EXPLANATORY NOTES

LIST OF EXPLANATORY NOTES

EXPLANATORY NOTE 1.1
Time element in relation to Articles 1, 2 and 3 of the Agreement

▪ Article 1

1. Article 1 of the Agreement on Customs Valuation stipulates that the Customs value of the imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the country of importation, subject to any necessary adjustments and provided that certain conditions are satisfied.

2. Neither in this Article nor in the corresponding Interpretative Notes is there any reference to a time standard external to the actual transaction, which would need to be taken into consideration when deciding whether the price actually paid or payable is a valid basis for the calculation of the Customs value.

3. Under the valuation method in Article 1 of the Agreement, the basis for establishing Customs value is the actual price made in the sale giving rise to the importation, the time at which the transaction took place being immaterial.

   In this connection the expression "when sold..." in paragraph 1 of Article 1 is not to be regarded as giving any indication of the time to be taken into consideration when deciding whether a price is valid for the purposes of Article 1; it merely indicates the type of transaction involved, namely one in which the goods were sold for export to the country of importation.

4. Consequently, provided that the conditions prescribed in Article 1 are fulfilled, the transaction value of imported goods should be accepted irrespective of the time at which the sale contract was concluded, and hence, irrespective of any market fluctuations after the date when the contract was concluded.

5. Article 1 does make a subsidiary reference to a time standard in paragraph 2 (b); this relates only to "test" values and thus does not influence the situation that there is no time element involved in determining transaction value under Article 1.

6. Paragraph 2 (b) provides that in a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of three alternatives occurring at or about the same time. But if the term "occurring at or about the same time" were the only reference to be taken into consideration, there could in some cases be a substantial difference between the conditions affecting the goods being valued and those affecting the goods furnishing the test value, and an inappropriate comparison could result.

7. The application of paragraph 2 (b) must be in a manner consistent with the principles of the Agreement. The time of export, which is the standard of comparison for the purposes of Articles 2 and 3 would be one approach.

8. Other measures within the framework of the Agreement would also be possible, in particular time standards adapted to the principles underlying the test values in question, namely : for subparagraph 1.2 (b) (i) the time of export to the country of importation of the goods being valued, for subparagraph 1.2 (b) (ii) the time of sale in the country of importation of the goods being valued, and for subparagraph 1.2 (b) (iii) the time of import of the goods being valued.

▪ Articles 2 and 3

9. The time element is treated differently in Articles 2 and 3 of the Agreement. Unlike Article 1, in which the valuation of imported goods is based on an autonomous element, namely the price actually paid or payable for the goods, Articles 2 and 3 refer to values previously established in accordance with Article 1, namely transaction values of identical or similar imported goods.

10. To provide uniformity of application Articles 2 and 3 state that the Customs value determined under the provisions of these Articles is the transaction value of identical or similar goods exported at or about the same time as the goods being valued. Thus these Articles establish an external time standard to be taken into consideration for their application.

11. It should be noted that the external time standard applicable under Articles 2 and 3 is the time when the goods to be valued are exported, and not the time when they are sold.

12. This external time standard must allow for practical application of the Article in question. Hence, the words "or about" should be regarded as intended simply to make the terms "at the same time" somewhat less rigid. In addition, it should be noted that according to its General Introductory Commentary, the Agreement seeks to base Customs value on simple and equitable criteria consistent with commercial practice. Starting from these principles "at or about the same time" should be taken to cover a period of time, as close to the date of exportation as possible, within which commercial practices and market conditions which affect price remain the same. In the final analysis, the question must be decided on a case by case basis within the overall context of the application of Articles 2 and 3.

13. The requirements in respect of time of course cannot alter the strict hierarchical order of the Agreement which requires that Article 2 must be exhausted before Article 3 can be invoked. Thus, the fact that the time of exportation of similar goods (as opposed to identical goods) is closer to that of the goods to be valued can never reverse the order of application of Articles 2 and 3.

- **The material time for Customs valuation**

14. The foregoing remarks on the role of the time element in the application of Articles 1, 2 and 3 of the Agreement do not, of course, have any bearing of the material time for Customs valuation. Article 9 makes provision for the time to be taken into consideration for conversion of currency only.

EXPLANATORY NOTE 2.1
Commissions and brokerage in the context of Article 8 of the Agreement

▪ Introduction

1. Article 8, paragraph 1 (a) (i) of the Agreement states that, in determining Customs value under the provisions of Article 1, commissions and brokerage, except buying commissions, shall be added to the price actually paid or payable to the extent that they are incurred by the buyer but are not included in the price. According to the Interpretative Note to Article 8, the term "buying commissions" means fees paid by an importer to his agent for the service of representing him abroad in the purchase of the goods being valued.

2. Commissions and brokerage are payments made to intermediaries for their participation in the conclusion of a contract of sale.

3. Although the legal position may differ between countries with regard to the designation and precise definition of the functions of these intermediaries, the following common characteristics can be identified.

▪ Buying and selling agents

4. The agent (also referred to as an "intermediary") is a person who buys or sells goods, possibly in his own name, but always for the account of a principal. He participates in the conclusion of a contract of sale, representing either the seller or the buyer.

5. The agent's remuneration takes the form of a commission, generally expressed as a percentage of the price of the goods.

6. A distinction can be made between selling agents and buying agents.

7. A selling agent is a person who acts for the account of a seller; he seeks customers and collects orders, and in some cases he may arrange for storage and delivery of the goods. The remuneration he receives for services rendered in the conclusion of a contract is usually termed "selling commission". Goods sold through the seller's agent cannot usually be purchased without payment of the selling agent's commission. These payments can be made in the ways set out below.

8. Foreign suppliers who deliver their goods in pursuance of orders placed through a selling agent usually pay for the latter's services themselves, and quote inclusive prices to their customers. In such cases, there is no need for the invoice price to be adjusted to take account of these services. If the terms of the sale require the buyer to pay, usually direct to the intermediary, a commission that is additional to the price invoiced for the goods, this commission must be added to the price when determining transaction value under Article 1 of the Agreement.

9. A buying agent is a person who acts for the account of a buyer, rendering him services in connection with finding suppliers, informing the seller of the desires of the importer, collecting samples, inspecting goods and, in some cases, arranging the insurance, transport, storage and delivery of the goods.

10. The buying agent's remuneration which is usually termed "buying commission" is paid by the importer, apart from the payment for the goods.

11. In this case, under the terms of paragraph 1 (a) (i) of Article 8, the commission paid by the buyer of the imported goods must not be added to the price actually paid or payable.

- **Brokers(and brokerage)**

12. There is a somewhat theoretical difference between the terms "brokers" and "brokerage" on the one hand and the terms "buying/selling agent" and "commissions" on the other ; in practice there is no clear-cut distinction between the two categories. Moreover, in some countries the terms "broker" and "brokerage" are seldom, if ever, employed.

13. Where the term "broker" is in use, it generally refers to an intermediary who does not act for his own account; he acts for both buyer and seller and usually has no role other than to put both parties to the transaction in touch with each other. The broker's remuneration is known as brokerage which is usually a percentage on the business concluded as a result of his activities. The percentage received by a broker is commensurate with his rather limited responsibilities.

14. Where the broker is paid by the supplier of the goods, the total brokerage will normally be included in the invoice price; in such cases, no problem arises with regard to valuation. In case it is not so included, and yet incurred by the buyer, it should be added to the price paid or payable. On the other hand, the broker may be paid by the buyer, or each of the parties to the transaction may pay part of the brokerage; in these cases, the brokerage should be added to the price actually paid or payable insofar as it is incurred by the buyer, is not already included in that price and does not constitute a buying commission.

