OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 13 FEBRUARY 1980 [1]

Mr. President,
Members of the Court,

1. The determination of the value of goods for customs purposes has been the subject both of international conventions preceding the birth of the Community — in particular the Brussels Convention of 15 December 1950 — and of rules of secondary Community law. I would recall especially the provisions introduced by Regulation No 803/68 of the Council of 27 June 1968 and by Regulation No 375/69 of the Commission of 27 February 1969. It is essentially within the framework of those provisions that the problems of interpretation raised by the present case of Chatain lie.

I consider it appropriate to preface matters, in the customary fashion, with a brief summary of the facts. Between the beginning of 1971 and the end of 1973 the French company Laboratoires Sandoz, a subsidiary of the Swiss Company Sandoz AG, imported into France numerous consignments of two primary pharmaceutical substances — the active substances ergotamine and dihydroergotamine — which had been sold to it by the parent company. It is to be noted, in this regard, that the company had granted to its French subsidiary an exclusive licence for the manufacture of certain proprietary medicinal products and the former enjoyed a preference in supplying the relevant starting materials required by the latter. In a report dated 20 February 1974 the French customs inspectorate noted that the purchase prices disclosed in the invoices produced by the importing firm were such as to appear excessive compared to the normal value of the goods. That conclusion was based, so far as ergotamine was concerned, on a comparison between the prices charged by Sandoz to the French subsidiary and the sale prices in France of equivalent products from other manufacturers and traders in various countries; so far as concerned dihydroergotamine, which was imported into France only by the said subsidiary of Sandoz, the French customs authorities had carried out a comparative technical investigation regarding the aforementioned product and had taken account of sales prices in the Federal Republic. The result of this was that, whilst the total value declared by Laboratoires Sandoz for imports for the said period amounted to roughly FF 90 000 000, the value acknowledged by the customs authorities was reduced to roughly FF 53 000 000.

Following upon that finding, the French customs authorities brought criminal proceedings before the appropriate criminal court against René Chatain, the managing director of Laboratoires Sandoz accusing him of making false declarations of value on importation and of illegally transferring capital abroad: in fact, it was said that by paying more for the imported products than their true value the said company had paid over its profits to Switzerland without paying the taxes to which they would have been subject in France.

1 — Translated from the Italian.

In his defence to these charges, the accused pleaded *inter alia* that Regulation No 803/68 of the Council on the valuation of goods for customs purposes excluded in principle any official reduction in the price actually paid; that, furthermore, Regulation No 375/69 of the Commission on the declaration of particulars relating to the valuation of goods for customs purposes put limits on the obligations of the importer in making the customs declaration; and, finally, that, in view of the differences in subject-matter the national authorities were precluded from using Community rules on valuation for customs purposes for suppressing currency frauds.

By two orders, the one dated 7 March and the other 14 May 1979, the Tribunal de Grande Instance [Regional Court], Nanterre, referred to the Court of Justice for a preliminary ruling eleven questions concerning the interpretation, not only of the aforementioned Community legislation on the value for customs purposes, but also Article 13 and 19 of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, brought into effect by Regulation No 2840/72 of the Council of 19 December 1972.

2. In the first question the French court inquires whether Regulation (EEC) No 803/68 of the Council of 27 June 1968, in particular Articles 1 to 10, and Regulation (EEC) No 1581/74 of the Commission of 24 June 1974 on the price reductions to be taken into account when determining value for customs purposes, allow the competent authorities of a Member State to attribute to goods imported from a non-member State a value for customs purposes *less* than the value declared by the importer or, for imports subsequent to the entry into force of Regulation (EEC) No 375/69 of the Commission of 27 February 1969, less than the value which results from the particulars relating to value for customs purposes declared by the importer.

In order to clarify the significance of the distinction drawn by the court making the reference between the situation before and after the entry into force of Regulation No 375/69, I would remind the Court that that regulation, by way of an innovation in regard to certain national customs rules and practices limited to requiring the importer to declare the value for customs purposes of the goods, introduced the obligation of specifying certain items of fact relating to the value for customs purposes with a view to the application of Regulation No 803/68. However, even in the system laid down by the regulation just mentioned there is still a value declared by the importer on the basis of the information provided, as appears from the form of questionnaire annexed to the regulation.

The answer to the question set forth above calls above all for an interpretation of Article 1 of Regulation No 803/68. That article provides that: "For the purposes of applying the Common Customs Tariff, the value for customs purposes of the goods imported shall be taken to be the normal price, that is to say, the price which they would fetch . . . on a sale in the open market between a buyer and a seller independent of each other." The judgment of the Court of 10 December 1970 in Case 27/70 *Edding* v *Hauptzollamt Hamburg* [1970] ECR 1035, in turn confirmed that "the price actually fetched by a specific item of goods sold" under conditions of free competition "is the best guide to the

normal price forming the basis of the value for customs purposes" (paragraph 8 of the decision at p. 1044).

It is clear that the possibility of there being a difference between the price agreed (and paid) and the "normal price" of the goods exists above all when the price has been agreed in a sale which was not effected under conditions of free competition. The *Edding* judgment above cited aptly stated (in paragraph 7 of the decision): "The principle objective of the concept of the normal price is to allow the customs authorities ... to verify the price of goods if the conditions of the transactions to which they have given rise were influenced by factors affecting the conditions prevailing amongst business partners in a state of free competition." The above-cited Article 1 (1) of Regulation No 803/68 seeks already, as has been seen, to define the concept of free competition by means of the requirement of the mutual independence of the seller and the purchaser. Article 2 (1) contains further detailed provisions laying down that before it is possible to speak of a sale in the open market between a buyer and seller independent of each other, it is necessary *inter alia* that payment of the price should constitute the sole consideration given by the buyer (that is, the only recompense given by him to the seller); that, furthermore, the price agreed upon must not be influenced by any commercial, financial or other relationship, other than that created by the sale itself, between the seller or any person associated in business with him on the one hand and the buyer or any person associated with him in business on the other hand, and finally that no part of the proceeds of any subsequent resale or other disposal or use of the goods will accrue, even indirectly, to the seller or any person associated in business with him.

