

India - Additional And Extra-Additional Duties On Imports From The United States

(WT/DS360)

Third Party Submission of Australia

Geneva, 10 September 2007

TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Argentina – Textiles</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045
<i>Chile – Price Band System 21.5</i>	Appellate Body Report, <i>Chile – Price Band System, Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 7 May 2007
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Japan – Alcoholic Beverages</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>US – Corrosion-Resistant Steel</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

INTRODUCTION¹

1. In this written submission made under Article 10.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Australia will focus on the following selected issues. Australia reserves its position in relation to any issue not addressed in this submission.
 - a. Whether the Panel has the authority to rule on the Additional Duty (AD) which India claims has been withdrawn;
 - b. Whether the Indian measures are ‘ordinary customs duties’ (OCD) or ‘other duties or charges’ (ODC) within the meaning of Article II:1(b) of the GATT 1994 (‘GATT’) or alternatively are charges of the kind permitted under GATT Article II:2(a); and
 - c. Whether India is correct in asking the Panel not to consider the relevant provisions of India’s *Customs Act* and *Customs Tariff Act* on the grounds that they are discretionary measures which are not challengeable ‘as such’.

A. REMOVAL OF THE ADDITIONAL DUTIES

2. The Panel is not precluded from making findings on measures which are properly within its terms of reference, even where those measures have ceased to exist.² However, a panel need only consider those claims which must be addressed to resolve the matter at issue in the dispute.³
3. If the Panel considers that India’s additional duty (AD) on alcoholic beverages has indeed been withdrawn and has ‘ceased to exist’, it should nevertheless consider whether, in the particular circumstances of this dispute, it is necessary to make findings on the AD in order to resolve the dispute.

B. CONSISTENCY OF THE AD AND “SUCH ADDITIONAL DUTIES AS WOULD COUNTERBALANCE TAXES SUCH AS SALES TAX, VALUE-ADDED TAX, LOCAL TAX OR ANY OTHER CHARGES (“SUAD”) WITH GATT ARTICLE II:1

1. Order of analysis: relationship between GATT Article II:1(a) and GATT Article II:1(b)

4. The United States claims that the AD and SUAD are inconsistent with both paragraphs (a) and (b) of GATT Article II:1. As paragraph (b) prohibits a specific

¹ Australia notes that the United States and India use different terminology to describe the measures at issue in this dispute. For simplicity’s sake, Australia has used India’s terminology throughout this submission. This should not be taken as an indication that Australia supports India’s contention that the United States has mischaracterised the nature of the duties as ‘ordinary customs duties’ or ‘other duties or charges’ within the meaning of GATT Article II:1(b).

² *India – Autos*, paragraph 7.26.

³ *US – Wool Shirts and Blouses*, p. 19; *US – Lead and Bismuth II*, paragraph 71.

kind of practice that will always be inconsistent with paragraph (a), Australia submits that the correct order of analysis is to begin with paragraph (b) before moving (if necessary) to consider paragraph (a).⁴

**2. 'Ordinary Customs Duty' (OCD) or 'Other Duty or Charge' (ODC)
under GATT Article II:1(b)**

5. A threshold issue is whether (as claimed by the United States) the AD and the SUAD are 'other customs duties' (OCDs) or 'other duties and charges' (ODCs) within the meaning of GATT Article II:1(b) *or* whether (as claimed by India) the AD and SUAD instead fall into a separate category of duties permitted under Article II:2(a).
6. There is no definition of either 'ordinary customs duty' or 'other duty or charge' in the GATT. In addition to considering the ordinary meaning of the terms, WTO jurisprudence suggests that determination of whether a measure constitutes an OCD or ODC should be based on the structure, design and application of the specific measure in question. The name or stated purpose the Member imposing the measure ascribes to it is not determinative.⁵
7. The United States has argued "that an 'ordinary customs duty' is a duty – either *ad valorem*, specific or a combination thereof – calculated based on the quantity or value of the good at the time of importation that applies as a matter of course upon a good's importation."⁶
8. India accepts that the AD and SUAD are charges on imports which are levied at the border and expressed in *ad valorem* terms. It disputes, however, that this necessarily makes them either an OCD or an ODC under GATT Article II:1(b). Instead, India claims that the AD and SUAD fall into a separate category of duties permitted under Article II:2(a) as charges imposed with the sole objective of off-setting internal taxes.
9. Australia agrees with India that GATT Article II:2 measures may be based on value or volume and still be distinct from OCDs and ODCs within the meaning of GATT Article II:1(b).⁷ Australia therefore submits that further consideration by the Panel of the measures' overall design, application and structure is necessary in order to decide whether the AD and SUAD fall within the scope of Article II:1(b) or alternatively Article II:2(a).

⁴ *Argentina – Textiles*, paragraph 45.

