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Committee on Customs Valuation

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JUSTIFICATION FOR INDIA'S PROPOSAL ON BURDEN OF PROOF

The following communication from the delegation of India has been received with the request that it be circulated to the Committee.

In September 1987, India had submitted suggestions for negotiations on certain issues in respect of the Tokyo Round Agreement and Arrangements (MTN.GNG/NG8/W/9, dated 30 September 1987). In that submission, India had proposed inter alia that in the Agreement on Customs Valuation adequate flexibility needs to be provided to enable the Customs Administration to shift the burden of proof to the importer at least in the following circumstances:

(i) when the declared price is less than that noticed in a series of transactions immediately preceding the relevant one; and

(ii) when the declared price is less than that noticed for transactions involving identical goods imported directly from the country of manufacture.

The purpose of the present communication is to provide detailed justification for the earlier proposal.

2. The proposal has been discussed in the Negotiating Group as well as in the Committee on Customs Valuation. In these discussions the existence of the problem has been acknowledged. Views have, however, been expressed that Article 17 of the Agreement and paragraph 7 of the Protocol, which empower the Customs authorities to call for any additional information, document or evidence to satisfy themselves about the truth or accuracy of the declared transaction value, are adequate to meet the situations mentioned in India's proposal and that no amendment to the Agreement is necessary. Paragraph 7 of the Protocol emphasizes full co-operation of importers in this regard. Attention was also drawn to the Advisory opinion of the Technical Committee on treatment of fraudulent documents that no administration is required to rely on such documents and it always has the right to assess the situation and ascertain that the declared price is acceptable. Some delegations have not been able to appreciate the difficulties expressed by India and want more details.

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3. The Technical Committee on Customs Valuation under the Customs Co-operation Council has also had occasion to consider this issue. The Committee had independently finalized an advisory opinion on the burden of proof. The Committee concluded that the rights and obligations of importers and customs, other than those which were specifically mentioned in the Agreement depended on national laws and regulations. A view could be taken that the burden of proof in the course of determination of customs values is not specifically mentioned in the Agreement and hence would depend on how it is regarded in the national laws and regulations. This would imply that the Agreement does not bar the customs administrations from shifting the burden of proof to the importer in situations of their choice while framing the national laws and regulations for implementation of the Agreement.

4. India implemented the Agreement with effect from 16 August 1988. Though the Agreement was signed in 1980, India availed of the reservation for delayed application for five years and had to take further extensions under paragraph 2 of the Protocol as elaborate arrangements had to be made for changing over to the new system of valuation. Even before the application of the Agreement, India was apprehensive of the inadequacy of Article 17 of the Agreement and paragraph 7 of the Protocol to deal with situations of full collusion between importer and exporter for under-valuation of goods for evading customs duty, where verification and enquiries would be of little help in establishing the fraud. Paragraph 7 of the Protocol is of no avail in such cases as the importer cannot be expected to co-operate when he is deliberately suppressing the information.

5. India's experience after the application of the Agreement confirms these apprehensions. Cases have been noticed where goods were under-valued to the extent of 50 per cent and the customs have to accept these values knowing fully well that the goods are deliberately under-valued. The modus operandi generally noticed is that unscrupulous traders create front companies abroad. The Indian importers acting in collusion with these front companies place orders for import of goods. The front companies in turn place orders with the manufacturers abroad. The goods are at times shipped directly by the manufacturers to the Indian importers as per directions of the indentor or they are also shipped to the front company who in turn ship the goods to the Indian importers. The relevant invoices and other commercial documents are prepared by the front company to make it appear as a fresh transaction between it and the Indian buyer. The invoices reflect a much lower value than the actual price which the front company pays to the manufacturer. The Indian buyer pays the invoice price to the front company through authorized channels and the rest is settled through illegal remittance. These front companies assist the Indian importers to mislead the customs by removing labels and identification marks of original manufacturer. These cases of undetectable manipulation of values cannot be proved in the absence of documentary evidence. In the absence of suitable flexibility the Customs have no option but to accept the declared values knowing fully well that the goods are deliberately under-valued. The existence of any number of transactions of appreciably higher prices for identical goods immediately preceding the import in question is of no help to reject the declared values. It is in this

context that India has suggested shifting of burden of proof to the importer so that in transactions of this nature Customs can resort to valuation based on values of identical goods where the importer is not able to satisfactorily explain the basis of the substantially reduced price.

