commercial, financial or other relationships between the seller and the buyer other than the relationship created by the sale itself. To determine whether such influence exists it is necessary to consider whether the buyer is commercially independent of the seller and whether the price agreed between them is not appreciably lower than the prices at which identical or similar goods are freely sold at the same time to any buyer in the customs territory of the Community at the same commercial level.

4. **It is in accordance with Regulation No 803/68 to calculate the value for customs purposes on the basis of the price at which the goods are resold in unaltered state after deduction of all the costs incurred by the buyer-reseller in respect of transactions within the customs territory of the Community and, where necessary, an appropriate profit margin.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 13 March 1980.

For the Registrar

J. A. Pompe

Deputy Registrar

A. O'Keeffe

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 7 FEBRUARY 1980

My Lords,

This case comes before the Court by way of a reference for a preliminary ruling by the Tribunal de Première Instance of Brussels.

The plaintiff in the proceedings before the Tribunal is the S.A. Caterpillar

Overseas, which I shall call "Caterpillar Overseas". It is a Swiss company, having its head office in Geneva and what I may perhaps call, without prejudging any question, a branch establishment at Grimbergen in Belgium.

That establishment I shall call simply "Grimbergen". Caterpillar Overseas is a wholly owned subsidiary of the Caterpillar Tractor Co., the well-known American manufacturer of earthmoving equipment, which I shall call "Caterpillar Tractor".

The defendant is described in the order for reference as "the Belgian State, in the person of the Minister of Finance who is responsible for the administration of customs and excise duties". I shall refer to that entity as "the Defendant".

The subject-matter of the dispute between the parties is the method of valuation for customs purposes of spare parts for Caterpillar equipment supplied by Caterpillar Tractor to Grimbergen. The action is brought by Caterpillar Overseas for the recovery from the Defendant of sums paid by Caterpillar Overseas (under protest) by way of customs duties in excess of what Caterpillar Overseas contends was the correct amount, because, so Caterpillar Overseas asserts, of over-valuation of the spare parts in question by the Belgian Customs. The sums at issure are very large. They were estimated to amount at the date of the commencement of the action to some 16 m BFR and they are increasing day by day as importations continue. We were told that at the date of the hearing before us they amounted to 100 m BFR.

The pleadings in the proceedings before the Tribunal show that, almost from the outset, it was agreed that questions would have to be referred to this Court on the interpretation of the Community legislation about the valuation of goods for customs purposes. After some to-ing and fro-ing the parties agreed on the formulation of those questions and they have been referred to the Court by the Tribunal in the form so agreed.

There are six questions, three of which are described as "general" and three as "more specific". They are preceded by a "preamble" setting out the facts on the basis of which the Court is asked to answer the questions.

I do not doubt that the Court is bound to answer the questions on the basis of those facts. In the "preamble", however, all proper names have been suppressed. Those of Caterpillar Tractor, Caterpillar Overseas and Grimbergen are replaced by symbols, those of the countries concerned by descriptions: thus the USA becomes "an overseas third State", Switzerland "a European country not belonging to the European Economic Community", and Belgium "a Member State of the Community". The symbols are not used in the "general" questions, but they are used in the "more specific" questions. By that means the "more specific" questions are given an air of being pure questions of Community law rather than questions requiring for their answer the application of that law to the facts of the case.

This is not the first case in which that device has been used. It was used in cases 51/75, 86/75 and 96/75 the *EMI* cases [1976] 1 ECR 811, 871 and 913, where the Court declined to use the

symbols in its answers. Nor do I think that Your Lordships should use them here. I heed of course the submission of Counsel for Caterpillar Overseas that the Court should strive to give answers that are as helpful as possible to the Tribunal. Nor do I overlook the authorities he cited to illustrate that, in customs valuation cases among others, the Court has, where necessary, gone into details. I also heed, however, the warning of Counsel for the Commission that the Court must not allow itself to be tempted, on a reference for a preliminary ruling, to apply the law to the facts of the case.

