

***INDIA – ADDITIONAL AND EXTRA-ADDITIONAL DUTIES ON
IMPORTS FROM THE UNITED STATES***

(WT/DS360)

**FIRST SUBMISSION OF
THE UNITED STATES OF AMERICA**

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| <i>India – Quantitative Restrictions</i> | Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Industrial and Textile Products</i> , WT/DS90/AB/R, adopted 22 September 1999 |
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| <i>Argentina – Textiles</i> | Appellate Body Report, <i>Argentina – Measures Affecting Footwear, Apparel and Other Items</i> , WT/DS56/AB/R, adopted on 22 April 1998 |
| <i>US - Certain EC Products</i> | Appellate Body, Report, <i>United States – Certain Import Measures on Products from the European Communities</i> , WT/DS165/AB/R, adopted on 10 January 2001 |
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| <i>Japan – Alcohol II</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 |
| <i>Chile – Alcohol</i> | Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000 |
| <i>Belgian Family Allowances</i> | GATT Panel Report, <i>Belgian Family Allowances</i> , BISD 1S/59, adopted 7 November 1952 |

*Dominican Republic –
Cigarettes*

Panel Report, *Dominican Republic - Measures Affecting the
Importation and Internal Sale of Cigarettes*, WT/DS302/R, 26
November 2004

I. INTRODUCTION

1. This dispute concerns the most basic of WTO claims: a breach of the bound rates of customs duty set forth in a Member's Schedule to the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). This dispute involves alcoholic beverages as well as a number of other products for which India imposes customs duties in excess of bound rates set forth in its Schedule to the GATT 1994.¹

2. In its WTO Schedule, India committed that ordinary customs duties would not exceed 150 percent *ad valorem*, and that it would not impose other duties or charges on imports of alcoholic beverages. India, however, has imposed ordinary customs duties on imports of alcoholic beverages from the United States that result in ordinary customs duties on these imports as high as 550 percent. These duties are, therefore, inconsistent with India's obligation under Article II:1(a) and (b) of the GATT 1994 not to apply ordinary customs duties or other duties or charges in excess of those set forth in its WTO Schedule or to accord less favorable treatment to imports than set forth in its WTO Schedule. India imposes these customs duties by levying an "additional customs duty" and an "extra-additional customs duty" in addition to and on top of a "basic customs duty" on imports of alcoholic beverages. India levies these duties through the following measures:

- Section 12 of the Customs Act, 1962 ("Customs Act") requiring the collection of customs duties as specified in the Customs Tariff Act, 1975;²
- Sections 2 and 3 and the First Schedule of the Customs Tariff Act, 1975 ("Customs Tariff Act") requiring the collection of a "basic customs duty" as well as an "additional customs duty", providing for the collection of an "extra-additional customs duty", and setting forth rates of basic customs duty;³
- Customs notices issued pursuant to Section 25 of the Customs Tariff Act setting set forth applied rates of basic customs duty that differ from those set forth in the First Schedule to the Customs Tariff Act, including Customs Notification 20/1997 and 11/2005;⁴
- Customs Notification 32/2003 setting forth rates of additional customs duty on alcoholic beverages;⁵ and

¹ GATT 1994, Marakesh Protocol, Schedule XII: India, Exhibit US-12. Exhibit US-12 includes US-12A through 12H representing India's original Uruguay Round Schedule and subsequent certified modifications in 1997 and 2003.

² Customs Act, Section 12, Exhibit US-2.

³ Customs Tariff Act, Sections 2-3, Exhibit US-3A; Customs Tariff Act, First Schedule, Exhibit US-3B.

⁴ See Customs Notification 20/1997 (March 1, 1997), Exhibit US-4; Customs Notification 11/2005 (March 1, 2007), Exhibit US-5.

⁵ Customs Notification 32/2003 (March 1, 2003), Exhibit US-6. On July 3, 2007, India appears to have issued a customs notification exempting alcoholic beverages from the rates of additional customs duty set forth in Customs Notification 32/2003, although Section 3(1) of the Customs Tariff Act requiring collection of the additional customs

- Customs Notification 19/2006 requiring the collection of an “extra-additional customs duty” on any good specified under the First Schedule to the Customs Tariff Act including alcoholic beverages.⁶

Imposed in conjunction with the basic customs duty, the additional customs duty and extra-additional customs duty on alcoholic beverages are each inconsistent with Article II:1(a) and (b) of the GATT 1994.

3. The extra-additional customs duty is also inconsistent with Article II:1(a) and (b) of the GATT 1994 as imposed on a number of imports other than alcoholic beverages, as imposition of the extra-additional customs duty on such imports likewise results in customs duties that exceed those set forth in India’s WTO Schedule. These products include certain agricultural products such as milk, raisins and orange juice, as well as various other products, including those listed in Exhibit US-1.