⁵ See further specifically in relation to GATT Article II:1(b) - *Chile – Price Band System*, paragraphs 264-288; *Chile – Price Band System 21.5*, paragraphs 149; 164-172; 190-226. In addition, in other contexts, for example in examining internal tax measures under GATT Article III, panels and the Appellate Body have emphasised the need to examine the measures structure, design and application rather than statements as to the purpose or intent of the measure. See, e.g., *Japan - Alcoholic Beverages*, p. 29-31.

⁶ First Written Submission of the United States, 24 July 2007, paragraph 43.

⁷ *Chile – Price Band System*, paragraphs 274-275.

10. In the event that the Panel accepts India's argument that its measures are properly within the terms of GATT Article II:2, it follows that they are neither ODCs or ODCs and therefore would be exempt from bound commitments.

C. GATT ARTICLE II:2

Do the disputed measures fall within the scope of GATT Article II:2(a) as charges equivalent to an internal tax?

11. GATT Article II:2(a) permits Members to impose duties in excess of their bound commitments where necessary to counterbalance internal taxes from which imported products are exempt, *provided* that such charges on imports are 'equivalent' to the internal taxes in question.
12. GATT Article II:2(a) requires that, in order to be categorised as 'equivalent' to internal taxes within the meaning of that provision, measures must also be applied in a manner consistent with GATT Article III:2. The United States claims in the alternative that the Indian measures are inconsistent with this requirement.
13. India argues that both the AD and the SUAD are imposed to off-set internal domestic charges on like products. Section 3(1) of India's *Customs Tariff Act* provides that AD be 'equal to the excise duty for the time being leviable on a like article if produced or manufactured in India'. Section 3(5) of that Act provides that SUAD would 'counter-balance the sales tax, value added tax, local tax or any other charges for the time being leviable on a like article on its sale, purchase or transportation in India.' Therefore, on the face of India's legislation, the AD and SUAD could be charges equivalent to internal taxes and within the scope of Article II:2(a).
14. However, in Australia's view, the application of India's measures may result in some imported products incurring charges 'in excess of' those imposed on some like domestic products (counter to the requirements of GATT Article III:2). This is because, as conceded by India, where internal charges are applied at different rates, the charge on imports is set at the *highest internal rate*.⁸ This presumably results in at least some like domestic products (that is, besides those subject to the highest internal duty) being subject to charges lower than those on like imported products. If this is indeed the result, Australia submits that the method used by India to calculate the equivalent charge on imported products would be inconsistent with GATT Article III:2 and would not satisfy the requirements of GATT Article II:2(a).

⁸ First Written Submission of India, 31 August 2007, at paragraph 14 and 15 regarding the AD and paragraphs 20 and 21 regarding the SUAD.

D. MANDATORY VS DISCRETIONARY LEGISLATION AND ‘AS SUCH’ CLAIMS

15. India asserts that the United States has made an ‘as such’ claim in relation to section 12 of the *Customs Act* and section 3 of the *Customs Tariff Act*.⁹ India further argues that the provisions in question are discretionary and that only mandatory measures are challengeable ‘as such’, and requests that the Panel limits its consideration to the relevant Customs Notifications only.¹⁰
16. It is clear that legislation having general application may be challenged ‘as such’.¹¹ The Appellate Body has identified the importance of this facet of the dispute settlement system in protecting ‘*not only existing trade but also the security and predictability needed to conduct future trade.*’¹²
17. However, Australia disagrees with India’s application of a mandatory and discretionary distinction in determining whether measures are challengeable ‘as such’. In *US - Corrosion-Resistant Steel*, the Appellate Body found that “the import of the ‘mandatory/discretionary distinction’ may vary from case to case”; cautioned against “the application of this distinction in a mechanistic fashion”¹³; and stated that there is no reason why “in principle, non-mandatory measures cannot be challenged ‘as such’”¹⁴. The Appellate Body concluded that whether a challenged measure is mandatory is not a preliminary jurisdictional matter but is “relevant, if at all, only as part of the Panel’s assessment of whether the measure is, as such, inconsistent with particular obligations”¹⁵.
18. Australia therefore submits that a mandatory/discretionary distinction is not determinative of whether a Panel has *jurisdiction* to consider the relevant measures. Further, the Appellate Body has left open the possibility that discretionary legislation could be found to be inconsistent with WTO obligations.

⁹ First Written Submission of India, 31 August 2007, paragraph 39.

¹⁰ *Ibid.*, paragraphs 39-41.

¹¹ As observed by the Appellate Body, a long line of cases under the GATT ‘firmly established’ the principle that complaining parties are permitted to challenge measures ‘as such’ – see *US-1916 Act*, paragraph 60.

¹² *US – Corrosion-Resistant Steel*, paragraph 82.

¹³ *Ibid.*, paragraph 93.

¹⁴ *Ibid.*, paragraph 88.

¹⁵ *Ibid.*, paragraph 89.