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WORKING PARTY 1 ON THE INTERNATIONAL CHAMBER OF COMMERCE RESOLUTIONS

Statement by Mr. Marcel Dreyfus, Chairman of the International Chamber of Commerce Delegation

In a resolution adopted at Lisbon in June 1952 by its XIIIth Congress, the ICC made two appeals to the CONTRACTING PARTIES to GATT on the subject of the valuation of goods for customs purposes.*

Firstly, after recalling the four general principles to which it subscribes on this question, the ICC suggested that the CONTRACTING PARTIES to GATT should consider the possibility of issuing a set of recommendations of that kind under Article VII of the General Agreement. Secondly, the ICC suggested that the CONTRACTING PARTIES to the General Agreement might usefully investigate the possibility of drawing up a standard definition of value for customs purposes for world-wide application, on the basis of the Brussels Definition revised in accordance with the comments set out by the ICC in its resolution.

In a note by the Executive Secretary of GATT (document G/22 of 29 August 1952), dealing, under heading A, with the question of the valuation of goods for customs purposes, an analysis was made of the recommendations referred to above. Of the four recommendations submitted by the ICC, three were sympathetically received, while the fourth (listed as (ii)), was provisionally left on one side as coming within the scope of the Brussels Convention. Paragraph 12 of note G/22 puts the position of the Executive Secretary of GATT on this point very clearly.

The ICC delegation, to whom the statement made to the GATT Working Party by Mr. F. Edmond-Smith, the representative of the European Customs Union Study Group (document W.7/8 of 7 October 1952) has just been transmitted, would be glad to have an opportunity of discussing it. It deeply regrets that circumstances have prevented Mr. Edmond-Smith from being present, not only because of the very high regard in which it holds him personally but also because of its admiration for the wealth of knowledge displayed by him in this field.

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* See ICC brochure No. 153, pages 7, 8 and 9.

It is not of course possible to go fully into the question of the valuation of goods for customs purposes here. The subject is a monumental one, and it took the Brussels Study Group months of work to arrive at its Definition of Value. The aim of the ICC delegation is a less ambitious one: it would merely like to submit a few observations on some of the points in Mr. Edmond-Smith's statement and thus make a modest contribution by bringing up the question before GATT. In paragraph 3 of Mr. Edmond-Smith's statement, it is asserted that following on the establishment of contacts in Paris and Brussels between the Study Group and the ICC, "a very considerable measure of agreement has now been reached". The wording in the French text ("un accord très général est maintenant realisé") does not, perhaps, exactly convey the sense of the English text, which appears to describe the position more accurately. In point of fact, various matters were cleared up and a great effort was made on both sides to arrive at a mutual understanding. The ICC abandoned several of the points raised in its observations, e.g., with regard to Article III of the Definition on the subject of patents, and also on the question of packing and the location in time and space of the goods to be valued. Unfortunately, however, a basic divergence of opinion persisted between the Brussels Study Group and the ICC on the general conception of the Definition and on two specific points - the use to be made of the commercial invoice and special relationships between buyer and seller.

As far as the difference in conception is concerned, the ICC's criticism of the Brussels Definition is that it is based on the idea of a "theoretical standard" for ascertaining a "normal price". Other grounds for criticism are its length, looseness and susceptibility to differences of interpretation. The mere fact that the Definition is long, that it is accompanied by extensive interpretative notes and that it is supported by a lengthy commentary is a clear pointer, in the ICC's view, to one of its major weaknesses.

Nevertheless, the ICC is firmly convinced that the Brussels Study Group embarked on its task with the best of intentions. It sees proof of this in the very wording of the nine principles formulated by the Group, of which the following may be specially mentioned:

Principle I. "The value for customs purposes should be determined in accordance with simple and equitable principles not conflicting with commercial practice."

Principle II. "The concept of value for customs purposes should be easily understandable by the importer and the Customs Administration alike."

Principle IV. "The system of valuation should permit the importer to determine the value for customs purposes in advance with a reasonable degree of certainty."

Principle VII. "Valuations should as far as possible be based on the commercial documents."

