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RESTRICTED

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**Committee on Customs Valuation**

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## **MINUTES OF THE MEETING OF 7 MAY 2002**

Chairman: Mr. Raimundas Karoblis (Lithuania)

The agenda proposed for the meeting, circulated in WTO/AIR/1783 and Add.1 was adopted as follows:

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

1.1 The Chairman recalled that paragraph 12 of document WT/MIN(01)/DEC/1 directed the Committee to address the tirets contained in paragraph 7 of Job(01)/152/Rev.1, and paragraph 8.3 of document WT/MIN(01)/17 directed the Committee to address the matter referred therein. These two assignments were listed as sub-items 1 and 2 of item A of the agenda for this meeting. He noted that the Committee held an informal discussion on these subjects prior to this formal meeting and he proposed reproducing the statements made at that meeting in the minutes of this formal meeting.

1.2 The Committee so agreed. Following are the statements made at the informal meeting of the Committee of 7 May 2002.

1.3 The Chairman suggested, given the detailed and comprehensive discussion of the tirets at the March meeting, and the numerous questions received on these issues, that the Committee begin hearing the responses to the questions on the tirets. This would be followed by a discussion of paragraph 8.3 of document WT/MIN(01)/17.

1.4 The Committee so agreed.

#### *General comments*

1.5 The Chairman drew Members' attention to the questions circulated in document series G/VAL/W/98 and Adds. 1-5. He invited Members to respond to the issues and questions raised in this document series. He encouraged all Members to engage in the discussions.

1.6 The representative of India considered that some of the questions had been addressed in earlier meetings of the Committee, including the meeting held in November 2000. She referred

Members to the detailed minutes of that meeting and the report by the Chairman of the Customs Valuation Committee (G/VAL/36). She noted that some of the questions were received past the deadline, but she would do her best to answer the questions received. She first wished to discuss an issue underpinning the implementation discussions. Several delegations noted that some of these issues had been around for the last 20 years during the Tokyo Round and the Uruguay Round. When she raised the matter with her customs administration, they directed her to the negotiating history available with the International Chambers of Commerce as well as from various books written by customs experts at the time. This history pointed to five contracting parties, the United States, the European Communities, Canada, Japan and the Nordic countries, which, she claimed, negotiated the Tokyo Round Agreement in small group sessions. The drafts that emanated were transmitted to the rest of the GATT Membership on a take-it-or-leave-it basis. Developing countries, namely India, Brazil, and Argentina raised three issues towards the end of the discussions on the Tokyo Round Code. Because of this and the absence of developing countries during the negotiations, this Code was the last to be agreed in the Tokyo Round. She provided this history to sensitise other developing countries and to make the point that this was the time to have their concerns addressed in the Customs Valuation Agreement (hereafter, the Agreement). The 3 issues that India, Brazil and Argentina raised were i) the transition period (they asked for 10 years but received 5); ii) the right to apply minimum values without stringent conditions; and iii) the proposal currently in tiret 61 on sole agents, etc. At the time, developing countries proposed that the GATT Secretariat do a factual study on the issue of sole agents but, according to the history, developed countries did not want such a study because it would have shown that there was a problem. The compromise reached was that a Member could request a study in whichever organization it wished.

1.7 She referred to a paper presented by the Members of the ICC Valuation Committee and UNCTAD during the end of the Tokyo Round negotiations which stated, "the Code quite clearly addresses the commercial and tariff realities of the developed industrialized countries. It is not by any stretch of imagination the ideal code for countries which regard import duties not a measure of protection but as a source of revenue, have a very different trading and business environment and thus a very different set of commercial realities, and have a real and justifiable concern about fraud." With this background, she did not understand why developed countries did not appreciate the genuine problems associated with the Agreement. The Agreement did not fully incorporate issues which were germane and sensitive to developing countries. Perhaps there was a lack of awareness of the trading environment or the commercial realities faced by developing countries. History also revealed that during the initial negotiating period of the Code, the EC was in favour of the Brussels Definition of Value. After Commission officials spent one month in the US to observe the use of the positive approach for valuation, the EC became convinced that the positive approach was the better approach. The EC completely changed its position in the negotiations and thus, the Agreement was based on the positive approach and not on the BDV approach. She highlighted this to point out the importance of understanding the realities other countries faced. Even if a particular country did not use certain techniques, it did not mean that those techniques were wrong. Equally, techniques applied by one Member to deal with fraud were not necessarily applicable to another country. She quoted two World Bank economists, Mr. M. Finger and Mr. Shuller, who wrote in an October 1999 paper entitled "Implementation of Uruguay Round Commitments – The Development Challenge" "where tariffs are high and accounting expertise and access to electronic information limited, shifting to a risk based valuation system that depends on an in-depth examination of a sample 15 or 20% of shipments might increase rather than reduce the number of shipments on which importers attempt to under invoice. Traders might view the change as giving them a better not a worse chance to get a way with under invoicing". She provided this quote to also illustrate why use of modern techniques, such as those used in developed countries, could not help meet the concerns of developing countries. It was not always possible to transfer a mechanism of dealing with fraud and have the same results. With these general remarks, she hoped that Members would better understand developing country concerns.

1.8 She addressed Japan's question of how India read the 1994 Ministerial Decision. Although this Decision dealt with fraud, there could be cases where it could not be used because the consignment was unique and there was no prior data regarding import values and no basis for reasonable doubt as stipulated in the Decision. The implementation proposals aimed to plug existing loopholes which unscrupulous traders may use to under-value imported consignments. Secondly, Japan said that the importer must provide further information. However, she did not consider it obligatory for the importer to provide full information because the second sentence of the Decision said, "if after receiving further information or in the absence of a response the customs administration still has reasonable doubts". She also had many real case studies and she invited Japan to review the minutes of the November 2000 discussion in G/VAL/M/17, paragraph 2.53. In this real case on tire 57, the importer ultimately agreed that no amount of engineering had actually been done in India. It was an attempt to evade duty by as much as 30 per cent.

1.9 The representative of Japan said that his delegation had read the minutes of the November 2000 meeting but still had difficulties understanding the real problems India was facing. His delegation still considered the response from India insufficient because they were essentially a repetition of previous explanations. He asked that the Indian delegation be encouraged to provide more information on the problems it was facing.

1.10 The representative of the United States noted the subjectivity of historical accounts such as that provided by India which gave the view that it would be desirable to renegotiate the Agreement in fundamental ways. It was important to also review the chaotic situation of valuation methodologies preceding the negotiations. There was no common approach nor transparency, and a substantial lack of predictability for traders. He did not doubt the sincerity with which India presented the merits of its proposals for customs administrations to have more discretion and more freedom to act. He cautioned Members about such an approach which moved seriously away from trade facilitation. Many Members had noted that this Agreement was one of the few that promoted trade facilitation practices. The proposals put forth would significantly compromise trade facilitation in the WTO and would have effects on important investment decisions. Developing countries had a lot at stake in terms of export interests. Recent attempts to use valuation to restrict trade by giving customs administrations more discretion were disturbing particularly since many of these efforts appeared to be targeted at developing country exports. This had to be kept under consideration during these discussions.

1.11 The representative of the European Communities noted that the Agreement had evolved considerably and was not implemented world-wide. He did not consider that it did justice to the Agreement and to the work that went into its negotiation to summarize it in such a brief way. It was true that the initial draft came from a smaller group of countries, but other countries were drawn into the negotiation. As the time passed, developing countries wanted to be more active and became more engaged in the work. Nevertheless, it was important to recall why the Agreement was needed at the time it was negotiated and the fact that it was even more needed today given the huge volume of trade and the amounts originating from developing countries. This did not exist in the 1970's and 1980's. This also meant that developing countries had more to benefit and more to lose if the Agreement lost its original structure. He also noted that developing and developed countries were working quite well together in the WTO and the WCO in addressing practical problems when they arose. The specific problems of today were not the same as those of 20 years ago. The Agreement did not itself open doors to fraud which was a phenomenon of criminal intent by traders and would exist in all areas of customs activity - origin, valuation, nomenclature, etc. Part of the problem was making sure customs administrations were functional and up to the task.

1.12 He appreciated the difficulty that India would have in attempting to respond to all the questions posed. Nevertheless, the questions had to be taken seriously, explored and responded to. Previous discussions did reflect some of the arguments/issues but it was important to ensure that all

issues were covered, even if it meant repetition. His delegation's overall objective was to ensure that the issues were not taken up in a way that would put into doubt fundamentals of the Agreement. It was necessary to look at the ways administrations dealt with problems. This did not necessarily mean changing legal texts nor that the Agreement was defective or too selective. There were a variety of ways customs administrations could address specific issues. One example was provided by India in the case involving engineering and design costs. It showed that the administration was actually working well because the fraud was detected. The Committee needed to look at how administrations' working methods could be assisted to address these kinds of situations.

