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Committee on Customs Valuation

MINUTES OF THE MEETING OF 17 OCTOBER 2008

Chairman: Octavia Cerchez (Romania)

The agenda proposed for the meeting, circulated in WTO/AIR/3254 was adopted as follows:

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I. REPORT OF THE WORK OF THE TECHNICAL COMMITTEE ON CUSTOMS VALUATION

1.1 The observer of the World Customs Organization reported on the activities of the Technical Committee between the 26th and 27th session, which would be held on 20 – 25 October 2008. This report is contained in Annex I.

1.2 The Committee took note of the report.

II. INFORMATION ON IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENT

A. NOTIFICATION OF NATIONAL LEGISLATION

2.1 The Chairman recalled that Article 22 of the Agreement on Customs Valuation (hereafter, the Agreement) required each Member to inform the Committee of any changes in its laws and regulations relevant to the Agreement, and of any changes in the administration of such laws and regulations. In addition, the Decision on Notification and Circulation of National Legislation, adopted by the Tokyo Round Committee, required each Member to notify its legislation to the Committee. She suggested that, under this sub-item, the Committee take up the legislations in sequence as listed in the agenda. She further recalled that the notification of legislation by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu had been presented to the Committee. However, the examination of this notification remained suspended since the Committee's meeting on 4-5 November 2002 pending resolution of the difference in views between the parties involved on notifications across the WTO.

- *Albania*

2.2 The Chairman drew Members' attention to Albania's responses to the Checklist of Issues which were circulated in document G/VAL/N/2/ALB/1. She recalled that Albania had notified its national legislation in document G/VAL/N/1/ALB/1 in September 2001 and the Committee had concluded its examination of this legislation at its meeting on 25 October 2001.

2.3 The representative of Canada recalled that at the last meeting, her delegation had asked two technical questions on Albania's notification related to inter-company prices and the appeals procedure. Her delegation's questions were in the report of the last meeting. However, since her delegation did not receive a response from Albania, she would circulate the questions through the Secretariat. She asked that the item remain on the agenda of the Committee's next meeting.

2.4 The Chairman proposed that the Committee takes note of the statement made and reverts to this notification at its next meeting.

2.5 It was so agreed.

- *Bahrain*

2.6 The Chairman drew Members' attention to Bahrain's responses to the Checklist of Issues circulated in document G/VAL/N/2/BHR/1. The Secretariat had informed her that Bahrain had also notified its implementing legislation. However, it was not yet complete and would be circulated once complete. She therefore, suggested that the Committee defers its examination of the responses to the Checklist of Issues, pending circulation of the national legislation

2.7 It was so agreed.

- *Belize*

2.8 The Chairman drew Members' attention to Belize's notification of its legislation circulated in document G/VAL/N/1/BLZ/1. This document contained Chapter 48 of the Customs And Excise Duty Act, of 2000. Belize also notified its responses to the Checklist of Issues in document G/VAL/N/2/BLZ/1.

2.9 The representative of the United States stated that her delegation did not see the interpretative notes to Annex I of the Agreement incorporated in the legislation and asked where these provisions might be found in the Belize legislation.

2.10 The representative of Canada said that her delegation also had a question similar to that of the US. Her delegation had 3 additional questions on the right to appeal without penalty, publication and explanations in writing. She would submit these questions in writing to Belize before the next meeting.

2.11 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.12 It was so agreed.

- *China*

2.13 The Chairman recalled that at the last meeting, it was agreed to revert to China's notification in G/VAL/N/1/CHN/5 at this meeting. The United States had posed questions to China at the last meeting and these were circulated in G/VAL/W/168 and Corr.1.

2.14 The representative of China responded to the questions from the United States. The first question focused on the disclosure of confidential, commercial information by the customs administration. According to Article 10 of the Agreement, confidential information should not be disclosed except to the extent that it may be required to be disclosed in the context of judiciary proceedings. The rules regarding determination of customs value of imported and exported goods as mentioned were in full conformity with the principles of the Agreement in that any information relating to the determination of customs value, which was by nature, confidential should not be disclosed to any party other than customs, unless in some cases as provided in the Article 45 of the criminal procedural law of the People's Republic of China. The second question related to the conditions under which the reversal of Articles 5 and 6 of the Agreement may be applied. Still, Article 6 of the Chinese legislation was consistent with Article 4 of the Agreement which stipulated that, at the request of the importer, the order of the application of Articles 5 and 6 shall be reserved. It was clear that the success of application of the computed value method was based on relevant but sufficient information.