For those reasons I take the facts from the "preamble" but in so doing I substitute proper names for the symbols and for the descriptions of countries.

Caterpillar Tractor manufactures and markets, under its trade mark "Caterpillar", machines and spare parts for those machines. It also obtains from independent suppliers spare parts for the machines that it manufactures, and it markets those spare parts. Grimbergen is a distribution centre for spare parts.

Spare parts are ordered on the initiative of Grimbergen from Caterpillar Tractor, or from other subsidiaries of, or companies affiliated to, Caterpillar Tractor. The sellers send them directly to Grimbergen which takes delivery of them when they enter Belgium. They are stocked and handled by Grimbergen and are eventually resold either to distributors that have entered into distribution agreements with Caterpillar Overseas or directly to customers. The price depends on the commercial level of the buyer. The sales are made in the Community, in European countries outside the Community, in the Middle East and in Africa. Where sales are made outside the Community, the parts are not subject to Community customs duty and the present case is not concerned with them. For the rest, the import transactions are controlled by the Belgian customs authorities and Grimbergen has customs warehouse facilities in Belgium. In carrying out its activities Grimbergen is in particular responsible for the following at its place of business:

— forecasting the requirements of all its customers, including distributors;

— ensuring that stocks are ordered in good time and maintained at the necessary levels;

— rapidly supplying its customers, the great majority of whom acquire spare parts in order to resell them to their own customers.

Distributors and other customers order their spare parts from Grimbergen. Grimbergen receives the orders and fulfils them, delivering the goods and invoices to the buyers. The buyers pay the amounts shown in the invoices directly to Caterpillar Overseas which takes charge of the collection of debts from customers and credits Grimbergen's account with the sums thus collected.

Grimbergen occupies premises covering 5.4 hectares and employs more than 640 persons, 240 of whom are responsible for its management. It is very independent in its transactions although it is a branch of Caterpillar Overseas, which makes the

distribution agreements with distributors for the products sold under the "Caterpillar" mark.

Grimbergen is entered in the "Registre du commerce" (Commercial Register) in Belgium and constitutes a "Succursale" (branch) within the meaning of the company law of that country. It has all the characteristics of a permanent establishment within the meaning of that expression in Belgian fiscal law and in the double taxation agreements of the OECD type, as well as within the meaning of the commercial, friendship and navigation treaties concluded by Belgium. It is moreover treated as a permanent establishment by that country, which levies direct taxation on the income arising from its activities as a branch of Caterpillar Overseas. For that reason, it keeps separate accounts as if it had separate personality.

According to Caterpillar Overseas, the price at which it buys spare parts is determined by adding to Caterpillar Tractor's production costs approximately 50 % of the consolidated profit obtained by Caterpillar Tractor and Grimbergen from the sale of spare parts to independent buyers. In that calculation, Caterpillar Tractor's production costs include not only the cost of production of the spare parts, or their cost of acquisition where the parts are obtained as finished goods, but also the full amount of handling, administrative and overhead costs. The Defendant states that it is not in a position to check the accounting data on which that assertion rests, but the questions referred to the Court are asked on the assumption that it is correct, the Tribunal leaving it open to itself to have it checked later by means of an expert's report, if appropriate. According to Caterpillar Overseas the price corresponds at least to the prices normally paid for parts of the same kind in sales organizations at the level of similar central distribution establishments where they do not form part of the same group as the seller-supplier.

Caterpillar Overseas contends that that price increased by the costs of delivery to Grimbergen constitutes the value for customs purposes. The "preamble" concludes with a sentence stating that the Belgian Customs, on the other hand, contend that that amount should be increased by 20 % or, alternatively, that the value for customs purposes should be the price charged by Grimbergen to distributors, less the costs of delivery, warehousing and preserving the goods in the customs territory of the Community. At the hearing, in answer to questions put by one of Your Lordships, we were told on behalf of the Defendant that that sentence did not represent its contention quite correctly. The Defendant did not contend that there were those alternative methods of ascertaining the value of the goods for customs purposes. Its case was that it had applied the "deductive method", taking the prices charged by Grimbergen on re-sale as the starting point of a calculation, and that that calculation had thrown up values for customs purposes that were about 21.5 % above the prices paid by Caterpillar Overseas to Caterpillar Tractor. That 21.5 % had been rounded down to 20 %.

The first of the general questions referred to the Court is:

"In so far as Article 9 of Regulation No 803/68 provides that 'the price paid or payable may be accepted' (on certain

conditions) 'as the value for customs purposes', does it give a definition of the value for customs purposes that is independent of or different from the definition given in Article 1 as 'the normal price'? Or does it derogate from Article 1?"

Those on whose behalf observations were submitted to the Court, namely Caterpillar Overseas, the Defendant and the Commission, were unanimous in saying that the answer to that question must be in the negative. I agree. I dealt with the relationship between Articles 1 and 9 of Regulation No 803/68 in my opinions in Case 91/74 *HZA Hamburg-Ericus* v *Hamburger Import-Kompanie* 1975 1 ECR at p. 652, in Case 1/77 *Bosch* v *HZA Hildesheim* [1977] 2 ECR at p. 1483 and, most fully and most recently, in Case 38/77 *Enka* v *Inspecteur der Invoerrechten en Accijnzen,* ibid. at p. 2217. I refrain from repeating what I there said. The position, shortly stated, is that by virtue of Article 1 the value of goods for customs purposes is in all cases the "normal price" that that Article, together with Articles 2 to 8, defines. Article 9 recognizes that, in practice, when imported goods are the subject of a bona fide sale, the price paid or payable on that sale can generally, subject to proper safeguards and adjustments, be taken as a valid indication of the normal price, and so be used as a basis for valuation. As it is put in the Explanatory Notes issued by the Customs Cooperation Council (the "CCC") under the Brussels Convention on the Valuation of Goods for Customs Purposes "the price paid or payable on a contract entirely consistent with the conditions which the Definition prescribes is no more than the materialization of its concept".

That being so, the second and third "general" questions, which are asked only on the footing that the first question is to be answered in the affirmative, do not arise.

I turn to the "more specific" questions. in setting them out I shall, as in the case of the "preamble", substitute proper names for the symbols.

With that modification the first "more specific" question is as follows:

"May the price invoiced by Caterpillar Tractor (fob port of shipment) with no adjustment other than for the costs of delivery to Grimbergen be treated as constituting the value for customs purposes within the meaning of Article 9 of Regulation No 803/68, having regard to the condition laid down in Regulation No 603/72, and in particular, is it possible to consider that:

(a) that price corresponds, at the time it is agreed upon, to the price on a sale in the open market between a buyer and a seller independent of each other;

(b) the sales are made to a buyer established in the customs territory of the Community?"

A minor comment that the wording of that question calls for is that, if the fob price charged by Caterpillar Tractor is to be used as the basis of valuation, there fall to be added to it, not the costs of delivery all the way to Grimbergen, but only those of delivery to the port or other place of introduction of the goods into the customs territory of the

Community: see Articles 1 (2) and 6 of Regulation No 803/68.

As regards sub-questions (a) and (b), I think it appropriate, as did the Commission, to deal first with sub-question (b). This was the subject of complex arguments before us, but it is in my opinion really very simple.

The preamble to Regulation No 603/72 recites *inter alia* that:

"... it can be inferred from [the provisions of Article 1 of Regulation No 803/68] that the concept of the normal price implies a sale concluded with a view to the importation of the goods into the customs territory of the Community and to their integration in the economy of that territory;

... the facts necessary for the practical application of such principles can be established only if the price paid or payable which is declared as a basis for determining the value for customs purposes is made to a buyer established in the customs territory of the Community; ... a buyer should be so regarded if he has his residence or place of business therein,"

Article 1 of the Regulation provides:

"For the purposes of applying the provisions of Council Regulation (EEC) No 803/68 ... and without prejudice to the other conditions set out in that Regulation, the price paid or payable shall be accepted as the value for customs purposes only if it has been made on a sale to a buyer established in the customs territory of the Community."

Thus the price paid or payable on a transaction can constitute the basis of valuation of goods for customs purposes only if:

(i) that transaction is a sale; and

(ii) the buyer is established in the customs territory of the Community — and he will be regarded as so established "if he has his residence or place of business" in the Community.

I agree of course with the Commission that such a place of business must be a genuine centre of commercial activity and not what the Commission called "un établissement fictif". Drawing inspiration from the reference in the preamble to the ascertainment of "the facts necessary for the practical application of such principles" the Commission submitted that the place of business in question must be one where sufficient books and records are kept for the customs authorities to be able to check the information given to them about the price paid or payable. That the authors of the Regulation had such a purpose in mind seems very probable, but I do not think that one can derive from the meagre language of the Regulation a distinct requirement as to the keeping of books and records precise enough to have legal effect. One can however, I think, infer from the language of the Regulation that, where the place of business in question is a branch establishment, the sale, in order to satisfy the requirements of the Regulation, must be for the account of that establishment.

It was submitted on behalf of the Defendant that the requirements of the Regulation were not here satisfied because Caterpillar Overseas, the buyer, was a Swiss company having, among other things, its head office and its "administration financière" (financial management) outside the Community, and because it was a subsidiary of

Caterpillar Tractor which was also established outside the Community. It was not enough, said the Defendant, that Caterpillar Overseas had an establishment, namely Grimbergen, in the Community.

It was not however denied by the Defendant that Grimbergen constituted an establishment (in the sense of a genuine place of business) within the Community belonging to Caterpillar Overseas. Nor did the Defendant contend that for the purposes of Regulation No 603/72 a company could have only one place of business.

In the upshot there is no dispute between the parties on the two crucial points. The transactions between Caterpillar Tractor and Caterpillar Overseas are sales; and Caterpillar Overseas has a genuine place of business, and therefore is established, within the Community.

That being so I need not, I think, pursue any of the subsidiary questions that were broached in argument, such as whether Grimbergen, even as a mere branch in the Caterpillar group, might be regarded as a "buyer" for the purposes of Regulation No 603/72.

I turn to sub-question (a).

It seemed at one time to be part of the Defendant's case that no sale between associated companies could ever constitute the basis of a valuation under Article 9 of Regulation No 803/68. At the hearing, however, Counsel for the Defendant told us, after some hesitation, in answer to a question of mine that that proposition did not form part of the Defendant's case. There was thus unanimity on this point too and I need not deal with it at any length. Counsel were in my opinion plainly right. That a sale between associated companies may be taken as a basis of valuation has been expressly accepted by the CCC in its Explanatory Notes on the Brussels Convention (see Chapter VIII of those Notes) and more particularly in its "Study No 5" (Annex I to the Commission's Observations). It was expressly accepted by the Bundesfinanzgericht in a judgment of 13 July 1960 (VII 99/59 U) to which we were referred on behalf of Caterpillar Overseas. Moreover, as was pointed out on behalf of the Commission, it is implicit in the wording of Articles 2 (1) (b) and 9 (1) (b) of Regulation No 803/68 itself.

