

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

VAL/Spec/4

17 June 1982

Committee on Customs Valuation

DRAFT MINUTES OF THE MEETING HELD ON 4-5 MAY 1982

Chairman : Mr. G.S. Sawhney

1. The Committee on Customs Valuation held its fourth meeting on 4 and 5 May 1982.
2. The Committee elected Mr. G.S. Sawhney (India) as Chairman and Mr. N. Kemmochi (Japan) as Vice-Chairman.
3. The Committee adopted the following agenda:
 - A. Accession of further countries to the Agreement
 - B. Information on implementation and administration of the Agreement
 - C. Use of various valuation methods by Parties
 - D. Technical assistance
 - E. Report by the Chairman of the Technical Committee
 - F. Agreed interpretation of the word "undertaken" used in Article 8.1.b(iv) of the Agreement
 - G. Possible amendments to the Agreement (treatment of interest for deferred payment and valuation of computer software)
 - H. Date and draft agenda for the next meeting
 - I. Other business
- A. Accession of further countries to the Agreement
4. The representative of Yugoslavia informed the Committee that his country had implemented the Agreement as from 1 April 1982 and that the relevant national legislation would be sent to the secretariat for circulation to the Committee.
5. The observer for New Zealand said that in view of the implementation of the Agreement by his country as from 1 July 1982 the appropriate legislation had been passed. The training programme for customs officers was well under way.

B. Information on implementation and administration of the Agreement (VAL/1 and Addenda and Supplements and VAL/2/Rev.1 and Addenda and Supplement)

1. Austria (VAL/1/Add.10 and VAL/2/Rev.1/Add.3 and Suppl.1)

6. In answer to a question raised at the last meeting by the representative of Spain concerning the replacement of the term expression "closely approximates" contained in Article 1:2(b) of the Agreement by "corresponds to" in the Austrian legislation, the representative of Austria said that serious concern had been expressed by the Austrian constitutional service about the use of legal terms not sufficiently precise. In order to reflect adequately the provisions of the Agreement relating to test values and the term "closely approximates", the Interpretative Note to Article 1, paragraph 2(b) was adopted analogously by inserting the sentence "price fluctuations normal in the branch of trade concerned". In practice, the application of this sentence corresponded to the factors to be taken into consideration in the application of Interpretative Note to Article 1.2(b).

7. Replying to a question put at the previous meeting by the representative of the United States relating to the time element in the valuation of identical and similar goods, the representative of Austria said that Section 4 and 5 of the Austrian Customs Valuation Act of 1980 referred to goods imported at or about the same time as the goods being valued which was in conformity with the Austrian system of customs legislation which attached liability in the field of import duties to the importation of goods. The time of importation was also selected as being most easily ascertainable by both the importer and the customs authorities. Finally, the Austrian administration had made the experience that the methods of valuation under Articles 2 and 3 of the Agreement had been used so far in very rare cases.

8. Reverting to a question raised at the November 1981 meeting by the representative of the European Economic Community concerning the way in which the Austrian customs administration determined that a price fluctuation was normal, the representative of Austria said that, in Section 3(4) of the Austrian Customs Valuation Act, the expression "taking account of price fluctuations normal in the branch of trade concerned" was chosen to reflect the Interpretative Note to Article 1. 2(b), i.e. "... whether the difference in values is commercially significant". This term determined that the expression "corresponds to" was in compliance with the provisions of the Agreement. Investigations in this field by customs authorities would be conducted in accordance with the Interpretative Note to Article 1.2(b). Price fluctuations were determined by the customs administration by taking into consideration the nature of the imported goods, the industry in question, the season in which the goods were imported and whether the difference in values was commercially significant.

9. The representatives of the United States and of the European Economic Community reserved their right to revert to the questions raised by the Austrian customs legislation at the next meeting.