2.15 The third question concerned the definition and proper application of Article 7 of the Agreement. Article 7 of the Agreement stipulated that the application of reasonable means should be consistent with the principles and the general provisions of the Agreement and should be based on the data available in the country of importation. Paragraphs 2 and 3 of the notes to Article 7 of the Agreement emphasized that such methods would be in conformity with the aims and the provisions of Article 7, while following up the question of order in a more flexible way. Instead of providing a strict definition of the reasonable methods of Article 7, the Agreement only stipulated the application of principles. Considering this, China Customs set forth a definition for applying the reasonable method which embodied not only the norms and the principles of Article 7 of the Agreement, but also those reflected in its interpretative notes. Question 4 touched upon the assumption of the omission of a sales test. The same question was once raised by the US and China's reply could be found in document G/VAL/W/141 of 23 Oct. 2004. The provisions of Article 1.2 and the corresponding notes were embodied in the Chinese legislation. It was also provided that the transaction value could not be refused simply on the grounds that the seller and the buyer were related. China Customs carried out a price test or conducted an examination of the circumstances of the sale in accordance with the relative provisions stipulated in Articles 17 and 48 of the Chinese legislation.

2.16 With respect to question 5 regarding the time-limit set for the importer/buyer to make a response, it should be noted that China Customs did not compel the duty payer to provide information. According to Article 1.2 of the Agreement and its corresponding note, his delegation understood that to provide information to customs was an important right granted to the duty payer to cooperate with customs in order to lessen or avoid misunderstandings. His Government believed that mutual understanding and successful consultations between the two parties would enable the customs value to be determined in a fair, uniform and neutral system avoiding unnecessary loss to the duty payer. Secondly, in such cases where the customs administration had reason to consider that the relationship did influence the price and the duty payer did not provide the information to reassure customs, then the customs value could not be determined on the basis of the transaction value and would be determined by applying the method of relationship laid down in Article 6 in sequential order. Thirdly, assuring customs clearance remained one of the most important tasks for China customs and practically most importers were able to provide the information within the set time limit. Ten more working days were permitted at the request of the duty payer which meant that, according to Article 48 of the Chinese legislation, importers were possibly given 10 to 15 working days to submit relevant information. Furthermore, in special cases the extension could be considered to exceed 15 working days.

2.17 The seventh question was related to the customs value of special imported goods, and the pertinence of certain provisions under Chapter 3 of the Chinese legislation. Specially imported goods in the provisions of Chapter 3 did not refer to specific items but rather to the goods that entered into the customs territory of China by special trade terms or special arrangements. On the eighth question he stressed that the Chinese legislation was consistent with the provisions in Articles 11 and 13 of the Agreement. The obligations of Articles 11 and 13 of the Agreement could be found in the provisions of the Chinese valuation legislation at three different levels. The first level was the law of the People's Republic of China; the second level was the regulations of the PRC on import and export duties; and the third level was the rules formulated by the Customs Administration such as the rules regarding the determination of the customs value of imported and exported goods, and the rules of the PRC regarding administrative reconsideration of customs matter. The last question also clarified the correct understanding or note falling under Article 5 of the Agreement. It was clear that mention was made for commissions or for profit and general expenses. Since the role of the person in business was easy to identify, it was not hard to distinguish the identity of the importer from its agent. Both sums might eventually, but respectively, be deducted from the customs value. It would not be assumed that the scope of the duty basis was also to be used for the purpose of customs valuation. China had been committed to fully implementing the Agreement since its accession to the WTO. It had consistently made its best endeavour to improve its national legislation on customs valuation, including the formal incorporation of the interpretative notes to the Articles within the framework of the Agreement. The notes to Articles 1, 5, 6, and 7, mentioned in the US questions were reflected in China's legislation.

2.18 The representative of the United States requested that the Chinese responses be submitted in writing so that her delegation could have time to review them prior to the next meeting of the Committee. She reserved her delegation's right to pose follow-up questions after its review of the responses.

2.19 The representative of China said that his delegation would provide the written responses to the Committee.

2.20 The representative of the European Communities said that his delegation looked forward to receiving the responses in written form as well. He noted that, in a few areas, the Chinese legislation was presented in an innovative way, structured differently that the Agreement. On example was the provisions on royalties and licence fees. While it remained to be seen in practice how these provisions would actually be applied, royalties and licence fees was an area with which many customs administrations had struggled. The way these provisions were presented in the Chinese legislation

might actually be useful in helping traders to understand the rules and the customs administrations to apply them. Having separate and different headings for aspects of royalties and licence fees was an interesting way to structure the rules, and his delegation looked forward to seeing how useful this turned out to be in practice over the years.

2.21 He noted that, in Article 7.2, the title section was "transaction value methods". He asked if this was meant to be in the singular form referring to the one and only transaction value method. He added that there appeared to be several mentions in the law of how the goods had to be valued subsequent to processing in an export processing zone or in other free-zone type arrangements. There may be some differences in approach in terms of how the rules might be applied. While he was aware that administrations might feel the need to make specific valuation rules for goods which had come through industrial zones, it would be interesting to see how the rules were applied in practice. There seemed to be a tendency in the legislation to consider additional situations not normally mentioned in the WTO Agreement. Another example included the case under Article 52 where, if a trader actually requested it, customs would not make any further enquiry or examination to determine the value. Customs would simply use previously determined customs values for the same goods. This was another innovation and might be quite useful. While he might have other comments about the way the provisions were expressed, what was important was how they were applied in practice.