There is therefore no doubt that what is paramount in the determination of the value for customs purposes of imported goods is the "notional" normal price of the goods, not the price actually agreed upon and paid. Confirmation of this is to be found in other provisions of the regulation under consideration. It will suffice to cite Article 1 (2) (b) and (c) under which the normal price is to be determined *on the assumption* that the expenses incidental to the sale and delivery of the goods are borne by the seller and the duties or taxes applicable in the customs territory of the Community are borne by the purchaser; Article 3, which lays down criteria for determining the normal price in the case of goods covered by a patent, trademark or other form of intellectual or industrial property right and, above all, Article 9 (1) (b) and (c) under which "the price paid or payable may be accepted as the value for customs purposes if ... the price 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, and that price is adjusted, if necessary, to take account of circumstances of the sale which differ from those on which the normal price is based". In regard to this

last provision, it is appropriate to note further that, when the conditions laid down are satisfied, the customs authorities have the power, but not a duty, to accept the price paid or to be paid as corresponding to the normal price and therefore to the value for customs purposes.

These rules surely lead to the view that the determination of value for customs purposes is to be carried out objectively, without being dependent upon the importer's declaration. Such objective determination, which may of course imply that the price shown in the invoice may be corrected, is by no means confined to cases in which the price actually paid is *lower* than the normal price. No rule of Community law imposes such a restriction. Thus the conclusion is reached that Community law permits and even requires national customs authorities to proceed to amend the declared value whenever it deviates, not just downwards, but also upwards, from the *normal* price for the goods.

Of course, by far the most common case of divergence between the delcared value and the normal price will involve the former amount's being less than the latter, since an importer has an obvious interest in having the customs authority apply the rate of duty to the lowest possible value. Accordingly, the rules on the determination of value for customs purposes have in view essentially such a case, being concerned above all to prevent evasion of the payment of duties which are owing. That is shown by *inter alia,* Article 9 (2) of Regulation No 803/68 in which are indicated the *principal* (not the only) adjustments to the prices paid or payable and in which are listed items going to make up value for customs purposes which have to be added to the invoiced price (expenses to be borne by the seller, reductions in price granted in favour of sole agents or sole concessionnaires, abnormal rebates). It may be added that the seventh recital in the preamble to the regulation recognizes the importance of avoiding and where appropriate eliminating any deflection of customs receipts. But that does not mean, in my opinion, that the customs authority is precluded from determining a normal price which is lower than the declared value.

In truth, that proposition may be maintained only by praying in aid the two objectives of the Common Customs Tariff which consist in ensuring adequate protection for the Community economy and in procuring financial receipts for the Community. A declaration of value higher than the true value of the goods following upon which a corresponding charge to customs duty is made, would appear, in fact, to be advantageous for the Community both from the point of view of the protection of its economy and from the point of view of its financial receipts and it may therefore be doubted whether indeed there is any Community interest in disputing that declaration by attributing a lower value to the goods. However, an assumed absence of any Community interest in so acting is insufficient ground for holding that the national authorities are prohibited from making any reduction in the value of imported products. For, in any event, when viewed on the level of objectives, it is surely not possible to ignore those which are specific to Regulation No 803/68 and consist principally in the introduction of uniform criteria for the determination of value for customs purposes.

It appears to me that that point deserves to be underscored. It suffices to read the

second, sixth and eighth recitals in the preamble to Regulation No 803/68 to appreciate the emphasis with which the legislature has expressed the need for "customs legislation which will ensure uniform application of the Common Customs Tariff", the same level of protection throughout the Community and equal treatment of importers as regards the collection of customs duties. In the case-law of the Court, the judgment of 12 July 1973 in Case 8/73 *Hauptzollamt Bremerhaven* v *Massey-Ferguson GmbH* [1973] ECR 897 has already stated that: "The functioning of a customs union requires of necessity the uniform determination of the valuation for customs purposes of goods imported from third countries" (paragraph 3 of the decision). The judgment of 23 November 1977 in Case 38/66 *Enka BV* v *Inspecteur der Invoerrechten en Accijnzen, Arnhem* [1977] ECR 2203 confirmed the same concept, citing the sixth recital in the preamble to Regulation No 803/68, and conveniently linked the objective of the uniform determination of value for customs purposes with the criterion of the "normal prices" of the imported goods (paragraph 13 and 14 of the decision). There are therefore good grounds for holding that the paramount Community interest, in regard to the determination of value for customs purposes, is that of uniformity in the criteria. That uniformity has been obtained by imposing on all Member States the criterion of the normal price. That fully justifies, in my view, the possibility of reducing the declared value in order to bring it into line with the normal market price.

Other considerations, of a different nature, reinforce further the suggested solution. On the level of the Community's interests, it appears proper to take account also of its interest in avoiding an over-valuation of imported products which is liable to have repercussions on the level of prices within the Community. On the other hand, the placing of a heavier burden of duty on goods erroneously overvalued by the importer would, in the end, put other more prudent importers in an advantageous position in clear opposition to the principle of fair competition. Finally, on the level of equity, an importer who may have made a bad bargain by paying too high a price ought to be able to have the customs duty calculated on the market price of the goods.

The court making the reference also refers in its first question to Regulation No 1581/74 of the Commission of 24 June 1974. However, it does not appear to me that that regulation has any bearing on the answer to be given to that question. In Regulation No 1581/74 the Commission laid down the circumstances under which price reductions granted by a seller to a buyer might be taken into account in determining value for customs purposes. But what is here being debated is, rather, the case in which the customs authority proceeds to revise the invoice price because of the discrepancy found between it and the normal market price of the product. The regulation cited cannot therefore contribute to the clarification of the problem with which we are concerned, except to the extent to which it confirms the criterion of the normal price (which represents its starting point); but that is nothing at all new, since it is a regulation implementing Council Regulation No 803/68 which was considered above.

So far as Regulation No 375/69 of the Commission of 27 February 1969 (which

is also mentioned in the first question submitted for a preliminary ruling) is concerned it aims to ensure equality of treatment for importers in completing the declaration of factors relating to value for customs purposes, and it does so by indicating in detail (in its annex) the information which they are bound to provide. For the present, I should like to restrict myself to drawing attention to one of the rules in this regulation which confirms the thesis which I considered might be drawn from the basic regulation. The provision is Article 1 (2) of the said Regulation No 375/69; it provides that the customs authorities may request from the importer more detailed information than that provided in the form of questionnaire annexed to the regulation, particularly where importation is effected pursuant to a transaction between a buyer and a seller who are not independent of each other. The interesting feature is that not even in this rule is the case in which the customs authority is confronted by an invoice price which is lower than the normal price distinguished from the case in which the invoice price appears higher than the normal price. That leads one to the view that, with the assistance of the further information requested, the customs authorities may rectify the value declared by the importer on the basis of his acquisition price in the sense either of increasing the sum or of reducing it.