▪ Conclusion

15. To sum up, when determining the transaction value of imported goods it will be necessary to include in that value commissions and brokerage incurred by the buyer, except buying commissions. Accordingly, the question of whether or not payments made to intermediaries by the buyer and not included in the price actually paid or payable should be added to that price will depend, in the final analysis, on the role played by the intermediary and not on the term ("agent" or "broker") by which he is known. It is also clear from the provisions of Article 8 that commissions or brokerage payable by the seller but which are not charged to the buyer could not be added to the price actually paid or payable.

16. It may also be worth pointing out that the existence and the nature of services rendered by intermediaries in connection with a sale are often not apparent from the commercial documents presented with the Customs declaration. In view of the importance of the interests at stake, national administrations will need to take whatever reasonable measures they consider necessary to ascertain the existence and precise nature of the services in question.

EXPLANATORY NOTE 3.1
Goods not in accordance with contract

▪ GENERAL

1. The treatment of goods not in accordance with contract poses a preliminary question, namely whether some or all of the situations are to be dealt with as matters of Customs valuation or, alternatively, are to be handled as matters of Customs technique (see Annex F.6. to the Kyoto Convention).

2. Although it seems that some situations involve questions that, in most countries, depend on national legislation not relating to Customs valuation, other situations may demand the application of valuation standards. This explanatory note therefore aims at the formulation of valuation rules for all foreseeable normal situations for the guidance of administrations which wish to treat those situations by valuation methods.

▪ TYPES OF CASES

3. The term "goods not in accordance with contract" can have different meanings under various national legislations. For example, some administrations consider damaged goods as falling under this term while others limit the term to sound goods which do not meet contractual specifications, the question of damaged goods being handled under separate procedures or other provisions of law. Therefore the present document has been subdivided to identify situations to facilitate arriving at a uniform approach under the Agreement. These are :

Ⅰ. Damaged goods :

(A) Upon importation, the shipment is found to be totally damaged, having no value.

(B) Upon importation the shipment is found to be partially damaged, or having scrap value only.

Ⅱ. Goods not in accordance with specification, i.e. goods which are not damaged but which are not in accordance with the original contract or order.

Ⅲ. Importation of goods replacing goods under I or II above :

(A) In a subsequent shipment.

(B) Included in the same shipment.

4. Since the nature of the damage and the type of goods can create an unlimited number of individual circumstance, it is not intended in this explanatory note to go into detail with respect to the differences between "totally damaged" and "partially damaged" for valuation purposes.

✓ VALUATION TREATMENT

I. Damaged goods

(A) The goods are totally damaged.

5. On the presumption of the existence of national procedures for the re-exportation, abandonment or destruction of the goods, there is no liability to duty (see also Standard 6 of Annex F.6. to the Kyoto Convention).

(B) The goods are partially damaged or have scrap value only.

6. Where the goods are re-exported, abandoned or destroyed, as in subparagraph (A) above, there is no liability to duty.

7. If, however, the importer takes delivery of the goods the Agreement would apply in the following manner :

Article 1 : The price actually paid or payable was not for the damaged goods actually imported, and therefore Article 1 is not applicable. However, if only a portion of the shipment is found to be damage, one could accept as transaction value the price represented by the proportion of the total price which the undamaged quantity bears to the total quantity purchased.
The damaged portion of the shipment will be valued under one of the subsequent provisions of the Agreement, in the prescribed order, as set out below.

Article 2 : In the majority of instances it would be improbable that a damaged shipment could be valued on the basis of the transaction value of identical goods, i.e. damaged goods being sold for export to the country of importation. That is not to say, however, that this standard can be completely ignored since certain products might lend themselves to such an approach.

Article 3 : The comments under Article 2 would have application under Article 3.

Article 5 : If the damaged goods or identical or similar goods are sold in the country of importation in the condition as imported and all other requirements of the provision are met, the Customs value of the damaged goods could be properly determined under the deductive method. If the goods are repaired prior to sale, and if the importer so requests, the value could be determined under the provisions of Article 5.2 with an allowance for the cost of repairs.

