome of conditionings for the specific case by the parties involved, and it is a real valuation for such parties.*** This is the so-called *positive notion* of customs value, reflected in article I of the Customs Valuation Agreement (CVA) as a transaction value.

1.5 Nevertheless, vital circumstances at play when setting the price in this specific negotiation may not be the same in another negotiation close in time where goods are identical but operators are different, or even among the same operators albeit under different conditions. This is the case of the thirsty traveller on their journey through the desert, willing to give their fortune for the first glass of water, but the following glasses of water are worth less, until the fifth glass is worthless. In a sales transaction between the same parties, and in a matter of seconds, the same object might undergo significant variations in price because of sudden subjective changes in the situation in which each party involved perceives itself. The idea of having the intersubjectivity of an object (resulting from the negotiations that operators carry on in a specific case) become an objective price therefore fades away. Thus, a fourth conclusion is inferred: ***A similar good may have different prices among different parties, in the same period and place, or even among the same buyers and sellers, and all such prices will be equally valid as a valuation base in the operations in which they are involved.***

1.6 Aside from parties defending their own interests, there are also third parties alien to the agreement. Nevertheless, setting a price that might not coincide with the value judgement these third parties estimate for this same object can entail consequences. These third parties, both in the negotiation and when contracts for import or export operations are entered into, estimate the price based on interests quite different from the ones that weighed heavily when setting the price during negotiations. They are mere spectators of the outcome, who are not conditioned by the circumstances that effectively influenced the will of the parties to the agreement. Among these third parties, financial analysts play a key role, since they attempt to establish the evolution of values for the goods depending on the changing circumstances at play in the overall supply and demand dynamics of a given product, regardless of the particular cases that may have served to set the trend (Mill 1848, III.15.4). Creditors seek to establish whether the price of the transaction diminishes the buyer's or seller's solvency, the seller being the creditor's debtor. The government, in turn, makes its best efforts to set the value of the goods of the transaction to serve as a basis for tax collection or for the amount of foreign currency that should enter or leave the country.

1.7 Although these third parties are not a party to the agreement, they are entitled to articulate claims arising therefrom when prices expressly stated in contracts are considered to be misrepresentations, prompting creditors to challenge them. These creditors are government agencies whose main task is tax collection, their interest lying in how great an incidence the contract's financial equation has on taxes. In the case of specific duties, the transaction's price lacks any relevance in customs duties, but when

dealing with *ad valorem* customs duties, the tax may have a strong impact on the negotiation of the price, especially if the tax is high. This entails a fifth conclusion: ***There are third parties who are unaware of the considerations taken into account in the negotiation, who in the face of clues or suspicions of a lack of sincerity in the transaction, may be interested in not knowing the agreed upon price and may assign to the goods an economic value that ignores the particularities and subjectivities of the case.***

1.8 These third parties, including government bodies such as customs, tax, foreign exchange or white-collar crime agencies, differ in their aims and purposes from the parties to the agreement, who actually reached the contract price willingly and by consensus. From their subjective standpoint, valuation is something else to them. This is clearly seen when setting up supply and demand curves, where the particularities of the case are not considered. This task provides an economic concept of value differing from the one generated in an actual case of a singular character. It is another value; a theoretical value created on the basis of an average of actual prices, which considers an ideal situation, where individuals are assumed to be driven only by economic utility and which, even if it might be close to the actual results of an individual case, is almost never identical to it. This is a valuation that suffers from an inevitable inaccuracy (Mill 1848, III.15.6). A sixth conclusion may be inferred here: ***The so-called market value of the good is an idealisation of the economic value that does not arise from a particular operation. Instead, it takes into account the prices obtained in multiple individual operations, pertaining to similar goods and under certain ideal conditions of an agreement, all of which lead to a theoretical notion of value, which does not usually coincide with the one obtained in an individual transaction, as exteriorised in the agreed contract price.*** This is the principle serving as the basis for the theoretical notion of customs value (CVA, Articles 2 to 7).

1.9 Third parties may refer to the exchange of goods between related enterprises when claiming there is a lack of sincerity in a transaction, thus justifying their ruling out the price as a basis for valuation. By 'related', we mean enterprises having a structural relationship as a business community seeking the maximum profit even when this profit is located in a business unit alien to whoever produces it. This transfer of profit is reflected in a distortion of prices, which should have been normally generated by supply and demand between independent parties. Thus, from the standpoint of Customs, the CVA in principle excludes transactions between related enterprises from the valuation method based on a positive notion and paves the way for the search of an objective valuation based on a theoretical notion, described in Articles 2 to 7 of the CVA. Domestic taxation is different. Earnings from an operation between independent parties are neither challenged nor subjected to adjustments (CVA, Article 8). The only thing necessary is to make comparisons if the parties are related in any way and it is thought that this affiliation distorts the arm's length price.