3. As I recalled at the outset, the criteria for determining value for customs purposes were laid down, even before the creation of the Community, in the Convention of Brussels of 15 December 1950 (which came into force on 28 July 1953). That Convention was conceived in accordance with the principles set forth in Article VII of GATT and in particular with the principle that value for customs purposes should correspond to the true value of the imported goods.

In regard to the first problem which the court making reference has submitted for consideration by this Court, the Convention of Brussels provides useful material of which account should be taken. Indeed, the Court, even in previous cases, has interpreted the rules of Community law on value for customs purposes without coming into conflict with the provisions of that Convention: see the above-mentioned judgments of 10 December 1970 in the case *Edding* (especially paragraph 11 of the decision) and of 23 November 1977 in the cas of *Enka* (paragraphs 24 to 26 of the decision). The latter judgment correctly pointed out that Article 1 (2) of Regulation No 803/68 reproduces almost literally the corresponding rules in Annex I to the Convention of Brussels: and the same applies to Article 1 (1) of that regulation, already cited, in which value for customs purposes is identified with the "normal price" of the goods. But apart from the almost complete correspondence between the two texts, it is not to be overlooked that all the Member States are contracting parties to that Convention (as is recorded in the ninth recital in the preamble to Regulation No 803/68) and that the powers previously exercised by the Member States in customs matters have been assumed by the Community. Accordingly, the Convention in question binds the Community (a clear statement to that effect is to be found in the judgment of 12 December 1972 in Joined Cases 21 to 24/72 *International Fruit Company NV and Others* v *Produktschap voor Groenten en Fruit* [1972] ECR 1219; see also judgment of 19 November 1975 in Case 38/75 *NV Nederlandse Spoorwegen* v *Inspecteur der Invoerrechten en Accijnzen* [1975] ECR 1439). From this it follows that, so far as possible, Community rules ought to be interpreted

so as to avoid their being in conflict with the international obligations arising from the said Convention of Brussels, while that Convention is in force (a new agreement on the implementation of Article VII of GATT is due to replace it shortly).

That said, attention turns to the interpretative notes on the definition of value for customs purposes which form the subject of Annex II to the Convention, and in particular to Note 5. It begins by stating that:

"The object of the definition of value is to make it possible in all cases to calculate the duties payable on the basis of the price at which imported goods are freely available to any buyer in the open market at the port or place of introduction into the country of importation. It is a concept for general use and is applicable whether or not the goods are in fact imported under a contract of sale, and *whatever the terms of that contract.*"

This first paragraph of the note shows that the authors of the Convention considered it right to move away from a method of determining value for customs purposes which was based on the actual price of the individual consignments of goods and, instead, to make reference to the concept of a "notional" contract of sale. In accordance with that concept, the price is that at which the goods would be sold under conditions of "free competition", that is on the assumption of the complete mutual independence of the seller and the purchaser. The note continues by stating that "... the application of the definition implies an inquiry into current prices at the time of valuation." In that way, emphasis is given to the independence of the customs authorities when determining the elements of the "national contract" to which I have referred. However, the necessity of clearing goods quickly through customs and of making the valuation dependent, so far as possible, on the commercial documents (necessities which found recognition in Principles III and VII formulated by the European Customs Union Study Group prior to the drawing up of the Brussels definition) led to the invoice price in individual sales being taken into account in practice. In that regard, Note 5 accepts that that price may "generally be considered as a valid indication of the normal price mentioned in the definition"; but it lays down the important qualification that the sale must be *bona fide* and excepts measures which may be taken to avoid customs duties' being evaded by means of fictitious or false prices or contracts, as well as the possible price adjustments necessary to take account of factors not in accordance with those of the definition.

In the light of Note 5 the Brussels Convention system therefore appears to be clearly directed towards adapting the customs charge to the objective value of the goods, which the customs authorities are entitled to determine without being bound by the price appearing in the commercial documents. It is obvious that the statement of a fictitious price is provided in the great majority of cases for the purpose of paying a smaller sum by way of customs duties and therefore takes the form of stating a price lower than the objective value. The first reservation mentioned above, contained in

Note 5, reflects this. But the context of the note — just like the context of Regulation No 803/68 — does not in fact exclude the possibility of the authorities' finding that the invoice price is higher than the objective value and I repeat that, once a finding of that nature has been made, the customs authorities would be bound to apply the criterion of the normal price by valuing the goods at a lower figure than the price declared by the importer. Confirmation of this may be drawn from the general character of the condition, expressed in Note 5, upon which the invoice price may be taken into account and from the reservation which follows it: I refer to the condition that the sale must be *bona fide* and to the reservation of rectifications designed to adjust the declared price to the price under the definition.

4. In its observations submitted in the course of the present litigation Laboratoires Sandoz has referred to the necessity for uniformity in the application of the Common Customs Tariff in order to emphasize that it must not be applied so as to protect national interests or to pursue goals which are strictly national, outside and beyond the Community interest in collecting customs duties. This submission calls for some comments.

First, I make the observation that the arguments developed up to now, in order to resolve the first problem raised by the court making the reference, have been maintained at the level of interpreting Community rules from the point of view of the Community interests at stake. I have already had occasion to note, that, were it to be considered that the paramount Community interest is that of receiving as large an amount of customs duties as possible, a construction of Regulation No 803/68 which gave power to the customs authorities to "under-value" imported goods would not be justified. But my view is that the paramount Community interest is that of determining the value of imported goods in accordance with a consistent and objective criterion in order to ensure the uniformity of application of the Common Customs Tariff: what is important is the accurate and uniform charging of customs duties and not the collection of an abnormally high amount, corresponding to the invoice price but not to the normal price of the product.