2.22 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.23 It was so agreed.

- *Egypt*

2.24 The Chairman recalled that at the previous meeting it was agreed to revert to Egypt's legislation and responses to the checklist of issues. The United States and Canada had posed questions to Egypt at the October 2007 meeting which were circulated in document G/VAL/W/166. Egypt circulated its responses in document G/VAL/W/169.

2.25 The representative of the United States posed a few follow-up questions in its continuing efforts to clarify some of the provisions in the Egyptian legislation. Her delegation would be submitting a question asking for clarification of Egypt's response on Article 13 and situations where goods were prohibited. Also on page 5 of Egypt's responses, there was reference to the fact that customs took promptly into consideration the interpretative notes of the Agreement along with the Egyptian customs law. Her delegation would submit a follow-up question on how customs officers would have access to these interpretative notes in order to take them properly into account. Her delegation continued to have concerns and questions about Articles 22 and 23 of Law No. 95 from 2005, the notified legislation. It asked what was meant by the term "actual value." Her delegation looked forward to working with Egypt in improving its understanding of the Egyptian legislative framework.

2.26 The representative of Canada said that her delegation also had a follow-up question. Egypt's response suggested that the right of appeal to the judiciary branch was not universal, particularly for cases stated in arbitration law. Her delegation sought more clarity on the specific circumstances where the judiciary was available, and confirmation that they followed Article 22 of the Agreement and provided the decision in writing. She asked if all traders would be informed of their further appeal rights and whether all customs decisions could be appealed to the judiciary level without penalty. Her delegation would follow-up this matter bilaterally with Egypt.

2.27 The representative of Egypt said that his delegation looked forward to receiving the questions in writing in order to be able to answer them correctly before the next meeting.

2.28 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.29 It was so agreed.

- *Nigeria*

2.30 The Chairman drew Members' attention to the notification received from Nigeria in document G/VAL/N/1/NGA/1. This notification contained the Act to Amend the Customs and Excise Management Act of 2003. Nigeria also notified its responses to the Checklist of Issues in document G/VAL/N/2/NGA/1.

2.31 The representative of the United States had a question that it would be submitting in writing. It concerned Article 8 of the legislation concerning importers being allowed to reverse the application of Articles 5 and 6 of the Agreement. Based on her delegation's research, it did not appear that Nigeria had made a reservation on this. Her delegation was surprised to see this provision in the Nigerian legislation and sought to understand its basis. Her delegation also had several other questions that it would submit and looked forward to answers and further discussion of this item.

2.32 The representative of Canada also had some questions that it would submit in writing to the Nigerian delegation. They were mainly related to Article 4 and the reversal of the order of Articles 5 and 6 of the Agreement. Other questions concerned confidentiality of information in Article 10, appeals in Article 11, access to the judiciary branch, and particularly a question related to paragraphs 2, 2.b and 3.b of the Nigerian legislation that required the use of the greater value where the use of two values were possible. This was contrary to the Agreement in Articles 2.3 and 3.3 which required the lowest value to be used.

2.33 The representative of the European Communities noted that the first Article simply said the "customs value shall be the transaction value". It did not then make reference to paragraph 7 which said that the customs value was the price of the goods. Normally these 2 concepts were grouped together as they were found in Article 1 of the Agreement. On another point, in the categories of parties who would be regarded as related parties, different wording as that of the Agreement was used and this could be confusing to the reader. Also, the legislation referred to the release of goods provided the buyer provided adequate surety, deposit or another appropriate instrument. The adequate surety would be for the customs duty that may be payable, whereas the alternative being a deposit or another appropriate instrument to cover the ultimate of customs duties. This might seem excessive, but sometimes these slight change of words could actually have an effect on the customs procedures. This may be a small matter that could be clarified quickly by Nigeria.

2.34 The representative of Nigeria said that his delegation was looking forward to receiving these questions in writing so that they could be referred to the Capital for further clarification and responses.

2.35 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.36 It was so agreed.

- *Tanzania*

2.37 The Chairman recalled that it had been agreed to revert to this notification at this meeting. At the previous meeting, the United States had indicated that it had concerns with Tanzania's valuation methodology for used clothing. His delegation sought clarification on how Tanzania determined the value of used clothing and how such valuation conformed to the Agreement.

2.38 The representative of the United States reiterated her delegation's concern about the Tanzanian valuation methodology for used clothing and remained interested in knowing the valuation method used. Her delegation was aware that the West African Community was currently reviewing this issue and looked forward to the results and ultimate outcome from this study.

2.39 The Chairman proposed that the Committee takes note of the statement made and reverts to this matter at its next meeting.