The ICC regards these principles as excellent. Unfortunately, no trace of them is to be found in the Definition. The impression received is that the Definition was formulated by jurists rather than by customs experts.

In paragraph 5 of his statement, Mr. Edmond-Smith refers to a misunderstanding which is supposed to have been subsequently dispelled. It is quite true that the ICC was afraid that subordinate customs officials might misapply the Definition. It is also quite true that the reassurances given to the ICC by the Brussels Study Group on the matter gave it satisfaction; however, it would be going too far to say that because the rules of application submitted to us generally appeared to be well grounded, the ICC was satisfied. They are, after all, rules for the application of a Definition which it does not endorse.

One important passage in Mr. Edmond-Smith's statement is that in which, with great clarity, he divides the question at issue into four processes. In this connection, he expresses the opinion that the last two stages are the only ones of possible concern to importers and the ICC. Perhaps we have misconstrued Mr. Edmond-Smith's thesis on this point, but if he meant that businessmen should not concern themselves with the first two processes, we cannot concur. Actually, the four processes flow naturally from each other and are interlinked; and in the event of lawsuits arising in connection with the last two, they could only be settled in accordance with the letter of the law made under the second process and the spirit of the law which may spring from the first process. We are faced here, in our contention, with an indivisible whole, as in the case of a law, followed by a decree, followed in turn by administrative orders and measures to implement those orders. In a democratic country every citizen who is subject to rules of application ensuing from a law should be able to take cognizance of the law itself.

In the last paragraph on page 3 of Mr. Edmond-Smith's statement, it is stated that one major issue alone was outstanding between the Brussels Group and the ICC - that of the maximum use of the commercial invoice. In point of fact, the ICC considers that two important points of disagreement remain outstanding - the one mentioned by Mr. Edmond-Smith and that concerning special relations between seller and buyer. The ICC is particularly concerned about the treatment which, under the Brussels Definition, would be meted out to the sole agents, representatives or concessionaires in country B of a supplier in country A. The ICC's view on this point is that where no social or financial bond exists between the supplier and the agent, the mere commercial relationship conferring on the latter the sole rights of sale does not constitute a state of dependency warranting an automatic addition to the value of the goods as invoiced to him by his supplier. The normal system of sale across frontiers, especially in the case of manufactured goods, is becoming increasingly based on the principle of concessions or sole agencies. This process, which has now become the general practice, should not result in penalization.

Mr. Edmond-Smith devotes the concluding passages of his statement to the technical side of import duty evaluation and explains, by means of examples, the reason why the Study Group takes exception to the ICC's main proposition of acknowledging the overriding validity of the commercial invoice price.

He quotes, as his first instance, the case of goods which, purchased and invoiced at £100 and temporarily detained abroad, are worth only £80 at the time of customs clearance. Mr. Edmond-Smith, full of solicitude for the importer, is unwilling to see him deprived of the possibility of paying ad valorem duties on £80 only. However, that is not what we are asking for. While the goods may happen to be worth only £80 at the time of customs clearance, their market price may also have changed in the opposite direction, making them worth £115 at that juncture. In either case, for reasons which will be enlarged on later, we urge that the ad valorem duties should be based on the value at which the transaction was negotiated, i.e., on £100.

The second example quoted by Mr. Edmond-Smith relates to goods which have suffered substantial damage in transit and the value of which is thereby considerably reduced. Here again, the ICC maintains its position. Risks are inherent in trade, and it is up to businessmen to take full measures to protect and insure themselves against them. Incidentally, it may be noted, with regard to this particular point, that, under the system of specific duties, the hypothesis envisaged by Mr. Edmond-Smith would involve the importer in the same or an even heavier commitment: a cargo of a particular type of raw material weighing one ton on leaving the supplier and suffering a drenching during a sea passage might arrive at the customs greatly reduced in value and greatly increased in weight as a result of the water absorbed. What about the incidence of the specific duty in that case?