4. The United States respectfully requests that the Panel find that India’s measures are inconsistent with GATT 1994 Article II:1(a) and (b), and that it recommend that India bring these measures into conformity with its obligations under the GATT 1994.

II. PROCEDURAL BACKGROUND

5. On March 6, 2007, the United States requested consultations with the Government of India pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII:1 of GATT 1994, regarding India’s additional customs duty and extra-additional customs duty on imports from the United States. This request was circulated to WTO Members on March 12, 2007 (WT/DS360/1). Pursuant to this request, the United States and India held consultations on April 13, 2007. The European Communities (“EC”) were joined in the consultations. These consultations failed to result in a mutually satisfactory resolution to this dispute.

6. On May 24, 2007, the United States requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS308/5). The Dispute Settlement Body (“DSB”) considered this request at its meetings of June 4 and June 20, 2007, and established the Panel on June 20 with standard terms of reference as follows:

duty remains in place. The U.S. claims concern measures India imposed at the time of the Panel’s establishment on June 20, 2007 and, accordingly, are not based on any effect the July 3, 2007 customs notification may have had on the collection of the additional customs duty on alcoholic beverages. *See supra* Section III and Section IV.A (providing additional information with respect to this issue).

⁶ Customs Notification 19/2006 (March 1, 2006), Exhibit US-7.

To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS360/5, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁷

Australia, Chile, the EC, Japan, and Vietnam have reserved third party rights in the dispute.

7. The establishment of this Panel follows the establishment of a panel on April 24, 2007 to consider similar claims raised by the EC against the additional and extra-additional customs duties on imports of wine and distilled spirits (WT/DS352).⁸ On July 3, 2007, the United States along with the EC and India agreed to have the same panelists, working procedures and schedule for both disputes, but to have separate panel reports. However, on July 13, 2007, the EC requested, pursuant to DSU Article 12.12, that the panel in DS352 suspend its work.⁹ The Panel granted that request on July 16, 2007.¹⁰

III. FACTUAL BACKGROUND

A. Products

8. The products at issue in this dispute are beer, wine and distilled spirits (“alcoholic beverages”) classified under headings 2203 (beer), 2204, 2205, 2206 (wine) and 2208 (distilled spirits) of the Harmonized System (“HS”), as well as other imports such as those listed in Exhibit US-1. The former include still and sparkling wines, vermouth and other fortified wines, and alcoholic beverages distilled from agricultural materials such as brandy, whisky, bourbon, gin, and rum.

9. The products listed Exhibit US-1A include a number of agricultural products, such as milk, raisins and orange juice, and the products listed in Exhibit US-1B include industrial products falling mainly under HS chapters 84, 85 and 90. As elaborated in Section V, the products listed in Exhibit US-1 have in common the fact that application of the extra-additional customs duty, in conjunction with the basic customs duty, results in ordinary customs duties in excess of the duties set forth in India’s Schedule.¹¹

⁷ WT/DS360/6 (July 3, 2007).

⁸ WT/352/5 (June 21, 2007).

⁹ Letter to from Minister-Counselor R. Raith to Chairman of the DSB (July 13, 2007); WT/352/6 (July 17, 2007).

¹⁰ WT/DS352/6 (July 17, 2007).

¹¹ GATT 1994, Marakesh Protocol, Schedule XII: India, Exhibit US-12. Exhibit US-1 includes certified modifications made to Schedule XII subsequent to the Uruguay Round.

10. India is a major market for distilled spirits and a small but growing market for wine and beer. In 2006, retail sales of distilled spirits in India were valued at approximately 16.2 billion USD (115 million nine-liter case in volume terms).¹² Of this, 13.08 billion USD was attributed to sales of whiskey (78 million nine-liter cases in volume terms). With respect to wine, consumption (imports plus domestic production) totaled 498,000 nine-liter cases (1545 million Rs in value terms) in 2004.¹³ For beer, consumption in India in 2006 totaled 132.7 million cases (up from 104.3 million cases in 2005).¹⁴ The Indian beer, wine and spirit markets have grown significantly over recent years and are expected to continue to do so. India is the largest, and fastest growing, whiskey market in the world,¹⁵ and has been noted as “one of the hottest growth spots for alcoholic beverage consumption globally.”¹⁶ Wine is helping to fuel the latter, with the wine market expected to grow by 30 percent by 2010.¹⁷ Beer consumption is expected to grow by 15 percent a year over the next ten years.¹⁸ Despite being a leading producer and exporter of wine and distilled spirits worldwide, U.S. exports to India remain small in comparison, or in the case of beer non-existent.¹⁹ In 2004, total world wine exports comprised only 15 percent of the Indian wine market and in 2006 total distilled spirits exports comprised less than one percent of the Indian distilled spirits market.²⁰

11. Prior to imposition of the additional customs duty, India imposed quantitative restrictions on a number of imports, including alcoholic beverages. The restrictions, which strictly limited the quantity of alcoholic beverage imports into India, were found inconsistent with India’s WTO commitments.²¹ In response to the DSB’s recommendations and rulings, India agreed to eliminate the restrictions in two stages, by April 1, 2000, for an initial list of products and by

¹² Euromonitor International: Country Market Insight, Alcoholic Drinks - India, June 2007, Tables 1 and 2, pages 13-14.

¹³ G.S. Karibasappa, *et alia*, *Present Scenario of Wine Industry in India* (July 25, 2006), available at <http://indianwine.com/cs/blogs/about_wine/archive/2006/06/25/984.aspx>.

¹⁴ Jane Sina, *Beer Consumption in Country Hit New High*, Beverage Manager (April 7, 2007), Exhibit US-17.

¹⁵ Boby Kurian, *India Beats US to Become World’s Largest Whiskey Market*, Economic Times Online (May 2, 2006), Exhibit US-14.

¹⁶ Boby Kurian, *Jim Beam’s Ready to Cheer Spirits Here*, Times News Network (July 25, 2006), Exhibit US-13.

¹⁷ Amrit Dhillon, *India Uncorks a Thirst for Wine* (April 28, 2007); see also See Ahmed, *Indians Embrace Wine-Drinking*, BBC News (April 2, 2004), Exhibit US-15.

¹⁸ Nandini Lakshman, *The Great Beer Rush*, Business Week (April 23, 2007), Exhibit US-16.

¹⁹ Over the 2000 to 2005 period, U.S. exports of wine and spirits worldwide averaged approximately \$630 million (USD) and \$633 million (USD), respectively; whereas in 2005, U.S. exports of wine and distilled spirits to India totaled only \$376,000 (USD) and \$1.2 million (USD) respectively. U.S. Department of Commerce, National Trade Data, available at <<http://tse.export.gov>>. Bourbon and Tennessee Whiskey accounted for vast majority of U.S. distilled spirits exports (73 percent).

²⁰ G.S. Karibasappa, *et alia*, *Present Scenario of Wine Industry in India* (July 25, 2006), available at <http://indianwine.com/cs/blogs/about_wine/archive/2006/06/25/984.aspx>; U.S. Department of Commerce, National Trade Data, available at <<http://tse.export.gov>>; Euromonitor International: Country Market Insight, Alcoholic Drinks - India, June 2007, Tables 1 and 2, pages 13-14..

²¹ Panel Report, *India – Quantitative Restrictions*, para. 6.1; Appellate Body Report, *India – Quantitative Restrictions*, Appellate Body Report, para. 153.

April 1, 2001, for the remainder.²² The date India committed to eliminate the remaining quantitative restrictions – April 1, 2001 – was the same date it imposed the additional customs duty on alcoholic beverages.²³

B. Indian Customs Duties

12. India imposes a series of customs duties on imports. These duties include, but are not limited to, a “basic customs duty”, an “additional customs duty”, and an “extra-additional customs duty”. These duties are calculated cumulatively such that, for example, the additional customs duty is calculated inclusive of the basic customs duty and the extra-additional customs duty is calculated inclusive of the basic customs duty as well as the additional customs duty.

13. The basic, additional and extra-additional customs duties are provided for in India’s Customs Act, 1962 (“Customs Act”) and Customs Tariff Act, 1975 (“Customs Tariff Act”). Section 12 of the Customs Act requires the collection of “duties of custom...at rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from India,” except as otherwise provided under the Customs Act or another law.²⁴ Section 25 of the Customs Act specifies certain circumstances under which the Central Government may collect duties of customs at rates higher or lower than the specified rates.²⁵ For example, Section 25(1) of the Customs Act provides that the Central Government may “exempt generally either absolutely or subject to such conditions...as may be specified in the [customs] notification goods of any specified description from the whole or any part of duty of customs leviable thereon.”

14. The Customs Tariff Act establishes several duties of customs, in particular: (1) duties specified in the First Schedule to the Customs Tariff Act (“basic customs duty”)²⁶; (2) the additional customs duty;²⁷ and (3) the extra-additional customs duty.²⁸

1. Basic Customs Duty

²² *India – Quantitative Restrictions: Agreement Under 21.3(b)*, Communication from India and the United States to the Chairman of the DSB, WT/DS90/15 (January 17, 2000).

²³ See Section III.B, *infra*.

²⁴ See Customs Act, Sec. 12, Exhibit US-2. Section 12 provides: “Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied as at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from India.”

²⁵ See Customs Act, Sec. 25, Exhibit US-2.

²⁶ See Customs Tariff Act, Sec. 2, Exhibit US-3A.

²⁷ See Customs Tariff Act, Sec. 3(1), Exhibit US-3A.

²⁸ See Customs Tariff Act, Sec. 3(5), Exhibit US-3A.

15. Section 2 of the Customs Tariff Act pertains to the basic customs duty and directs the collection of customs duties as specified in the First and Second Schedules to the Customs Tariff Act. The First Schedule generally establishes the highest basic customs duty leviable on goods falling under Chapters 1 through 99 of the Harmonized Tariff Schedule. The Second Schedule sets out duties applicable to exports from India. Under the authority provided in Section 25 of the Customs Act, the Central Government regularly levies basic customs duties at rates that are less than the rates specified in the First Schedule²⁹ and in some cases, higher than the rates set out in the First Schedule.³⁰ The Central Government sets rates of basic customs duty that are higher or lower than the rate set out in the Customs Tariff Act through customs notifications. There is no official Government of India compilation of applied rates of basic customs duties. Determining the basic customs duty applicable to a particular product requires knowing whether the rate set out in the First Schedule has been modified through a prior or subsequent customs notification or, alternatively, relying on private sector publications such as BIG's Easy Reference Customs Tariff 2007-2008.³¹

16. The rates of basic custom duty for alcoholic beverages are:

| | Basic Customs Duty (<i>ad valorem</i>) |
|---------------------------------|---|
| Beer (HS No. 2203) | 100 percent ³² |
| Wine (HS Nos. 2204, 2205, 2206) | 100 percent ³³ |
| Distilled Spirits (HS No. 2208) | 150 percent ³⁴ |

17. The rates of basic customs duty for products other than alcoholic beverages are set out in Exhibit US-1.

2. Additional Customs Duty

²⁹ For example, the First Schedule to the Customs Tariff Act as of 2006 set out a rate of 182 percent as the basic customs duty on spirits. *See* Customs Tariff Act, First Schedule, Chapter 22 (HS no. 2208), Exhibit US-3B. However, per a customs notification issued in 2005, the basic customs duty applied to spirits is 150 percent. *See* Customs Notification No. 11/2005, Exhibit US-5. The fact that the customs notification pre-dates the latest version of the First Schedule does not affect the validity of the customs notification.

³⁰ For example, the First Schedule as of 2007 set out a rate of 100 percent as the basic customs duty on wine. *See* Customs Tariff Act, First Schedule, Chapter 22 (HS nos. 2204, 2205, 2206). However, per Customs Notification 81/2007 (July 3, 2007), the basic customs duty applied to wine is 150 percent.

³¹ Arun Goyal ed., BIG's Easy Reference Customs Tariff 2007-2008 (Academy of Business Studies, New Delhi, 26th edition).

³² Customs Notification 20/1997 (March 1, 1997), Exhibit US-4.

³³ Customs Notification 20/1997 (March 1, 1997), Exhibit US-4.

³⁴ Customs Notification 11/2005 (March 1, 2005), Exhibit US-5. Customs Notification 11/2005 replaces Customs Notification 5/2004 (January 8, 2004) which was rescinded by Customs Notification 12/2005 (March 1, 2005). Customs Notification 5/2004 established a basic customs duty of 150 percent *ad valorem* for distilled spirits.

18. The additional customs duty³⁵ is established under Section 3(1) of the Customs Tariff Act and was made applicable to alcoholic beverages on April 1, 2001, pursuant to Section 110 of India’s 2001 Finance Bill.³⁶ Section 3(1), as amended by the 2001 Finance Bill, states:

Any article imported into India shall, in addition, be liable to a duty (hereinafter in this section referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India....

Provided that in case of any alcoholic liquor for human consumption imported into India, the Central Government may, by notification in the Official Gazette, specify the rate of additional duty, having regard to the excise duty for the time being leviable on a like alcoholic liquor produced or manufactured in different States...

An explanatory note following this statutory provision reads:

In this sub-section, the expression “the excise duty for the time being leviable on a like article if produced or manufactured in India” means the excise duty for the time being in force which would be leviable on a like article if produced or manufactured in India or, if a like article is not so produced or manufactured, which would be leviable on the class or description of articles on which the imported article belongs, *and where such duty is leviable at different rates, the highest duty.*

In accordance with the explanatory note, India interprets Section 3(1) to require that where the like domestic product is subject to various tax rates, for example in different Indian states, the rate of the additional customs duty shall be set at a rate corresponding to the highest rate of excise duty imposed by any Indian state.

19. Section 3(2) of the Customs Tariff Act provides that the additional customs duty shall be calculated on the value of the import³⁷ inclusive of the basic customs duty,³⁸ and Section 3(7) of

³⁵ The additional customs duty is also known as the “countervailing duty” or “CVD” but is distinct from countervailing duties as addressed under the *WTO Agreement on Subsidies and Countervailing Measures* (“WTO SCM Agreement”), which are covered in Section 9 of the Customs Tariff Act.

³⁶ Government of India, Finance Bill, 2001 (announced February 28, 2001; entered into force April 1, 2001).

³⁷ Section 14 of the Customs Act and Customs Valuation Rules, 1988 (“Customs Valuation Rules”) set out rules for valuing imports for purposes of collecting customs duties. Import value is generally the price at which the imported product is “ordinarily sold, or offered for sale, for delivery at the time and place of importation ... in the course of international trade” to an unaffiliated importer. Customs Act, Section 14(1), Exhibit US-2. The Customs Valuation Rules call this the “transaction value” and provide that the transaction value is the “price actually paid or payable for the goods when sold for export to India” and includes the cost of transport, handling, and insurance as well as *inter alia* commissions, brokerage, packing costs, royalties and licensing fees. *See* Customs Valuation

the Customs Tariff Act provides that any duty leviable under Section 3 shall be “in addition to any other duty imposed under [the Customs Tariff Act] or any other law for time being in force.”³⁹ Sections 3(2) and 3(7) thus require the collection of the additional customs duty in addition to the basic customs duty and any other duty (such as the extra-additional customs duty), and that the base for calculating the amount of additional customs duty owed include the amount of basic customs duty owed.

20. Although Section 3(1) states that it applies to “any” product imported into India, the Central Government has exempted a number of products from the additional customs duty pursuant to Section 25(1) of the Customs Act.⁴⁰ As with the basic customs duty, knowing whether a particular product has been exempted from the additional customs duty requires knowing whether a customs notification has been issued for that product or, alternatively, relying on private sector publications; there is no official Government of India compilation of products exempted from the additional customs duty.

21. For products other than alcoholic beverages, Section 3(1) indicates that the additional customs duty shall be “equal to the excise duty” leviable on the “like” product produced or manufactured in India. Excise duties leviable on products produced or manufactured in India are provided for under India’s Central Excise Act, 1944 (“Central Excise Act”) and Central Excise Tariff Act, 1985 (“Central Excise Tariff Act”).⁴¹ Similar to the Customs Tariff Act, the Central

(Determination of Price of Imported Goods) Rules, 1988, Sections 3, 4 and 9, Exhibit US-8.

³⁸ Section 3(2) states:

For purposes of calculating under sections (1) and (3), the additional duty on any imported article, where such duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act, 1962, be the aggregate of –

- (I) the value of the imported article determined under sub-section (1) of section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and
- (ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include –
 - (a) the duty referred to in sub-section (1), (3), and (5);
 - (b) the safeguard duty referred to in sections 8B and 8C;
 - (c) the countervailing duty referred to in section 9; and
 - (d) the anti-dumping duty referred to in section 9A....

³⁹ Customs Tariff Act, Section 3(7), Exhibit US-3A.

⁴⁰ See, e.g., Customs Notification 21/2002 (March 1, 2002), Exhibit US-9.

⁴¹ Central Excise Act, 1944; Central Excise Tariff Act, 1985.

Excise Tariff Act includes a “First Schedule” setting out rates of excise duty or tax (known as the “central value-added tax” or “CENVAT”) leviable on products produced or manufactured in India. It provides that the Central Government may, by notification, exempt any product from the central excise tax⁴². The Central Government regularly issues central excise notifications exempting particular products from the central excise tax.

22. For alcoholic beverages, Section 3(1) provides that the additional customs duty shall be specified by the Central Government by notification “having regard to the excise duty for the time being leviable on like alcoholic liquor produced or manufactured in different States in India” and pursuant to the explanatory note shall be set at the highest excise duty rate imposed by any of the Indian states.

23. Pursuant to Section 3(1), the Central Government issued Customs Notification 32/2003 specifying the rates of additional customs duty for beer (HS code 2203), wine (HS codes 2204, 2205, and 2206) and distilled spirits (HS code 2208) in bottles, cans, or any other packing for “ultimate sale in retail.”⁴³ The notification sets out rates of additional customs duty that vary depending on the import’s CIF value (in U.S. dollars or “USD”) per case. The notification sets out three such rates for wine or beer and four for distilled spirits, with lower-value imports subject to higher rates of additional customs duty:

| Wine or Beer | |
|--------------------------------------|---|
| CIF value USD per case ⁴⁴ | Additional Customs Duty |
| 0 to less than 25 | 75 % <i>ad valorem</i> |
| 25 to less than 40 | 50% <i>ad valorem</i> or USD 37 per case, whichever is higher |
| greater than 40 | 20% <i>ad valorem</i> or USD 40 per case, whichever is higher |
| Distilled Spirits | |
| CIF value USD per case | Additional Customs Duty |

⁴² Central Excise Tariff Act, Section 5A.

⁴³ Customs Notification 32/2003 (March 1, 2003), Exhibit US-6. In other words, the additional customs duty does not apply to bulk imports of alcoholic beverages.

⁴⁴ Customs Notification 32/2003 specifies that a “case” means “a packing containing a total volume of nine litres of liquor”. Customs Notification 32/2003 (March 1, 2003), Exhibit US-6. Nine liters is equivalent to twelve 750 milliliter bottles.

| | |
|--------------------|---|
| less than 10 | 150% <i>ad valorem</i> |
| 10 to less than 20 | 100% <i>ad valorem</i> or USD 40 per case, whichever is higher |
| 20 to less than 40 | 50% <i>ad valorem</i> or USD 53.2 per case, whichever is higher |
| greater than 40 | 25% <i>ad valorem</i> or USD 53.2 per case, whichever is higher |

Depending on the value of the import, it may be subject to an *ad valorem* or specific rate of duty. In situations where a specific duty rate applies it results in a duty rate in percentage terms that is higher than the *ad valorem* rate specified for the particular CIF value. For example, an imported spirit with a CIF value of 10 USD will be subject to the 40 USD specific duty rate, or a 400 percent duty rate.

24. Although Customs Notification 32/2003 asserts that the above rates “hav[e] regard to the excise duties . . . leviable on like alcoholic liquors produced or manufactured in the different [Indian] States,” the notification does not identify any Indian state excise duties to which the above duties relate. The Notification also does not provide any indication of how the Central Government determined that the above rates “have regard” to such excise duties. Despite U.S. requests, India has not provided the United States with documentation or explanation of how the above rates “have regard to” excise duties levied by the Indian states on like alcoholic beverages produced or manufactured in India nor indicated where such documentation or explanation might be found.

25. On July 3, 2007, after the DSB established this Panel with standard terms of reference, the Central Government issued Customs Notification 82/2007 exempting alcoholic beverages from the rates of additional customs duty specified in Customs Notification 32/2003.⁴⁵ On the same day, the Central Government raised the basic customs duty on wine to 150 percent *ad valorem*.⁴⁶ The Government of India press release announcing withdrawal of the additional customs duty states that it “decided to withdraw the additional duty of customs (in lieu of State Excise Duty) on imported spirit/liquor, wines and beer.”⁴⁷ The press release noted concerns raised by the United States and the EC that the additional customs duty on alcoholic beverages was not consistent with India’s WTO obligations.

⁴⁵ Customs Notification 82/2007 (July 3, 2007). The Central Government issued the exemption pursuant to Section 25(1) of the Customs Act.

⁴⁶ Customs Notification 81/2007 (July 3, 2007).

⁴⁷ Government of India, Press Release: “Withdrawal of Additional Duty of Customs (In Lieu of State Excises on Wines, Spirits and Liquors) on Wines Spirits and Liquors” (July 3, 2007), Exhibit US-10.

3. Extra-Additional Customs Duty

26. The extra-additional customs duty⁴⁸ was established pursuant to Section 72 of India's 2005 Finance Bill⁴⁹ and is set out under Section 3(5) of the Customs Tariff Act.⁵⁰ Section 3(5) states:

If the Central Government is satisfied that it is necessary in the public interest to levy on any imported article [whether on such article duty is leviable under sub-section (1) or, as the case may be, sub-section (3) or not] such additional duty as 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, it may, by notification in the Official Gazette, direct that such imported article shall, in addition, be liable to an additional duty at a rate not exceeding four per cent of the value of the imported article as specified in that notification.⁵¹

An explanatory note follows:

In this sub-section, the expression “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” means the sales tax, value added tax, local tax or other charges for the time being in force, which would be leviable on a like article if sold, purchased or transported in India or, if a like article is not sold, purchased or transported, which would be leviable on the class or description of articles to which the imported article belongs, and where such taxes, or, as the case may be, such charges are leviable at different rates, *the highest such tax or, as the case may be, such charge.*⁵²

27. As with Section 3(1), India interprets Section 3(5) in accordance with the explanatory note to require that where the like domestic product is subject to various tax rates within India the rate of the extra-additional customs duty shall be set at a rate corresponding to the highest of such rates.

⁴⁸ The extra-additional customs duty is also known as the “special countervailing duty” or “special CVD”, and as with the additional customs duty, should not be confused with countervailing duties as addressed under the WTO SCM Agreement and provide for in India under Section 9 of the Customs Tariff Act.

⁴⁹ Government of India, Finance Bill, 2005 (announced February 28, 2005; entered into force April 1, 2005).

⁵⁰ Customs Tariff Act, Section 3(5), Exhibit US-3A.

⁵¹ Customs Tariff Act, Section 3(5) (brackets in original), Exhibit US-3A.

⁵² *Id.*

28. Section 3(6) of the Customs Tariff Act provides that the extra-additional customs duty shall be calculated on the value of the import⁵³ inclusive of the basic customs duty and the additional customs duty,⁵⁴ and Section 3(7) requires that the extra-additional customs duty shall be levied in addition to any other duty (such as the basic customs duty and additional customs duty).⁵⁵ Thus, similar to the additional customs duty, Section 3(6) and 3(7) provide for the collection of the extra-additional customs duty in addition to the basic customs duty and additional customs duty and that the base for calculating the extra-additional customs duty owed shall include the amount of basic customs duty as well as the amount of additional customs duty owed.⁵⁶

29. Unlike the additional customs duty under Section 3(1), the extra-additional customs duty under Section 3(5) does not differentiate between alcoholic beverages and other products; the extra-additional customs duty applies equally to all imports, unless specifically exempted pursuant to a customs notification issued pursuant to Section 25(1) of the Customs Act.⁵⁷ With respect to alcoholic beverages, unlike the additional customs duty, the extra-additional customs

⁵³ See Customs Act, Section 14, Exhibit US-2; Customs Valuation Rules, Sections 3, 4 and 9, Exhibit US-8.

⁵⁴ Section 3(6) states:

For purposes of calculating under sub-section (5), the additional duty on any imported article, the value of the imported article shall, notwithstanding anything contained in sub-section 2, or section 14 of the Customs Act, 1962, be the aggregate of –

- (I) the value of the imported article determined under sub-section (1) of section 14 or the tariff value of such article fixed under sub-section (2) of that section, as the case may be; and
- (ii) any duty of customs chargeable on that article under section 12 of the Customs Act, 1962, and any sum chargeable on that article under any law for the time being in force as an addition to, and in the same manner as, a duty of customs, but does not include –
 - (a) the duty referred to in sub-section (5);
 - (b) the safeguard duty referred to in sections 8B and 8C;
 - (c) the countervailing duty referred to in section 9; and
 - (d) the anti-dumping duty referred to in section 9A.

⁵⁵ Customs Tariff Act, Section 3(7), Exhibit US-3A.

⁵⁶ The base for calculating the extra-additional customs duty differs from the base for calculating the additional customs duty in that former includes the latter but not vice versa.

⁵⁷ Customs Tariff Act, Section 3(5), Exhibit US-3A; *see, e.g.*, Customs Notification 20/2006 (March 1, 2006), Exhibit US-11 (exempting a number of products from the extra-additional customs duty).

duty applies equally to bottled and bulk imports. Customs Notification 19/2006 sets the extra-additional customs duty at four percent *ad valorem*.⁵⁸

30. Customs Notification 19/2006 does not indicate how the four percent *ad valorem* extra-additional customs duty has “regard to the sales tax, value added tax, local tax and other taxes or charges” leviable on like goods produced or manufactured in India. The Notification also does not specify the Indian sales, value-added, local or other taxes that the extra-additional customs duty is intended to “counter-balance.” Despite U.S. requests, India has not provided the United States with any details on the sales tax, value-added tax, local tax, or other taxes or charges that the extra-additional customs duty “counter-balances” nor has India indicated where such details might be found.

IV. SUMMARY OF LEGAL ARGUMENT

31. This dispute concerns ordinary customs duties or other duties or charges (“ODCs”) imposed on the importation of goods that India applies to alcoholic beverages as well as other products in excess of the those set forth in India’s Schedule. These duties comprise the additional customs duty and the extra-additional customs duty, and both are inconsistent with India’s obligations under GATT Article II. Specifically, the additional customs duty is:

- (1) inconsistent with GATT Article II:1(b) as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India’s WTO Schedule; and
- (2) inconsistent with GATT Article II:1(a) as an ordinary customs duty that affords imports of alcoholic beverages less favorable treatment than that provided for in India’s WTO Schedule.

