GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

VAL/M/23

2 March 1989

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Committee on Customs Valuation

MINUTES OF THE MEETING OF 11 OCTOBER 1988

Chairman: Mr. A. Rodin (Sweden)

1. The Committee on Customs Valuation met on 11 October 1988.

2. The following agenda was adopted:

A. Accession of further countries to the Agreement

(i) Turkey

3. The representative of Turkey informed the Committee that the constitutional requirements for the ratification of the Agreement had been completed. The decree promulgating the ratification by the Council of Ministers, and the text of the Agreement were published in the Official Gazette of 8 September 1988. The instrument of ratification would be deposited with the Director-General in the near future. The Committee took note of this statement.

B. Report on the work of the Technical Committee

4. The Chairwoman of the Technical Committee on Customs Valuation gave an oral report on the sixteenth Session of the Technical Committee on Customs Valuation, held in Brussels from 3-6 October 1988, the full report of which is contained in CCC Doc. 35.000.

5. In connection with intersessional developments, the Chairwoman said that the Technical Committee had been informed that, at its nineteenth Session, the Policy Commission of the Council had approved a proposal for increasing the computer and word-processing capacity at the Council headquarters. In the field of customs valuation, this facility could be used for the storage of information on the Agreement, the instruments of the Committee on Customs Valuation and the Technical Committee and the Index of Valuation Rulings. Other applications might be identified as development proceeded. It had been noted that it was crucial for countries to have efficient valuation administration and that the computerization of valuation data could play an important rôle in this respect. It was agreed to explore the possibility of a joint effort by valuation and computer experts for the compilation and dissemination of information in this area.

6. In the area of technical assistance, the Technical Committee had taken note of Doc. 34.924, which supplemented the revised information contained in Doc. 34.540. Subsequent to the publication of this document, the Technical Committee had been notified of training courses organized by the Customs organization of Austria for customs officers from developing countries in Africa. The seminars, conducted in English, lasted for about two months. Special emphasis was given to the problems of valuation, and one of the major subjects included was the Agreement and its comparison with the Brussels Definition of Value. The Council had been represented at the Fifth Seminar on Customs Valuation, organized by the Mexican Administration. The seminar had been held in Mexico City in August and was attended by forty-seven Spanish-speaking participants from sixteen countries in South America. A Council official had made presentations on the Valuation Agreement and on a comparison between the Agreement and the Brussels Definition of Value. The Ninth Valuation Training Course, organized by the Council in Cyprus from 16-27 May 1988, had been attended by thirty-two mid-management level officers of the Cyprus Customs

Administration. The training course had generated considerable interest, as Cyprus would shortly be applying the Agreement. The Technical Committee had also been informed that, at its June meeting, the Policy Commission of the Council had adopted a draft plan for the 1990s, which placed high priority on extending technical co-operation to help developing countries to adopt international customs instruments. Also at its June session, many members had noted that training should remain a priority activity of the Council.

7. With regard to the dissemination of information on national legislations, the Chairwoman said that the Technical Committee had taken note of Doc. 34.898, which contained the Hungarian Administrative Directives with respect to the determination of Customs value under the Agreement. It had been pointed out that this information appeared to cover Hungarian legislative provisions for valuation, and that the publication of such information was the responsibility of the Committee on Customs Valuation. The Technical Committee had also taken note of Doc. 34.897 containing the rulings and conclusions, issued up to 31 June 1988, by members applying the Agreement.

8. The Technical Committee had also held a discussion on the possibility of undertaking a survey on the use of various valuation methods by the Parties. It had been recalled that the results of such a survey carried out by the Committee on Customs Valuation in 1981 were annexed to document L/5240. In 1983, it had been envisaged to conduct another survey, with a precise methodology prepared by the Technical Committee. However, it had been decided at that time to wait until more countries applied the Agreement. At its fifteenth Session, the Technical Committee had agreed to examine the possibility of undertaking a new survey, taking into account the fact that thirty-six countries had been presently applying the Agreement, the majority of which had had about eight years' experience with its implementation. However, at the present session of the Technical Committee, the majority of delegations had not been in favour of such a study due to reasons such as administrative burden. Furthermore, it had been recognized that the authority to take a decision on this subject rested with the Committee on Customs Valuation.

9. Continuing her report, the Chairwoman said that the Technical Committee had examined the following technical matters:

- Meaning of the expression "the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for rejecting the transaction value as unacceptable". Following its discussion of the revised advisory opinion relating to this subject, the Technical Committee had concluded that Article 1 and its relevant Interpretative Notes were quite clear and provided the sequence of procedures to be followed in respect of related party transactions. The point which had required clarification was, under which circumstances, and to what extent, Customs would examine related party transactions. Accordingly, the Secretariat had been instructed to prepare a new document for the next session.