Article 6 : Not applicable inasmuch as damaged goods are not manufactured or produced as such.

Article 7 : While, as noted above, there are distinct possibilities of arriving at a Customs value for damaged goods under one of the preceding standards of the hierarchy, it could be anticipated that the majority of instances would be dealt with under the provisions of Article 7. In this event, the value must be determined using reasonable means consistent with the principles and general provisions of the Agreement and of Article VII of the General Agreement and on the basis of data available in the country of importation.

8. The method of valuation to be employed under Article 7 could be a flexible application of Article 1, that is, in the example cited :

(a) a renegotiated price (bearing in mind that this price may reflect either an element of compensation by the seller, or the fact that the seller wishes to avoid the expense of having the goods returned to him, or both);

(b) the full price originally paid or payable, reduced by an amount equal to any one of the following :

(i) the estimate of a surveyor independent of the buyer and seller;

(ii) the cost of repairs or refurbishing;

(iii) the insurance settlement.
Attention is drawn to the fact that an insurance settlement may not be an accurate measure of the reduction of value due to damage, because it can be affected by extraneous circumstances such as over-insurance, under-insurance or negotiations. Nevertheless payment of an insurance settlement to the buyer does not affect acceptance by Customs of a price reduced by reason of damage at importation. In other words, even though the price actually paid or payable to the seller remains unchanged, with the compensation for the damage being handled as a separate matter between the insurance carrier and the importer, the value of the goods must be established on the basis of their condition as imported.

Ⅱ. Goods not in accordance with specification

(A) Re-exportation, abandonment or destruction

9. On the presumption of the existence of national procedures for the re-exportation, abandonment or destruction of the goods, there is no liability to duty (see also Standard 8 of Annex F.6. to the Kyoto Convention).

(B) Retained

10. If, despite the non-conformity to specifications found upon delivery, the goods are kept by the importer, the determination of the Customs value would be influenced by the nature of the non- conformity. Goods of this type would fall into two categories : those which involve a shipment of the wrong goods (e.g. a shipment of woollen gloves against an order of sweaters) and those which are, in fact, the goods actually ordered but which fail to conform to the specifications in the original order to such an extent that the buyer seeks some form of reimbursement from the seller.

11. (ⅰ) Wrong goods

Article 1 : If there is no sale for export, transaction value is not applicable.

Article 2 : Applicable, on the basis of the transaction value of identical goods if available.

Article 3 : In the absence of a transaction value for identical goods, the transaction value of similar merchandise could apply.

Article 5 : In the absence of a Customs value determined under Article 2 or 3, the value could properly be determined under the deductive method, either if the goods are sold in the condition as imported or, if the importer so requests, under the provisions of Article 5.2.

Article 6 : Computed value would have application in the context of the hierarchical order. However, a judgement would have to be made, in view of the relative origins of the situation, as to whether this Article could be applied, particularly noting the provisions of the first sentence of Article 6.2.

Article 7 : In the absence of a determination of the Customs value under the preceding standards, Article 7 would apply. In the example cited, a price agreed to and paid by the importer for the gloves, even though after actual importation, might be accepted under a flexible application of Article 1 (but see the caveat in paragraph 8 (a)).

(ii) Goods not conforming to specification

A number of situations may arise depending on the level of agreement, or disagreement, between the buyer and the seller. For example, the seller may take steps to bring the goods into conformity, either directly or through other parties, or he may render some form of compensation to the buyer which is extraneous to the goods themselves. On the other hand, the seller may not agree that there is, in fact, a non-conformity to specifications or, alternatively, the buyer may be seeking an amount of redress from the seller which is predicted on damages resulting from the non-specification rather than on a measure of the non-specification itself. From the Customs valuation aspect, however, the price actually paid or payable still exists and since the Agreement does not make specific provisions for this situation, if all other conditions are met, the value will be determined on the basis of transaction value under Article 1. Nothing in this section precludes "goods not conforming to specification" being considered as "wrong goods" and dealt with as in (i) above.