In his third example, Mr. Edmond-Smith postulates the case of one and the same consignment purchased by an importer at £100 a ton and resold in parts to different buyers at £115, £117 and £120 a ton; and he asks which of these values should be taken for import duty purposes. In our view, there is nothing at all objectionable in the idea that import duty should be paid at the same time and place on one and the same consignment on the basis of three or four different values if each of the persons submitting customs declarations produces an invoice corresponding to the price at which he has bought his portion of the goods.

Using the three examples quoted by Mr. Edmond-Smith, we are able to pin down the difference between the Brussels Study Group's conception and that of the ICC. Whereas, according to the Group, the absolute and optimum value of the goods must be determined in each specific case, our position is that it is the transaction which should be dutiable through the medium of the goods. Seen in its true light, ad valorem duty is a tax levied on a commercial operation on the occasion of the passage of merchandise across

a customs frontier. As is the case in all countries in levying the majority of indirect taxes, it is the transactional price that forms the base for the tax, there being no question of attempting in each individual case to ascertain the "ideal" or "normal" value of the goods from any particular point of view.

Where the work performed at Brussels is in error, in the ICC's view is in trying in all cases to ascertain the optimum and absolute value of a commodity and expressing it in terms of a "normal price". The ICC regards such attempts as completely futile in view of the impossibility of ever achieving the desired result, even if only because of differences in quality. In the case of manufactured goods, e.g. two given articles may possess exactly the same characteristics and be exactly the same in appearance and yet have clearly distinct intrinsic values owing to differences in quality which no customs investigation could possibly reveal.

Concluding his statement, Mr. Edmond-Smith refers to the exceptions which must admittedly be made from a normal acceptance of the commercial price. He notes that the ICC itself proposes two exceptions. The first relates to deliberate undervaluation or fraud. We fail to see how the application of this exception would necessarily result in an "administrative impasse". Obviously, the ICC has no intention of putting in a plea on behalf of defrauders, and its theses apply only to honest trade. In this connection, it is our recollection that it is stated in the Commentary on the Brussels Definition, by way of example, that in the United Kingdom about 90 per cent of the declarations made on the basis of the price paid or to be paid are regarded as valid without any verification. A far more thorough examination has to be made in the case of the remaining 10 per cent. In our view, the Brussels Definition is completely appropriate for this 10 per cent of the total number of declarations, and that is the main objection we level against it when we state that in order to decide on what will happen in this 10 per cent of cases, the Definition has been drawn up to cover 100 per cent of all cases, whereas, for 90 per cent of them, it could have proceeded from the concept of the price paid or to be paid.

The second exception recognised by the ICC relates to cases where the relationship between buyer and seller is such that there is reason to believe that the price shown on the invoice is substantially lower than the normal price as between independent buyers and sellers, there being no question, as stated above, of applying this formula in the case of representatives, sole agents or concessionaires. We do not see how the ICC can be criticized for having made this concession; and in any case everyone knows that it is a proper function of rules to admit of justified exceptions.

The above comments regarding the Brussels Definition and arising from Mr. Edmond-Smith's recent statement should not be interpreted as an outright condemnation of the work achieved in that field by the European Customs Union Study Group. The ICC is fully alive to the importance of the work done at Brussels, and is gratified at the results achieved, which constitute a notable contribution towards the efforts to work out uniform methods of valuation for customs purposes. Nevertheless, for the reasons given above and on other grounds which cannot be mentioned here, the International Chamber of Commerce is unfortunately unable to subscribe to the conclusions of the authors of the Brussels Definition. It trusts that the Customs Cooperation Council, which is to be started up under the Brussels Convention, will make a point of making the necessary amendments to the Definition during its first months of work.

In this connection, since GATT has decided to study the question of value for customs purposes, we should be most grateful if it would begin by examining whether the Brussels Definition is truly in harmony with the provisions of Article VII of the General Agreement, with particular reference to the following provisions of the Article:

> Paragraph 2, which states that the value for customs purposes of imported merchandise should be based "on the actual value of the imported merchandise" and not on "arbitrary or fictitious values";
>
> Paragraph 5, which states that "the bases and methods of determining the value ... should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes".