CUSTOMS VALUATION · ROYALTIES AND LICENCE FEES

The Royalty Is Decided in the Contract, Not the Audit

How Article 8.1(c) of the WTO Valuation Agreement reads across the WCO, the United States, the European Union and the Andean Community, and why the outcome is fixed long before an audit begins.

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> A single treaty provision governs whether a royalty enters the customs value of imported goods. Four authorities read it in four ways, and the divergence is widening. The argument of this article is that the decisive work happens at the contract drafting table, not in the audit room, and that a practitioner who understands where a royalty lives can settle the question before the first shipment moves.

The question customs valuation keeps reopening

As I write this, licensed merchandise for the 2026 FIFA World Cup is clearing customs in three countries at once. The tournament is co-hosted by the United States, Mexico and Canada,[1] and somewhere among the host ports a customs officer is reviewing a value declaration that turns on one question: is the licensing fee the importer paid part of the price of the goods, or is it payment for something else? The question is old, and it remains one of the least settled in customs valuation. What makes it concrete this summer is volume and timing, arriving in exactly the markets where the answer diverges most.

At the centre sits Article 8.1(c) of the Agreement on Implementation of Article VII of the GATT 1994, the WTO Customs Valuation Agreement. It adds to the price actually paid or payable the royalties and licence fees related to the imported goods that the buyer must pay, directly or indirectly, as a condition of sale, to the extent those amounts are not already included in the price.[2] The text is short. Its application is anything but.

Here is the proposition that fifteen years of customs work has settled for me, and that no audit defence can retrofit. The fate of a royalty is decided at the drafting table, before the first shipment, not in the audit room. The authority does not, in the end, examine the goods. It examines the concept under which the payment is made, as the contract defines it. Draw that line cleanly, and the payment stays out of customs value. Leave it loose, and the authority fills the gap with its own reading, which rarely favours the importer.

One provision, four conditions

Before turning to how different authorities diverge, it is worth restating what the provision actually requires, because the divergence lives inside these conditions rather than around them. For a royalty to be added to the customs value, four things must hold together, and the failure of any one defeats the addition.

Related to the goods. The royalty must relate to the goods being valued. In practice this means the imported goods incorporate the intellectual property, or are manufactured using it, such that the right paid for is embodied in what crosses the border. A trademark affixed to the imported article relates; a fee for know-how used only to complete or distribute a product after import is a weaker link, and often no link at all.

A condition of sale. The buyer must be required to pay the royalty, directly or indirectly, as a condition of the sale of the goods for export. The working test that authorities apply, in one form or another, is whether the buyer could obtain the imported goods without making the payment. If it could not, the payment is treated as a condition of sale, even where the contract of sale is silent and the royalty is paid to a third party.

Objective and quantifiable data. Any addition may be made only on the basis of objective and quantifiable data.[3] Where a single royalty covers both dutiable and non-dutiable elements, or both imported and domestically produced goods, an apportionment is required, and that apportionment must rest on figures the importer can document rather than on estimate. This requirement is the practitioner's most useful lever, because it converts a vague dispute about character into a concrete dispute about numbers.

Not already in the price. Finally, the royalty is added only to the extent it is not already reflected in the price actually paid or payable. An amount already inside the invoice is not added twice. This condition is rarely contested, but it frames the others: the whole exercise is about what the buyer pays for the goods, assembled from every payment that functions as part of that price.

Four readings of the same rule

One treaty rule, but it is enacted, interpreted and litigated in at least four places, and they do not read it the same way.

The **World Customs Organization** speaks through its Technical Committee on Customs Valuation. Commentary 25.1 sets out a non-exhaustive list of factors that point to a payment being a condition of sale, among them whether the sales contract references the royalty, whether the licence agreement references the sale, and whether breach of the licence can terminate the supply.[4] The Advisory Opinions swing both ways. In Advisory Opinion 4.17 a franchise fee was kept out of customs value, because it remunerated the use of the franchisor's brand and system in the country of importation rather than the imported goods themselves.[5] In draft Advisory Opinion 4.19 a royalty was brought in, where bulk goods are merely converted into marketable form without patented processing.[6] The Committee itself has acknowledged what practitioners live with daily, that there is an emerging split among countries over what condition of sale actually means.[7]

The **United States** enacted the same rule as 19 U.S.C. § 1401a(b)(1)(D).[8] Its working framework comes from a 1993 General Notice, known as the Hasbro II ruling, which asks three questions: was the merchandise manufactured under patent, was the royalty involved in its production or sale, and could the importer have bought the product without paying the fee.[9] Customs and Border Protection has said the third question goes to the heart of whether the payment is a condition of sale, and the trend across recent rulings runs toward inclusion. In the Sports Authority decision, CBP found a third-party royalty dutiable because the importer could not have contracted with the manufacturer at all without first entering the licence.[10]