On behalf of Caterpillar Overseas it was contended that the price paid or payable should always be taken as the starting point in ascertaining the value of goods for customs purposes save where there was some specific reason for rejecting it. That proposition seems to me startling. Take the facts of this case. We know, or at all events are invited to assume, that the group profit is divided equally between Caterpillar Tractor and Caterpillar Overseas. But we do not know and are not invited to make any assumption as to whether, if Caterpillar Tractor and Caterpillar Overseas had been trading at arm's length, one of them would have been able to secure a larger share of the profit. Not until that question — which is of course a question

of fact — is answered in the negative can one say that the requirement of Article 9 (1) (b) of Regulation No 803/68 is satisfied, i.e. that the price paid or payable by Caterpillar Overseas to Caterpillar Tractor "corresponds, at the time it is agreed upon, to prices on a sale in the open market between a buyer and a seller independent of each other". That question of fact can only be determined by the competent Belgian courts, which is why I will not take up Your Lordships' time with a discussion of the voluminous evidence put forward by Caterpillar Overseas on it.

There is nothing, so far as I can see, in the Brussels Convention or in anything published by the CCC under it, that supports Caterpillar Overseas's contention. On the contrary, in Chapter VIII of its Explanatory Notes (at pp. 64-65) the CCC lists under "Transactions which by their nature may not establish prices acceptable as bases for valuation" among others "Importations by a firm associated in business with the supplier ... as a subsidiary ..." and it says of a sale between such associated companies "it has to be decided on the facts whether that sale can nevertheless be accepted as providing a price suitable as a basis for valuation". In my opinion, the structure and wording of Regulation No 803/68 are also against Caterpillar Overseas's contention. Whereas Articles 1 to 8 are mandatory in form, Article 9 is permissive. Nor is Article 9 alone in providing a "practical" method of ascertaining the normal price. Article 13, which enables "standard average values" to be established for certain goods, affords an alternative method.

I would therefore answer the first " more specific" question as follows:

(i) For the purposes of Commission Regulation (EEC) No 603/72 a sale made by a company to its subsidiary is to be regarded as "a sale to a buyer established in the customs territory of the Community" if the subsidiary has a permanent establishment, in the sense of a genuine place of business, in that territory, and the sale is for the account of that establishment.

(ii) Whether the price paid or payable on such a sale "corresponds, at the time it is agreed upon, to prices on a sale in the open market between a buyer and a seller independent of each other", is a question of fact, to be determined, where it is raised before a court or tribunal of a Member State, by that court or tribunal.

(iii) If the answer to that question is in the affirmative and the contract of sale is executed within the period specified in Article 10 of Regulation No 803/68, that price, adjusted if necessary to take account of circumstances of the sale which differ from those on which the normal price is based, may be accepted as the value for customs purposes.

(iv) Where the price is fob port of shipment it should be adjusted so as to include all costs, charges and expenses incidental to the delivery of the goods at the port or other place of introduction into the customs territory of the Community.

The second "more specific" question is as follows:

"If the answer to the first question is in the negative, may the value for customs purposes be determined, in the present case, on the basis of the prices charged to distributors or to certain other customers, it being understood that these prices may vary according to the commercial level of the buyers?"

Since the answer to the first "more specific" question is in my opinion neither in the negative nor in the affirmative, I think it necessary for the Court to address itself to that second question.

It is framed on the assumption that the "deductive" method of arriving at the normal price may only be used if the price paid or payable cannot be accepted as the basis of valuation. I have after some hesitation come to the conclusion that that is right, save that I agree with the Commission that, where the relevant sale is between associated companies, the "deductive" method may be used also to check whether the price paid or payable is a reliable one. Regulation No 803/68 does not mention the deductive method, any more than does the Brussels Convention, from which one may deduce that it is a method of last resort. The CCC seems to take the same view. Its opinion on the use of the deductive method in the case of importations between associated houses is summarized in paragraphs 7 to 9 of its Study No 5. It seems to boil down to this, that the deductive method is appropriate only —

(a) where the importer's functions are akin to those of an agent rather than of a buyer/reseller or where, although his activities are those of a buyer/reseller, they could not viably be carried out by an independent trader (so that, in the jargon of the CCC, the importer cannot "be accorded a level");

(b) where the importer is acting as a buyer/reseller and where his activities would be viable under open market conditions but it cannot be said of the price paid or payable by him either that it has not been influenced by the special relationship

between buyer and seller or that "the influence is readily ascertainable and quantifiable and the situation will remain stable".