- Conversion of currency in cases where the contract provided for a fixed rate of exchange. At the fifteenth Session of the Technical Committee, the Australian Administration had requested further consideration of the previously adopted advisory opinion on this subject and had submitted an alternative text. Following a lengthy discussion of both texts at the sixteenth Session, it had been decided to postpone the final decision to enable the Australian Administration to further explain its arguments. Examination of certain examples illustrating the principles established by the previously adopted advisory opinion and a case study on the subject had also been deferred.

- Determination of the amount for commission or profit and general expenses for use in the deductive value. In accordance with the previously-taken decision, the Technical Committee had examined a draft commentary and a case study providing specific indications on the application of this valuation method. In view of the various questions involved, it had been decided to form a working group which would meet prior to the seventeenth Session, to examine issues relating to Article 5, before adopting an instrument.

- Buying commissions. The Technical Committee had examined a draft factually-based case study, and after a general discussion of the practical problems involved and the complex issues encountered in the treatment of buying commissions, had found this study to be limited in its scope and coverage. Accordingly, the Secretariat had been instructed to prepare a draft commentary for the next session, setting out the relevant problems and proposing answers with suitable examples.

10. In addition to the aforementioned technical questions, the Technical Committee also discussed the status of its adopted instruments and recent suggestions regarding the modification, amendment or revision of such instruments. It had been recognized that the instruments could be re-opened for discussion if a real need arose, and that a procedure to this end should be determined. The Technical Committee had decided to discuss this issue at its next meeting. It had also agreed to review its methods of work, and in this respect, guidelines for dealing with new issues would be established at its next session, on the basis of a document to be prepared by the Secretariat.

11. The next meeting of the Technical Committee had been scheduled for 14-17 March 1989, preceded on 13 March by a meeting of a working group.

12. The Committee took note of the report on the work of the Technical Committee and expressed appreciation of the continued valuable work of that body.

C. Information on the implementation and administration of the Agreement

(i) Brazil

13. The Committee took note of a communication by Brazil (VAL/W/36/Add.3), dated 13 September 1988, regarding the abolition by the Brazilian Government of the use of officially-established minimum values and reference prices for valuation purposes as of 22 July 1988. It therefore noted with satisfaction that Brazil had abided by its commitments within the agreed time-limits as set out in paragraph 4 of the Committee Decision of June 1986 concerning the reservation under paragraph 1:3 of the Protocol.

(ii) Zimbabwe

14. The Committee took note of the implementing legislation of Zimbabwe (VAL/1/Add.23) and its replies to the checklist of questions (VAL/2/Rev.2/Add.5). It agreed that the examination of the legislation of Zimbabwe had been completed.

(iii) Argentina

15. The Committee noted that the implementing legislation of Argentina and its replies to the checklist of issues had been circulated respectively in documents VAL/1/Add.22 and VAL/2/Rev.2/Add.4. The sections of the Customs Code (approved by Law No. 22.415) relating to valuation matters would be submitted to the Committee in the near future (subsequently issued as VAL/1/Add.22/Suppl.1). The Committee agreed to revert to the examination of the implementing legislation at its next meeting on the basis of questions and answers to be exchanged between Argentina and other Parties, through the secretariat.

(iv) India

16. The representative of India informed the Committee that with effect from 16 August 1988, the legislation relating to the implementation of the Agreement on Customs Valuation, as well as the implementing rules and regulations had been brought into force by the Indian authorities. The implementing legislation of India and its replies to the checklist of issues would be circulated in the near future (subsequently circulated as VAL/1/Add.24 and VAL/2/Rev.2/Add.6). The Committee noted this statement and agreed to revert to the examination of India's implementing legislation on the basis of the questions and replies exchanged through the secretariat, between any interested delegations and India.