2. Canada

10. The representative of Canada said that in the context of the revision of the draft legislation, a number of recommendations from the Canadian Tariff Board as well as comments from the Parties had been received. He was confident that the revised draft legislation which had been circulated to the Parties in early 1982, along with the statement of administrative principles, reflected fairly the obligations which Canada would assume under the Agreement in 1985. There was still opportunity for review and revision until the time the legislation would be tabled in the Canadian Parliament which would take place once Canada had completed the negotiations on tariff adjustments provided for in the reservation. The question of the necessary tariff adjustments had been referred to the Tariff Board which had published a draft discussion paper outlining the results of the survey of customs entries made over the past years. Public hearings would be held on that issue shortly. The final report would be provided to the government with advice on tariff rate adjustments by 1 July 1983. It was anticipated that the government would initiate discussions shortly thereafter with other contracting parties. A draft set of operational guidelines which represented a more detailed version of the administrative principles would be circulated to the Parties. The representative of Canada said that he would be pleased to consider comments from the Parties on these documents.

11. The representative of the European Economic Community welcomed the opportunity to discuss further the Canadian draft legislation. Written comments had been sent by the European Economic Community to the Canadian government on the first draft legislation and a number of these comments had been taken into account. However, there were still certain provisions in the draft where the terms of the Agreement had not been faithfully reflected. The European Economic Community reserved its right to take up specific points with the Canadian administration. Confirmation was sought that the text was still open to amendment. A question was raised about the status of the various provisions reflected in the statement of administrative principles. Another question concerned the way in which the Canadian administration intended to give legal effect to those provisions of the Agreement which were not reflected in either the draft legislation or the status of administrative principles. For example, the draft legislation did not cover the importer's right under Article 13 of the Agreement to withdraw goods on payment of a sufficient guarantee, nor did it contain Article 8:4 which provided that no additions should be made to the price actually paid or payable in determining the customs value except as provided in Article 8. Likewise, the draft legislation did not reflect the Interpretative Notes to Article 1 under "Price actually paid or payable" and to Article 8.1(c) under paragraph 2, which related to the exclusion from the transaction value of the costs of certain activities of the buyer, for example, marketing and payments for the right to distribute or resell the imported goods.

12. The representative of the European Economic Community went on to raise a number of other specific points. The Canadian draft legislation contained the concept of deductions of "reasonable costs" incurred for construction of the goods although the element of reasonableness did not appear in the Agreement because it would have introduced an element of

subjectivity. The draft legislation also did not spell out appeal procedures to an independent body. Concern was also expressed about Section 37(5)(c) of the draft legislation which provided that the price paid or payable should be adjusted by disregarding any rebate of, or other decrease in, the price paid or payable for the goods that was effected after the goods were imported. Such a practice would preclude an adjustment in the case of, for example, damaged goods. Finally, information was requested on the exchange rates which were prorogated in accordance with regulations made under the Canadian Currency and Exchange Act. Other more specific points would be raised in writing with the Canadian delegation.

13. The representative of Canada reiterated that the draft legislation was open for amendments until it had been passed by the Parliament. Comments could still be received and would be considered. However, the Canadian government had indicated at the time of the publication of the draft legislation was made public that it reflected in its current form the government's basic position on the main legislative provisions which were needed to implement the Agreement. The Canadian authorities would not be entertaining suggestions for fundamental changes in the draft legislation although there was still an opportunity for suggesting minor changes. The statement of administrative principles which provided information to the public on the operational rules that would be followed by the Canadian customs administration had no status in Canadian legislation. These principles and guidelines were a statement of how the customs officers would apply the legislation until they were told otherwise by a Canadian court; in essence it amounted to an internal customs directive to customs officers. There would be an opportunity for importers to launch an appeal against the application of these principles and guidelines in any particular case. The basis for appeal would then be the legislation rather than the guidelines. Replying to a further question, the Canadian delegate said that the government had decided not to incorporate the full text of the Agreement in the Canadian legislation. This was the same practice which had been followed in respect of the General Agreement itself and various other international agreements. In the case of customs valuation, the draft legislation would, in terms of Canadian jurisprudence, give effect to Canadian obligations under the Agreement.