6. Direct importation from country of manufacture also poses similar problems. These are mainly in respect of transactions between principals and the sole agents, distributors, concessionaries, etc. who have the protection from the purview of related persons under clause (5) of Article 15 of the Agreement. The agents in the country of importation claim the benefit of this clause in terms of specially reduced prices and special discounts and the Customs have no means to check the veracity of such special prices. They are able to manipulate the documents and suppress the actual transaction value and the differential amounts are settled through unauthorized channels. Even in cases where such agents could be regarded as related persons, the provisions of Article 1.2 protects them. Paragraph 6 of the Protocol is also of no help in such cases, when there are reasonable grounds for suspecting that the transaction value is not genuine.

7. Following the introduction of the GATT Valuation Code by India, it has been observed that buying agents not only charge the buying commission for services said to have been rendered on behalf of the buyer, but also buy the goods from the manufacturer or trader in the same country and reinvoice to the Indian importer. The Agreement recognizes the second invoice price as the transaction value for such cases. This is always at reduced prices and the difference is paid through illegal channels, either through illegal remittances or compensatory supplies through under-valued exports from the same buyer, in which they act as selling agents. These agents usually have close trading relationship with the importers and have regular transactions. They manipulate the commercial documents for mutual benefit at the cost of revenue and violation of foreign exchange regulations.

8. The tendency for under-valuation is on the increase with the application of GATT Valuation Code. Prior to its application, valuation in India was based on the national concept of "actual value" under Article VII of the GATT and this allowed the uplifting of invoice values found to be low compared to other contemporaneous transactions and this acted as a check. With the GATT Valuation Code in operation the stipulation to accept the declared "transactions value" unless there is evidence to the contrary, acts as a great incentive to deliberate under-valuation through collusion between the parties. In fact, importers of same goods from the same suppliers (front companies or agents) have started getting invoices at far less prices after introduction of norms contained in the GATT Valuation Code. This is noticed mostly for goods which are having high rates of duty and are imported in bulk. Valuation of used plant and machinery also poses serious problems on account of deliberate under-valuation. Importers are well aware of the limitations placed on Customs authorities by the Valuation Code and are taking full advantage of the situation. No precise estimate is available on the loss of revenue on this account. However, it can be roughly assessed at 5 to 10 per cent of the total revenue of Rs.180 billion (about US$ 10 billion). This is a large amount for a country like India where customs duties is a major source of Government revenues.

9. This is not a problem faced by India alone. Developing countries who have a high rate of customs duties face the same problem. It is clear that this is one of the main reasons why a number of developing countries have not been able to accede to the Code. It is necessary to recognize these types of under-valuation as a commercial reality and permit suitable adjustments to resolve these difficulties. It could be by way of amendment to Article I of the Agreement or an elaboration of Article 17 to provide suitable flexibility to customs administrations to deal with such situations.

10. One suggestion for overcoming the problem is that appropriate provisions could be made in the national legislation to enable the Customs authorities to shift the onus of proof in suitable cases. However, India does not believe that the solution lies only in making suitable provisions in the national laws and regulations. Once it is recognized that such a problem exists it is preferable to have a multilateral solution incorporated in the Agreement itself which will ensure uniform application. Leaving it to individual signatories to determine the onus of proof for different situations could lead to distortions in the implementation of the Agreement and divergent practices could consequently become barriers to trade.

11. India, therefore, reiterates its proposal to provide adequate flexibility to enable the Customs administration to reject the declared values in the specific situations pointed out in the Indian proposal. The Protocol to the Agreement recognizes that developing countries do have problems in adopting the agreement as such. The provisions of the Protocol are however inadequate as they do not take account of the problems of undervaluation resulting from collusion between the importer and the exporter. The problem therefore needs to be addressed. The solution lies in either amending the agreement or concluding another Protocol to give effect to the Indian proposal. India is also willing to consider alternative ways of finding a solution.