Although the Defendant hinted that, in its view, the question whether Caterpillar Overseas could be "accorded a level" was irrelevant, no-one in this case has suggested that Caterpillar Overseas's functions are akin to those of an agent or that its activities would not be commercially viable under upon market conditions.

I would accordingly answer the second "more specific" question by saying that if the price paid or payable cannot be accepted as the basis of valuation, the value for customs purposes may be determined on the basis of the prices charged by the importing subsidiary to its own customers. I would leave the circumstance that those prices may vary according to the commercial level of the customers to be dealt with in answer to the third "more specific" question.

That question is as follows:

"If the answer to the second question is in the affirmative, should there be taken into consideration with a view to their possible deduction from such prices as may be fixed upon in accordance with the reply to the second question:

(a) the costs of warehousing and preserving the goods;

(b) other expenses inherent in the activities of Grimbergen;

(c) an amount representing the trading profit attributable to the activities of Grimbergen?"

In other words the Tribunal wants to know what deductions should be made, if the deductive method is to be applied, from the prices charged by Grimbergen to its customers in order to arrive back at the normal price.

There is no dispute about item (a) in the Tribunal's question. Both the Defendant and the Commission concede that the costs of warehousing and preserving the goods at Grimbergen are deductible. That is in accordance with the judgment of the Court in the *Enka* case and no more need be said about it.

As to item (b) both the Defendant and the Commission shifted their ground in the course of the proceedings before us. In its written observations the Defendant contended that nothing was deductible beyond the costs comprised in item (a). At the hearing the Defendant conceded that the costs of the "usual forms of handling" listed in Council Directive No 71/235/EEC were also deductible. The Commission in its written observations said that the only costs that could be deducted in addition to those in item (a) were those of the "forms of handling" listed in that Directive. At the hearing,

however, the Commission accepted that, if other expenses incurred by Grimbergen downstream of the importation were reflected in the prices it charged on re-sale, the logic of the deductive method required that they too should be deducted. Those second thoughts of the Commission were in my opinion right. I do not doubt that the costs of "forms of handling" listed in the Directive are deductible. But the purpose of the Directive, as is plain from its preamble, is only to particularize the usual forms of handling that may be carried out in customs warehouses and in "free zones". Here the problem is a wider one. It is to ascertain what costs an independent trader performing the commercial function of Grimbergen would have incurred after importation (i.e. after an importation effected on the terms prescribed by Articles 1 to 8 of Regulation No 803/68) and passed on in the prices he charged to his customers.

Lastly there is item (c): "an amount representing the trading profit attributable to the activities of Grimbergen". The Defendant denies that any such amount is deductible. The Commission's observations on the question were both brief and obscurely expressed but I gathered from them that in certain circumstances the Commission would concede that such an amount should be deducted. The opinion of the CCC, however, as expressed in paragraph 9 of its Study No 5, is clear. It is that "In that case" (i. e. in the case of a buyer/reseller the price paid or payable by whom cannot be accepted as the basis of valuation) "his re-sale prices will need to be adjusted by deduction of the appropriate trade margin or its equivalent in order to arrive at the proper level for valuation" (see also paragraphs 21 and 22 of the Study). That must, in my opinion, be right, because the essence of the deductive method, as applied in such a case, is that one computes the normal price by deducting from the re-sale prices all the items that would, in the case of an independent trader importing under a contract in the terms prescribed by Articles 1 to 8, make up the difference between his re-sale prices and the price paid by him to his foreign supplier. The only refinement one need add is that the appropriate margin will vary according to the commercial level of the customers to whom the resales are made.

In the result I would answer the third "more specific" question by saying that all the items therein mentioned should be taken into account in applying the deductive method and that, in computing the profit margin to be deducted under (c), account should be taken of the commercial level of each customer.