2.40 It was so agreed.

- *Thailand*

2.41 The Chairman recalled that at the previous meeting it had been agreed to revert to this legislation at this meeting. The United States had circulated questions to Thailand in G/VAL/W/128, and Thailand's replies were circulated in G/VAL/W/130. Follow-up questions from the United States were circulated in document G/VAL/W/143 of November 2004. Thailand's responses to these questions were circulated in document G/VAL/W/158. Additional questions from the European Communities and the United States regarding Thailand's valuation of alcoholic beverages imports were circulated prior to the last meeting in document G/VAL/W/160. And, following the last meeting the Philippines circulated questions regarding Thailand's valuation of cigarettes in G/VAL/W/164 and the United States circulated additional questions on the legislation in G/VAL/W/165.

2.42 The representative of Thailand informed the Committee that her delegation had just received written answers from the capital which it had already passed on to the US. It hoped that the US would be satisfied with its responses this time, and it would circulated these responses to the Committee for transparency purposes.

2.43 The representative of the European Communities looked forward to seeing the responses as soon as possible. His delegation was consulting with Thailand and believed that good progress was being made. Some time was going to be needed for confirmation and updates from all contributors to the process, and hopefully this could be done soon. He reiterated the importance of the notification process in the Committee and hoped that, with the responses from Thailand, the process in the Committee could be concluded. As a general remark he noted that sometimes notifications dated several years back. It was important for the Committee to be sure that it was following the sequencing of legislation and the changes made. This was important in order to have the full picture of the current state of legislation. While he believed that this was the case under this item, his delegation was always interested in any new information regarding the legislations of Members.

2.44 The representative of the United States confirmed that her delegation had received the answers from Thailand prior to the meeting. It would review them and perhaps come back with some follow-up questions. Her delegation would appreciate it if the responses could be circulated to the entire Committee.

2.45 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.46 The Committee so agreed.

- *Ukraine*

2.47 The Chairman drew Members' attention to the notification received from the Ukraine in document G/VAL/N/1/UKR/1. The notification contained an Abstract from the Section XI of the Customs Code, 11 July 2002, No. 92-IV; the Decision of the Cabinet of Ministers of Ukraine "On Approval of the Order of Declaration of the Customs Value of Commodities Crossing the Customs Border of Ukraine, and Presentation of Information for its Confirmation"; the Order of the State Customs Service of 31 January 2007 "On Approval of Methodological Recommendations on Application of certain provisions of the Customs Code of Ukraine, which concerned issues of definition of the customs value of commodities imported to the customs territory of Ukraine"; and the Decision of the Cabinet of Ministers of Ukraine "On approval of the Order of exercising control over the accuracy of determination of the customs value of commodities" of 9 April 2008, No.339. Ukraine had also submitted its responses to the Checklist of Issues in document G/VAL/N/2/UKR/1.

2.48 The representative of the European Communities noted some issues in the legislation which could be related to translation problems. His delegation would study the texts further and discuss bilaterally with Ukraine with a view to reverting to the matter at the next meeting of the Committee. He noted, as well, that there was an increasing tendency for Members to include the procedural parts of their laws when submitting customs valuation legislation. Given the large amount of information presented, his delegation wanted to be sure that it clearly understood the legislation before coming to the Committee with specific questions.

2.49 The representative of the United States supported the statement by the European Communities. She noted that Ukraine had worked hard on customs valuation during the accession process. The translations provided during that process seemed to be better than the translations that were before the Committee. In this regard, she also believed that any questions that his delegation had would probably be related to translations issues. Her delegation would follow up bilaterally with Ukraine.

2.50 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

2.51 The Committee so agreed.

III. INFORMATION ON THE APPLICATION OF DECISIONS OF THE COMMITTEE ON CUSTOMS VALUATION

3.1 The Chairman recalled that under this agenda item, the Committee noted any new notifications of application of the Decisions of the Committee on Customs Valuation on, first, the "Treatment of Interest Charges in the Customs Value of Imported Goods" and, second, the "Valuation of Carrier Media Bearing Software for Data Processing Equipment", both adopted by the Committee and contained in document G/VAL/5. Since the last meeting, Albania had notified its application of the two Decisions as of 8 September 2000 and Ukraine had notified its application of the two Decisions as of 20 March 2006. This was recorded in the updated document G/VAL/W/5/Rev.20. She urged Members to notify the Committee, as necessary, on their practices regarding these two Decisions. She proposed that the Committee takes note of this information.

3.2 The Committee so agreed.

IV. TECHNICAL ASSISTANCE

- *Information on Technical Assistance*

4.1 The Chairman recalled that under this item, the Secretariat informed Members of the technical assistance activities carried out under the auspices of the WCO. Given that the 27th Session of the Technical Committee on Customs Valuation would be held the following week, this information was not available in time to be reported at today's meeting. It would be reported at the next meeting of the Committee.