Secondly, the need for a uniform application of the Common Customs Tariff is bound up with other interests which are equally Community interests. A point of importance concerns above all the interest in maintaining conditions of free and fair competition: it has been seen how that influences the very definition of value for customs purposes. It is easy to see that, in defence of that interest, under-valuations made by importers must be resisted. They aim to reduce the burden of customs duties unduly and therefore to make possible the fixing of lower sale prices. But even over-valuations made by importers may bring them undue profits: in particular, when the over-valuation permits them to show an artificially smaller margin of profit and thus to escape fiscal burdens which may bear more heavily than the higher customs duties. It is hardly

necessary to point out that a device of that nature is conceivable especially when a subsidiary imports goods from a parent company.

Thirdly, I do not consider that there is any ground for holding that the results of checks on the value for customs purposes, that is to say, the ascertainment of the "normal price" of the goods, may not be used to protect, as a secondary matter national interests which are distinct from the Community interest in collecting customs duties. It appears to me that the only limits to be placed on such a case comprise the compatibility of the two types of interests and strict observance of the Community criteria relating to the determination of value for customs purposes. In other words, the prosecution of possible national aims (of a fiscal or monetary character, for example) must not prejudice in any way the correct collection of customs duties and the determination of value must not be made dependent upon criteria different from those accepted in the Community rules. But if the adjustment of the declared value, in the direction of establishing the normal price, takes place in accordance with the Community rules, the State concerned will be free to draw further consequences from it, in order to apply measures in fields other than that of customs. What is important is that the criteria and methods of ascertainment be related to the Community interest — which must be held to be established if the Community rules on the subject are observed. On the assumption that that has occurred, and the invoice price has been adjusted, that adjustment may carry at national level any result which does not put in jeopardy the primary, Community, objectives of the determining of the value for customs purposes.

5. Before I proceed to consider Questions 2 to 10 put by the said order of the Tribunal de Grande Instance, Nanterre, dated 7 March 1979, it is convenient to deal shortly with Question 11 which the national court referred to this Court by order of 14 May 1979 inasmuch as that question is closely linked with the problem which I have just discussed. What the French court asks is whether Article 9 of Regulation No 803/68 of the Council and, for the imports to which they apply, Regulation No 375/69 of the Commission and the annex thereto allow the competent authorities of a Member State to apply to the invoice price, in order to determine the value for customs purposes, downward adjustments other than those which are listed under Nos 18 to 21 of the aforesaid annex and which are determined by items separate from the price of the goods but nevertheless included in the invoice price.

Article 9 (1) specifies the conditions upon which the price paid or payable may be accepted as the value for customs purposes. Paragraph (2) indicates some of the adjustments which, in accordance with subparagraph (c), may be necessary to take account of circumstances of the sale in question which differ from those upon which the normal price is based. In their turn, heads 18 to 21 of the form annexed to Regulation No 375/69 of the Commission relate to certain "items which do not go to make up the value for customs purposes" but are included in the invoice price, which is assumed to have been made the basis for calculating the declared value. In essence, the items mentioned in Article 9 (2) (and further specified in heads 11 to 17 of the said

form) must be added to the invoice price in order to determine the normal price whilst the items in heads 18 to 21 of the form (which Regulation No 803/68 mentions more shortly in Article 1 (2) (c)) must be deducted from the invoice price, whenever they have been included in it, in order to arrive at a determination of the normal price.

By making reference to both the one and the other set of items the court making the reference shows that it is conscious that the Community legislation provides for the possibility of adjustment both in the case of an invoice price lower than the normal price and in the converse case. The court doubts, however, whether adjustments other than those indicated in the aforementioned provisions may be admissible, at least in regard to downward adjustments. In truth, it is quite clear that in regard to upward adjustments those mentioned in Article 9 (2) are the principal but certainly not the only ones, as is shown by the expression "in particular" which occurs in the first and second lines of that paragraph.

It would be possible to reply by making the observation that freedom to adjust upwards would make little sense if it were not accompanied by an equal freedom in the opposite direction, given that the objective is always to arrive at the normal price. It would be possible to add the textual argument that head 21 of the form annexed to Regulation No 375/69 of the Commission asks for information on "other items" not going to make up the value for customs purposes, thereby demonstrating that the category concerned is an open one. But in my opinion the answer must be based on a consideration of a different nature. Both Article 9 of Regulation No 803/68 and the form annexed to Regulation No 375/69 presuppose that the invoice price constitutes the basis of calculation of the value for customs purposes and that the adjustments necessary to determine that value consist merely of simple arithmetical operations. But — as has already been seen and as I shall state more fully hereafter — the customs authorities are free to proceed to make their own valuation of the goods without taking the invoice price as the basis of calculation. In practice that will only happen in the rare cases in which there are reasons for thinking that the invoice price differs considerably from the normal price. Such cases lie outside the area of application of the rules mentioned above, but it certainly cannot be thought that the existence of those rules — which are not exhaustive — deprives the customs authorities of that independence of assessment which is to be inferred both from the scheme of the Brussels Convention and from the Community rules, regarded as a whole.

6. In the second question (which is dependent upon the affirmative answer to the first) the French court inquires whether the Community legislation considered above allows the competent authorities of a Member State to reduce the value declared by the importer (or, in the application of Regulation No 375/69 of the Commission, the value resulting from the particulars furnished by that importer) and to rely, for that purpose, upon a comparison between that value and one or more prices charged on other contracts of sale concerning the same product.

Given that, as I have stated at length, it is permissible for the customs authorities to determine the value of goods for customs purposes at a lower level than the invoice price, it seems to me to be indisputable that they may *inter alia* make use of comparisons with prices actually charged in sales of identical commodities. That such is possible appears in particular from the above-mentioned interpretative Note 5 annexed to the Convention of Brussels which, as has been seen, states that "the application of the definition" of value for customs purposes "implies an inquiry into current prices at the time of valuation". Later, in discussing the items of which account has to be taken in adjusting the sale price, the same note mentions, *inter alia,* any reduction from the "ordinary competitive price". From that it may be deduced that that price is an objective datum. However, it is necessary for the goods with which the comparison is made to be actually identical and the economic context must be comparable, especially as regards the quantity concerned in the sale, the origin of the goods, the marketing situation and the other circumstances which characterize the transaction of sale.

