

## INDIA – MEASURES AFFECTING THE AUTOMOTIVE SECTOR

### Report of the Appellate Body WT/DS146/AB/R, WT/DS175/AB/R

*Adopted by the Dispute Settlement Body  
 on 5 April 2002*

India – *Appellant*

European Communities – *Appellee*

United States – *Appellee*

Korea – *Third Participant*

Present:

Ganesan, Presiding Member

Sacerdoti, Member

Taniguchi, Member

1. This appeal concerns the Panel Report, *India – Measures Affecting the Automotive Sector* (the "Panel Report").<sup>1</sup> The Panel was established to consider complaints by the United States and the European Communities relating to certain aspects of India's automotive components licensing policy as set forth in India's Public Notice No. 60<sup>2</sup> and the Memoranda of Understanding signed pursuant thereto. Public Notice No. 60 required each passenger car manufacturer in India to sign a Memorandum of Understanding ("MOU") with the Director General of Foreign Trade, and specified a number of conditions to be included in such MOUs.<sup>3</sup>

2. This dispute concerns two of the conditions stipulated by Public Notice No. 60 and included in each MOU, namely: (i) an "indigenization" requirement, whereby each car manufacturer was obliged to achieve indigenization, or local content, of a minimum level of 50 percent by the third year from the date of its first import of cars in the form of completely and semi-knocked down kits ("CKD/SKD kits"), or certain automobile components, and 70 percent by the fifth year from that date; and (ii) a "trade balancing requirement", whereby each car manufacturer was obliged to balance, over the period of the MOU, the value of its imports of CKD/SKD kits and components with the value of its exports of cars and components.<sup>4</sup> At the time Public Notice No. 60 was issued, India maintained import restrictions and a discretionary import licensing scheme for, *inter alia*, automobile CKD/SKD kits and components. A manufacturer that failed to comply with the conditions set forth in Public Notice No. 60 and the MOUs could be denied a licence to import CKD/SKD kits and components. India abolished its import restrictions and related discretionary import licensing scheme,

<sup>1</sup> WT/DS146/R, WT/DS175/R, 21 December 2001.

<sup>2</sup> Public Notice No. 60 was issued on 12 December 1997 by the Government of India's Ministry of Commerce, acting pursuant to the Foreign Trade (Development and Regulation) Act of 1992. (Panel Report, para. 2.4)

<sup>3</sup> Panel Report, paras. 2.4 and 2.5 and Annex Tables 1 and 2.

<sup>4</sup> *Ibid.*

---

Report of the Appellate Body

---

including the restrictions and licensing requirements applicable to CKD/SKD kits and components, on 1 April 2001. This occurred during the course of the Panel proceedings. The relevant factual aspects of this dispute are set out in greater detail in paragraphs 2.1 through 2.5 of the Panel Report.

3. On 15 May 2000, the United States requested the establishment of a panel to examine the consistency of the measures at issue with Articles III:4 and XI:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and Articles 2.1 and 2.2 of the *Agreement on Trade-Related Investment Measures* (the "TRIMS Agreement").<sup>5</sup> On 12 October 2000, the European Communities requested the establishment of a panel to examine the consistency of the measures at issue with Articles III:4 and XI:1 of the GATT 1994, and Article 2.1 of the *TRIMS Agreement*.<sup>6</sup> The European Communities also specifically requested the Panel to find that the measures at issue were inconsistent with these provisions of the covered agreements as of the date of establishment of the Panel, and that they had remained so after 1 April 2001.<sup>7</sup> Pursuant to Article 10.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Korea and Japan reserved their third party rights in the dispute.<sup>8</sup>

4. In its Report, circulated on 21 December 2001, the Panel found that:

- (a) India acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing on automotive manufacturers, under the terms of Public Notice No. 60 and the MOUs signed thereunder, an obligation to use a certain proportion of local parts and components in the manufacture of cars and automotive vehicles ("indigenization" condition);
- (b) India acted inconsistently with its obligations under Article XI of the GATT 1994 by imposing on automotive manufacturers, under the terms of Public Notice No. 60 and the MOUs signed thereunder, an obligation to balance any importation of certain kits and components with exports of equivalent value ("trade balancing" condition); [and]
- (c) India acted inconsistently with its obligations under Article III:4 of the GATT 1994 by imposing, in the context of the trade balancing condition under the terms of Public Notice No. 60 and the MOUs signed thereunder, an obligation to offset the amount of any purchases of previously im-

---

<sup>5</sup> WT/DS175/4.

<sup>6</sup> WT/DS146/4. At its meeting on 17 November 2000, the Dispute Settlement Body agreed, in accordance with Article 9.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, that the Panel established on 27 July 2000 to examine the complaint by the United States should also examine the complaint by the European Communities. (Panel Report, para. 1.4; WT/DSB/M/92)

<sup>7</sup> Panel Report, para. 3.5.