- *Article 20.3 Technical Assistance and Trade-Related Technical Assistance*

4.2 The Chairman recalled that the Committee's Work Programme on Technical Assistance for Capacity Building as Regards the Implementation and Administration of the WTO Agreement on Customs Valuation was contained in document G/VAL/W/82/Rev.1. The Committee noted previously that customs valuation technical assistance was incorporated in the WTO-wide technical assistance program. The 2008-9 Plan did not contain any regional activities on customs valuation. Requests for technical assistance on customs valuation could be made at any time by individual Members and would be met by a national activity designed to meet the needs of the recipient. One such national activity was scheduled to be carried out in Zimbabwe on 27-30 October 2008. While she encouraged Members to inform the Committee of technical assistance and capacity building activities that they had provided on bilateral or other bases, no such information had been received for this meeting. She proposed that the Committee takes note of this information.

4.3 The Committee so agreed.

V. TRANSITIONAL REVIEW IN ACCORDANCE WITH PARAGRAPH 18 OF THE PROTOCOL OF ACCESSION OF THE PEOPLE'S REPUBLIC OF CHINA

5.1 The Chairman informed Members that, in accordance with paragraph 18 of the Protocol of Accession of the People's Republic of China, the Committee was to report to the Council for Trade in Goods on the outcome of this Review, which would then report to the General Council. The Committee conducted its sixth Transitional Review in 2007, where China explained its implementation efforts with regard to the Agreement on Customs Valuation and responded to the questions raised. She noted that China had recently submitted an informational document for this Review. This had been circulated in document G/VAL/W/172.

5.2 In the absence of any statements, she proposed that the Committee takes note of the information provided by China and that the Secretariat prepares a short factual report on this Transitional Review as had been done in previous years. She would then submit this report to the Council for Trade in Goods under her own responsibility.

5.3 The Committee so agreed.

VI. REPORT OF THE COMMITTEE TO THE COUNCIL FOR TRADE IN GOODS

6.1 The Chairman drew Members' attention to document G/VAL/W/170 which contained the draft report of the Committee to the Council for Trade in Goods. She asked for any comments on the text.

6.2 The representative of Thailand reserved her delegation's right to comment on the updated draft that would be circulated to Members before circulation.

6.3 The representative of the European Communities requested a correction be made to reflect the current Membership of the EC. He asked if the word "complaint" was the usual language to use in this type of report when referring to views exchanged among Members on notifications. If this was not the usual language used, he requested that the different terms be made compatible.

6.4 The representative of Thailand shared this concern and asked that some other language be used instead of "complaint".

6.5 The representative of the United States supported the request to change the language.

6.6 The Chairman proposed that the Committee takes note of the statements made. She proposed that the Secretariat revises the document to include the changes and updates the document to include the present meeting. It would then be sent by fax to Members allowing them five day to comment. After this period, the report would be forwarded to the Council for Trade in Goods.

6.7 The Committee so agreed.

VII. FOURTH, FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH, TWELFTH, AND THIRTEENTH ANNUAL REVIEWS OF THE IMPLEMENTATION AND OPERATION OF THE CUSTOMS VALUATION AGREEMENT

7.1 The Chairman recalled that at its previous meeting, the Committee took note of the nine documents containing the Fourth through Thirteenth Annual Reviews in documents G/VAL/W/29, G/VAL/W/43, G/VAL/W/77, G/VAL/W/89, G/VAL/W/109, G/VAL/W/124, G/VAL/W/136, G/VAL/W/150, G/VAL/W/156 and Corr.1, and G/VAL/W/162. Today, the fourteenth annual review , circulated in document G/VAL/W/171, was added to this list. She asked India to update the Committee.

7.2 The representative of India stated that his delegation had nothing new to report. He would come back to this matter at the next meeting of the Committee.

7.3 The representative of the European Communities reiterated that his delegation looked forward to resolution of this issue which it believed was ripe for resolution. It hoped that at the next meeting the matter could be resolved. The Committee should not have to go through the item at each meeting and its annual reviews should be brought up to date.

7.4 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

7.5 The Committee so agreed.

VIII. PRESHIPMENT INSPECTION

8.1 The Chairman recalled that Preshipment Inspection was a standing item on the agenda of the Committee on Customs Valuation. She drew Members' attention to two documents which had been circulated since the last Committee meeting. Document G/VAL/W/63/Rev.10 contained an update of the information received from the International Federation of Inspection Agencies on countries which used preshipment inspection services, and G/PSI/N/1/Add.11 contained an update of the notifications received under the PSI Agreement since July 2004.

8.2 The representative of the United States expressed her delegation's appreciation for the report, which it continued to value as a mechanism to allow all Members to monitor the use of PSI companies. Her delegation looked forward to all Members reporting any changes in this area.

8.3 The representative of the European Communities asked if the categories contained in the first document were those created by the International Federation of Inspection Agencies (IFIA). His delegation was particularly interested in the category entitled "Other programs for customs not subject to the WTO Agreement on PSI" and was not aware of programmes so described.