Ⅲ. Replacement goods

12. (A) In a subsequent shipment

There are two possibilities. The replacement may be sent :

(a) invoiced at the original price, separate arrangements having been made as regards credit for the original goods; or

(b) invoiced free of charge.

In the case of (a), other conditions being met, the price would form the basis for determination of the Customs value under Article 1.

Where replacement goods are sent free of charge, as in (b), they should be regarded as goods imported in fulfilment of the original transaction; in these circumstances it would be therefore appropriate to accept the price in that transaction for determination of the Customs value under Article 1, the treatment of the first shipment being a matter for separate consideration.

(B) In the same shipment

With certain types of goods it is trade practice for the sellers to include in their shipments a quantity of articles "free of charge" as replacements for articles which experience shows are likely to be defective or damaged in transit : similarly materials somewhat in excess of the ordered measurements may be sent, for example because the edges are known to be liable to damage in transit. In these cases the sale price should be regarded as covering the total quantity shipped, no attempt being made to value separately the "free replacements" or to take account of the additional quantity for valuation purposes.

EXPLANATORY NOTE 4.1
Consideration of relationship under Article 15.5, read in conjunction with Article 15.4

1. Article 15.4 of the Agreement sets out 8 situations only where, for the purposes of the Agreement, persons shall be deemed to be related.

2. In Article 15.5 the Agreement further provides that persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire (hereinafter referred to for brevity as sole agent), however described, of the other shall be deemed to be related for the purposes of the Agreement only if they fall within the criteria of paragraph 4 of Article 15.

3. The wording of Article 15.5 of the Agreement has two objectives. The first is to provide a clear departure from the concept held in certain valuation systems that sole agents are by their nature related to their suppliers.

4. On the other hand it is recognized that parties who have been established as being sole agents should not on that basis alone be considered as being unrelated if, in fact, they meet one of the criteria in Article 15.4. Therefore, the second objective of Article 15.5 is to direct consideration of the relationship of parties solely within the provisions of Article 15.4.

5. The persons who wish to become associated in business in that one will become the sole agent of the other, will contact each other through a variety of means such as notices in business and trade journals and other avenues available in trade circles. Negotiations will be undertaken and, in most cases, written contracts will result which specify the terms and conditions of the sole agency agreement.

6. It can be expected that three situations will be encountered. The first involves an established and reputable manufacturer/seller whose products are much sought after in the markets of the importing country. Obviously, in these circumstances, the manufacturer/seller will be in the stronger negotiating position and the terms of the contract will weigh more heavily in his favour in terms of the conditions and requirements placed upon the sole agent. Parenthetically, however, this inevitably is accompanied by a higher price for the goods.

7. The second situation is the reverse, wherein the importer is a large enterprise with many distribution, sales and service locations in a lucrative market. In this instance the importer would have more influence in the negotiating process in terms of the conditions and requirements placed upon the supplier. The supplier, moreover, would be likely to accept a somewhat lower price to gain access to the advantages of the importer's large distribution and sales structure. The third situation is between these two extremes where the parties open and conclude their negotiations on a more equal footing.

8. In such cases the resulting contract becomes critical, recognizing that such contracts are freely entered into, usually have termination or renewal provisions, and are enforceable under the civil laws of the countries concerned in the event of a breach of a condition by one of the parties.

9. The question which must be considered is whether the terms or conditions of the contract are such as to meet one of the provisions of Article 15.4. There will be instances where the contract establishing a sole agency does establish a relationship, such as when the contract includes a provision relating to persons appointed as officers or directors of one another's businesses under Article 15.4 (a), or where there is an exchange of stock (5% or more) under Article 15.4 (d). It could be envisaged that some contracts could create a third entity which might bring in the provisions of Articles 15.4 (f) and (g), while others could create a partnership under 15.4 (b). On the other hand, it is reasonable to assume that such contracts would not usually create an employer/employee relationship under Article 15.4 (c) nor a family relationship under Article 15.4 (h).