14. With respect to the importer's right to withdraw the goods and the appeal to an independent body, the representative of Canada said that current Canadian legislation already made provision for this. In relation to the limitations on additions to the price paid or payable, the Canadian draft legislation authorized the customs officer to make only the additions to the price paid or payable expressly mentioned in the law; there was thus no need to list the additions that could not be made. In legal terms, no addition could be made unless it was specifically authorized by the legislation. It was felt that through the present drafting technique Canada had met the obligations under the Agreement. With respect to the reasonable construction costs, Canadian authorities had found it necessary to specify in the draft legislation what the customs officers could do by way of accepting declared costs in order not to distort the deductible value. The exchange rate regulations would be circulated to participants to the Committee. The current criterion of time of shipment, which was appropriate for exchange rate determination, would be kept in the new

system. The question of allowances for damaged goods was, in the Canadian practice, not a matter of customs valuation because separate provisions already existed in the Canadian Customs Act which would be substantially revised in light of the changeover from the present fair market value system.

15. In answer to a question by the Chairman, the representative of Canada said that the Canadian government intended to introduce the draft legislation in the Parliament in 1984 as soon as the negotiations on tariff adjustments, which were to be held between July 1983 and mid-1984, were concluded. He anticipated that the legislation would be in operation by 1 January 1985.

16. The representative of the European Economic Community expressed his concern about the status of the statement of administrative principles which did not have any legal force. If the Canadian legislation did not confer legal rights to an importer, problems might arise when the importer resorted to a court in Canada.

17. The representative of Canada confirmed that in Canadian law the signature of an international treaty did not in itself confer rights on Canadian citizens. These were conferred only by the legislation giving effect to the treaty. It was the view of legal experts in the Canadian government that the draft legislation conferred to Canadian citizens all the rights. It had also been felt that the Agreement was somewhat redundant in places; for example the Agreement had a positive and a negative list of elements relating to adjustments of the price paid or payable. Canadian practice was to draft the legislation in a positive way laying down only what was required by law.

18. The representative of Switzerland wondered whether the Canadian draft legislation excluded provisions from the Agreement only of a purely descriptive nature such as examples in the Interpretative Notes and whether all normative provisions were included without exceptions.

19. In reply to similar questions from the representatives of the United States, Japan and Spain, the representative of Canada gave the assurance that all substantive provisions of the Agreement had been incorporated in the Canadian draft legislation although the exact wording of the Agreement had not been used in every case. For example, on Article 7:2, the list of prohibited methods of valuation had not been incorporated, but the obligation was provided for in the sense that the customs officer was obliged to use the valuation methods contained in the other articles of the Agreement. In terms of Canadian law, he was prevented by law from using any other methods. It was therefore not felt necessary to specify the prohibited methods. The Canadian delegate assured the Committee that action would be taken if, in the application of the Canadian legislation, deficiencies should arise.

3. Finland (VAL/1/Add.4 and Suppl.1, VAL/2/Rev.1/Add.5)

20. The representative of Finland informed the Committee that in response

to the concern expressed by several delegations at the November 1981 meeting concerning Articles 15 and 17 of the Finnish Customs Valuation Act, the Finnish government had proposed to the Parliament to change the wording of these two Articles in order to bring them into line with the wording of the Agreement. These changes would be notified to the Committee once they had been accepted by the Finnish Parliament.

4. Sweden (VAL/1/Add.3, VAL/2/Rev.1/Add.2 and Suppl.1)

21. The representative of Sweden said that the texts he had referred to at the last meeting had now been made available to the Committee. They concerned some of the provisions of the Agreement which were contained in a general law and in a customs procedure law. This applied for example to provisions on communications and matters reflected in questions 8, 9, 11(a) and 12(a) of the checklist and to the right of appeal. With respect to question 1(a)(iii), in order to avoid uncertainty, the Swedish administration had decided to insert a new paragraph in the Swedish legislation on customs valuation which was identical to the third sentence in Article 1.2(a). Other parts of the Swedish reply contained relevant texts of various Swedish laws in the administrative and judicial fields.

C. Use of various valuation methods by Parties

22. The Committee had an exchange of views on the question of collecting additional and more detailed information, including the volume of trade, on the basis of statistics collected by the Parties during an identical time period. It agreed to revert to this matter at its next meeting.