<sup>8</sup> *Ibid.*, para. 1.6.

ported restricted kits and components on the Indian market, by exports of equivalent value.<sup>9</sup>

5. In the light of its findings that the measures at issue were inconsistent with Articles III:4 and XI:1 of the GATT 1994, the Panel was of the view that it was not necessary to address the claims made by the European Communities and the United States under the *TRIMS Agreement*.<sup>10</sup>
6. The Panel then went on to give "separate consideration" to:
  - ... whether the events which took place subsequently, including on or after 1 April 2001, might have affected the existence of any violations identified and ... whether those events affect the nature or range of any recommendations [the Panel] may make to the DSB in accordance with Article 19.1 of the DSU.<sup>11</sup>
7. More specifically, the Panel:
  - ... felt that it would not be making an "objective assessment of the matter before it", or assisting the DSB in discharging its responsibilities under the DSU in accordance with Article 11 of the DSU, had it chosen not to address the impact of events having taken place in the course of the proceedings, in assessing the appropriateness of making a recommendation under Article 19.1 of the DSU.<sup>12</sup>
8. Having considered the events that took place during the Panel proceedings, the Panel found that:
  - ... the indigenization conditions contained in Public Notice No. 60 and in the MOUs, as they have continued to exist and apply after 1 April 2001, have remained in violation of the relevant GATT provisions.<sup>13</sup>
  - ...
  - ... the trade balancing conditions contained in Public Notice No. 60 and in the MOUs, as they have continued to exist and apply after 1 April 2001, have remained in violation of the relevant GATT provisions.<sup>14</sup>
9. The Panel consequently recommended that the Dispute Settlement Body (the "DSB") request India to bring its measures into conformity with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").<sup>15</sup>

<sup>9</sup> Panel Report, para. 8.1.

<sup>10</sup> *Ibid.*, para. 7.324.

<sup>11</sup> *Ibid.*, para. 8.3.

<sup>12</sup> *Ibid.*, para. 8.28.

<sup>13</sup> *Ibid.*, para. 8.47.

<sup>14</sup> Panel Report, para. 8.61.

<sup>15</sup> *Ibid.*, para. 8.65.

---

Report of the Appellate Body

---

10. On 31 January 2002, India notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). In this Notice of Appeal, India stated that:

India seeks review by the Appellate Body of the Panel's conclusion that Articles 11 and 19.1 of the DSU required it to address the question of whether the measures found [to] be inconsistent with Articles III:4 and XI:1 of the General Agreement on Tariffs and Trade 1994 ("GATT") had been brought into conformity with the GATT as a result of measures taken by India during the course of the proceedings.

India further seeks review by the Appellate Body of the Panel's conclusion that the enforcement of the export obligations that automobile manufacturers incurred until 1 April 2001 under India's former import licensing scheme is inconsistent with Articles III:4 and XI:1 of the GATT.

India considers these conclusions of the Panel to be in error and based upon erroneous findings on issues of law and related legal interpretations.<sup>16</sup>

11. On 11 February 2002, India filed an appellant's submission.<sup>17</sup> The European Communities and the United States each filed an appellee's submission on 25 February 2002.<sup>18</sup> On the same day, Korea filed a third participant's submission.<sup>19</sup>

12. On 25 February 2002, the Appellate Body received a letter from Japan indicating that Japan would not be filing a written submission in this appeal, but that Japan wished to attend the oral hearing.<sup>20</sup> By letter dated 27 February 2002, the Appellate Body Secretariat informed Japan, the participants and the third participant that the Division hearing this appeal was "inclined to allow Japan to attend the oral hearing as a passive observer, if none of the participants or third participants object." On 1 March 2002 and 4 March 2002, respectively, the Appellate Body received written responses from the European Communities and the United States.

13. Taking account of the views expressed by the European Communities and the United States, the Division on 5 March 2002 informed Japan, the participants, and the third participant, that although Japan had not filed a written submission as a third participant, Japan would be allowed to attend the oral hearing

---

<sup>16</sup> WT/DS146/8, WT/DS175/8, 31 January 2002.

<sup>17</sup> Pursuant to Rule 21(1) of the *Working Procedures*.

<sup>18</sup> Pursuant to Rule 22(1) of the *Working Procedures*.

<sup>19</sup> Pursuant to Rule 24 of the *Working Procedures*.

<sup>20</sup> Japan had reserved its rights to participate as a third party in the proceedings before the Panel; Panel Report, para. 1.6.

as a passive observer, that is, to attend the oral hearing and hear the oral statements and responses to questioning by the participants and the third participant in this appeal.