The **European Union** has built its reading through the Court of Justice. In GE *Healthcare* the Court held that a royalty paid to a company related to both buyer and seller is a condition of sale, and framed the test in one line: would the seller proceed with the sale absent the payment.[11] Three years later, in *5th Avenue*, it folded an exclusivity payment into customs value, where a buyer paid the seller a share of its turnover for exclusive distribution rights in a territory.[12] The instructive part is what that judgment leaves open. Not every payment for distribution rights is dutiable. A contract drafted to disconnect the payment from the goods, and to keep it from functioning as a condition of the export sale, can still stay outside the value. The drafting does the work.

Colombia, applying the Andean Community framework under Decision 571 and Resolutions 846 and 1684, produced the clearest recent illustration. In December 2022 the Consejo de Estado decided the Adidas Colombia case.[13] The company paid two charges to its German parent, both calculated as a percentage of net sales: an international marketing fee of four percent, and a royalty of six percent for trademark and know-how. The court split them. The marketing fee fell outside customs value, because advertising and marketing are simply not among the additions Article 8 permits. The royalty went in. Running the four-condition test, and leaning on Advisory Opinion 4.11, the court held that the link among the related parties was enough to make the royalty a condition of sale, even though the goods were bought from an affiliate in Panama while the royalty was paid to the parent in Germany.[14] The Adidas reasoning is the Andean expression of a logic that CBP and the Court of Justice reach by their own routes.

Article 8.1(c), read *four ways*

WCO *Commentary 25.1 · AO 4.17, 4.19*

Factors, not a formula. The Committee itself admits “condition of sale” is still unsettled.

UNITED STATES *CBP · Hasbro II test*

Could the importer buy the goods without paying the fee? That question is the heart of it.

EUROPEAN UNION *CJEU · GE Healthcare · 5th Avenue*

Would the seller proceed with the sale absent the payment? If not, it is a condition of sale.

ANDEAN / COLOMBIA *Consejo de Estado · Adidas, 2022*

Marketing fee out, trademark royalty in. Same percentage of sales, opposite outcomes.

One treaty rule. Four authorities. They do not read it the same way.

Figure 1. One WTO provision, four readings. The same Article 8.1(c) governs all four, yet each authority frames the condition-of-sale test differently.

Where the royalty lives: regime and the state of the goods

The variable that resolves most cases before those four conditions are ever reached is the customs regime and the state of the goods. It is the question I ask first, and it disposes of more disputes than any single piece of case law.

Under a suspensive regime, an importer brings in inputs to transform and re-export. Raw material, packaging, components. The royalty for a brand and its know-how does not live in a coil of laminate or a carton of cans. It lives downstream, in the finished licensed product that leaves the plant later. The WCO has captured this directly: a royalty for the right to manufacture and sell a licensed preparation relates to that preparation, not to the imported raw material used to make it.[15]

I have defended that line in practice. I once carried the file on a multi-million-dollar valuation audit centred on royalties, run against an export-manufacturing operation under an inward-processing regime. It was a complex matter, argued largely apart from the rest of the file, and it held. It held because of the contract. The clause drew the boundary the authority could not cross: the payment remunerated the right to produce and sell the finished licensed good, not the inputs that had entered under suspension. The defence was not improvised when the audit letter arrived. It had been written, in the contract, years earlier.

The real exposure sits at the other pole. Definitive regime, finished branded goods. There the royalty can be embedded in the very thing you import, and the condition-of-sale test bites with full force. So the operative question is not only what the payment remunerates. It is also this: what did you import, under which regime, and where does the royalty sit relative to that merchandise.

The unrelated buyer

The World Cup importer is the second archetype, and it behaves differently from the related-party manufacturer. Here the buyer has no ownership link to the seller. It buys finished branded goods outright, in the definitive regime, and pays a licensing fee for the right to import and sell product carrying someone else's intellectual property, whether that is a film studio's characters, a sports federation's marks, or a global event's branding. In that configuration the fee is usually tied straight to the importation. It is not a royalty on local manufacture, because there is no local manufacture. It is the price of being allowed to bring the branded goods in.

When the fee is that closely bound to the import, the cleaner course is to treat it as dutiable from the outset and pay the entry tax proactively, rather than declare it out and absorb an assessment later, with interest and a penalty on top. This is where the relationship across the border earns its keep. A seller in the United States or Europe is well placed to support its Latin American buyer, by issuing the letters and documentation that let the buyer declare the fee correctly and pay what is owed at entry. That is supply-chain management, not merely compliance. It is the difference between a payment made cleanly and a surprise assessment that lands on the client months after the goods have sold through.