10. It can therefore be concluded with some assurance that the specific provisions of the contract can be expected to give a clear indication of the applicability or non-applicability of the provisions of the Agreement in question.

11. The remaining provision of Article 15.4 defining relationships is that of 15.4 (e) wherein one person directly or indirectly controls the other. The Interpretative Note to Article 15.4 (e) provides that "for the purposes of this Agreement, one person shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter".

12. Obviously, caution must be exercised in this respect to ensure that unintended results do not occur through improper interpretations of this provision when considering the terms and conditions of contracts which have been freely entered into by otherwise unrelated parties. The examples given in paragraphs 6 and 7 above represent situations wherein the terms and conditions of the contracts are weighted in favour of one party over the other and the former would be legally in a position to enforce its contractual rights over the latter. However, in any contract, verbal or written, even of the most simple type, one party is always in a position to specify certain rights, obligations and other expectations which are legally enforceable on the other.

13. For example, in a basic contract to deliver at a given price, both parties have an expectation that their legal rights and obligations will be honoured, that is, one must deliver and one must pay a certain price. This, however, would not create a relationship under Article 15.4 (e). Even in a more complex contractual arrangement where the seller, because of royalty payments on the imported goods, has the right to establish and audit the accounting systems the importer must use to account for the royalties, the exercise of this right would not in itself create a relationship under Article 15.4 (e).

14. It can be concluded that it is not the intent of the Agreement to create a relationship out of every contract or agreement which of their very nature establish legal rights or obligations enforceable under national laws. Therefore, the wording of the Interpretative Note to Article 15.4 (e) must normally be taken to apply to situations which go beyond usual buyer/seller or distribution arrangements and involve a position to exercise restraint or direction in respect of essential aspects relating to the management of the activities of the other person.

15. The consideration of control and the existence of a position to exercise restraint or direction requires the determination of questions of fact and degree which must be based on the particulars of each individual situation.

EXPLANATORY NOTE 5.1
Confirming commissions

▪ General remarks

1. Exporters protect themselves against the financial risk of non-payment for goods and services supplied in international trade, through the use of financial services, including those which provide confirmation to guarantee payment. Various forms of financial services are available to exporters to guarantee against the risk of non-payment or insolvency on the part of a buyer. While these services can vary from country to country, they generally give rise to a payment to an intermediary (often a bank), which, for a fee, will accept the risk on behalf of the exporter. The payments made for such services are often known as "confirming commissions". They may, however, be denoted by other names in various countries.

▪ Confirming commissions

2. The confirmation or the guarantee of the payment for the goods by the buyer can be undertaken through normal banking channels, government agencies, insurance companies or specialized commercial companies dealing with such matters.

3. The situation is frequently as follows : a buyer opens a letter of credit with his own bank. However, the seller may lack confidence in the status and reliability of the letter of credit raised by the buyer's bank. He seeks to confirm the letter of credit through another bank (usually in his own country) which guarantees the seller against the commercial risk of non-payment by the buyer's bank. The fee charged by the bank for this service is a confirming commission.

4. There are specialized commercial companies called confirming houses, which act either for buyers or for sellers. Among the variety of services performed by them is the guarantee of payment. The commission charged for the service is often called a confirming commission.

▪ **Determination of the valuation treatment**

5. The determination of the valuation treatment to be given to confirming commissions is a complex question inasmuch as the issue relates to a variety of financial practices which may not be defined uniformly among countries.

6. It would be normal practice that a seller, incurring this expense, would seek to recover his confirming commission costs from a buyer. In the great majority of cases, he would do this by including the commission cost directly in his price for the goods. In such cases, the confirming commission would be included in the price actually paid or payable for the goods and there is no provision under the Agreement which would allow for its deduction in determining the transaction value.