14. In accordance with the Working Schedule for Appeal communicated to the parties and the third parties on 1 February 2002, the oral hearing in the appeal was scheduled to be held on 15 March 2002.<sup>21</sup>

15. On 14 March 2002, the Appellate Body received a letter from India, in which India stated that:

Pursuant to Rule 30(1) of the *Working Procedures for Appellate Review*, this is to inform the Appellate Body that India is withdrawing the above-mentioned appeal; oral hearing on this is scheduled for 15 March 2002. Inconvenience caused to the Appellate Body, Secretariat, the other parties and the third participants is deeply regretted.

16. Rule 30(1) of the *Working Procedures* provides that:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

17. Upon receipt of India's letter of 14 March 2002, the Appellate Body on the same day notified the DSB, pursuant to Rule 30(1) of the *Working Procedures*, that India "has notified the Appellate Body that India is withdrawing its appeal" in this dispute<sup>22</sup>, and simultaneously informed India, the European Communities, the United States, Korea and Japan that the oral hearing in this appeal was cancelled.

18. In view of India's withdrawal of the appeal by its letter of 14 March 2002, the Appellate Body hereby completes its work in this appeal.

<sup>21</sup> Pursuant to Rule 27 of the *Working Procedures*.

<sup>22</sup> WT/DS146/9, WT/DS175/9, 14 March 2002.

## INDIA – MEASURES AFFECTING THE AUTOMOTIVE SECTOR

### Report of the Panel WT/DS146/R, WT/DS175/R

*Adopted by the Dispute Settlement Body  
on 5 April 2002*

#### TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1832
II. FACTUAL ASPECTS .....	1834
A. The Licensing Regime .....	1834
B. Public Notice No. 60 and the MOUs.....	1835
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS .....	1836
A. US Claims and Requests for Findings.....	1836
B. EC Claims and Requests for Findings.....	1836
C. India's Requests for Findings .....	1837
IV. ARGUMENTS OF THE PARTIES .....	1839
A. Factual Arguments .....	1839
1. The Licensing Regime .....	1839
2. Public Notice No. 60 and the MOUs .....	1841
(a) The "indigenization" Requirement (paragraph 3 (iii) of Public Notice No. 60) and paragraph III(IV) of the MOU).....	1842
(b) The "trade balancing" Requirement (paragraph 3 (iv) of Public Notice No. 60 and paragraph III (vi) of the MOU) .....	1844
B. Has The Matter Been Settled and Adjudicated?.....	1849
1. Has the Matter Been Settled?.....	1852
2. Has the Matter Already Been Adjudicated?.....	1860
(a) India – Quantitative Restrictions .....	1860
(i) The Notion of Res Judicata .....	1866
(b) The Provisions Are an Inherent Part of the Licensing Scheme that Must be Eliminated....	1868
(i) The Notion of Abusive Splitting .....	1872

---

 Report of the Panel
 

---

	Page
C. Are the Measures within the Terms of Reference of the Panel?.....	1877
1. Do the Measures Applied After 1 April 2001 Fall Outside the Terms of Reference?.....	1877
(a) The Method of Enforcement before and after 1 April 2001 .....	1880
D. Claims under GATT 1994 and TRIMs.....	1898
1. Article III:4 .....	1898
(a) The Indigenization Requirement .....	1900
(b) The Trade Balancing Requirement .....	1905
2. Article XI:1 .....	1908
(i) The Indigenization Requirement .....	1908
(ii) The Trade Balancing Requirement.....	1908
(a) Are the Measures Justified by Article XVIII:B of the GATT and Articles 3 and 4 of the TRIMs Agreement? .....	1920
(i) Procedural Requirements of the Balance of Payments Provisions .....	1924
(ii) Substantive Requirements of the Balance of Payments Provisions .....	1925
(iii) The Burden of Proof.....	1929
(iv) Relevance of the India – Quantitative Restrictions Case .....	1934
3. TRIMs Agreement .....	1936
V. ARGUMENTS OF THE THIRD PARTIES .....	1943
1. The Agreements Regarding the Indian Measures Must be Respected and Enforced.....	1943
2. The Measures that India May Take by 1 April 2001 are not, and as a Matter of Logic Cannot be, Properly before the Panel.....	1944
3. Prospective Measures .....	1945
VI. INTERIM REVIEW .....	1946
A. Comments on the Descriptive Part.....	1947
1. Comments by the United States .....	1947
2. Comments by India.....	1947
3. Comments by the European Communities.....	1948
B. Comments on the Findings and Conclusions .....	1948
1. Comments by the United States .....	1948