D. Technical assistance

23. The observer for Pakistan said that his authorities were presently examining the question of acceding to the Agreement. A number of positive elements, in particular special and differential treatment to developing countries, had been found in the Agreement. However, some problems had caused concern, and informal discussions would be held with delegations in this regard. The provisions dealing with technical assistance in the Agreement were of particular interest to Pakistan and to other developing countries. If due importance were given to this aspect of the Agreement, it would facilitate the decision of those developing countries considering accession to the Agreement. Some developed countries had already provided technical assistance, mainly through seminars. The view of Pakistan was that such an assistance was inadequate. Developing countries would need technical assistance in training their officials and in acquainting the traders and customs brokers with the new system of valuation. Assistance was also needed in drafting legislation and in setting up administrative and organizational machinery. Technical assistance in the form of equipment and financing might also be required for setting up training establishments. It was for consideration whether to channel the assistance through the GATT secretariat or the CCC rather than providing it on a bilateral basis.

24. The representative of the European Economic Community said that his delegation was very keen that the maximum number of countries should participate in the Agreement. Although the obligations for providing

technical assistance had been limited to signatories, the EEC had been prepared to consider requests from countries which had not yet signed the Agreement. The EEC was hopeful that other developed country delegations would also be prepared to assist developing countries which were potential signatories. Further technical assistance similar to the seminar held in Montevideo in October 1981 in conjunction with the Latin American Integration Organization were being contemplated. The EEC was willing to coordinate its activities with other countries, the GATT and the CCC, to avoid overlapping in this area.

25. A member of the secretariat said that he agreed fully with the representative of the European Economic Community that duplication of work should be avoided and that the organizations or delegations which were willing to extend technical assistance should work hand in hand together. In the context of technical assistance extended by the UNCTAD for the ECOWAS countries, the CCC and the GATT secretariats had been invited to participate in a seminar on customs valuation in Bamako in mid-July 1983.

26. The observer from the Customs Co-operation Council shared the views expressed by the previous speaker. With respect to the activities of the CCC, he referred to paragraphs 22-42 of the report on the third session of the Technical Committee (CCC document 28.560) which covered the present situation concerning the activities of the Technical Committee. The Policy Commission of the CCC and the Council itself were also undertaking a project called the Programme for the Eighties to identify major programme goals of the CCC through the next decade. Among the various programmes, the setting up of a training programme in valuation for developing countries had been proposed by the CCC secretariat. This draft programme would be considered by the Policy Commission at the Council meeting in June 1982. The hope was expressed that a favourable report could be presented at the November 1982 meeting of the Committee and that a document could be provided to the GATT secretariat in advance to that meeting.

E. Report by the Chairman of the Technical Committee

27. The Chairman of the Technical Committee stated that the report of the third session of the Technical Committee which had been held from 15 to 23 March 1982 was contained in CCC document 28.560. Under the agenda item "Technical questions" the Technical Committee had adopted the following:

- (a) a text in respect of goods imported for destruction which would be incorporated into the advisory opinion relating to the concept of "sale";
- (b) an advisory opinion illustrating a situation where a royalty paid for the right to use a foreign manufacturer's trademark should not be added by virtue of Article 8.1(c) to the price paid or payable;
- (c) a commentary examining the question of identical and similar goods in the general context of the application of Article 2 and 3;
- (d) a commentary relating to the treatment of goods subject to export subsidies;

- (e) a commentary relating to the treatment of goods sold at dumping prices;
- (f) an explanatory note on commissions and brokerage;
- (g) an explanatory note on the treatment of goods not in accordance with contract;
- (h) two advisory opinions concerning the treatment of cash discount under the Agreement;
- (i) a report of a case study on the interpretation of Article 8.1(b)(iv) concerning engineering, development, artwork, etc.;
- (j) two advisory opinions concerning the treatment of barter or compensation deals and the acceptability of test values under Article 1.2(b);
- (k) a commentary on the treatment of price review clauses and an advisory opinion on the treatment of credits in respect of earlier transactions.