1.13 The representative of Canada associated his delegation with the comments of Japan, the US and the EC. His delegation was concerned that the proposals moved away from the basic principles of the Agreement as set out in the Preamble as well as in the actual operational provisions of the Agreement. With regard to the history of the Agreement, he noted that since the Code was established, much had taken place. During the Uruguay Round, many more countries were directly involved in the negotiations. In addition, these proposals were tabled and discussed before and after the Seattle Ministerial, before Doha, and presently. It did not do justice to look back 20 years ago. He agreed with the EC that the case provided by India demonstrated that the Agreement worked. He supported the EC that the issue was not to change the Agreement but to look at how to solve real problems.

1.14 He asked India to confirm what it had said about the Ministerial Decision. Did it really mean that a customs service was required to accept the transaction value if the importer was unprepared to provide responses to questions on information? His delegation did not share this view and considered that the Decision was designed so that customs services would ask questions to satisfy itself with the answers. If it was not satisfied it could take the appropriate next steps. He acknowledged that his delegation submitted its questions late, but it still hoped to receive responses at an appropriate time.

1.15 The representative of Brazil considered that India's initial statement threw an historical light on the Committee's work. His delegation attached importance to the implementation issues and, in accordance with paragraph 12 of the Doha Ministerial Declaration, they were an integral part of the work program. His delegation was looking eagerly towards positive results from the Doha round of multilateral trade negotiations and, therefore, approached implementation issues with total seriousness. The proposals before the Committee had been on the table since before Seattle. The response to them had always been that they could not be addressed outside of a negotiating round. Now Members were in a negotiating round so constructive engagement in these proposals was warranted. It had also been said that the Agreement was a significant improvement on the prior situation. This was true, but it should not be said that it was a perfect document and could not be improved. Some countries were facing problems with it and these should be addressed. His delegation had looked at each of these proposals on its own merits. Some merited further consideration and could enhance the Agreement. His delegation was not convinced by others but was willing to discuss them. This was the approach that his delegation hoped would govern the Committee's work. It had been said that one of the main benefits of the Agreement was that it was trade facilitating. Legitimate trade facilitation was good and the Committee should be careful not to be facilitating fraud. If a Member identified a problem with fraud associated with the Agreement, it was incumbent upon the Committee to examine it seriously.

1.16 The representative of India was puzzled that some Members thought that India was seeking to renegotiate the Agreement in a fundamental way. India, Brazil and Argentina were the first developing countries to accept the Tokyo Round Code and its positive approach. This was at no small cost because India's customs administrations had to undergo a major change in its approach to customs valuation. The proposals were seeking to tighten the loopholes in the Agreement which were preventing proper or legitimate trade and were furthering fraudulent trade. Unilateral solutions were possible but would be ad-hoc, lack predictability, and defeat the purposes of the Agreement. Her

delegation was trying to provide multilateral, transparent and predictable solutions to situations where proper trade was hindered. If the EC admitted that fraud still existed but that customs administrations perhaps had more resources now, did this not imply that the EC was content to allow legal loopholes in the Agreement? Was it not the Committee's obligation to see how it could deter or prevent such situations? Her delegation was not seeking to revert to the pre-Tokyo Round days and none of the proposals touched Article I of the Agreement. Her delegation was seeking to provide more freedom to customs administrations to detect and deal with fraud, not to give discretionary powers to customs administrations. It was not seeking to restrict trade through valuation.

1.17 She acknowledged that in the example of fraud that she had given, her customs administration had been able to detect the fraud and deal with it. But there were other examples of fraud for which her administration did not have the sufficient proof that would stand up in a court of law. This implied that something had to be done about this in the WTO. Equally she considered that her example showed that fraud was possible because of certain provisions in the Agreement which should be dealt with to prevent fraud, not be reactionary to it. She reiterated that her delegation's intention was to strengthen the Agreement and to not allow a distortion of proper trade among WTO Members.

1.18 With regard to the questions posed by Members, she observed that the large number of questions posed by Canada addressed the general questions posed by other Members. In providing her responses, she asked Members to point out if she had missed any specific questions. On the question of whether the proposals required a change to the Agreement, she responded that they did not. Her delegation was seeking to elaborate on or to plug loopholes in the Agreement in light of its experience with certain existing provisions that were being used by unscrupulous traders to undervalue imported goods. Another general question was whether the proposal effected the transaction value as the basis of customs valuation. As mentioned earlier, the transaction value as the basis for determining value would remain unchanged. Her delegation was seeking to strengthen its underpinnings. Another question was whether the proposals effected the fairness, uniformity or neutrality of determining customs value under the Agreement. The proposals did not as there was no proposal to change the basic system of valuation, the transaction value, nor the hierarchical system of determining value. The proposals would ensure increased transparency in the determination of customs value as they addressed some areas of misuse under the Agreement. Her delegation considered that any multilateral solutions found which aimed at discouraging misuse of certain provisions of the Agreement would lend greater transparency to its operation.

1.19 She added that the proposals would ensure that customs values would not be determined by or on the basis of arbitrary, or fictitious values since her delegation was seeking to maintain not just the transaction value, but also the hierarchical system of determining the assessable value in case the declared value was found to be fraudulent. On the question of how the proposals effected the principles in the Agreement that customs value should not be determined by prices in the exporting country's market or in the importing country's market, she responded that there was no proposal to change the basic system of valuation – the transaction value nor the hierarchical structure of determination of the assessable value. The proposal was only to consider these methods under the residual method in Article 7 of the Agreement. The note to Article 7 in paragraphs 3 (a) and (b) provided that customs value could be based on identical and similar goods produced in a third country. It would not be anomalous to provide for determination of value on the basis of third country prices. Her delegation was only suggesting another basis for using the principle of transaction value which would be useful in addressing transfer pricing in the context of multi-country production, operations and transfers by transnational corporations. The proposals did not seek determination of assessable value on the basis of the domestic price of the importing country since this was already permitted under certain circumstances in Article 5 of the Agreement.

1.20 Another question was how the proposals would deter fraud, particularly since fraud was not caused by the Agreement but was a deliberate misrepresentation of the facts. This was perhaps not

unique to customs valuation and suggested that there should be effective enforcement programmes. Her delegation's proposals were intended to deter fraud by shutting the window for misuse which was presently available to unscrupulous traders under the Agreement. An element of effective enforcement programmes would be to identify the loopholes in existing law and plug them so as to close off available routes for fraud. Her proposals dealt with both prevention as well as enforcement. Another question was how the proposals would facilitate genuine trade as opposed to creating uncertainty for importers by increasing the discretion and choice of customs authorities. Her delegation's proposals did not create uncertainty for importers or give increased discretion or choice to customs authorities. Two of the proposals created additions to the declared transaction value under the existing Article 8 of the Agreement. This would not add further discretion to customs officers than what was already provided for under the existing Article 8. Similarly, the proposal to take the highest of the available values of identical goods or similar goods only sought to look at the basis for arriving at the assessable values. The proposal that imports from sole agents, etc. would be considered as related party transactions would lessen the discretion presently enjoyed by the customs authority for determining a relationship. Rather than the two-tier system of investigating to determine a relationship and whether such relationship influenced the price, customs would only have to determine whether the relationship influenced the transaction value. This was desirable also because of increasing instances of transfer pricing among transnational corporations.

1.21 The proposals related to the residual method under Article 7 would provide additional means to the customs authorities to determine the value in accordance with other available transaction values in third country exports or in the domestic market of the exporting country. None of these proposals were aimed at increasing either the discretion or choice available with customs authorities nor to provide uncertainty to trade. She confirmed that her proposals were not intended to increase revenue collection by increasing the value for duty as they would be used in few cases without affecting the primacy of the transaction value as the main basis for assessment. They were aimed at protecting the revenue from transactions between unscrupulous traders who were using the provisions to undervalue their imports. On a general note, she stated that the issue of multilateralism was particularly relevant for her delegation's proposals. As in the context of the current Paragraph 8.3, her delegation believed that a multilateral arrangement for exchange of information on customs value was preferable to bilateral arrangements which were impractical and uncertain. In the context of the other proposals, her delegation was also seeking multilateral solutions. On whether India verified and confirmed the value of goods at the border before the goods were cleared from customs or through post-entry audits, she stated that India mostly verified the value of goods at the border before clearing it from the customs control.

1.22 The final set of general question concerned whether her administration had tried to follow other approaches and methods and why these had not worked. It was an open question as to whether other countries had successfully addressed the problem of under-valuation by other means. India was not making these proposals alone and was seeking to address the problem of fraud on every possible front. One of the most important means was through these implementation proposals because her delegation believed that the answer to many of its problems laid in the specific provisions themselves. It was better to prevent fraud than to place full reliance merely on enforcement.