(v) Australia

17. The representative of Australia introduced the Customs (Valuation) Amendment Act 1987, amending valuation provisions of the Customs Act 1901 (VAL/1/Add.14/Suppl.2). The amendment, which had been enacted on

5 June 1987 and had come into operation on 1 July 1987, was the first part of a two-stage package of proposed amendments to the Customs Act 1901. The second part was due to be considered by Parliament in its current session and if passed, these amendments would come into operation on 1 February 1989. The major purpose of the amendments was to prevent manipulation of the price of goods through the separation of payments for the goods themselves into payments for goods and services. They were designed to ensure that all elements of the cost of obtaining the goods, as envisaged by the Agreement, were reflected in the customs value of the goods. Recognizing the importance of the Agreement and the need for nations to minimise tariff barriers to trade, in 1988 Australia had introduced a comprehensive series of reductions of customs duty rates. It was, nevertheless, considered that a proper delivery of tariff-based industry assistance through ad valorem duty régimes and adequate protection of the revenue, required that goods traded to Australia were properly valued for customs purposes. Since the adoption of the Agreement by Australia in November 1981, certain practices had emerged which exploited deficiencies in the initial legislation and which were designed to understate the value of imported goods and thereby minimise or avoid duty. These practices had been reflected in the import transactions themselves, the way in which related goods had been provided, pricing arrangements, the quantification of interest and associated charges and other contrived arrangements. The amendments of 1987 gave further precision to the Customs Act of 1901 in order to combat those practices. However, in framing its amending legislation, Australia was mindful of its obligations under the Agreement, particularly the desire to ensure the primacy of the transaction value method of valuation and to eschew arbitrary and fictitious customs values.

18. The representative of the United States expressed the concern of her delegation regarding the general direction of the proposed changes, which in many cases appeared to go beyond the Agreement. Her delegation was also concerned by the fourteen-month delay in the notification of the first phase of the legislation. Furthermore, they felt the need to seek clarification on a number of specific points: what was the exact meaning and intention of the provision "the doing of anything to increase the value of the goods" included in the definition of "price" under section 4 sub-section (b) of the Customs (Valuation) Amendment Act amending section 154 of the Principal Act; what guidelines had been established for the benefit of importers and customs in this respect; the deletion of the phrase "generally accepted accounting principles" in section 159 of the Principal Act was not in conformity with the provisions under the General Note in Article 1 of the Agreement; the statement "appropriate GAAP are to continue to be used wherever possible" in paragraph 11.3 of the explanation attached to the notification of the amendment was contrary to both language and spirit of the Agreement; the provision which precluded the existence of buying commissions when the agent was related to the buyer established another rule for related parties and was contrary to the definition in paragraph 1(a)(i) of the Note to Article 8 and Article 1, paragraph 1(d) of the Agreement. In addition, paragraph 10 of the Explanatory Note 2.1 of

the Technical Committee on Customs Valuation did not set forth any such limitation; with respect to the references to "generally accepted accounting principles" under sections 7 and 8 of the Customs (Valuation) Amendment Act 1987, amending section 161 of the Principal Act their comments were the same as those concerning the amendments to section 159. The representative of the United States concluded by saying that her delegation also had concerns about what was being considered under the second phase of the amendments.

19. The representative of the European Economic Community stated that his authorities were concerned as to whether: the combined effect of the provisions of sections 154(1)(e) of the Act, as amended, and section 154(2)(a)(ii), as amended, regarding certain marketing expenses, respected the intentions of the Note to Article 1, paragraph 1(b) of the Agreement, in particular of the final sentence of its final paragraph, and whether the provision of section 159(3)(a), as amended, regarding buying commissions, placed restrictions on these commissions which were not provided for in the Agreement.

20. The representative of Australia explained the reason for the delay in notification of the amendments. Both phases of the amendments were originally to be notified simultaneously to the Committee, but due to delays in the Parliamentary process, it had not been possible to pass the second package. It had therefore been decided to submit to the Committee only the first part of the amendments at this stage.

21. In response to the question by the representative of the United States regarding the provision "the doing of anything to increase value of goods", he said that an explanation of the purpose of this provision and of the meaning of the phrase was set out in paragraphs 2.2 and 2.3 respectively of the explanation of amendments attached to the notification (VAL/1/Add.14/Suppl.2, page 11). Regarding the guidelines established for importers and customs, he said that comprehensive explanatory material in relation to legislation on valuation matters were contained in the Australian Customs Service Manuals, Volume 8 - Valuation. The recent changes were notified to the importing community and to the public in Australian Customs Notice 87/114 of 22 June 1987. Concerning the deletion of the phrase "generally accepted accounting principles" (GAAP), he said that his delegation considered that under the Agreement, a Party was not required to incorporate the specific term in the text of its legislation. As explained in paragraph 11.1 of the attachment to the notification in document VAL/1/Add.14/Suppl.2, the decision to delete the phrase was based on the experience under the initial legislation which had incorporated it. Difficulties had arisen because of interpretations in the courts of the effect of requiring by law that the GAAP be applied. There had also been problems in cases were GAAP had not existed in particular transactions. The term had not therefore been incorporated as a legislative requirement, however it would continue to be used to the greatest extent possible in the administering of the Act for the purposes of determining value. Regarding the question relating to the authority to preclude the existence of buying

