

**ACWL SEMINAR**

25 November 2008

**APPELLATE BODY REPORT IN INDIA - ADDITIONAL DUTIES****Customs Duties and other Charges on Importation  
Basic Principles set out in GATT Articles II:1(b) II:2(a) and III:2**

1. The basic provisions of the GATT governing customs duties and other charges imposed on the importation of products of other Members are paragraphs 1(b) and 2 of Article II. The basic rules set out in Article II:1(b) read as follows:

*The products described in ... the Schedule... shall, on their importation ... , be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation....*

2. The first sentence of paragraph 1(b) obliges WTO Members to exempt the products described in their Schedule of Concessions from ordinary customs duties in excess of those set forth in that Schedule (generally described as “bound rates”). The second sentence obliges Members to exempt such products from “all other duties or charges of any kind imposed on or in connection with importation”. The two sentences of Article II:1(b) have different objectives: According to the first sentence no customs duty may be levied that exceeds the bound rate. It is intended to protect the results of market access negotiations. The second sentence obliges Members to reduce the number and diversity of import duties or charges by prohibiting in principle all duties and charges other than ordinary customs charges. It is intended to facilitate trade by simplifying customs procedures. It is thus not sufficient that the total of all duties and charges levied on or in connection with the importation of a bound item does not exceed the bound rate. Duties and charges of any kind other than ordinary customs duties are in principle prohibited whatever their level.
3. There are a number of important exceptions to the general prohibition of other duties and charges on the importation of products included in the Schedule of Concessions. The first is contained in the second sentence of Article II:1(b) itself. This provision permits other duties and charges that are not

*... in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date...*

4. This exemption has been further elaborated in the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. Paragraph 2 of the Understanding defines the “date of this Agreement” as follows:

*The date as of which 'other duties or charges' are bound, for the purposes of Article II, shall be 15 April 1994. 'Other duties or charges' shall therefore be recorded in the Schedules at the levels applying on this date.*

5. Paragraph 7 of the Understanding provides:

*Other duties or charges' omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 ..., shall not subsequently be added to it and any 'other duties or charges' recorded at a level lower than that prevailing at the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.*

6. The Panel in *Dominican Republic – Import and Sale of Cigarettes* noted that Members were required under the above provisions of the Understanding to record all other duties and charges as applied on 15 April 1994 within six months of the date of deposit of the instrument by which they accepted the WTO Agreement and that no further duties and charges could be recorded after that point in time. The Panel concluded from this that Article II:1(b), second sentence read together with the Understanding meant that

*imported products shall be exempted from all "other duties or charges" of any kinds in excess of those as validly recorded in the Schedule of the Member concerned.<sup>1</sup>*

7. The advantage of the Understanding is that each Member’s Schedule now clearly indicates not only the maximum rates of ordinary customs duties the Member may levy in accordance with the first sentence of Article II:1(b) but also all other duties and charges that the Member may impose in accordance with the second sentence of that provision.

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<sup>1</sup> WT/DS302/R, para. 7.88.

8. A further exemption from the general prohibition of other duties and charges on bound items is contained in Article II:2, which reads as follows:

*Nothing in this Article shall prevent [Member] from imposing at any time on the importation of any product:*

*(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;*

*(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

*(c) fees or other charges commensurate with the cost of services rendered.*

9. Articles III, VI and VIII of the GATT set out the conditions under which charges equivalent to internal taxes, and anti-dumping or countervailing duties and fees for services rendered may be levied. This raises the question of why it was necessary to provide in Article II:2 for an explicit permission to levy charges consistent with those Articles. The answer is that, while Articles III, VI and VIII permit the levying of specific charges, they do *not* permit their imposition *as a condition on the importation* of products. For instance, while Article VI:2 states that Members “may levy on any dumped product an anti-dumping duty”, it does not exempt anti-dumping duties from the general prohibition of duties and charges other than ordinary customs duties on the importation of bound items set out in Article I:1(b). Given this general prohibition, the right to levy an anti-dumping duty on dumped products must be distinguished from the right to levy such a duty as a condition of importation. Articles III, VI and VIII can consequently not be interpreted to imply the right to burden the process of importation with the collection of the charges they regulate. That right is conferred by Article II:2. In short: Articles III, VI and VIII permit Members to impose specific charges; Article II:2 accords them the right to levy them as a condition of importation notwithstanding the general prohibition to burden the process of importation with the levying of charges other than ordinary customs duties set out in Article II:1(b), second sentence.

10. In respect of charges equivalent to an internal tax, Article II:2 has further functions. The application of internal measures is governed by the national treatment provisions of Article III of the GATT. In respect of internal taxes, Article III:2 states:

*The products of the territory of any [WTO Member] imported into the territory of any other [WTO Member] shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.*

11. The Note *ad* Article III provides in relevant part:

*Any internal . . . charge . . . which applies to an imported product and to the like domestic product and is collected . . . in the case of the imported product at the time or point of importation is nevertheless to be regarded as . . . internal charge . . . subject to the provisions of Article III.*

12. This Note defines the scope of application of Article III. It makes clear that an internal charge is not turned into a “border charge” subject to Article II:1(b) merely because it is collected in respect of imported products at the time or point of importation. However, the Note does not define to the scope of Article III to comprise charges levied “on the importation” of products equivalent to internal taxes on like products. Such charges are levied as a condition of importation - and consequently not on products already imported - and therefore fall under the general prohibition of other duties and charges set out in Article II:1(b), second sentence. The function of Article II:2(a) is to exempt border charges that are not internal taxes covered by Article III but are equivalent to such taxes from this general prohibition.

13. To summarise: An internal charge consistent with Article III may be imposed in respect of imported products “at the time or point of importation” according to the Note ad Article III and a border charge that is equivalent to an internal tax consistent with Article III may be imposed according to Article II:2(a). WTO Members may thus use their customs services to collect their internal charges in respect of imported products and may make the importation of products conditional upon the payment of charges equivalent to internal taxes on like domestic products.

14. The principles explained above are summarised in the table on the next page.

**Customs Duties and other Charges on Importation**  
**Basic Principles of set out in GATT Articles II:1(b) II:2(a) and III:2**

<b>CHARGE</b>	<b>PRINCIPLE</b>	<b>MAIN PROVISIONS</b>
<b>Ordinary customs duties</b>	<b>Permitted</b> but must not exceed level of tariff binding	Article II:1(b) of the GATT
<b>Other duties and charges</b>	<b>Prohibited on bound items</b> except if validly recorded in Schedule	Article II:1(b) of the GATT and Understanding on Article II:1(b)
<b>Internal charges collected or enforced at time or point of importation</b>	<b>Permitted</b> provided the charge is consistent with Article III:2	Note to Article III of the GATT
<b>Charges on importation equivalent to internal taxes</b>	<b>Permitted</b> provided the charge is consistent with Article III:2	Article II:2(a) of the GATT