		India – Autos
		Page
2.	Comments by the European Communities.....	1949
3.	Comments by India .....	1950
(a)	General Comment in Respect of India's Procedural Rights in the Proceedings .....	1951
(b)	India's Argument that the Matters Addressed in the Recommendations Section Should be Left to a Compliance Panel.....	1953
(c)	India's Argument that the Panel could not "properly" Conclude that the Violation is Still in Existence .....	1955
(d)	India's Argument that the Panel Inappropriately Prescribes a "retrospective" Remedy.....	1957
VII.	FINDINGS .....	1958
A.	Clarification of the Claims in the Course of the Proceedings and Requests for Preliminary Rulings .....	1959
B.	Clarification of the Measures within the Terms of Reference of this Panel.....	1962
1.	Measures Identified in the Complainants' Requests for Establishment of a Panel .....	1963
2.	Evolution of the Measures in the Course of the Proceedings .....	1965
3.	Measures not within our Terms of Reference .....	1967
C.	The Panel's Competence to Consider the Matter before it .....	1969
1.	Are any of the United States' Claims Barred by the Principle of <i>res judicata</i> ?.....	1970
(a)	Arguments of the Parties and Scope of India's Invocation of the Doctrine of <i>res judicata</i> .....	1970
(b)	Role of India's Import Licensing System in the United States' Claims .....	1971
(c)	General Approach to the <i>res judicata</i> Arguments .....	1972
(i)	The Matter before this Panel .....	1977
(ii)	The Matter Ruled on by the India – Quantitative Restrictions Panel .....	1979
(iii)	Comparison between the Matter Ruled on by the India – QRs Panel and the Matter before this Panel.....	1981



## Report of the Panel

	Page
	A Comparison of the Measures Expressly Considered..... 1982
	A Comparison of the Express Claims..... 1983
	Are the Matters the Same?..... 1984
	Conclusion..... 1987
1.	Has Any Part of the Matter before this Panel Been Settled Through a Mutually Agreed Solution? ..... 1988
	(a) The Mutually Agreed Solution in the <i>India – Quantitative Restrictions</i> Dispute with the EC ..... 1988
	(b) Relevance of Mutually Agreed Solutions in Subsequent Proceedings ..... 1989
	(c) The Scope of the Mutually Agreed Solution Between the European Communities and India..... 1990
	(d) Conclusion..... 1995
2.	Measures to be Eliminated in the Course of Implementing the Results of the <i>India □ Quantitative Restrictions</i> Dispute and Abusive Splitting of a Dispute ..... 1996
	(a) Abusive Splitting ..... 1996
	(b) Unnecessary Litigation ..... 1997
3.	Conclusion ..... 1999
D.	Order of Examination of the Claims ..... 1999
E.	Consistency of the Indigenization Condition with the GATT 1994..... 2003
	1. Claims under Article III:4 of GATT 1994 ..... 2004
	(a) Like Products..... 2005
	(b) "Laws, regulations or requirements" ..... 2005
	(i) The Notion of "requirement" within the Meaning of Article III:4 ..... 2006
	(ii) The Indigenization Condition as a "requirement" ..... 2008
	(c) ... Affecting the Internal Sale, Offering for Sale, Purchase (...) of the Products ..... 2010
	(d) Whether Imported Products are Accorded Less Favourable Treatment..... 2010
	(e) Conclusion..... 2012
	2. Claim under Article XI ..... 2012

	Page
F. GATT Claims Concerning the Trade Balancing Condition ..	2013
1. Factual Aspects of the Measure .....	2013
2. Order of Analysis of the Claims .....	2014
3. Relationship between Articles III and XI.....	2015
4. Claims under Article XI:1.....	2016
(a) Scope of the European Communities' Claim ..	2016
(i) The Scope of the Trade Balancing Obligation.....	2017
(ii) The Continued Enforceability of the MOUs after 1 April 2001 .....	2019
(b) Arguments of the Parties .....	2020
(c) Scope of Article XI:1.....	2021
(i) The Notion of "measures" within the Meaning of Article XI:1 .....	2021
(ii) "Restriction on importation" within the Meaning of Article XI:1 and "border measures" .....	2023
(d) The Trade Balancing Condition as a "restriction ... on importation" .....	2025
(i) The Notion of "restriction ... on importation".....	2025
(ii) Analysis of the Trade Balancing Condition.....	2029
5. Balance-of-Payments Defense .....	2030
6. Claims under Article III:4.....	2032
(a) Purchases of Restricted Imported Kits and Components on the Domestic Market .....	2033
(i) Like Products.....	2034
(ii) Laws, Regulations or Requirements....	2034
(iii) Affecting Internal Sale, Use, ... ..	2034
(iv) Whether the Measure Affords Less Favourable Treatment to Imported Products.....	2036
7. Ruling on the Consistency of Public Notice No. 60 with the GATT 1994.....	2036
(a) Consistency of Public Notice No. 60 with Article III:4 of GATT 1994 .....	2037