7. In the event of an affirmative answer to the foregoing question the court making the reference wishes to know, thirdly, what are the country or countries of exportation and/or importation from and/or to which sales must have been made in order for the competent authorities of a Member State to be empowered by the Community regulations to found, upon the prices charged in those sales, a reduction of the declared value (or the value resulting from the particulars furnished by the importer). In particular, the court asks whether the sales, of which the prices may be used as reference prices, must necessarily have been made between an exporter and an importer respectively established in the same countries as those between which the sale was made in relation to which the importer's declaration of value (or the particulars furnished by him for valuation for customs purposes) is disputed.

In my opinion, such a necessity must be ruled out, at least where there are no comparable transactions relating to the same commodity between the two countries in question. Indeed, the goods may be ones not generally available (as appears to be the case with the products in the main proceedings) and it is clear that in order to be able to establish the proper value of the goods, the customs authorities must be in a position to carry out their comparative study within a compass going beyond the aforementioned two countries.

The negative answer that I accordingly suggest be given to that question involves the consideration of another subsidiary question put by the national court, namely, whether the Community legislation, including Regulation No 603/72 of the Commission of 24 March 1972 on the buyer to be taken into consideration when determining the value of goods for customs purposes, allows regard to be had to sales by exporters established in other Member States or to importers established in other Member States, or by exporters established in non-member States or to importers established in non-member States or, finally, between a supplier and a purchaser both established in non-member States.

Article 1 of Regulation No 603/72 provides that for the purpose of applying the provisions of Regulation No 803/68

"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". That territorial restriction leads me to rule out the taking into consideration, even when dealing with the comparative studies which we are at present discussing, of prices charged in sales to importers outside the Community customs territory, that is, in non-member countries. On the same ground, however, it appears to me that regard may undoubtedly be had to sales to importers established in other Member States.

In this regard, it is necessary to recall that the recommendation issued on 1 June 1975 by the Customs Co-operation Council on the application of the Brussels definition of value for customs purposes, in dealing with the determination of that value, "in the exceptional cases of prices which are abnormally low in comparison with prices made for identical or similar goods" makes constant reference to prices which may be freely obtained by "any buyer *in the country of importation* at the same commercial level as the actual buyer". However, I believe that, if it is desired to have regard to that recommendation from a community point of view, the concept of the country of importation must be extended to the Community in its entirety, which represents a single customs territory, and not be limited to individual Member States.

Let us now see what limits are set to the comparative investigations under discussion as regards the position of sellers. In the absence of other sellers in the State of origin of the goods which have to be valued, it will undoubtedly be permissible to have regard to sales made by exporters established in other Member States. In accordance with what is suggested in paragraph 3 (a) (ii) of the recommendation of the Customs Co-operation Council cited above it will, however, be necessary to take account of the differences which may exist between the countries of exportation under consideration, especially as regards the costs of the factors of production.

The same approach applies, in my opinion, to possible reference to sales by exporters in non-member States, that is, in States other than that in which the seller of the goods to be valued is established and outside the Community.

Finally, it is scarcely necessary to add that, since the possibility of having regard to sales made to importers established in non-member States is thus excluded, any reference to sales taking place between suppliers and purchasers who are both established in non-member States is equally to be ruled out.

8. In the fourth question the French court asks whether the Community legislation considered above allows the national customs authorities to take as reference price for reducing the value declared by the importer (or — in the application of Regulation No 375/69 — the value resulting from the particulars furnished by the importer) prices charged (a) in sales of products coming from countries whose external trade is governed by a State monopoly or by public undertakings; and (b) in sales of imitations of the products coming the subject-matter of the sale in relation to which the value for customs purposes is reduced.

So far as sales in the first group are concerned, the Commission has rightly

pointed out that, since they are transacted in countries in which foreign trade is a State or public enterprise monopoly, they are not generally subject to market forces and do not take place on the open market as is stipulated by Article 1 of Regulation No 803/68. Prices charged in such sales could therefore be taken as reference prices only if it were found that they corresponded to normal prices on the open market. But in order to be able to arrive at such a finding it would be necessary to refer to other sale transactions in the same product entered into outside State trading channels. That amounts to excluding reliance upon prices charged in exports subject to such a monopoly regime in determining the normal value of a product.

So far as sales involving imitation products are concerned, the possibility of referring to their prices must certainly be ruled out if they are products manufactured in contravention of the rights of the proprietor of the relevant patent and if their distribution in the country of importation involves the infringement of that exclusive industrial property right (which is the case considered by the German Government in its written observations). Indeed, given that an imitation product may be lawfully distributed on the market of the importing State only with the consent of the proprietor of the patent, a price indicated for sales which exclude the cost of the patent could not be considered as representative; it has been reached by unlawfully suppressing one of the normal elements of the price. One the other hand, if the products are not protected by industrial property rights and are consequently free imitations, it would be permissible to have regard to the price of the imitation product, provided it were comparable in quality to the product to be valued for customs purposes.

9. The fifth question from the court making the reference is based on the assumption that no reference price may be used either in law or in fact and inquires whether the competent authorities of the importing country are entitled unilaterally to employ other methods or facts and, if so, which.

I would recall at the outset that the question of valuation for customs purposes on bases other than the price paid or payable is certainly not unknown to the system of the Brussels Convention. Chapters VIII and IX of the Explanatory Notes to the Brussels Definition are given over to this matter and they have regard in particular to cases of importation by associated undertakings (including subsidiaries of foreign companies). It is stated in this regard that "The primary criterion is that of expected realizations for the goods to be valued" (see p. 75 of those notes). But it also stated more specifically that:

"Specific provision is not made for cases in which a price paid or payable does not provide an acceptable basis for valuation because the authenticity of the price is in question or because misrepresentation of cthe facts has been proved (for example, false invoicing). Fraud is outside the scope of the Notes. But where notional values have to be established in such cases, the guidance offered by this Chapter [IX] should be followed, use being made of the criteria and methods which appear to be most suitable or convenient for the valuation of the goods in question" (p. 74).