8.4 The WTO Secretariat informed Members that the document was prepared by IFIA. The categories were created by IFIA and, as such, the document was duplicated in its entirety for circulation to Members.

8.5 The Chairman proposed that the Committee takes note of the information provided and the statements made.

8.6 The Committee so agreed.

IX. PARAGRAPH 12 OF THE DOHA MINISTERIAL DECLARATION (WT/MIN(01)/DEC/1): IMPLEMENTATION-RELATED ISSUES

- *Paragraph 8.3 of document WT/MIN/(01)/17*

9.1 The Chairman recalled that the General Council, at its meeting in December 2002, authorized the Committee to continue its work under the existing mandate in paragraph 8.3 of the Decision on Implementation-Related Issues and Concerns, and to report back to the General Council once its work had been completed. At its previous meeting, the Committee had an exchange of views on the proposal that was circulated by India in Job(07)153. Although the exchange was inconclusive, several delegations commented on the fact that this matter was being discussed in two fora at the same time and some questioned the usefulness of this approach. It was agreed to revert to this matter at this meeting.

9.2 The representative of India noted that his delegation's proposal had been debated since 2002. It was simply about operationalizing the ministerial mandate contained in paragraph 8.3 of the Doha Declaration. His delegation's proposal provided a format and a procedure for the exchange of customs valuation information between customs administration. The proposal also provided certain safeguards to limit requests, including the provisions for confidentiality of the information exchanged. During the course of the debate, his delegation had received suggestions from Members which he classified under 3 categories: 1) the issue of confidentiality; 2) the elements of the proposal; and 3) the nature of the obligations. He reiterated that paragraph 8.3 did not contain any wording which required that the exchange of information be voluntary. If it had to be voluntary, then it was not necessary to discuss the matter here. As for the first two categories, his predecessor had issued a statement and a document in which his delegation had tried to address the comments and the concerns of Members. His delegation was looking forward to Members' comments and to a fruitful outcome to the consideration of this item. He added that the fact that the matter was being discussed in another WTO body did not affect what was being discussed in this Committee. This Committee had a mandate to operationalize the mandate in paragraph 8.3 of the Doha Ministerial Declaration.

9.3 The representative of Canada agreed that the Committee had a specific mandate in the Doha Declaration and her delegation treated it in that way when it looked at the matter from a customs valuation perspective. The Decision in paragraph 8.3 was clear: when information exchange was sought, the exporting Member shall offer cooperation and assistance consistent with its domestic laws and procedures. Canada maintained that the caveat that assistance be given consistent with its domestic laws suggested that some Members would have difficulty in assisting in all cases. Therefore 8.3 was not binding. In keeping with this, her delegation did not believe that the proposal so far provided exactly the solution that was needed in this Committee. India's proposal did not provide for cases where a Member could decline a request if it had concerns about the use of the information, confidentiality, or consistency with its domestic laws given that the information collected would be under the domestic laws of the Member concerned. It was important to respect this confidentiality. Canada had maintained in previous meetings that the Technical Committee on Customs Valuation had provided updates on how to deal with situations where customs had doubts about the truth or accuracy

of the values declared. Her delegation encouraged India to examine these procedures. Her delegation remained of the opinion that the TCCV had provided good advice on how to operationalise this Decision and her delegation supported the emerging consensus on a draft decision from this Committee in 2002. Most Members had been ready to adopt this draft decision but India was not. Her delegation still believed that India had to come forward and address Members' concerns.

9.4 The representative of the United States pointed to the fact that this matter was being discussed in another forum. There was a good and robust discussion in that forum on this issue and many of the elements that were contained in the most recent Indian proposal were being discussed there. Her delegation reiterated its position that this other forum was the appropriate place for that discussion.

9.5 The representative of Hong Kong, China echoed other colleagues' comment about India's original proposal. Paragraph 8.3 clearly stated that the cooperation needed to be consistent with the domestic laws and regulations. Because of the legal implication, his delegation looked forward to India coming up with some solutions to address Members' concerns in this regard.

9.6 The representative of India recalled that his delegation's proposal stated that the information furnished should be treated as confidential in accordance with Article 10 of the Agreement. However, in cases where it was required to disclose the information in judicial proceedings, necessary permission for that purpose should also be provided if sought by the requesting administration. In comparing the provisions of the existing Agreement with his delegation's proposal, the latter was more liberal than the former. Article 10 of the Agreement clearly stated that any information which was provided by a Member had to be treated as confidential except to the extent it may be required to be disclose in judicial proceeding. So the existing Agreement already authorised Members to use the information obtained on a confidential basis in judicial proceedings. Rather, his delegation had gone further by saying that where it was required to disclose the information in judicial proceedings, necessary permission for that purpose should be provided if sought by the requesting administration.