The distinction the importer has to hold onto is the one the whole question turns on. A fee paid for the right to import branded goods is not the same as a fee paid on local sales for the use of a brand in the territory. The first is bound to the imported merchandise. The second can be argued to remunerate the local operation. Tax the right concept and you are defensible. Blur the two, and the authority will resolve the blur against you.

Sell-in or sell-out: the design choice

Which brings the design choice into focus, the one that separates the practitioner who structures from the consultant who reviews after the fact.

Pay the royalty on the value of the imported merchandise, and you are paying sell-in. The charge is anchored to what crosses the border, and drags straight into customs value. On high-margin product, where the import price is a fraction of the eventual retail, you end up paying duty and VAT on a base that swells well beyond the goods themselves. Pay the royalty on what is actually sold in the local market, and you are paying sell-out. The charge is anchored to local commercialisation, which supports the argument that it remunerates the operation in the territory rather than the export sale of the goods, and that in turn strengthens the position under 8.1(c).

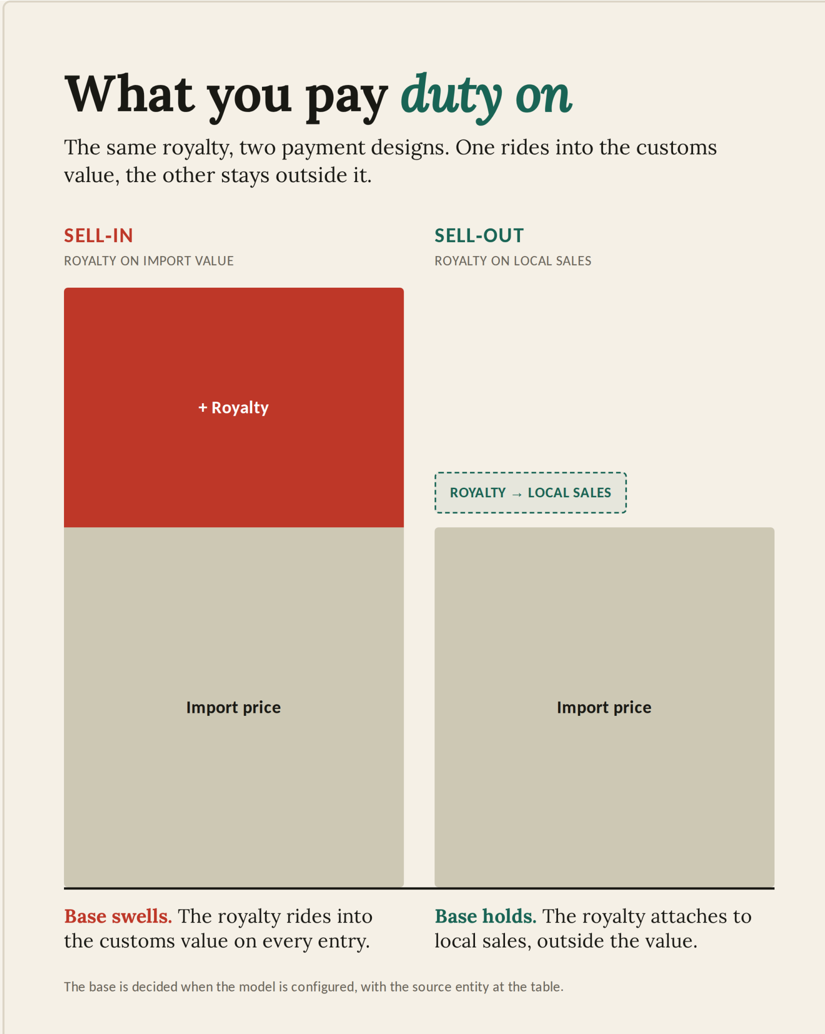

Figure 2. The same royalty, two payment designs. Under sell-in the royalty rides into the customs value; under sell-out it attaches to local sales and stays outside the dutiable base.

The same royalty, two payment designs, two opposite customs exposures. The *5th Avenue* judgment is the cautionary case, since a turnover-based payment to the seller was caught. But the court's own logic cuts both ways. Where the payment is structured and routed so that it does not function as a condition of the export sale, the importer keeps a real defence. That is a decision taken when the business model is configured, with the source entity in the United States or Europe at the table, not a problem discovered at the port.