1.23 The representative of Senegal informed the Committee that his Government was applying the Agreement since July 2001 and had made a reservation to continue to use minimum values. For the time being, his administration had not faced these particular difficulties but could foresee the difficulties it would face. Developed countries should study these difficulties carefully in order to provide concrete answers so that developing countries could apply the Agreement in due course. This implementation debate was important to his country considering the importance of customs valuation to customs revenue. Realities in developing countries were not the same as in developed countries and, therefore, the perspectives were not the same. Developed countries often understood issues and proposals as a means of using the Agreement for protection purposes. It was important to go beyond

this. For some countries, customs revenue constituted 40 or more per cent of government revenue. Customs modernization might imply being able to substitute customs income by income raised internally but this was a different matter. The Customs Valuation Agreement was not set in stone and had to take into account developing country problems. Transparency was important, but so was differentiated rules in order to allow the coexistence among developing and developed countries in the framework of this Agreement.

1.24 Flexibility was contained in the provisions allowing the use of both FOB and CAF values. Therefore, differentiated rules could exist in the framework of this Agreement such as those in the proposals. Members that were against the proposals should explain why. For example, his delegation would like to know why buying commissions should not be included in the customs value since the customs value had to take into account all costs. With respect to tirt 59, a country that needed income and depended upon customs revenue must have an option to take the highest value. It would be an option just like the use of FOB or CAF value. Developed countries did not have these concerns but developing countries did. He asked for more clarification from developed countries on these matters.

1.25 With regard to the issue of mutual assistance in paragraph 8.3, he wondered why more developed countries were not part of the Nairobi Convention of the WCO? Perhaps there was no will to cooperate and provide developing countries with the information they needed. Senegal would like to cooperate as it was essentially an importing country.

1.26 The representative of Canada agreed that technical assistance, both on implementing the Agreement and on finding alternative ways of collecting revenue, whether through sales tax or income tax was a legitimate issue. Canada was involved in a 3-year programme in India on improving sales tax and income tax collection. The revenue issue could not be ignored but it was a matter of appropriate solutions. Turning to tirt 60, India said that the objective was not to raise the value for duty or the amount of duty collected. Adding buying commissions would explicitly raise the value for duty for any importer who used a buying agent. This would result in discrimination because a large company which did not use a buying agent would not pay any additional duty whereas a small importer who used a buying commissioner would have to pay additional duty. Senegal touched on a relevant question – was the buying commission something of value to the producer/exporter or the importer? It was the importer who benefitted so why should the imported be taxed on that? Was the purpose to tax the good? Therefore, his delegation did not agree with India that tirt 60 would not raise the duty and would not lead to arbitrariness. On tirt 59, his delegation considered that using the highest value would be arbitrary. On tirt 61, his delegation was not sure that this proposal would not affect the primacy of the transaction value. He understood from the discussion at the last meeting, that under this proposal, a sole agent/distributor/concessionaire would be considered related unless they could demonstrate that they were not on the basis of unknown criteria. This provoked additional questions from his delegation such as what these criteria were. If they were considered related, the sole agent would have no certainty regarding how its imports would be valued because it would have to show that their was no influence on the price. Once customs determined a relationship and influence on the price, it would have to go through the hierarchy of methods which increased the uncertainty further. His delegation saw the uncertainty beginning with the automatic assumption of relationship. Finally, he considered that tirt 57 would also increase uncertainty in that the importer would have to determine how much research, development or engineering costs were incorporated in the good and then how to apportion it to the particular import in question. His delegation would need to study the matters further and, therefore, requested India's responses in writing.

1.27 The representative of the United States also looked forward to the written responses to the questions. He added that he was left with a more favourable impression by the second Indian intervention as opposed to the first. His delegation was fully committed to thoroughly reviewing the implementation proposals and we agreed on need to do so on a methodological basis without resorting

to generalities. The review should be a specific examination of the problems that had been communicated and proposed to be addressed by the proposals. An important consideration in how the problems might be addressed was whether the specific problems identified were common to all, many or a few Members. Questions to think about were what were the options to address the problems; were the proposals to resort to measures in the Agreement the best options; what were the implications in terms of restricting trade and were there better alternatives outside the Agreement to address the particular problems of fraud? He cautioned against creating new potential for different forms of fraud that might raise more concerns.

1.28 The representative of India reiterated that her delegation's proposals did not intend to raise the collectable revenue but to ensure that the proper revenue was collected. Although, for example, adding the costs at issue in tiret 57 would actually raise the duty collected, the discriminatory nature of dealing with these costs would be eliminated. For the purpose of assessable duty, these costs, wherever incurred, would be given the same treatment so that the duty collected would be the proper duty. Similarly for buying commissions, because it was an element of cost which had been incurred, and other types of commissions were already included in the assessable value, the proposal was not intended to raise duty but again to eliminate discrimination between different types of costs. In relation to tiret 59, Canada alleged that by using the highest value instead of the lowest value the provision would be made more arbitrary. However, she recalled an historical proposal by Spain which considered that the lowest value was also was an arbitrary value. She noted that traders committed fraud to evade duty. A fraudulent transaction would place a low transaction in customs' records. It would not be in their interest to submit a fictitious high value so a higher value would not be fictitious or arbitrary but a very low value had the potential of being so. While this would not occur in every case, her delegation was trying to plug the possibility of recourse to a lowest value which would be more likely a fictitious and arbitrary value.

1.29 She did not agree with Canada's assertion that the primacy of the transaction value would be effected because the sole agent would be deemed to be related. The proposal sought to merely shift the burden of proof of a relationship from the customs authority which her delegation believed would not have sufficient materials available to prove a relationship. It would be in the importers' and the sole agents' interest to prove that they were not related by providing customs administrations with necessary evidence. In relation to tiret 57, Canada alleged that uncertainty would increase with the allocation of the relevant costs to the imported good. Her delegation was trying to ensure that when these costs were provided by the buyer in the country of import they would also be admissible, as was the case when the costs were provided outside the country of importation or by a person other than the buyer in the country of import, etc. In addition, the question of allocation of costs was the same in both cases.

1.30 Responding to Japan's questions on tiret 57 (question of 4), her reading of Article 8.1.b(iv) of the Agreement indicated that the costs of engineering, development, artwork, design work, etc. undertaken in the country of importation would not be included if they were supplied directly or indirectly by the buyer, either free of charge or at reduced cost. This implied that if such services were supplied to the exporter by a person other than a buyer based in the country of importation they could be included in the assessable value. Article 8.1.b clearly mentioned "by the buyer free of charge or at reduced cost" and sub-indent (iv) used the phrase "undertaken elsewhere than in the country of importation" so these provisions established the link between the buyer and procurement of such services elsewhere than in the country of importation. As mentioned in her February statement, her delegation read four situations in Article 8.1.b: the value of goods supplied from abroad and from the importing country by the buyer or anyone else were meant to be included in the value; the value of services supplied from abroad by the buyer and anyone else was also to be included; the value of services supplied from the importing country by anyone else was also to be included; and the value of services supplied from the importing country by the buyer was not meant to be included. In relation



to Japan's question 5 on double taxation, her delegation considered that this problem could be addressed by individual countries exempting such elements from internal taxation or for customs valuation purpose, similar to the option provided for in the case of Article 8.2 for freight transportation, loading-unloading and insurance, etc. It was for the Members concerned to determine how they would choose to deal with it.

1.31 On Japan's question 6, her delegation considered that under the Agreement, the burden of proof normally laid with the customs administration and that it was shifted to an importer only in cases where the customs administration had reasons to doubt the truth or accuracy of the declared value. On question 6(b), in cases of doubt, customs administration could request the importer to prove its claim. However there may not be reasonable grounds to doubt the truth of the declaration. In some cases, documents could be manipulated to camouflage the extent of under-valuation. The possibility of misusing this particular loophole in the provisions of the Agreement would be thwarted by her delegation's proposal. In relation to question 7, saying that an increased customs value brought about by expanding the elements for inclusion would thus off-set the effects of tariff negotiations was not a correct proposition. The Agreement could not be used as a tool for the benefits of tariff negotiations nor could it be used to deny or subvert the tariff bindings already agreed. The Agreement was meant to facilitate establishment of the proper value for duty. Moreover, her delegation's proposal was actually aimed at preventing the distortion of trade through the misuse of certain provisions of the Agreement. As far as the impact on fiscal revenue or economic implications, her delegation did not know of any study on this. The crucial issue was that the proposal in tiret 57 was not aimed at enhancing revenue but at curbing the misuse of certain elements of the Agreement through under- valuation or under-invoicing of imports.