28. The Chairman of the Technical Committee then drew the attention of the Committee to the question of time standard for test values under Article 1.2(b) of the Agreement. The phrase "occurring at or about the same time" had been interpreted in different ways by different countries, and national legislation on this point was consequently not uniform. There had been a consensus of opinion that it was not within the Technical Committee's powers to formulate a rule in these circumstances. The Committee might consequently consider whether in order to achieve uniformity, it should prepare an interpretative note, or it might take the view that the differences were not important. This question would be for the Committee to decide.

29. After a discussion of the explanatory note adopted by the Technical Committee relating to goods not in accordance with contract, , the representative of the European Economic Community stated that it was his understanding that the EEC legislation on this point was not inconsistent with the explanatory note. It had been on this understanding that his delegation had been prepared to accept it in the Technical Committee.

F. Agreed interpretation of the word "undertaken" used in Article 8.1(b)(iv) of the Agreement

30. The Chairman recalled that at the third meeting (VAL/M/3, paragraph 73), the Committee had agreed to take up the proposal by the the European Economic Community for an agreed interpretation of the word "undertaken". It had been proposed that the Committee confirm by way of an agreed interpretation that in Article 8.1(b)(iv) the English word "undertaken" was to be understood as meaning "carried out".

31. The observer for Australia said he could agree with the EEC that the intention of the negotiators had been that the word "undertaken" should mean "carried out". It was clear from Article 8 that a carrying out of a

physical performance of services had been intended and not a mere undertaking to perform them.

32. The representative of the United States said that his authorities did not yet have a clear view on this issue and would therefore wish to examine it further before a final decision was taken.

33. The representative of Japan said that his authorities had been studying this proposal and that they reserved their position on this matter.

34. The representative of the European Economic Community expressed the hope that by the time of the next meeting of the Committee those delegations which had not yet taken a position would be able to do so in order that a decision could be taken at that time.

G. Possible amendments to the Agreement (treatment of interest for deferred payment and valuation of computer software)

35. The Committee had a first exchange of views on procedures for amendments to the Agreement in accordance with Article 27. The secretariat was requested to circulate a draft text on these procedures before the next meeting, in consultation with other GATT Committees concerned.

36. The representative of the United States said that his authorities had in the process of implementation found at least one unexpected result in the valuation of computer software. Under the Brussels Definition of Value, in cases where a computer tape had been imported, the valuation had been based on the value of the tape and the cost of putting information on the tape. However, if the tape contained a programme, this had not been considered to be part of the dutiable value. The United States had believed that this had been an appropriate method for handling such transactions. Since the Agreement had entered into force, some countries had felt that the concept of transaction value required that the value of the programme or software be included in the dutiable value. The implication of this approach was that the value of such media had been increased considerably. He said that it had not been the intention of the drafters of the Agreement to create new obstacles to trade. Therefore the United States proposed, in document VAL/W/7, to deal with this matter by an amendment to the Agreement. The proposal was limited to valuation aspects and was not intended to cover intellectual property issues for which the Committee was not the proper forum.

37. The representative of the United States went on to say that paragraph (b) on page 2 of VAL/W/7 referred to data or instructions which meant computer programmes or data carried on computer tapes but did not apply to data or instructions which had been incorporated in data processing equipment. Therefore in the case of a purchase of a calculator which contained an integrated circuit with the necessary programmes and data, the equipment would be valued inclusive of the value of its programming. If, however, a computer tape was being imported, this tape would simply be valued on the basis of the value of the tape itself plus the cost of inscribing any information on the tape.

38. The representative of the European Economic Community said that the EEC practice had changed with respect to valuation of computer software as a result of the implementation of the Agreement. This had been an issue of considerable complexity to the customs administrations. It had been considered that in the sale of software, there would probably be a charge for the right of reproduction. The Interpretative Note to Article 8 concerning the exclusion of payments for the right of reproduction would help to solve this particular problem. However, some other specific problems had to be tackled. For example, a spare part for a machine could usually be imported free of duty. In the case of software, if there had been an error in the programme, normal practice had been to replace the complete programme with the error amended. The newly supplied programme posed a different problem than the previous case of a spare part. Another issue was the distinction between data, for example company accounts or sales information, supplied on tape for subsequent reproduction, from software consisting of instructions to a computer for which the Customs had difficulty in ascertaining their precise nature.