Further pointers may be obtained from the draft Agreement on the Implementation of Article VII of GATT, which ought soon to take the place of

the Brussels Convention and which is the subject of very advanced negotiations between the States which are members of the General Agreement. Under Articles 5 and 6 of this draft (appended to the written observations of the United Kingdom) — where reference prices are not available — the criterion of the estimated sale price is supplemented by that of the computed value, which comprises principally the cost of the raw materials and of manufacture, together with an amount equivalent to profit and general expenses.

Without going into the details of those methods of valuation, I note that the doubts expressed by the French court on the power of the national authorities to resort to methods other than the taking of reference prices arises solely through the fact that the Community has been substituted for the Member States in the implementing of the obligation assumed under the Brussels Convention. That leads the German Government to submit that the question above referred to ought to be answered negatively, since the Member States have lost their powers in the matter which is now governed entirely by Community legislation.

In my opinion, that view omits to take into account the fact that the Community legislation is silent on the methods of valuation which apply when it is not possible to base the valuation on price; that, at the same time, that legislation (according to my preferred interpretation) recognizes a power in the national customs authorities to proceed with their own investigations for determining the normal value of a product and, finally, that the system of the Brussels Convention — which, as I have made plain earlier, applies in the Community context — provides helpful pointers for the determination of value for customs purposes on bases other than the invoice price. It is therefore on the basis of that system that the national customs authorities, charged with applying the Community legislation in the light also of the said Convention, can, and must, deal with the situation mentioned in the French court's fifth question (the impossibility of using reference prices).

On the other hand, it is proper to take account of the risk, to which the German Government points, of action by the national customs authorities being transformed into an arbitrary exercise of the power of valuing goods on bases other than the invoice price or reference prices thereby compromising the uniform application of the Common Customs Tariff. For this reason the national authorities must consult the appropriate officers of the Commission whenever they require to enter on to territory which falls outside the express provisions of Regulation No 803/68 and the supplementary regulation on this matter.

10. The sixth question put by the French court proceeds upon the hypothesis that "the methods applied by the French administration to determine the value for customs purposes ar not permissible" and asks according to which criteria that value is correctly to be established where no valid price is available for comparison and where the matter concerns patented products

forming the subject-matter of sales between two companies which are not independent of one another.

It is obvious that it is not for the Court of Justice to decide, in the ambit of these proceedings for interpretation, whether the criteria adopted by the French administration in this case are to be regarded as permissible or not. In other respects the question concerned repeats substantially the problem raised by the preceding question adding only the further refinement presented by the assumption that the matter concerns the sale of patented products between two companies which are not independent of one another. I feel therefore that it is superfluous to repeat the remarks just made: the answer remains implanted in the system of the Brussels Convention, supplemented by the recommendations of the Customs Co-operation Council and the results of the consultative activity and the studies carried out by the Valuation Committee.

11. In the seventh question the French court asks whether the authorities of a Member State are entitled to charge an importer with a false declaration of value for customs purposes made by means of a false, incomplete, inaccurate or inapplicable invoice, thereby treating such facts in the same way as importation of goods without declaration, which is prohibited by the national law and is an offence punishable by heavy fines and prison sentences, even where the importer has complied with Regulation No 375/69 of the Commission by correctly furnishing the particulars relating to the value of goods for customs purposes which are the subject-matter of the questionnaire set out in the annex to the said regulation, and where it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price.

In the framing of its question, the national court clearly proceeds upon the supposition that, having complied with Regulation No 375/69 and having actually performed the contract, the importer has not committed any infringement of Community customs law. On that basis, the answer cannot be other than in the negative: that is to say, it is impossible for the national authorities to accuse the importer in question of the offence of making a false declaration of value for customs purposes. Indeed, national laws on customs matters, including those of a criminal nature, are purely ancillary to Community customs laws, since their only legal basis is for implementing the Community rules and guaranteeing their observance. In that regard, the settled case-law of this Court makes it clear that, in sectors covered by Community law, the Member States may not unilaterally add additional conditions relating to a subject which has already been comprehensively governed by Community legislation — see, in particular, the judgment of 11 February 1971 in Case 39/70 *Norddeutsches Vieh- und Fleischkontor GmbH* v *Hauptzollamt Hamburg-St. Annen* [1971] ECR 49 at p. 58 and that of 14 March 1973 in Case 57/72 *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker [1973] ECR 321* at p. 342.

The issue, then, is to see whether, or rather to what extent, the supposition mentioned above is an accurate one. In my opinion, over and above his duty to specify the facts relating to value for customs purposes by making use of the form annexed to the said Regulation No 375/69 of the Commission, the fundamental duty of the importer is to

declare in good faith the true value of the imported goods. As I have already had occasion to observe, the form concludes with a notification of the value declared, for which the importer assumes responsibility; and, at least two cases may arise in which an apparently accurate completion of the form will not amount to fulfilment of the duty to declare the true value in good faith. First, an agreement to falsify the price may have been entered into between the seller and the buyer: the invoice price is therefore greater, or less, than the real one (whereupon the contract is performed but the seller either pays an extra price or applies to other accounts with the purchaser the sum received in excess of the real price). Secondly, the importer may have omitted to disclose certain items, included in the invoice price, which are in truth extrinsic to the sale transaction. In cases of the latter kind it may also be considered that the importer would be in a position to specify on the form the items which artificially increase the price, using, if need be, head 21 (which serves essentially to cover additional costs subsequent to the purchase). From that point of view, the latter might be charged with making an incomplete declaration, even as regards Regulation No 375/69. But what appears to me to be more important, is that, where there is a sham agreement between the parties, the provisions of that regulation may have been observed without the declaration's reflecting the true price. That occurs through a fraudulent scheme on the part of the importer and it therefore appears to me to be certain that he infringes Community customs rules notwithstanding the apparent compliance with the provisions on declaration of the items making up value for customs purposes. Consequently, criminal proceedings at national level would appear to be permissible if the legal system of the Member State contains rules for the punishment of infringements of customs law. The same must be said, I believe, if the importer conceals — even negligently — facts which he ought to have declared.

What I have stated up to now needs to be clarified and supplemented by some further considerations. Since criminal laws in customs matters must serve, as I have said, to strengthen the guarantee that Community customs rules will be observed, it may be asked what interest justifies the punishment of a person who, by declaring a value higher than the true value, has not jeopardized either the protection of the Community economy or the Community's revenue. The answer is logically linked to a point which I stressed earlier. The Community interest, which is protected also by national penal laws, is to obtain from importers declarations which correspond to the objective value of the goods, as part of the uniform application of the Common Customs Tariff. That other matters which are illegal under the national law alone (illegal currency transactions, for example) may possibly be punishable at the same time neither detracts from nor adds to the logic of protecting the Community customs system with criminal sanctions.