1.32 Turning to Canada's request on tiret 57 for a copy of India's regulations, she noted that India's implementing legislation had been considered in the GATT and WTO Committees and were available with the WTO Secretariat. Canada also questioned whether Indian customs verified the amounts paid, etc and how these audits were conducted. She was not sure how all this was relevant to the proposal. She had already remarked that post-audit clearance or risk assessment techniques used by developed countries may not always be an answer to the problems of developing countries. She had read an extract from a study by Mr. M. Finger and Mr. Shuller on this. As India was still a developing country and evolving modern methods of customs valuation, she was not sure that these modern techniques had to be in place before dealing with fraud. Canada also questioned what percentage of imports during the year involved domestically supplied engineering, development and design work. She was not sure that it was relevant to set artificial benchmarks. Suffice it to say, her delegation was not talking about small percentages of duty evasion. On Canada's question 4 regarding tiret 57, she again noted that her delegation's proposal was intended to close a loophole which unscrupulous traders could misuse, and to address fraud at the pre-commitment rather than at the post-commitment stage. On question 5, she stated that such costs would be easily available on importers' records and this, therefore, would not increase the uncertainty for traders nor create a compliance burden on importers. She added that she had already addressed Canada's last question on why this proposal would not increase the discretion of customs in the determination or acceptance of transaction value.

1.33 The representative of Canada noted that his questions were designed to facilitate understanding of India's concerns and how it was dealing with these concerns, and what kind of tools it used in order to better assess possible solutions. His delegation agreed that fraud was a problem but was not convinced that the Indian proposals would actually close loopholes. At the last meeting, Brazil had indicated that, in addition to the general definition provided by the Agreement and the work done by the WCO, it had also put in place legislation to provide guidance on how a provision was applied. Likewise, his delegation was interested in examining India's practices and regulations to have a clearer picture of the Indian situation in order to better understand the proposals. For example, receiving a clear picture on where India was in evolving its risk assessment programmes could help in thinking about possible technical assistance or the work of the WCO. His question on percentages

was not meant to create a benchmark but was a desire to have a clearer understanding of the importance of this issue. His delegation would go through the responses for further consideration.

1.34 The representative of Japan requested the Indian responses in writing. It would facilitate understanding of the different perspectives. His delegations' questions were drafted by the Japanese Customs Administration. However, there was intergovernmental coordination with the Ministry of Trade which had an interest in the proposals because they would affect the exporters' interests.

1.35 The representative of the United States provided some preliminary reactions to the responses but would perform a fuller assessment once responses were received in writing. It was not clear to his delegation why Members would want to create a disincentive to certain services taking place in their country, i.e. the country of import. It was mentioned that "proper valuation" was preferable to having those activities take place in their country. This led to the question of proper valuation and what it meant. He considered it a shifting definition depending on the perspective of the traders, of those who actually contracted out to perform the services, and of the customs authorities. He was not sure that it was a useful concept. It was not clear to him that this kind of work was actually part of the importation. To a large extent, it would seem to be a situation where the buyer was consuming services in his/her country. It would be useful to have further clarification on how this was part of the importation which then raised the question of double taxation. Singapore, in previous meetings, had asked why the importing country would want to tax twice these services by making them subject to duties as well as to internal taxation. Finally, he did not consider that there was currently an incentive for fraud associated with excluding these services coming from the country of importation. It seemed easy to verify whether, for purposes of fraud, there was an attempt to characterise design work taking place in the country of exportation as actually taking place in the country of importation. However, to actually allow these services to be included in the dutiable value would seem to create new loopholes and opportunities for fraud by masking or minimizing the value of design work that's actually taking place in the country of importation and would create a new verification burden..

*Tiret 57*

1.36 The representative of Brazil considered that an in-depth examination of the issues in tiret 57 was necessary. If a buyer contracted services required for the production of a good in a third country and supplied this free of charge to the producer of the goods then this cost could be added to the dutiable value. The problem arose when the same services were contracted within the importing country and not allowed to be added to the dutiable value. His delegation thought that this raised a possibility of discriminatory treatment based on where the services were contracted which created a possible incentive for fraud. While double taxation may be a problem, why was it not a problem for goods? The other sections of Article 8.1.b allowed goods procured internally and supplied free of charge to be added to the dutiable value. The possibility of double taxation on goods did not seem to be creating problems for Members. Why should there be different treatment for services?

1.37 The representative of Canada responded that, for the first three sections of Article 8.1.b, Brazil was correct if the goods were exported from a country of importation. In many countries, exported goods were not charged domestic sales taxes or VAT, etc. under the "destination principle" (i.e. goods were taxed at their destination or point of consumption). But the fourth section of Article 8.1.b dealt with services, which may likely be taxed at the origin (i.e. the country of importation).

1.38 The representative of Brazil considered that if the buyer procured the goods locally then internal taxes would be paid on them. If they were then supplied free of charge for the production of the good and that was added to the customs value then they would be doubly taxed.

1.39 The representative of Mexico said that his delegation was studying the issue and trying to understand the magnitude of its repercussions in the Agreement. He confirmed his delegation's

understanding that the proposal was concerned with charging a duty based on the additional value that the product would gain when entering the country of import. The Agreement was supposed to provide transparency and clarity to practices when the good arrived at the customs office but, he asked, how far should the Agreement go?

1.40 The representative of Singapore noted that her delegation had raised some questions in relation to the proposal in tiret 57 because it was trying to understand how the proposal would actually address the fraud problem and to what extent these services artificially reduced the customs value. There seemed to be a more complicated question of taxation and discriminatory treatment raised by Brazil. Her delegation would appreciate written responses to its questions.

1.41 The representative of Canada stated that he would continue to discuss the taxation question bilaterally with Brazil. He asked for clarification from India as to whether it would automatically include as part of the import value a service that was obtained by an importer from somebody within the country but other than the buyer? How would India would deal with this?

1.42 The representative of India stated that the provisions of Article 8.1.b provided for allowable adjustments to the price actually paid or payable for the imported goods. It said "...the value apportioned as appropriate for the following goods and services where supplied directly or indirectly by the buyer". This stated that only items supplied by the buyer were under consideration. The rubric was clear for sub-indent (iv) of Article 8.1.b which added the phrase "undertaken elsewhere then in the country of importation". If put in the converse, it meant that when a buyer supplied goods directly or indirectly from the country of importation and not from a third country then they were not meant to be included. But in all other situations, because there was no other specification in Article 8.1.b(iv), there was the possibility of inclusion. The terms and legality of the provisions were open on the question of inclusion in the value when someone other than the buyer supplied the item. This was why, in response to Japan's question, her delegation stated that it was an issue of discrimination as well as fraud. This also partly addressed Singapore's question of whether it was purely fraud or discrimination. It was both. As Brazil said, there was discrimination implicit in this provision that led or provided the basis for potential fraud. She considered that her delegation would be within its legal obligations if it automatically included engineering costs, etc. that were supplied by anyone other than the buyer and that were from the country of importation.

1.43 On the US point regarding disincentives, she said that her above explanation showed that the Agreement did not provide an incentive. Under this provision it was only when buyers supplied the services that they would be excluded from the value. Services from any other supplier in the country of importation was automatically included. Even within the country of importation there was not an appropriate incentive structure, therefore, there was no disincentive from the proposal. Her delegation's proposal sought the possibility for Members to include these costs; how different Members dealt with the issue was left to them. Similar treatment was provided in the case of Article 8.2 dealing with freight, transportation, loading/unloading and insurance. These were also services which Members were free to include or exclude for the purposes of dutiable value. Similar provision should be provided for engineering, etc. services. Members could deal with the question of double taxation in the same way they did for the services of insurance, loading/unloading, etc. As these were provided at the place of importation, the same issues applied.

1.44 The representative of Malaysia was pleased with the serious consideration being afforded these proposals. Her delegation understood that duties were normally paid on products or components that were imported. Duty was usually not paid on that portion of the product that had not been imported. In this case, her delegation could see why the services produced locally had not been included in the dutiable amount. The problem raised by India was that, as a result, the cost of these services could be inflated and hence reduce the value of the dutiable product which would give rise to fraud. Her delegation could see that in many countries this could be overcome by a taxation system.

However, in countries where great reliance was placed on the customs duty, this could be a problem. The Committee could examine how then to capture the part of the value that was under-declared.

1.45 The representative of the European Communities noticed similarity between his delegation's questions and other Members' questions. His first question dealt with the important issue of incentives - why would it be beneficial to countries to tax a service produced internally in their country? If there was discrimination, it was not random but was there to recognize the importance of not taxing an economic activity in the country of import. He questioned the assertion of whether there was, in fact, a loophole in the provision which could lead to fraud. His delegation's experience showed that it would be difficult for an importer to devise a scheme that would present a cost which would have to be subsequently met by a buyer in the country of import. In fact, the importer would really be disadvantaging him/herself by having to prove something which could be difficult to prove. His delegation was listening carefully to some of the comments, such as the issue of creating new problems of verification which would increase the workload of customs and the issue of double taxation. His delegation's overall assessment was that little would be gained by making the proposed change and, in fact, there would be more to lose. He looked forward to the written responses which would stimulate further reflection.