9.7 The representative of Singapore also recalled that paragraph 8.3 of the Decision actually stated that when information exchange was sought, the exporting Member shall offer cooperation consistent with domestic laws and procedures. This meant that the mandate did not provide for a binding mechanism. While his delegation was open to discussing how to operationalise paragraph 8.3, it was still unable to see how the Indian proposal would be able to fulfil the mandate. It was also pointed out by the US delegation that the appropriate forum for discussion of this proposal was the Trade Facilitation Negotiating Group. The Committee should examine the efficiency as well as the interface of these two discussions taking place in parallel. He also thanked Canada for reminding the Committee of the historical situation back in 2002.

9.8 The representative of Japan said that his delegation was also of the view that the Decision in Paragraph 8.3 of the Doha Ministerial Decision clearly mentioned that the information exchange was to be conducted in line with each Member's domestic laws and regulations. Therefore there was no binding nature to this Decision. His delegation also raised the question of the same issue being discussed in two different fora. He concluded that his delegation wanted to be included in any further discussion on this matter.

9.9 The representative of Thailand also noted that this matter was being discussed elsewhere and acknowledged the extensive work done in the World Customs Organization. Her authorities were currently studying the Indian proposals and needed more time to consider this issue carefully before providing further comments. Having said this, her delegation was willing to engage in any forum of discussions with all interested Member to further understand this proposal.

9.10 The representative of Korea also supported discussing this matter in the other forum under the WTO. Considering the mandate of paragraph 8.3, his delegation believed that the exchange of valuation information should be on a bilateral and non-binding basis.

9.11 The Chairman proposed that the Committee takes note of the statements made and reverts to this matter at its next meeting.

9.12 The Committee so agreed.

X. OTHER BUSINESS

- *Questions posed to India on its valuation practices*

10.1 The representative of the United States recalled that his delegation had submitted questions to the delegations of India and Indonesia at the previous meeting. His delegation had received responses to its questions from the Indian delegation for which it was grateful. His delegation was still waiting for responses from Indonesia and, therefore, wished to leave this matter as a standing request.

10.2 The representative of India presented his delegation's responses orally and would follow with written responses. In his view, the US's primary area of concern was the non-receipt of documentation such as Show Cause Notice. The point raised was that because the importer or the exporter did not receive the Show Cause Notice, they were precluded from filing the appeal. But this was not correct. Under Indian law, if an importer/exporter was aggrieved by an assessment order, he/she could file an appeal to the authorities. If the order was passed by the Deputy Commissioner of Customs, the appeal could be filed with the Commissioner of Customs, or if it the order was passed by the Commissioner of Customs, the appeal could be filed with the Tribunal. The appeal could be filed on the strength of the assessment order itself. He responded directly to the specific questions: (i) Could India please explain how companies were informed of actions taken by Indian Customs with regard to them or their shipments? He responded that the document was either filed by the importer or by a customs broker. So whenever the customs had any queries to raise, they would either write to the importer or to the customs office agent. (ii) Could India confirm that an appeal cannot be made until documentation is received? As he had previously clarified, the answer was no since there was no documentation requirement for filing an appeal, only a copy of the assessment was necessary. He informed the Committee that in 2006, the Customs Act was amended. In paragraph 5 of Section 17, dealing with assessment of duty, the law was amended to provide that if the order of assessment was controlled to the claim filed by the importer on the issue of classification, valuation, or rate of duty, or the assessment order passed by the customs official was not approved or confirmed by the importer or its authorizing agent, then the official concerned was duty bound under the law to provide a speaking order within 15 days of the assessment. So, if any importer/exporter was aggrieved by the speaking order, he/she could file an appeal; (iii) If documentation was required before an appeal could be lodged, were there guidelines as to when such documentation must be provided? There were no guidelines but the provisions were in the law itself. As he had mentioned above, if the official gave a decision that was contrary to the claim of the importer/exporter, he/she would have to pass a speaking order. Using the speaking order, the importer/exporter could file an appeal.

10.3 He continued to the next question: (iv) If a company requested documentation and did not receive it, were there avenues which the company could pursue to obtain such documentation? He clarified that the order was required to be served to the affected party and the date of filing an appeal was counted from the date of its receipt by the party. After the order was passed, within 2 months, the appeal must be filed. If there was a delay in serving the order, the time limit to file an appeal would not be affected. (v) Could India confirm that an importer had the right, not just the ability, to withdraw its goods by providing a guarantee as required by Article 13 of the CVA? If so, where was that stated in the law? Section 18 of the Customs Act dealt with provisional assessment. Three