Of course, contraventions of the provisions of that system may be more serious or less serious and it appears to me clear that to over-value imported goods represents a much less serious offence than under-valuing them, since

only in the latter case is the Community defrauded of revenue from customs duties. In that regard, there comes into operation the principle of proportionality, which, according to the case-law of this Court, ought principally to serve to restrict the acts of the Community institutions, but which may be invoked also in regard to the acts of the national authorities taken to implement the Treaty (in this case to ensure its observance). Therefore, the penal sanctions through which the Member States contribute towards ensuring the observance of the Community customs rules must be commensurate with the nature and gravity of the offence committed, account being taken of the magnitude of the interests adversely affected by the offence.

Another point to be borne in mind is that the establishing of some variation or other between the value declared by the importer and the value established by the authorities as "normal" is not sufficient to bring penal sanctions to bear. The discrepancy between the two values may be the result of various causes: it is conceivable that the invoice price may turn out to be higher than the market price by reason of special skill on the part of the seller and absence of expertise on the part of the buyer (for example, the buyer may have made a mistake or have been misled as to the quality of the goods). As a matter of principle, therefore, the instituting of criminal proceedings against the importer by the national authorities on the sole ground that the declared value requires adjustment must be ruled out. In truth, I hesitate to maintain that it is appropriate here to speak of conditions or restrictions in respect of Community law: in criminal law the mental element is normally a crucial factor. Faced with a penal system which is particularly harsh, in the sense that severe penalties are provided even for negligent conduct, it would be possible to invoke again the principle of proportionality whenever such sanctions are intended to ensure observance of Community rules. Similarly, it seems clear that the onus of proving offences of the kind here considered falls on the public authority bringing the proceedings but that is in accordance with a fundamental principle of criminal law which does not require to be confirmed by Community law.

Finally, it should be borne in mind that where an importer has been charged simultaneously with breach of customs obligations arising out of Community law and obligations of a different kind flowing exclusively from the laws of the State, the outcome of the first charge must not be conditioned or affected by the second. Customs rules must therefore not be interpreted in relation to the pursuance of objectives which are alien to those rules according to the Community legal order. And in freely instituting proceedings based on national law for the suppression of conduct outside the scope of customs law the national authorities must do so in such a way as not to interfere with the correct application of the rules which are peculiar to the Community legal system.

12. The eighth question put by the Nanterre court seeks to clarify whether the practice of reducing the declared value and the serious consequences

which it entails for importers are compatible with the customs union set up by Articles 12 to 29 of the EEC Treaty, having regard to the deflections of trade and distortions of competition to which that practice may lead.

The language used by the court making the reference appears already to contain the answer: indeed, if a marking down of the value of the goods on the part of the customs authority were to lead to deflections of trade and distortions of competition it would be necessary to consider that "practice" to be contrary to the principles of the customs union. It seems to me, however, that reducing the declared value *per se* may not be regarded as giving rise to the negative consequences which the French court fears. On the contrary, according to my views, it is for the purpose of ensuring the uniform application of the Common Customs Tariff, by strictly observing the criterion of the normal value of the goods, that the customs authorities may reduce, or increase, the value declared by the importer. Therefore, the assumption of incompatibility with the principles of the customs union is quite out of the question.

As for "the serious consequences . . . for importers" which, in the wording of the question, may be regarded as linked to the marking down by the customs authorities of the value of the goods, one has the impression that the French court means to refer to the seriousness of the criminal penalties provided under French law for false declarations of value for customs purposes, even when the declared price turns out to be higher than the normal price. But at the level of Community law a situation of that kind may be considered only from the point of view of whether or not the principle of proportionality has been observed by the Member States in providing criminal penalties for offences against the Community interest. I have already dealt with this point and I do not think it necessary to dwell upon the subject; I observe, however, that a case of non-observance of the principle of proportionality is a different matter from the alleged infringement of the rules relating to the customs union.

13. In the ninth question the national court asks, first, whether Article 13 of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, by the fact of prohibiting any measure having an effect equivalent to quantitative restrictions on imports in trade between the Community and Switzerland, does not thereby prohibit the competent authorities of a Member State from reducing the declared value (or the value resulting from the particulars furnished by the importer). The French court also inquires whether the said Article 13 allows heavy fines and prison sentences to be imposed upon an importer of a Member State of the EEC who has duly fulfilled his obligations by correctly and completely giving the national authorities the information required by Regulation No 375/69 of the Commission where it is not disputed that the goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price.

In regard to the first part of this question, I restrict myself to recalling the considerations already expressed when I submitted that reducing the value declared is compatible with the rules of the customs union. Obviously Article 13 of the Agreement between the EEC and Switzerland reflects, at least in part, the

provisions of Articles 30 and 31 of the Treaty of Rome. In my opinion, the making by the customs authorities of a lower valuation of goods, carried out in accordance with the Community system of rules and with the system of the Brussels Convention does not create any obstacle to the free movement of goods either within the Community or in trade with the Swiss Confederation. Therefore it seems to me impossible to infer from Article 13 of the Agreement cited that the national authorities are prohibited from adjusting the declared value in a downward direction.

In regard to the point raised in the second part of the question, I have had occasion to explain that formal compliance by the importer with Regulation No 375/69 does not necessarily mean that he has discharged in good faith the duty which may be deduced under Community law of declaring the true price. But, for the purposes of answering the question, let it be assumed that in fact every Community duty in relation to the customs declaration has been fulfilled by the purchaser and, that the State of importation nevertheless seeks "to impose heavy fines and prison sentences" on him, holding him to be guilty of customs frauds apparently on the basis of a national concept of that offence which takes no account of Community rules on the matter. If such a case were to occur, the importer would have to be regarded as the victim of a treatment which was unjustified, from a Community point of view, and such as to affect adversely his commercial activities. There would then exist, in my view, the conditions necessary for holding that in his case a measure having an effect equivalent to a quantitative restriction had been adopted and Article 13 of the Convention previously cited would have been infringed.