39. With respect to the proposal by the EEC on the treatment of interest charges in the customs value of imported goods, circulated in document VAL/W/8, the representative of the European Economic Community said that this issue had not been solved in the negotiations. An analysis of the way in which the Agreement was being implemented by most Parties seemed to indicate that in most cases interest was not included in the customs value. It was felt that this issue could usefully be clarified by an amendment to the Agreement.

40. The observer for Australia said that his authorities had no objection to the proposal of the European Economic Community on the treatment of interest charges which accorded with Australian practice and law. With regard to the United States proposal concerning the valuation of computer software, he said that his country did not favour exceptions of particular categories of goods from the valuation provisions. To do so would establish a precedent which could be used to support claims for the exclusion of other goods which would weaken the Agreement. Specific matters such as data or instructions on carrier media useable in a data processing system should be handled through the customs tariff rather than through valuation.

41. The representative of Japan said that his authorities had agreed that interest charges should not form part of the customs value. The intention of the drafters had been to exclude interest charges from the valuation of goods. He raised the question of the necessity of amending the Agreement as almost all Parties had treated interest charges as proposed by the EEC.

42. The representative of Norway said that the understanding of his authorities had been that interest charges should be included in the customs value provided they could be identified.

43. The representative of Spain said that he needed more time to study the question of possible amendments to the Agreement. He added that the Technical Committee might be asked to examine the two issues raised and to report back to the Committee for its decision.

44. The observer from the Customs Co-operation Council advised the Committee that both questions presently discussed, i.e. valuation of computer software and interest charges, were on the programme of future work of the Technical Committee. He suggested that if the Committee wished the Technical Committee to undertake work on these items, the questions to be examined should be spelled out in specific terms in which case they would be on the agenda of the September 1982 meeting of the Technical Committee; a report could be presented to the Committee at its November meeting.

45. After a discussion of the procedural matters, the Committee decided to request the Technical Committee to ascertain what the present national practices of the Parties were with regard to the treatment of interest charges in the customs value of imported goods and the valuation of computer software. The Committee also decided to invite Parties to send written comments on the two submissions made before the next meeting of the Committee.

H. Date and draft agenda for the next meeting

46. The Committee agreed to hold its next meetings on 10-12 November 1982 and 10-11 May 1983.

47. The draft agenda for the next meeting would include the following items:

- A. Accession of further countries to the Agreement
- B. Information on implementation and administration of the Agreement
- C. Use of various valuation methods by Parties
- D. Technical assistance
- E. Report by the Chairman of the Technical Committee
- F. Agreed interpretation of the word "undertaken" used in Article 8.1.b(iv) of the Agreement
- G. Possible amendments to the Agreement (treatment of interest for deferred payment and valuation of computer software)
- H. Draft rules of procedures for amendments
- I. Annual review of the operation of the Agreement and adoption of annual report by the CONTRACTING PARTIES
- J. Date and draft agenda for the next meeting
- K. Other business

48. Other items might be included by the Chairman in consultation with delegations. The draft agenda for the next meeting would be circulated in accordance with established practice.

J. Other business

(i) Panelists

49. The Chairman recalled that nominations of persons available for panel service had been received from the following Parties: Denmark, Finland, India, Norway, Spain and the United Kingdom. Referring to the provisions of Annex III, paragraph 2, the Chairman invited Parties which had not yet done so to confirm the existing nominations or to present new ones.

50. The representative of the European Economic Community said that a letter listing the names of panelists for the EEC was on the way to the secretariat.

(ii) Contribution to the Ministerial Meeting

51. The Committee decided that the Chairman submit to the Preparatory Committee a note outlining the main areas of consideration in the field of customs valuation which were of relevance to the work of the Preparatory Committee. This note was subsequently circulated in VAL/3.