1.46 The representative of the United States thought it would be useful to consider a particular experience in this area which had generated fraud problems. He asked, for example, did a typical case of fraud usually involve design work that was taking place in the country of exportation or a third country that was being characterized as design work in a country of importation? Or did it extend to some of the value-added in the manufacturing process in the country of exportation that was being characterized as design work in the country of importation? He also wondered in which sector this might be prevalent and how it actually would take place?

1.47 The representative of India responded that there was not an incentive structure implicit in the provisions of Article 8.1.b.(iv) because it was only when the buyer in the country of importation was providing the services that they were required to be excluded. Provision by any other supplier in the country of importation (and the possibilities were enormous) was meant to be included. Therefore, how could any government claim that it provided an incentive structure when the customs duty or the customs valuation regime allowed for exclusion of something that may have been provided domestically in one instance but not in another. Also, the Agreement was not intended to provide incentives. Incentives to industry or to domestic production were done in a multitude of complex ways by governments through appropriate fiscal and other means which would not be affected by the proposal. She had provided an example of how engineering costs were being used to evade duty. It was well documented in the report of the November 2000 meeting (G/VAL/M/17). She urged delegations to have another look at this example which showed clearly how the fraud had been carried out. The extent of the problem was enormous as the example showed an effort to evade up to 30 per cent of the dutiable value through fraud. Another example was similar to that outlined by the US where the engineering work was actually done in a third country but was shown to have been done in the country of importation (India). In addition to the engineering sector, there were examples from other sectors. The objective was to block the loophole which allowed fraud, not to pin-point where exactly it was being perpetuated because the ingenuity of people who committed fraud was endless. There would be no new verification burden, as mentioned by the EC, because customs authorities were, in any case, required to look at the costs of these services by suppliers other than the buyer in the country of importation or by anyone including the buyer in a third country. On the contrary, by allowing all engineering costs, regardless of from where they are supplied, to be part of the dutiable value was easier than trying to determine from where they were being supplied. Double taxation was not a new issue and also occurred in the first sections of Article 8.1.b which dealt with materials, tools and components supplied by the buyer from the country of importation.

1.48 The representative of Canada clarified that his delegation had a different approach than India regarding the provisions in Article 8.1. His delegation considered that the service would be excluded no matter who provided it within the importing country. There appeared to be a different reading of the word "indirectly". For example, an engineering service was purchased from a supplier in Canada by an importer in Canada. It was given to a producer in India to help build the product. His delegation would view this service as sourced in the importing country and, therefore, not included in the customs value. As he understood India, it would be included in the customs value. He wondered how other Members viewed this provision. On the Indian assertion that the Agreement was not meant to create an incentive, he stated that, in fact, in this instance it was. In the negotiating history, there was an explicit decision to exclude those engineering services provided within an importing country in the customs value for incentive purposes. He added that the double taxation issue depended upon how the word incorporated was viewed. His administration operated on the destination principles, i.e. that exported goods were not subject to domestic sales or other tax imposed directly on the good. This did not happen for services where there was a risk of double taxation. However, this question would depend on the laws of each country.

1.49 The representative of the United States considered it useful to have detailed information on specific examples. The example provided at the November 2000 meeting referred to problems associated with re-engineering taking place in the country of importation. He asked if re-engineering that took place in the country of importation was really importation? It was an activity that took place in the country of importation and did not affect the product in any way before it came into the country of importation. The specific examples cited dealt with fraud that could be easily verified because the activity was presumed to have taken place in the country of importation when, in fact, very little activity actually took place. Therefore, he did not consider this example convincing.

1.50 The representative of Japan indicated that his delegation shared the views of Canada. If the service came from the country of importation, it would not be added to the customs value. He added that if, as India stated, Indian customs verified the provision of these services from suppliers other than the buyer, it could do the same for the buyer. Finally, his delegation wanted to better understand why this provision allowed a loophole for Indian customs and how it was being misused.

1.51 The representative of India clarified that her delegation interpreted the word "indirectly" in the context as stated, i.e. "where supplied directly or indirectly by the buyer". The term was not "where supplied by the buyer directly or indirectly free of charge". This implied that when it was a non-buyer, then the term indirectly did not apply. On the incentive issue, she added that the Agreement was not meant to provide incentives. If that were the intention, she could provide many other customs valuation proposals which would provide incentives for other economic activity.

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1.52 The representative of India, on Japan's question 9, responded that a residual system of valuation based on the transaction value in the domestic market of the country of export or to a third country export could not be viewed as an arbitrary or fictitious value. Article 7 was a residual clause, and under the circumstances provided therein, the proposal sought to permit two additional methods for arriving at the assessable value. These methods would only be used in accordance with the circumstances surrounding Article 7 which allowed the customs value to be determined using reasonable means and consistent with the principles and general provisions of the Agreement. Her delegation believed that it would be consistent with the principles of the Agreement in providing for two additional tools which customs administrations could use. Question 10 addressed the same issue so the above answer applied. On question 11, her delegation believed that the responsibility for providing information would lie with the importer. While these would not be the only methods that could be used under Article 7, it may be easier for an importer to produce documentary evidence, like published price lists, and schedules of discount for sale to various countries, which could serve as a

possible basis for the assessable value. Japan also questioned how the truth or accuracy would be verified. She responded that verification would be the same as for verifying the truth or accuracy regarding acceptance of the transaction value, i.e. documentary evidence. Where this evidence was doubted, it would be rejected. She was not sure what else would be required. On question 12, her delegation believed that the assessable value was not based on the standard of appropriateness but on the standard of transaction value. She was not clear on the meaning of Japan's final question. Her delegation considered that the Agreement only permitted use of the transaction value in a prescribed hierarchy and there was no freedom to use a particular price for customs valuation purposes. She asked Japan for clarification on what it meant by "using a wide variety of prices for the transactions of goods either domestic or international".

1.53 She did not consider relevant the question from Canada on the percentage of customs value determined under Article 7. The second Canadian question was also not relevant. In relation to question 3, the phrase "residual eventualities" was crafted by the Secretariat or a group of Members that drafted the document in which the first first appeared. There was no legal significance to the phrase and her delegation was only seeking to add two other methods to Article 7 which it believed were relevant and appropriate to determine value under Article 7. More precisely, it was seeking to permit two presently prohibited methods. On question 4, an option could be given to the importer to furnish information on the price for export to third countries and of domestic prices in the country of export to arrive at the assessable values. The appropriate adjustments would, of course, need to be made on the basis of the information furnished by the importer and on the basis of prevailing international business practices such as determined from internationally published bulletins, commodity price bulletins, catalogues, price lists, etc. These methods were not new and already available with Members in different contexts. On verification, it would be rare that this would be required but it could be undertaken under the provisions of the Ministerial Declaration on exchange of information on customs values for instance. On whether the proposed methods of valuation would not be consistent with the principals set out in the Preamble of the Agreement, these values would also be reflective of the transaction value. She had already addressed the question of whether these methods would be fair, uniform or neutral, as well as uncertainty and unpredictability for traders.

1.54 The representative of Japan asked how any differences of opinion between the Indian customs authorities and Indian importers would be reconciled in an accountable and reasonably neutral manner. International transactions versus domestic transactions of the same product could carry different prices according to, for example, the level of trade and the timing of trade involved. Prices could vary widely for the transaction of goods and he wondered how differences of opinion would be resolved in a satisfactory manner. The Agreement provided a balance between the power of the customs authority and expectations of the traders. Increasing the methods which customs would use would disadvantage the trader. He asked India to provide further information in relation to his question 10. Customs valuation involved day-to-day operations which required detailed information from the importers which could be difficult.