14. The tenth question from the French court refers to the first paragraph of Article 19 of the above-cited Agreement between the EEC and Switzerland, which prohibits any restrictions on payments relating to trade in goods and the transfer of such payments between the Member States of the European Community and Switzerland. The national court asks whether that provision prevents the national authorities from classifying as "unlawful transfers of capital" a transaction whereby a purchaser in a Member State of the European Community pays his Swiss supplier the amount of an invoice relating to a sale of goods where it is not disputed that those goods have actually been delivered to the purchaser in the quality and quantity stated in the invoice and that the seller has received the whole of the invoice price.

It is to be noted that, in a Community context, the liberalization of payments relating to trade in goods involves an obligation on every Member State to grant to importers exchange control authorization for an amount corresponding to the price of the goods. The same results flow from Article 19 of the said Agreement between the EEC and Switzerland. However, when an importer and a seller have fraudulently agreed upon an artificial over-valuation of the goods in order to effect a transfer of capital which is greater than that which would have been warranted by way of payment for the goods themselves, it is clear that the difference between the true price and the invoice price may not be regarded as covered by the authorization under the rules of Community law just mentioned. Those

rules in fact oblige the Member States to allow payments which are truly necessary for the movement of goods and may certainly not be used to render lawful what are actually transfers of capital in contravention of fiscal or exchange control legislation. That said, the reference, made in the course of the proceedings, to the judgment of this Court of 23 November 1978 in Case 7/78 *Regina* v *Thompson* [1978] ECR 2248 especially at p. 2274, which in currency matters permitted a national prohibition on exportation even in trade between Member States if it were justified on grounds of public policy within the meaning of Article 36 of the Treaty (which corresponds to Article 20 of the said Agreement with Switzerland), is of no assistance. It is not necessary, in my opinion, to rely upon these exceptional provisions in order to permit the suppression of fraudulent schemes directed against national legislation on fiscal or currency matters, but it is sufficient and more correct to have regard to the limits of the commitments undertaken by the Community, which, as I have said, do not extend beyond current payments for the goods imported, *within the limit of their true value.*

15. In conclusion, I would suggest that the Court answer the questions referred to it for a preliminary ruling by the Tribunal de Grande Instance, Nanterre, by orders of 7 March and 14 May 1979, by declaring that:

1. In applying the criterion of the normal price of the imported goods, Regulation (EEC) No 803/68 of the Council of 27 June 1968 permits the attribution to specific products of a value for customs purposes which is less than that declared by the importer or that resulting from the particulars furnished by him under Article 1 (1) of Regulation (EEC) No 375/69 of the Commission of 27 February 1969. In determining the value of the goods the customs authorities may also take account of facts and circumstances other than those mentioned in Article 9 of the said regulation of the Council and in heads 18 to 21 of the annex to the said regulation of the Commission.

2. The customs authority may determine the normal value of the goods by comparing the value declared by the importer with one or more prices contained in other contracts for the sale of the same product, provided that the economic context is comparable, in particular as regards the quantities involved in the sales to which regard is had, the origin of the goods, the marketing conditions and the other circumstances which characterize the contract of sale.

3. Where it is not possible to make a comparison with the prices charged by competitors in sales concluded between an exporter and an importer established in the same countries as those between which the sale giving rise to the problem of valuation for customs purposes took place, the customs authority has power to extend its investigation to contracts concluded otherwise than in trade between those two countries.

   For the purpose of such comparative study the prices charged in sales to importers established in non-member countries may not be taken into account; sales to importers established in other Member States may, however, be taken into consideration. Sales used as bases of comparison may include those made by exporters in other Member States or even in non-member countries provided that it is not possible to refer to sales made by exporters in the same country as that from which the goods to be valued came.

4. Only those prices normally charged under open market conditions may be used as reference prices. Prices charged in sales of products coming from countries in which foreign trade is subject to a monopoly by the State or a public undertaking are therefore excluded. Prices of imitation products may be taken into account only if the product of which they are an imitation is not protected by industrial property rights and on condition that it is proved to be of comparable quality to the product the value of which is to be established.

5. Where it is not possible to rely upon any reference price, the national customs authorities may resort to the methods and the factors permitted under the system of the Brussels Convention on the Valuation of Goods for Customs Purposes in order to determine the normal value of the goods, provided account is taken of the desirability of consulting the appropriate officers of the Commission of the European Communities.

6. Where the importer, in making the customs declaration of the value of the goods, has fully observed the rules of Community law by providing all the information at his disposal relating to the value for customs purposes and by declaring in good faith the true price of the imported goods, no criminal penalties may be regarded as applicable by a Member State in relation to such conduct. Where the national authorities find that the price paid by the importer for goods is either more or less than their value for customs purposes as ascertained in accordance with the said rules, they may not infer from that alone a fraudulent intent on the part of the importer to contravene Community customs rules.

However, where the existence of an agreement between an exporter and an importer to falsify the price invoiced and declared for customs purposes is proved, or where the importer has concealed facts which make the invoice price different from the true price, the imposition of criminal penalties by a Member State may be justified, provided they are proportional to the nature and gravity of the contravention of Community customs law.

7. Article 13 of the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972, which prohibits in trade between the two parties any measures having an effect equivalent to quantitative restrictions on imports does not affect the powers of the customs authorities of the Member States to determine the value of goods for customs purposes by establishing that the normal value is less than that declared.

   The imposition by a Member State of criminal penalties on an importer who has fully observed Community rules in declaring the value of goods imported from Switzerland would constitute a measure having an effect equivalent to a quantitative restriction on imports in contravention of the said Article 13 of the Agreement between the EEC and Switzerland.

8. In prohibiting any restriction on payments relating to trade in goods and the transfer of sums connected therewith between the Member States and Switzerland, the first paragraph of Article 19 of the above-mentioned Agreement between the European Economic Community and Switzerland does not prevent the national authorities from classifying as an illegal transfer of capital a transaction whereby a purchaser, established in a Member State of the European Economic Community, pays to its Swiss parent company, which has supplied it with certain goods, the invoiced sale price if it is proved that the price is significantly higher than the true value of the imported products and that the purchaser has fraudulently agreed with the seller upon the over-valuation of those products.