commissions when the agent was related to the buyer, section 159(3)(a) specifically provided for the genuine buying commissions to be excluded from the customs value. There was no suggestion in the legislation that buying commissions would be disallowed when the buying agent was associated with the buyer. The intention of the legislation was to exclude from the customs value of goods, only that commission paid to the purchaser's buying agent, who acted solely for the purchaser and was not associated with the vendor except through the incidental association brought about by that agent acting for the purchaser in respect of the relevant transaction. They considered that if the buyer was associated (and that included related) to the seller, other than by the mere association brought about by the transaction, then the commission involved was to be included in the customs value. They further considered that its treatment of the commission in these circumstances was in accordance with the terms of the Agreement. The Committee took note of the statements made under this sub-item.

D. Technical assistance

22. The Committee noted that the most recent information concerning technical assistance was contained in document VAL/W/29/Rev.3 dated 24 March 1988.

E. Other business

(i) Treatment of quota charges

23. The Chairman stated that the matter of the treatment of quota charges had been raised in connection with two Advisory Opinions adopted by the Technical Committee at its fifteenth Session.

24. The representative of the European Economic Community stated that the discussions which had taken place in the Technical Committee and also in the present Committee, had made it clear that the matter of quota charges was unusually delicate, and for that reason, his delegation felt that there were serious political and economic implications which ought to be explored thoroughly before further steps could be taken.

25. The representative of Canada said that her authorities believed that the issue of the treatment of quota charges was an important one. They had studied very carefully the two advisory opinions adopted by the Technical Committee on the treatment of quota charges under Article 1 of the Agreement and were of the view that the opinions were not consistent with each other. They agreed with the approach adopted in advisory opinion No. 1 and believed that payments for quota charges formed part of the total payments made by the purchaser to the vendor for goods, and were therefore a part of the price paid for the goods, and were thus dutiable. The quota, in itself, was of no value unless it was used as a means to export a specific type of good to a specific country. A manufacturer and an

importer could enter into an agreement for the sale of a product, but the sale for export to the country of importation could not be completed unless the product could leave the country of export. It could not be exported without the exporter having an export license, which was only possible if the exporter obtained a qucta for the quantity of the product to be exported to the country of importation. They had argued, and the Technical Committee had agreed, that the price paid for the quota was in respect of the goods purchased. They believed, therefore, that advisory opinion No. 1 was correct, and that the total payment made by the purchaser to or for the benefit of the vendor for the imported goods must include the quota charge. With respect to advisory opinion No. 2, the Canadian authorities believed that payment for quota to a third party was no less in respect of the goods than it was in advisory opinion No. 1. Furthermore, they believed that the provision of the quota was for the benefit of the seller of the imported goods, a point which was clearly outlined in the first paragraph of the Note to Article 1. In their view, the act of obtaining a quota was a vital element and a necessary component in completing a contract for the sale of goods for export and was not an incidental activity. It was therefore a benefit to the vendor of the goods for export, as there could be no exportation to the country of importation if the quota were not obtained. Her delegation wished to point out that the Agreement did not require that the condition must be imposed by the seller, as was stated in advisory opinion No. 2 and therefore, the conclusions arrived at in this advisory opinion were not, in their view, supported by the Agreement. In conclusion, her delegation wished to draw the attention of the Committee to a problems which was very likely to arise if both advisory opinions were implemented in their current form. The provisions for excluding quota charges as part of the price paid or payable when paid to a third party would undoubtedly give rise to considerable abuse, as vendors would always then find third parties to involve in the sale of the quota allocation to the importer. Such a situation might result in a transfer pricing problem where the value for duty to the importer could be reduced, thus avoiding the full application of duties and taxes by the importing country. They did not believe that this type of anomaly was intended in the Agreement. In their view, quota charges constituted a part of the price paid for the goods and that those charges, however paid, were dutiable. They believed that this was the only way that consistent and equitable treatment for all importers could be ensured.

26. The representative of Argentina supported the statement by Canada and said that the charge mentioned in Article 1, according to the advisory opinions, could be covered directly or indirectly. While in the example given in Advisory Opinion Number 2, there was an indirect payment, there was no doubt that this payment was closely related to the export of the goods, to the extent that a payment for goods could not be made unless such charges were paid. Therefore, this was a sales operation. Furthermore, he wished the Committee to note that according to the provisions of paragraph I:8 of the Protocol, the payment could be made directly to the seller or to a third party.