1.55 The representative of Canada expressed disappointment that India would not provide the information in relation to his first two questions. His delegation was seeking this information to better understand the problems India was encountering. Previously his delegation had asked what other methods India had used to try to tackle what he considered not fraud, but valuation problems. For example, what methods had India been using to value goods when it reached Article 7 of the Agreement and what kinds of problems had they encountered in using them. On his question 3, he assumed that every word of this proposal had significance and meaning. If not, as India said, it should be deleted. As regards the response to question 4, he considered it insufficient to rely on the importer. This underlined his concern about arbitrariness. Which price catalogues would be used and from which country? Also, price catalogues were rarely the actual price - there were discounts, different quantities, etc. How was the importer to know what the proper adjustments would be and who would decide? He was also concerned that for those rare cases where verification would be necessary, India

would look to the solution of exchange of export prices. His understanding of the original proposal for export values was that they were not to be used for purposes of assigning a value. This was shifting the intention of the exchange of the export price mechanism; prior to the Doha Ministerial, it was about dealing with fraud cases. All these concerns led to his fifth question which asked about inconsistencies with the Preamble of the Agreement which spoke of consistency with commercial practices and not basing value on arbitrary values. Price catalogues were not based on actual commercial transactions nor would ensure a fair, uniform and neutral basis for valuation. The possibility for customs to choose among various price catalogues, discounts, etc. would increase the uncertainty, predictability and lack of transparency of the value determination, even when under Article 7. He concluded that Japan's question related to the appeal provisions in the Agreement was important – would they apply to a determination made under Article 7 using these two methods? Would India then agree that customs would have to provide, in writing, the reasons for the determination, i.e. for accepting one price catalogue over another, etc.

1.56 The representative of the United States cautioned against compromising on the fundamentals of the Agreement and he considered that his proposal went in that direction. The proposal envisaged a significant change to the Agreement in that it would reclassify what Article 7 designated as "unreasonable" methods into "reasonable" ones. It was legitimate to also question how this proposal might be inconsistent with the reference in the Preamble to not using valuation for purposes of anti-dumping. It would appear to allow, under certain circumstances and after proceeding through the hierarchy of methods, an anti-dumping type of measure for the purpose of determining value. Yet the built-in guarantees that exist in the Anti-Dumping Agreement such as transparency and the predictability of an investigatory process and determination of injury would not be there. He also questioned whether this information would be readily available from importers. It was not clear how the importer would obtain such information and to what extent it could be reliable. Given the problems associated with the proposal, he sought more information on the particular problem it was seeking to address. He understood India's sensitivities about responding to some of the Canadian questions, but he considered that the information would be useful.

1.57 The representative of the European Communities recalled that there were five prescribed methods under the Agreement which should provide the basis for valuation under Article 7, although applied in a more flexible way. This would allow a number of methods in which to determine value. He could not understand why a customs administration would need additional methods. Maybe there were special circumstances and his delegation would like to hear more about them. He agreed with the United States that the proposed changes would go to the heart of the Agreement by allowing determination of value by methods that had nothing to do with the presently structured Agreement. He added a problem of retrieving information. If the customs administration and an importer could not arrive at a solution on the basis of the information they had available, how would they reach a conclusion on the basis of information which would have to be located, verified, etc. Additionally, the question of further review and appeal were important and should not be overlooked.

1.58 Custom value, based on a price in the country of export, could not be a transaction value. In addition, sales to other countries would be governed by the jurisdiction of customs authorities in these third countries who would have their own methods of examining the cases. They might even cross-reference to other countries. He concluded that the character of this proposal was different from the others and his delegation had difficulties seeing how it would combat fraud or close a loophole. His delegation was anxious to understand the nature of the problem that would lead an administration to consider it necessary to seek such a solution.

1.59 The representative of Brazil explained his understanding that the proposal would eliminate paragraph (c) and (e) from Article 7 of the Agreement. His delegation shared the concerns expressed by others, including the US, that paragraph (c) could be similar to a dumping investigation. Under-invoicing of imports in relation to the domestic market price seemed to be a classic case of dumping

and there were appropriate mechanisms to deal with that problem. On paragraph (e), however, his delegation was willing to explore further the use of the price of export to a third country. Since the Agreement was drafted 20 years ago, there had been a major shift in world trade patterns. Intra-firm trade had grown exponentially and this could render relevant, in some cases, a comparison with the price of goods exported to a third country in assisting customs authorities to determine the appropriate value and to identify instances of fraud.

1.60 The representative of Korea supported the views of Canada. The fundamental problem with the proposal was the difference between prices of goods on the domestic export market and the basic price. The former was influenced by additional costs in the country of export such as advertisement and sales promotion costs, which would render it different from the basic export price. The former would also be usually higher than the export price. The export price to a third country would also be different. For example, transaction conditions and well as quantities could be different.

1.61 The representative of Mexico shared the concern expressed by others on the potential arbitrariness of the proposal. Article 7, subparagraph c, was fine as it was and his delegation was concerned with the attempts to change it. His delegation was, however, willing to maintain the dialogue on this matter.

1.62 The representative of India recalled that, under Article 7, customs was free to determine the methodology to determine value, provided it was reasonable, consistent with the principles and the general provisions of the Agreement, and based on data available in the country of importation. This was why her delegation considered it important that importers and traders had as much predictability or certainty as to what were the possible methodologies or means that customs may use under Article 7. Because it provided for residual means of determining assessable value, it was important that there be well-established or known methodologies underpinning determinations to the maximum extent possible. Further, her delegation had clarified earlier that it was not seeking to use prices available in catalogues, etc. in a blind fashion. There would be adjustments made to these prices. As Canada mentioned, this would be necessary to get as close as possible to the commercial reality. One adjustment would be with respect to whether the price was on a FOB or CAF basis. If the exporting country had a different basis then the price would have to include these additional charges. As Japan mentioned, there would also be adjustments in light of the volume and timing of trade. Adjustments were required in other Articles of the Agreement, so what was suggested was not new.

1.63 On the question of how differences of opinion would be resolved, she recalled that Article 7.3 already called for information to be provided in writing by the customs authorities. This would not change by virtue of the proposal - whatever reconciliation was needed between the importer and the customs authorities would continue to apply. None of the other requirements of Article 7 would be changed. The two proposed methods would be used only after the previous methods had been exhausted; this would not happen on a daily basis. These two methods would also be used in a transparent manner. On the use of the term "all residual eventualities", she had already stated that her delegation's purpose was to add two methodologies to Article 7. When she responded to Canada's question on verification, it was in the context of verifying the authenticity of information provided by the importer in case the transaction value or the documents provided by the importer were fraudulent. Therefore, she did not consider that she was adding a further dimension to what had already been agreed in paragraph 8.3 of WT/MIN(01)/17. This was not the intention. On the issue of lack of predictability, she was not sure using a known methodology versus using any other reasonable means which was not defined could create a lack of predictability. She agreed with the US and the EC that this proposal was not in the nature of the other proposals. But the proposal would not change the fundamental primacy of the transaction value and the other hierarchical aspects of the Agreement. If the transaction value could be applied there would be no need to use any other method. An example of when these methods might be used could be for new or innovative goods for which no means of



determining the price were available. The two proposed prices, based on information furnished by the importer, could augment the choice of methods.

1.64 The representative of Canada asked India what methods it currently used when its customs administrations arrived at Article 7 and why had it encountered problems in applying these methods? As regard his question 4, he was not asking about verification in the context of fraud because there was no fraud situation. This was why he had expressed concerns about the use of the export price information exchange mechanism in paragraph 8.3. That mechanism was for use in the context of fraud and this proposal was not necessarily about a fraud situation. More importantly, his delegation was concerned about the adjustments. Some were in the Agreement, but some that would have to be made, like advertising, were not. His delegation shared the concerns of the US, EC and others that this proposal went beyond the earlier proposals in terms of trying to deal with fraud. It would involve altering Articles 7.2.c and 7.2.e and hence altering the character of that provision.

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1.65 The representative of India stated that this proposal was not seeking to change the Agreement in a fundamental way and did not challenge the primacy of the transaction value as the basis for determining value. Her delegation was proposing that the highest of the available transaction values be used for assessment purposes under Articles 2.3 and 3.3 of the Agreement, instead of the lowest value which had a higher probability of being arbitrary or fictitious. In relation to Japan's question 14, her delegation believed that it would not be correct to say that the highest value would significantly exceed the appropriate estimate of the actual transaction value. If the transaction value under Article 1 had been rejected, all other values would necessarily be only estimated values and it would be difficult to say which would be the more appropriate estimate. On question 15, even if a pilot transaction for which the value was set at a low level was cleared on account of lack of any other evidence of a higher import value, the loss to revenue would be limited only to this consignment as the trader would not be able to use this artificially low value for clearance of future consignments if a higher import value became available during the period between the first pilot import and the subsequent imports. Finally on question 16, the transaction value under Articles 2 and 3 of the Agreement would also be subject to the tests for same commercial level and same quantity as the goods being valued. Therefore, it would be possible to make adjustments to the price based on these differences. Articles 2.1 and 3.1 already allowed for this and Articles 2.3 and 3.3 were, in a sense, residual in nature because it was only when more than one transaction value of the identical good was found that the lowest had to be accepted.