The value declaration becomes a sworn instrument

Customs administrations have grown more exacting, and the value declaration is turning into a sworn instrument. The Andean Customs Value Declaration, the equivalent declaration under the EU Union Customs Code, and the reasonable-care obligation in the United States all converge on the same demand. The importer must state, under penalty, whether it pays royalties or licence fees related to the imported goods.

That shift changes the stakes. It converts the ambiguity of the payment concept from a fiscal question into a legal one. When you instruct your customs broker, yes or no, is there a royalty related to this merchandise, you are no longer filling a clerical field. You are fixing the content of a declaration the importer signs and answers for. And when the international payments are made, the concept behind each one has to be unambiguous: a royalty for importation, or a royalty for something else, an operation related to but distinct from the imported goods. The seller abroad can help here, by supplying the documentation that lets the buyer declare correctly and pay up front.

What this means for the practitioner

The through-line connecting all of this to the wider hardening of customs enforcement now under way is that the authorities are reading contracts. The importer who can show, from the contract, what each payment remunerates is the one who is ready. In practical terms, that readiness is built at a handful of points, most of them upstream of the first import:

Decide the customs treatment of the licence when the business model is configured, alongside the free-trade-agreement analysis and the logistics design, not after the structure is fixed.

Define in the contract precisely what each payment remunerates, separating the right to import branded goods from the right to use a brand in local manufacture and sale.

Map the regime and the state of the goods for each flow, since inputs under a suspensive regime and finished branded goods under a definitive regime sit at opposite ends of the exposure.

Choose the payment design, sell-in or sell-out, with the customs-value consequence in view, and route the payment so it does not function as a condition of the export sale where that is the intent.

Build the objective and quantifiable basis for any apportionment before it is needed, so that a partial, defensible addition is available rather than an all-or-nothing dispute.

Align the value declaration and the broker's instructions with the contract, and secure from the foreign seller the documentation that supports a correct, proactive declaration at entry.

Conclusion

None of this is a matter of finding the right argument once the audit letter arrives. The practitioner who drafts the contract controls where the royalty lands. The one who inherits a loose contract spends the audit trying to recover ground that was already lost at signing. Across the WCO, the United States, the European Union and the Andean Community, the instruments differ and the case law diverges, but the work that decides the outcome is the same in every jurisdiction, and it happens long before the goods move, in the language that fixes what the money is for.

Notes

1. The 2026 FIFA World Cup runs 11 June to 19 July 2026, co-hosted by the United States, Mexico and Canada across sixteen host cities. FIFA, *FIFA World Cup 2026 — Host Countries and Cities*.
2. Agreement on Implementation of Article VII of the GATT 1994 (WTO Customs Valuation Agreement), Art. 8.1(c).
3. WTO Customs Valuation Agreement, Art. 8.3 and the Interpretative Note thereto, requiring that additions rest on objective and quantifiable data.
4. WCO Technical Committee on Customs Valuation, Commentary 25.1, *Third party royalties and licence fees — General commentary* (adopted 15 April 2011).
5. WCO Advisory Opinion 4.17, *Royalties paid under a franchise agreement*.
6. WCO Advisory Opinion 4.19, *Royalties and licence fees under Article* 8.1(c) (adopted 20 October 2021).
7. WCO News No. 93 (October 2020), noting the absence of consensus and an emerging split among countries on the meaning of condition of sale.
8. 19 U.S.C. § 1401a(b)(1)(D).
9. General Notice, *Dutiability of Royalty Payments*, Vol. 27, No. 6 Cust. B. & Dec. (10 February 1993) (the Hasbro II ruling).
10. U.S. Customs and Border Protection, HQ H024980 (Sports Authority).
11. CJEU, Case C-173/15, *GE Healthcare GmbH v Hauptzollamt Düsseldorf*, judgment of 9 March 2017, ECLI:EU:C:2017:195.

12. CJEU, Case C-775/19, *5th AVENUE Products Trading GmbH v Hauptzollamt Singen*, judgment of 19 November 2020, ECLI:EU:C:2020:948.

13. Consejo de Estado de Colombia, Sección Cuarta, *Adidas Colombia Ltda. v DIAN*, exp. 25000-23-37-000-2019-00054-00 (26383), 7 December 2022, applying CAN Decision 571 and Resolutions 846 (2004) and 1684 (2014).

14. WCO Advisory Opinion 4.11, *Cánones y derechos de licencia según el artículo 8.1(c)*.

15. WCO Advisory Opinion 4.9, treating a royalty for the right to manufacture and sell a licensed preparation as related to that preparation rather than to the imported raw material used to make it.

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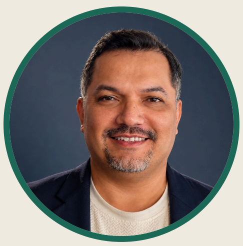

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