27. The representative of the United States stated that her delegation considered that there was no inconsistency between the two advisory opinions, and that both decisions were appropriate.

28. The Committee agreed revert to this matter at its next meeting.

(ii) Linguistic consistency

29. The Chairman reverted to the question of linguistic consistency in the English, French and Spanish versions of the text of paragraph 1 of the Notes to Articles 2 and 3 (VAL/M/21, paragraph 8 and VAL/M/22, paragraphs 41-46).

30. At the invitation of the Chairman, the representative of the secretariat stated that with regard to the inclusion of the words "la vente" in the French text, grammatically, the French version, on the one hand, and the English and Spanish versions on the other, of the first sentence of the Notes to Articles 2 and 3 were different. The English and Spanish versions repeated the wording of the Article itself in paragraph 1(b), whereas the French version did not. It was important to note that in the French and Spanish versions, the text of Article 2:1(b) was modelled on the wording of Article 2:1(a), which was grammatically the same in all three language versions, while the English texts of the two sub-paragraphs had quite different structures. This would appear to be the origin of the differences in the Note. The question whether the above-mentioned discrepancies could have any substantive implications hinged on whether the expression "the goods being valued" could be construed as not referring to a specific sale, i.e. if valuation could be considered as an autonomous operation, not linked to the sale itself. If that had been the case, the fact that the French version referred to "la vente" (the sale) could conceivably lead to a conflicting interpretation if the sale was to take place at a later stage, after the valuation exercise (as in the case of goods imported on consignment), or if the sale was not to take place at all (as in the case of goods given as a gift).

31. With regard to the inclusion of the words "valor de transacción" in the Spanish text, the representative of the secretariat stated that, grammatically, as in the previous case, there was a difference in the texts: the Spanish version introduced the concept of "valor de transacción" (transaction value) which was not explicit in the other two versions. It should be noted, however, that the Spanish version repeated the wording of Articles 2 and 3. Concerning any possible substantive implications, he said that the fact that Articles 2 and 3 explicitly referred in all three versions to the transaction value led one to think that this discrepancy was unsubstantial, unless the value of the sale taken as reference could be construed to be a value other than the transaction value, which did not seem to be the case.

32. The representative of the European Economic Community, joined by the representatives of Argentina and New Zealand, said that the two problems had been quite well identified by the secretariat, and that there was a

possible difficulty of substance with the first point concerning the inclusion of the words "la vente" in the French text. His delegation was not convinced, however, that there was a difficulty of substance with the second point, which concerned the inclusion of the words "valor de transacción" in the Spanish text. On this last point, the representative of Argentina added that it was clear that the Notes to Articles 2 and 3 in the Spanish text reproduced the exact text of the respective Articles. On the other hand, in other paragraphs of the Notes to Articles 2 and 3, such as in paragraph 4, it was specified that it related not only to sale but also to transaction value. The representative of New Zealand felt that the problem relating to the English and French text could have a certain effect on their national legislation, and that time was needed to allow an in-depth examination of the problem. The delegations who spoke on the matter felt that both of those points ought to be studied carefully in the light of the intentions of the Agreement, and how these should be best expressed in the languages concerned. The Committee agreed to revert to this matter at the next meeting.

(iii) Panel candidates for 1989

33. The Chairman recalled that, in accordance with the requirements of paragraph 2 of Annex III to the Agreement, Parties would be expected at the beginning of 1989 to nominate persons available for panel service in 1989 or to confirm existing nominations. He urged all Parties to communicate the relevant information, through the secretariat, as soon as possible.

F. Eighth Annual Review of the Implementation and Operation of the Agreement; Report (1988) to the CONTRACTING PARTIES

34. The Committee conducted its annual review of the implementation and operation of the Agreement on the basis of a secretariat background note, VAL/W/47, and agreed that the secretariat issue, as a VAL/- document, a revisions taking into account the comments made and the work at the present meeting.

35. The Committee adopted its annual report to the CONTRACTING PARTIES (L/6413).

G. Date and draft agenda of the next meeting

36. The Committee agreed to hold its next meeting on 21 March 1989. The following draft agenda was agreed for the next meeting:

A. Election of officers for 1989
B. Accession of further countries to the Agreement;
C. Report on the work of the Technical Committee;
D. Information on implementation and administration of the Agreement;
E. Technical assistance;
F. Other business.