1.66 She did not consider Canada's question on how India identified or obtained information relevant to the proposal. In relation to Canada's question 3, the expression "at or about the same time as the goods being valued" used in the Agreement in Articles 2.1.a and 3.1.b did not provide a reference timeframe. As a result, it was not uncommon for importers or customs administrations to rely on the existing import values of the preceeding 3 months from the date of the current import. This could lead to acceptance of the declared value on the basis of an already declared low value of the pilot consignment. On question 4, her delegation understood that Articles 2 and 3 did not prohibit assessment of goods on the basis of goods imported in a different quantity and commercial level provided proper adjustments were made. In relation to question 5, efforts were indeed made to investigate organized attempts at under-valuation however acceptance of the lowest value created a window which unscrupulous traders could exploit. She knew of a number of actual cases of such fraud. One involved 11 consignments following one consignment in a 3-month period using different ports in India and fictitious company names, some of which could be detected in the first instance but some not, even after 2 years of investigation. It was not always possible to do an immediate investigation of fraud since companies and importers could be clever. Her delegation was not attempting to undermine enforcement but to strengthen it by plugging known possibilities for fraud.

1.67 The representative of Canada asked for a copy of India's regulatory practices and procedures for applying customs valuation Articles 2 and 3 to facilitate his delegation's consideration of the matter. On question 2, his delegation wanted to know how the information was obtained because it was being used to make valuation determinations. The point his delegation was making in questions 3 and 4 was that the way India presented its proposal, it could be understood that the lowest value had to be used because there was no other choice and customs could not say no to a method. There was enough flexibility in the Agreement so that if customs believed a value was artificially low, it did not have to accept it. Indeed, the methods in Articles 2 and 3 did not even have to be used if there was good reason to suspect them. This was why his delegation was interested in the response to question 6 - why would the importers continue to ship at the same low quantity to avoid detection because once customs accepts a higher quantity, adjustments could be made to the values? His customs administration was puzzled by the fraudulent scenario presented by India and, therefore, looked forward to the answers from India in writing.

1.68 The representative of Japan considered the responses repetitive and wished to have specific examples to understand the problems further. The Agreement contained provisions which allowed each customs authority to punish those responsible for fraud. Artificial or low values were not relevant to enforcement of the customs regulations. Indian customs officers could start an investigation already at the initial claim related to the artificial low-valued pilot transaction.

1.69 The representative of Colombia expressed appreciation for the replies and would be studying the additional information. Her delegation, like Brazil and Malaysia, was interested in implementation issues and, therefore, wished to play a constructive role in the Committee's work. Her delegation was also open to any changes adopted in the working methods and considered that perhaps a useful approach to be adopted was to look at the pros and cons of India's proposals. However, she was concerned that some delegations may have difficulties understanding the scope of the proposals and the concerns being addressed because not all developing countries were implementing the Agreement. Therefore, she would like additional elements of information in order to play a more active role. For example, it would be useful to understand better the different interpretations of the Agreement that were being discussed under tiret 57. Concrete examples from different customs administrations that were applying the Agreement might help in overcoming some of the informational problems. Her delegation further supported Canada's request for India to illustrate the instances in which it had to resort to the residual approach under Article 7, what specific problems were encountered and how were they overcome? On tiret 59, she did not believe that it was possible to generalize on how certain provisions of the Agreement would be used by unscrupulous traders. The Agreement contained provisions that prevented these approaches being adopted towards ordinary imports. Since fraud was not a regular practice, her delegation considered it best to maintain Articles 2.3 and 3.3 as they were, in order to guarantee the spirit of the Agreement and the value of the goods in question as close as possible to the economic situation in which international trade was conducted. Her delegation believed that India's proposal for customs to use the highest value of all possible values was a contradiction of one of the basic tenets of the Agreement, as contained in Article VII.2(c) of GATT 1994. This provision stated, "when the actual value is not ascertainable in accordance with subparagraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value".

1.70 The representative of the United States also supported those delegations who questioned whether a true problem had been identified by the proponents of the proposal which would warrant a change to a fundamental tenet of the Agreement. It seemed that the proposal was motivated more by a desire for higher valuation for purposes of determining the customs duties to be paid as opposed to addressing a specific problem associated with fraud or with implementation of the Agreement. Canada's question 5 was critical. He questioned the apparent presumption that lower valued shipments were inherently fraudulent or were more likely to be fraudulent. But as had been noted, Articles 2 and 3 required the use of transaction value of identical and similar goods. If a transaction

value had been previously accepted with respect to these transactions, the presumption would be that they had not been fraudulent.

1.71 The representative of Korea defended the basic principle that export prices should be based on the actual transaction value. If this proposal was adopted, the highest value would take a long time to ascertain because nobody would actually know what the highest value would be. This would impair the trade facilitating objectives of the WTO and also hinder early determination of values.

1.72 The representative of Malaysia, in reference to Canada's comment that there could be flexibility in using Articles 2 and 3, wondered how much flexibility was offered under this provision? Should the lowest value be used when customs had reason to doubt the accuracy of the lowest value?

1.73 The representative of Canada considered Malaysia's question perfectly valid. The Agreement set out 5 different methodologies in hierarchical fashion so that if customs had reasons to doubt that a particular value was reflective of an actual transaction value, then it did not have to use that value. If customs, for the reasons set out in Articles 2 and 3, did not believe that a value could be determined, i.e. they could not find the appropriate adjustments, or they did not have shipments in a similar period of time, or they felt that even with the flexibilities allowed under Articles 2 and 3 they could not assess a reasonable transaction value, then they could move to Articles 4 or 5. A main concern with this proposal was that the only motivation his delegation could see was that of raising the value for duty. He thought that there was sufficient flexibility within Articles 2 and 3 to make appropriate adjustments. But if this was not possible, the Agreement provided for Articles 4, 5, 6 and 7. He was concerned that the proposal seemed to imply that customs had to stop at Article 2 and 3.

1.74 The representative of India, in response to Malaysia, noted that if customs had reached Article 2.3 (and 3.3 by inference), it meant that Article 1 had been examined and rejected. In looking at identical goods, there was often more than one transaction of the identical good under question during the representative time-period. Article 2.3 mandated customs to use the lowest such value. A lot had been said on the adjustments that needed to be made; she was interested to hear from Members as to what extent the Agreement provided flexibility to make those adjustments. Article 2.2 stated that where the costs and charges referred to in Article 8.2 were included in the transaction value, an adjustment must be made to account for significant differences in such cost and charges. Here, for instance, the flexibility available in making the adjustment to costs and charges was in relation to differences in distances and modes of transport. For instance, her delegation had found a transaction of an identical good from a fictitious company where the country, the mode of transport and the approximate timing and commercial quantity were the same. Assuming collusion between the importer and the exporter, this fictitious value was generated and was in the custom's records. Suppose that fraud could not be proven and therefore the value was accepted and, through collusion, the buyer and the seller had agreed that they would not reap profits from this particular consignment, but would for other consignments. Was customs, therefore, mandated to use this value of the identical good? She did not see how, under Article 2, customs could reject this earlier transaction. The Ministerial Decision on fraud allowed rejection of a fraudulent value in relation to Article 1 but not in relation to Article 2 and certainly not for a separate consignment that followed.

1.75 Following a point by Colombia, she noted that customs was required to use in relation to Articles 2 and 3, a comparable equivalent. She provided the following example: suppose the customs administration saw that all consignments were more or less within a reasonable spectrum, i.e 90 \$/unit to 100 \$/unit. This posed no problem if the 90\$/unit had to be used under Article 2. However, suppose the bulk of the consignments that were arriving were within the range of 90 to 100 but one consignment which had arrived was priced at 75\$/unit. Under the provisions of Article 2, customs was mandated to use the 75\$ price. Would the comparable equivalent be the single transaction at 75 or the bulk of the transactions in the range of 90 to 100? This was the question in looking at her delegation's proposal. On the US concern that all low values would be considered fraudulent, she

reassured Members that this was not her delegation's presumption. Her delegation was talking about a spectrum of values of which the lower end of the values was suspected; it was unlikely that traders would contract at fraudulently higher values since it would not serve their purposes. A higher value was more likely to be a regular or a real value. It might not be the most economically efficient transaction, but at least it would be a non fraudulent one.

1.76 On the requests for specific examples, she had provided the example of 11 consignments which had arrived within a 3 months period. She would review her information and provide more examples of how fraudulent transactions had taken place. Japan noted that fraud existed regardless of the Agreement. She did not agree that fraud existed no matter extensive efforts to plug loopholes in the provisions. When a loophole or weak provision was perceived, Members should try to plug it as soon as possible. Korea raised the point that that the actual value should be used, but the fact of assessing value under Article 2 implied a previous rejection of the actual value. The hierarchical principles should continue to be followed in the use of Articles 2 and 3 as should all other aspects of Article 2, including the adjustments to ensure that the value used was indeed a comparable equivalent. She noted Canada's point that Article 2 was more flexible than perhaps her delegation's reading of it and Article 3. She would advise her customs officials to be more liberal in their reading so that India's trade share could increase beyond its current levels.