1.10 Even if a price as a basis for valuation is eventually dismissed because authorities are suspicious of its truthfulness or genuineness, the law does establish valuation rules restricting the discriminatory faculties of agencies in setting the tax base to somehow mitigate a strong backlash from the government. Therefore, ignoring the price obtained within the framework of an agreement and, as a result, going beyond the positive value, should have certain limits of objectivity and neutrality. An objective value may be based on intersubjectivity shared by all (Cossio 1945, p. 155). Insofar as we aim to distance ourselves from the subjectivity of the parties involved in a transaction, we should focus on an intellectual task, far from the intuitive perception wielded by parties to a transaction, to enter into a terrain where the valuation process is thought through and where the parties to the transaction are brushed aside to query other parties and data, all of which, under ideal conditions, provide a distance from the likely motivations the parties to the transaction had in the first place.

1.11 The task of setting a value in this way steers away from the real causes that originated the price. On the contrary, it is based on an archetype of a person, an ideal or idealised subject, driven by motivations of exclusively economic utility, only conditioned by supply and demand according to how scarce or abundant the goods are in the market regardless of other particular circumstances; that is, their

actual and concrete economic and financial status. This leads to a seventh conclusion: ***The idea of an objective valuation, based on an ideal pattern of transaction, has an entity that is different from the valuation performed by the parties to the actual transaction originating the price under scrutiny. As the conditionings of the participants in the business are not taken into account, the value will be different and, hence, from a Customs standpoint, the value will not have been actually adjusted or reset. It will just be another value.***

1.12 Therefore, the term *value* is used as an economic estimation of an object within the framework of an international transaction. Valuation differs depending on the position assumed by each one of the parties involved in this legal relationship. To sum up, there are three different levels for analysing the concept of value:

(a) At a first level there is a *subjective* valuation of the goods by whoever values such items individually (paragraph 1.2 above).
(b) At a second level there is an *intersubjective* valuation limited to the parties of the transaction that determines the price of the goods involved (paragraph 1.4 above).
(c) At a third level there is a supposedly *objective* valuation based on an ideal transaction pattern (paragraph 1.8 above).

1.13 A subjective valuation (first level) is not applicable in the case of transactions between two or more parties, so it is not a useful criterion for our analysis. An intersubjective valuation (second level) is applicable in most cases for customs value, except if the price is influenced by related parties or there are other reasons to consider it inadmissible, as the CVA indicates for the transaction value. The methods under the OECD guidelines for transfer pricing are based on a relationship that might influence prices so that it first displaces the transaction value and adopts methods that the CVA considers alternative in pursuit of an objective or theoretical valuation, for which the arm's length price becomes an ideal transaction pattern applying the notion of what would be the price under conditions that do not exist in the real world. An objective valuation (third level) is not, then, more appropriate than the intersubjective one; it is simply different and, therefore, except if the price paid or payable were outrageous, one should not punish anyone who in good faith believes that it is adequate to the circumstances of the transaction.

2. Fragmentation of international law

2.1 Again, specialised government agencies with different competencies and, thus, varying interests and objectives, converge to analyse the import or export declaration that a private party files to obtain the necessary clearances to enable an international deal to be realised. Depending on the circumstances, the declaration may be accepted by some and turned down by others, or a seemingly appropriate declaration to some is deemed suspicious or outright incorrect to others. Depending on how distrustful and susceptible the acting official is, and on the circumstances and ultimate gravity of what is being detected, the party may be exposed to a series of administrative enquiries, entailing delay costs, paperwork, contractual fines, and other inconveniences. One cannot ignore how mortified the party feels, particularly when suspicions are unfounded, all of which causes unease and, more importantly, a negative impact on the rule of law; that is, a situation incompatible with the simplicity, ease, fairness and facility international agencies aim to confer to international trade.

2.2 Controls may be justified, yet it is not desirable to have a legal system where the one same object is worth 10 to one government agency, 8 to another, and even 12 to yet another. From the civil law standpoint, these are different legal goods, that is, rights, protected by the law, but there is a certain incoherence in any legal system allowing this. The lack of connection between the objectives of the various domestic agencies is a reflection of the frequently disparate compliance requirements established

by international organisations that member states are mandated to enforce. In 2006, the International Law Commission (ILC) Study Group—formed to analyse the fragmentation of international law, with special reference to the difficulties stemming from its diversification and expansion—in its final report stated that one of the main features of globalisation is the rise of rules of cooperation in areas of expertise where the transborder application of domestic law is inapplicable. The work of different intergovernmental cooperation agencies has effectively produced a fragmentation of international law, where rules are drawn up for specific areas having no clear relation between one and the other (ILC Report, para. 483).