circumstances could give rise to provisional assessment: the first was where the importer did not provide the documentation that was required for assessing the goods, the second was where the documentation was provided but the official still needed to examine the goods, and the third was where the importer provided all the information but the customs officer did not consider it was sufficient. The Act said that in such cases, provisional assessment could be ordered pending the production or furnishing of the necessary documentation or the completion of tests and inquiry, if the importer/exporter produced the security as the officer saw fit. The provisions of Article 13 of the Agreement were along these lines and spoke about "sufficient guarantee", without giving a definition of this term. That was why it was at the discretion of the customs officials to order a provisional assessment. If the official believed that the importer had filed a guarantee/security that was sufficient to cover the duty and penalties, the goods could be cleared. But this was not mandatory. Customs had to make a determination whether to clear the goods or not. In reality, sometimes customs accepted a simple letter of undertaking, a corporate guarantee, a security, or a bank guarantee. India did not follow a hard and fast rule. But the law said that the importer/exporter had to provide a bond along with the security to cover the deficiency, i.e. the difference between the provisional and final assessment. (vi) Did India have any additional laws, regulations or directives pertaining to guarantees? Please provide references for the additional laws, regulations, and directives. According to Section 18 of the Customs Act, the Customs (Provisional Duty Assessment) Regulations, 1963 (Notification No. 181-Cus., dated 13.07.1963. Paragraphs 2, 3 and 4 of the said Regulations dealt with the execution of bond along with surety or security. Finally, (vii) could India please provide additional information regarding how the guarantee amount was determined and what procedures importers must follow in order to withdraw goods from customs pending final determination of value? The quantum of bond and surety or security depended on the differential duty between the duty finally assessed and the duty provisionally assessed. The importer did not have the right to demand provisional assessment. The proper officer, pending production of any document/information necessary for assessment, may direct that the duty liable on the goods be assessed provisionally if the importer furnished security.

10.4 The representative of European Communities noted that some attention to customs clearance was also being made in the discussions in the Trade Facilitation Negotiations. He looked forward to seeing the responses in writing and, at this stage, wondered whether this matter would benefit from some additional guidance at the international level.

10.5 The representative of Canada also looked forward to receiving the written responses since, on the issue of guarantees, there seemed to be some conflicting information on the provision of guarantees in Indian law.

10.6 The representative of India shared the concerns of the EC. He read out Article 13 of the Agreement. The Article spoke about a "sufficient" guarantee, without defining what was a "sufficient" guarantee. The Indian law provided for the three conditions he had mentioned above for establishing provisional assessment. He also spoke about the current economic situation which could call into question the soundness of certain banks, and therefore securities provided to release goods. Simply because an importer/exporter provided a guarantee, did not mean that it was "sufficient". It was up to customs to assure itself that the guarantee was sufficient; customs had the discretion to decide whether a guarantee was sufficient or not.

10.7 The Chairman proposed that the Committee takes note of the statements made.

10.8 The Committee so agreed.

- *Date of the next meeting*

10.9 The Chairman informed Members that the next meeting of the Committee was scheduled for 7 May 2009.

10.10 The meeting was adjourned.

Annex I

Report of the work of the Technical Committee on Customs Valuation

Since the last meeting of the Committee on Customs Valuation, the Technical Committee on Customs Valuation (Technical Committee) has not held any meeting. It will hold its 27th Session from 20 to 24 October at the WCO Headquarters in Brussels.

The report of its 25th Session and WCO Secretariat's programme of technical assistance in the field of Customs valuation was presented to the Committee in May 2008.

Administrative Matters Related to the Application of the Agreement

The Council, at its 111/112th Sessions in June 2008, adopted Case Study 13.2 on the Application of Decision 6.1 of the Committee on Customs Valuation (on Group under invoicing).

Technical Assistance and Capacity Building

Since our last report to the Committee on Customs Valuation, the WCO Secretariat has conducted three regional seminars on implementation of the WTO Agreement. These regional seminars took place in the Dominican Republic in May, in Burkina Faso in July and in Bosnia and Herzegovina in September 2008.

Fellowship Programme

The WCO has organized the 48th Fellowship Programme for English-speaking officers from 29 September to 24 October 2008 at the WCO Headquarters. Four officers from the Customs administrations of Gambia, Guyana, Kenya and Zambia have chosen Customs valuation as their field of study.

27th Session of the Technical Committee

At its 27th Session, the Technical Committee will continue to consider the technical questions of Royalties and License Fees submitted by Brazil, Canada, Colombia and Japan.

The Technical Committee will also discuss the following technical issues:

- Customs Valuation of imported electricity (Brazil)
- Customs Valuation treatment of business design documentation (Kazakhstan)
- Valuation of perfume testers (Mauritius)
- Valuation of cinematographic films (Mauritius)

The Technical Committee at its 27th Session will also discuss the issue of Transfer Pricing, which was recommended by the Focus Group on Transfer Pricing in October 2007. The OECD and the ICC will make presentations on the issue of Transfer Pricing, and the Technical Committee will hold a preliminary discussion on developing draft case studies. In addition, there has been a proposal for the Technical Committee to set up a Working Group on Transfer Pricing.

Private Sector Workshops on Transfer Pricing

The Second Workshop on Customs Valuation and Transfer Pricing for the private sector was held on 14-15 May 2008 at the WCO. The Third Workshop on the same topic will be held on 24-25 November at the WCO.

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