7. Situations will occur where the charge for confirming commissions is separately identified, either by the seller in the invoice of sale for the goods, or in a separate invoice sent to the buyer by the seller or by the confirming institution.

8. In examining the above situations, it seems that the type of activity giving rise to the payment of a confirming commission is not one envisaged under the provisions of Article 8 of the Agreement either as a "commission" under Article 8.1 (a) or as "insurance" under Article 8.2 (c). Confirming commissions are more in the nature of premiums for insurance against the risk of non-payment for the goods, rather than commissions in the strict sense of the word. Similarly, the insurance referred to under Article 8.2 (c) would be that incurred for the transport of the imported goods only, as noted in Advisory Opinion 13.1. Therefore, the question which needs to be addressed is whether the payments for confirming commissions are part of the price actually paid or payable for the imported goods.

9. The Interpretative Note to Article 1 and paragraph 7 of Annex III make it clear that the price actually paid or payable is the total payment made or to be made directly or indirectly by the buyer to or for the benefit of the seller for the imported goods. That price includes all payments actually made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. Subject to paragraph 10 of this Explanatory Note, if a confirmation of the instrument of payment for the imported goods is considered to be for the benefit of the seller because it insures the seller against the risk of non-payment by the buyer's bank, and if confirming commissions are paid by the buyer to the seller or to a third party as a condition of the sale of the imported goods, the price actually paid or payable would include any confirming commission.

10. There may be cases where a buyer undertakes on his own initiative to provide a seller with an irrevocable and confirmed letter of credit, the primary purpose being to ensure the conclusion of the contract of sale. Any commission charges arising in those cases could be paid by the buyer directly to the confirming institution. In these circumstances, there being no condition imposed in the sale contract and the benefit being realized by the buyer rather than the seller, the amount paid for the confirming commission would not be part of the price actually paid or payable.

EXPLANATORY NOTE 6.1
Distinction between the term "maintenance" in the Note to Article 1 and the term "warranty"

1. The Note to Article 1, in the paragraphs related to "price actually paid or payable", stipulates inter alia that the Customs value shall not include charges for maintenance, undertaken after importation on imported goods such as industrial plant, machinery or equipment, provided that they are distinguished from the price actually paid or payable for the imported goods.

2. Since the concept of "maintenance" is not specifically defined in the Agreement, that term has to be given its ordinary meaning.

3. Reference works define "maintenance" in general terms as, for example :

   - "The upkeep or preservation of condition of property, including the cost of ordinary repairs necessary and proper from time to time for that purpose" (Black's Law Dictionary, Sixth Edition, 1990, page 953); or

   - In respect of assets, the term maintenance is defined as "expenditures undertaken to preserve an asset's service potential for its originally-intended life; these expenditures are treated as periodic expenses or product costs" (Black's, page 954); or

   - The "action of keeping something in good condition, of providing what is necessary for that purpose"; the "service in a company responsible for maintaining the performance of equipment and materials" (French dictionary Petit Larousse Illustré, 1987 - translation).

4. The question has arisen as to whether the scope of the term "maintenance", referred to in the Note to Article 1, includes warranty. This question is examined below.

5. The difference between "warranty" and "maintenance" is as follows :

   - Maintenance is a form of preventative care on goods such as industrial facilities and equipment to ensure the upkeep of those facilities and equipment to a standard which enables them to perform the function for which they were acquired;

   - Warranty is a form of guarantee on goods, such as motor vehicles and electrical appliances, which covers costs of correcting defects (parts and labour) or replacement subject to certain conditions being met by the warranty holder. If those conditions are not met, warranty can be voided. Warranty covers hidden defects in the goods, i.e. defects which should not exist and which prevent the use of the goods or reduce their usefulness;

   - Maintenance must always be performed, whereas warranty is only a contingency measure which might be invoked in the case of failure or under-performance of goods.

6. There is, therefore, a fundamental difference between the two concepts, and the term "maintenance" in the Note to Article 1 cannot be applied to warranties.