2.3 Thus, fragmentation occurs when agencies, because of their jurisdiction and competency, dissent in the application and interpretation of the rules and regulations they promote (Czar de Zalduendo 2007, p. 9). The absence of a clear hierarchy of rules in international law, save for a few exceptions, generates specialised legal frameworks, where rules and regulations enter into conflict. As international law is a law of coordination, lacking centralised institutions to ensure homogeneity in the different subsystems or systems, this promotes competition between the various legal areas (Remiro Brótons 2007, §18, p. 81).

2.4 The ILC has acknowledged that fragmentation implies a certain incoherence in international law, and that it works against the predictability of law and the rule of law. Furthermore, the ILC has admitted that although the principles embodied in the 1969 Vienna Convention on the Law of the Treaties could have brought some order toward the application of specific principles as well as the ultimate abrogation, either express or implicit, of some clauses of a multilateral treaty, they have yet to solve problems such as the ones we mention (Barreira 2007, pp. 19–21). Indeed, the Vienna Convention was grounded on the concept where the only subjects involved are nations and not the individuals subjected to its provisions. So it is not unusual that there is no solution so far, perhaps because domestic law might be thought to solve fragmentation and its consequences, by apparently serving as an arbiter of sorts for the legal rights that need to be protected. Yet this is not so.

2.5 Specialised international organisations, arising from international treaties, are a source of inspiration these days in the international trade system, striving to protect the specific social values or legal goods underlying their particular spheres of interests. Hence, they endeavour to compel the adoption of their rules of conduct at a global scale. However, as they lack any real power to impose imperative rules, these organisations establish standards, guidelines, recommendations, opinions, advice or warnings that create soft law. Soft law provides mechanisms contributing to enforce new values in existing institutions in an apparently harmless fashion, as they do not impose sanctions if unenforced. This new source of rules should be analysed as a change in values that is encouraged by promoting their practice and social acceptance at the national level; hence, guidelines first turn into principles and ultimately end up generating legal values to be protected by domestic law, even under the threat of sanctions. In the end, what actually changes is how noncompliance is sanctioned (Lasserre 2015, §109, p. 182).

2.6 Some international organisations are entitled to establish recommendations, to be abided by member states, and so deadlines are set up to report on any advances. Noncompliance is followed by the disapproval of the international organisation, to effectively induce their adoption by domestic law through the issuance of mandatory rules, even if contrary to the ideas and values of large sectors of a member state. Insofar as there are sectoral treaties made concurrently, touching upon different social institutions, this poses a serious risk where the proliferation of guidelines, recommendations, and advice might end up as rules that are alien to the social values that each nation attempts to preserve domestically. This risk implies that automatic acceptance of soft law in fact enhances unpredictability and has a negative impact on the rule of law.

3. Indeterminate legal concepts and interpretive discretionality

3.1 Every agency tends to reaffirm itself, justifying its own existence by wielding its power to the utmost, and there is no more notorious manifestation of power than the act of legislating. In *On Liberty*, John Stuart Mill (1869, I.6) warned about how we, as humans, are inclined to make others carry on according to our own whims or to the whims of the group to which we belong, without admitting that the regulator of judgement is an individual's own taste or interest, acting in disguise behind certain insincere principles. Mill stressed, in addition, the dangerous and growing tendency of extending the powers of society to an individual by exercising pressure on public opinion and restricting liberty through legislation. Mill (1869, I.15) predicted that this evil, far from vanishing, would become more and more formidable with the passage of time.

3.2 Agreements such as the CVA, as well as the guidelines and recommendations of other international organisations, usually lack precise wording. To use only one concept to encompass the most individual cases, indeterminate words are used to draft valuation rules, forcing upon whoever must apply them the heavy task of interpreting what they mean. The CVA abounds in indeterminate legal terms whose exact meanings are dependent on the various motivations driving the everyday performance of public officials at the domestic level. Thus, acting officials risk encountering suspicious elements where there are none or misrepresentations in declarations falling short of their expectations. The World Customs Organization (WCO) Technical Committee has attempted to hone the interpretation of these indeterminate words in its Advisory Opinions, Commentaries, Explanatory Notes, Studies and Case Studies, although such efforts are not international rules, unlike the CVA (Sherman 1988, p. 56; González Bianchi 2003, p. 83; Zolezzi 2008, p. 27; Lascano 2003, p. 49).