1.77 The representative of the United States, on trying to understand unscrupulous traders, countered that where there had been shipments of identical or similar goods at or about the same time as another shipment, and there was suspicion that they were fraudulent, the transaction value would have already been rejected for those shipments or there would not yet have been a final determination of value under Article 1. Under these circumstances, these shipments would not be eligible to be used for purposes of comparison under Article 2 and 3. This did not appear to be a real problem; if there was a real suspicion of fraud with respect to a low value shipment, he did not see how it could be considered eligible to be used for comparison purposes. He suggested examining the text of some Articles to determine to what extent they were truly constraining a particular scenario.

1.78 The representative of Canada agreed with the US that if you reject the first transaction value on the basis of fraud, it could not be used again under Article 2. He was a little puzzled by India's remark that somehow a value would be rejected under Article 1 on the basis of fraud, but not rejected under Article 2. He suggested all delegations ask their customs services how they would deal with this particular type of circumstances, including the question of when they would use a fraudulent value under Article 2 or 3.

1.79 The representative of India noted that fraudulent traders were constantly coming up with new ways of committing fraud. Her customs administrations had difficulty detecting fraudulent transactions through internal audit etc. because financial transactions were so intricate; often the way payments for services went, the actual suppliers could not always be tracked. That may be one reason why the identical goods transaction was not rejected and it was not possible to prevent a mistake or lower valuation from occurring in a second or a third consignment. The low value had already been established in the records for the period under review and any time Articles 2 or 3 were invoked, this value would arise. She stated that customs was allowed to reject a value under Article 1 but not under Article 2 because the fact of being under Article 2 meant that the transaction value under Article 1 had already been rejected.

1.80 The representative of Malaysia still had queries on the use of Article 2. One reason was because of the matter raised by the US - that if the lowest transaction value had been fraudulent, it would not be used as a reference to determine a value. Because Article 2 did not appear to include differences in quality as a reason for making adjustments, the product could be identical in appearance or in function but any differences in quality could not be adjusted. Commercial level, the quantity imported, or the distance or transportation were the reasons for making adjustments.

1.81 The representative of the United States added, to Malaysia, that differences in quality would raise the question of whether the good was, in fact, identical or similar. On the question of customs being forced to use the low value transactions, it was also important to look at the time element. The phrase " at or about the same time" implied a specific period of time. The proposal envisioned a situation in which a particular low valued shipment would remain on the books forever and customs would be required to use it for comparison purposes under Articles 2 and 3. Secondly, many Members used post-entry or post-clearance verification methodologies which were often included in technical assistance programs. These methods allowed an opportunity to check the accuracy of low valued shipments so that a customs administration was not stuck using what might be perceived to be an unusually low value shipment.

1.82 The representative of Canada noted that one of the reasons his delegation was requesting India's regulations, was to understand when India applied Article 2, was it using transaction values that had been cleared by the customs service already or was it also including transaction values that were still subject to review? Under the Canadian system, a final determination would be forthcoming for a good for which customs had questions. Taking the Indian example, a clear difference in quality between the shipment at 75 \$/unit as opposed to those at 90 to 100\$/unit, might explain the difference in price. But if there was an identical good which arrived at customs the same day, customs might assess it at 90\$ or preliminarily at 75\$/unit because customs wanted to examine it further. Suppose, the next day another shipment arrived. His understanding was that the 75\$ value would not be used for comparison purposes because it had not been finalized. However, the value of 90\$ was final so would be used. He asked India if it had an outstanding value, would it be used for comparison purposes? If a shipment arrived at 75\$/unit and all other shipments of the same good cleared customs at 90\$/unit, did the Indian customs administration sign off on the 75\$/unit because it had no suspicion of fraud? He would appreciate more information from India on his questions 1 and 2.

1.83 The representative of India reiterated that in her earlier example of a real incident in India, there were 12 consignments over a period of 3 months. There was an initial consignment followed by 11 subsequent consignments which were practically comparable to the first consignment. She noted that India was a large country and each of these consignments entered customs from a different port India and the names of the companies were different. However, 2 identical elements were the country of export. The goods were deemed to be either identical or similar in each of these cases. Her customs assured her that they were not able to reject or to confirm the first consignment as a fraudulent transaction even though they suspected it as being so. This resulted in the 11 subsequent transactions entering fraudulently. The total fraud committed was more than 13 million rupees of duty evasion. The problem was real. However, she would ask her customs administration to explain why it did not use evident flexibilities in Articles 2 and 3. It had taken Indian customs 2 years to investigate this matter and when it finally uncovered the fraud, it found that the original company which imported the first transaction had no address or had moved by that time and could not be tracked. Therefore, penalties or post audit enforcement was not possible because the company had disappeared. She was not certain what her customs had done with regard to the 11 subsequent consignments but she would check if they had been able to reject Article 2 for them. Her main point was that her authorities were having difficulties handling the provisions of Articles 2 and 3.

1.84 The representative of Canada concluded that his delegation understood the fraud, but the question remained was this proposal an appropriate solution for dealing with fraud?

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

1.85 The Chairman proposed moving to paragraph 8.3 since there had not been any previous discussion of the matter and the time allowed for the meeting was running short. The Chairman noted that this paragraph was the result of negotiations on the implementation-related proposal first made in

document WT/GC/W/227 of 2 July 1999. The initial proposal was subject to extensive discussion in the Committee, contained in G/VAL/M/17, and two reports by the Chairman of the Committee to the General Council in G/VAL/36 and WT/GC/49. The relevant sections of these documents were compiled in document G/VAL/W/97 for reference.

1.86 The Committee so agreed.

1.87 The representative of India noted that her delegation was still assessing how best to deal with this matter and would come back to it at the July meeting.

1.88 The Chairman took note of all statements made. He asked Members to submit any additional questions in writing to India by 7 June. He noted that the next meeting on implementation-related issues would be held on 3-4 July and that this meeting would be structured along the same format as the present and the two previous meetings. He suggested that Members reflect on carrying out a stocktaking at the end of the July meeting to assess where the Committee was with respect to the implementation-related issues. He also suggested that Members begin reflecting on how they might want to structure this work beyond the July meeting, including the tentative schedule of meetings for the fall. Further, he suggested that, after the July meeting, the Secretariat prepare an issues paper which would organize the statements made on the tirets and on paragraph 8.3 according to issue. This would assist towards the future preparation of the Committee's two reports.

1.89 The representative of India noted that the deadline of 7 June for follow-up questions was too late. She considered that most Members who had formulated questions already had a good idea of what kind of information they needed from the proponents. In order for her delegation to have sufficient time to prepare, she urged that the deadline for follow-up questions be advanced to the last week of May. This would still allow 3 weeks from the present date. Of course, questions asked after 25 or 26 May would still be addressed.

1.90 The representative of the United States thought that submission of follow-up questions would be largely dependent on receiving written answers to the questions that were previously posed. It was difficult to accelerate the deadline for follow-up questions without yet having written answers to the questions submitted before this meeting.

1.91 The representative of India suggested calling new questions "additional questions" rather than "follow-up" questions. Whatever additional questions needed to be sent could be done so by the end of May. Her delegation would then prepare a consolidation of written replies.

1.92 The representative of Canada wished to be flexible but tended to agree with the US. Any additional questions would depend on the written answers received. He suggested that India provide written replies to all the questions submitted in writing by 7 June. Any follow-up questions should then be submitted by 15 June. Then, India could be asked to provide written replies to the follow-up, additional questions by the time of the July meeting. Like the US, his delegation would like to see the written answers to earlier questions to determine if there was a need to follow up.

1.93 The representative of India suggested that additional questions and responses be submitted at the same time, i.e. Members were encouraged to send additional questions by the end of May and India was encouraged to send written replies by the end of May. That way, there could be a further round of questions and answers, if necessary, by mid-July so that the Committee could have a July meeting as well.

1.94 The representative of the United States acknowledged sending in questions slightly late. However, in terms of sequencing, it would be necessary to have written responses before submitting a second set of written questions.

1.95 The representative of India clarified that she was not taking away the hierarchical nature of follow-up questions. If Members had additional questions, they could pose them. She would respond to the questions by the end of May. She had received some questions only at the end of last week. There was always the possibility for Members to raise a second round of questions, i.e. additional or follow-up questions by the middle of June.

1.96 The Committee agreed that India would submit responses by the end of May and that any follow-up questions would be submitted by 7 June 2002.

## **II. OTHER BUSINESS**

2.1 The Chairman reported that the next meeting of the Committee would be held on 3-4 July 2002.

2.2 The meeting was adjourned.

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