3.3 These indeterminate and uncertain legal terms are practically unavoidable because even if lawmakers make their best efforts to use accurate wording, they cannot imagine the countless cases that might come before the law without omitting others that are unforeseen. A greater part of legal doctrine argues that indeterminate language does not imply the use of discretionary powers. Nonetheless, this indeterminacy elicits an interpretation of the law and implies the existence of some leeway on the part of administrative agencies, where acting officials wield more autonomy to make choices, verging on the actual use of discretionary powers (Hart 1995, p. 169; Grecco 1980, p. 1312). The purpose of a rule sets a limit to this practice, but if the rule is characterised by its neutrality, as required by the CVA's General Introductory Commentary, then the aim is not only to apply the best means with the least sacrifice. Instead, a technically neutral application of the law is called for, prompting the need to enforce it, with the ensuing risk of arbitrariness. As one scholar has stated, 'When the rules of law are not neutral or precise, the threshold separating subjectivity from arbitrariness gets narrower' (Zolezzi 2008, §11.b, p. 17).

4. Conclusions

4.1 The value of an object in a transaction depends on the individual situation and the circumstances in which whoever is performing the valuation is in, because value does not belong to the object in itself, but rather, it is a perception of whoever is putting the value on it. This not only applies to the parties to the transaction, who agree on a transaction price, but also to third parties who have their own stake in the transaction, even if they are outside the immediate context of multiple needs, conditions, and options at play in a negotiation. This is the case of public officials with opposing missions to enforce within one and the same nation, who variously take part in estimating a value for the goods from different perspectives, even if they strive to be objective and impartial. In the end, there is always some degree of preference, buoyed by either personal interest or the specific requirements of the government agency. This explains why whoever has to judge a case sometimes has to step down for reasons of incompatibility or is challenged to do so.

4.2 Values assigned to goods by government agencies are far from predictable for the parties to the transaction because there is a certain degree of flexibility in the methods acting officials apply to decide whether prices reached by private parties are suspicious or should be dismissed outright. This flexibility is reflected in the discretionary powers that such rules provide acting officials, or in the open texture of the indeterminate language of the rule, subjecting the wording to the personal interpretation of the acting authority.

4.3 Acting officials may end up with dissimilar appraisals because their interests differ from the interests of operators in international transactions and of other agencies involved. This entails opposing consequences that clash with the purposes of other agencies belonging to one and the same nation. Thus, under a particular situation, there may well be diverging public interests at stake under the same legal framework, all of which affect the concept in itself of the sovereign state as a coherent legal system.

4.4 This divergent situation concerning the various legal goods in conflict within the same nation is worsened if international organisations, under the umbrella of international multilateral treaties, have segmented goals and act independently and concurrently through opinions, recommended practices, guidelines or other types of standards of conduct.

4.5 Fragmentation of international law is manifested by parallel, yet not always concordant, interests. These interests, however, influence or determine the content of national legislatures. In the long run, standards of conduct based on soft law are enacted at the national level, with the ensuing legal consequences for whoever does not abide by them.

4.6 If a party has to declare a certain value under the threat of punishment, the relativity of this value might conspire against the application of the penalty, because no sanction is fair if it cannot be prevented by performing a contrary action. In this case, the required conduct consists of determining a certain value or price for a transaction and requires that the said value or price be clearly determinable and independent from unlikely, or at least, unforeseeable, subjective estimations. Thus, a sanction is only applicable if actual data from the transaction is inaccurately declared; in other words, the agreed-upon price and the conditions that might have influenced this price. In short, to establish a true value, it is necessary to ensure the genuineness of the price.

4.7 The rights of individuals are relative and may be restricted for the benefit of the rest of society; yet this principle will apply provided that restrictions are inspired in the public good and that measures are appropriate and proportional to the end sought, that is, something coherent with the rest of the legal values prescribed by law.

4.8 Moreover, under the CVA, values estimated by parties in good faith—based on their wealth, needs and the circumstances of a transaction—should be the ones accepted '*to the greatest possible extent*' (paragraph 1.4 above). The fundamental principles governing the international flow of goods should be met; that is, promptness, simplicity and uniformity, as established by General Agreement on Tariffs and Trade (GATT) and accepted by the World Trade Organization (WTO) Agreement in 1994 under the CVA. Indeed, the CVA provides a neutral procedure to guarantee the streamlined flow of goods required by the dynamics of contemporary trade to ensure the rule of law in the context of fair international trade.

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