32. The extra-additional customs duty is:

- (1) inconsistent with GATT Article II:1(b) as an ordinary customs duty that subjects imports, including imports of alcoholic beverages and products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India’s WTO Schedule; and

⁵⁸ Customs Notification 19/2006 (March 1, 2006), Exhibit US-7. Customs Notification 19/2006 directs that “all goods specified under the...First Schedule to the [Customs Tariff Act] ... shall be liable to an additional duty of customs at the rate of four percent, *ad valorem*.” *Id.* Initially, however, the extra-additional customs duty applied to a more limited number of products pursuant to Customs Notification 19/2005. Customs Notification 19/2005 (March 1, 2005). Customs Notification 19/2005 was repealed and replaced by Customs Notification 19/2006.

- (2) inconsistent with GATT Article II:1(a) as an ordinary customs duty that affords imports, including imports of alcoholic beverages and products listed in Exhibit US-1, less favorable treatment than that provided for in India’s WTO Schedule.

33. Alternatively, the additional customs duty and extra-additional customs duty are inconsistent with GATT Article III:2 as taxes applied on imported products, including alcoholic beverages, that exceed those applied to like domestic products or directly competitive or substitutable domestic products.

V. LEGAL ARGUMENT

A. Introduction

34. GATT Article II:1 prohibits Members from levying customs duties or other charges on imports in excess of the rates established in the Member’s Schedule (“bound rates” or “tariff bindings”) or otherwise according less favorable treatment to imports than provided in the Member’s WTO Schedule.⁵⁹ Specifically, GATT Article II:1 states:

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

- (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, 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 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.

The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 requires Members to record “other duties or charges” referred to in Article II:1(b) in their respective Schedules and states that the date on which such “other duties or charges” shall be bound is April 15, 1994.⁶⁰

35. Thus, GATT Article II:1(b) requires India to exempt imports from “ordinary customs duties” or “other duties or charges of any kind imposed on or in connection with ...importation” in excess of those provided for in its Schedule, and GATT Article II:1(a) requires India to afford

⁵⁹ See, e.g., Appellate Body Report, *Argentina – Textiles*, paras. 45-47.

⁶⁰ Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade, 1994, paras. 1-2.

no less favorable treatment to imports than provided for in its Schedule. Together these provisions serve to “preserve the value of tariff concession negotiated by a Member with its trading partners, and bound in that Member’s schedule.”⁶¹ Both the additional customs duty and extra-additional customs duty are inconsistent with GATT Article II:1(a) and (b).

36. The additional customs duty is imposed in addition to the basic customs duty already levied on imports of alcoholic beverages. The additional customs duty is inconsistent with GATT Article II:1(a) and (b) because the combination of these two duties, as elaborated further below, results in “ordinary customs duties” on imports of alcoholic beverages that exceed those set forth in India’s Schedule.

37. The extra-additional customs duty is imposed in addition to the basic customs duty. The extra-additional customs duty is inconsistent with GATT Article II:1(a) and (b) because the combination of these duties results in “ordinary customs duties” on imports that exceed those set forth in India’s Schedule. The United States notes that the extra-additional customs duty has been applied in addition to, and has been calculated on top of, the additional customs duty. U.S. claims against the extra-additional customs duty, however, do not rely on imposition of the additional customs duty to demonstrate that the extra-additional customs duty is inconsistent with GATT Article II:1(a) or (b).

38. The U.S. claims against the extra-additional customs duty concern a broader range of products than the U.S. claims against the additional customs duty. Whereas the latter concern alcoholic beverages, the claims against the extra-additional customs duty concern alcoholic beverages as well as other products such as those listed in Exhibit US-1.

39. As noted above, after establishment of the Panel, India issued Customs Notification 82/2007 exempting imports of alcoholic beverages from the additional customs duty leviable under Customs Notification 32/2003.⁶² However, as this action was taken after the Panel was established, it is outside the Panel’s terms of reference.⁶³ Furthermore, as far as the United States is aware, although Customs Notification 82/2007 may have exempted alcoholic beverages from the rates of duty specified in Customs Notification 32/2003, Customs Notification 32/2003 remains in force. Section 3(1) of the Customs Tariff Act also remains in force and directs that “[a]ny article which is imported into India *shall*... be liable” for the additional customs duty and that, with respect to alcoholic beverages, the rate of additional customs duty may be specified through customs notification. Accordingly, the measures identified in the U.S. panel request as

⁶¹ Appellate Body Report, *Argentina – Textiles*, para. 47; Panel Report, *US - Certain EC Products*, para. 6.57 (quoting the Appellate Body in *Argentina – Textiles*).

⁶² Customs Notification 82/2007 (July 3, 2007). The Central Government issued the exemption pursuant to Section 25(1) of the Customs Act.

⁶³ Any issue concerning the impact of Customs Notification 82/2007 would be an issue to be considered as part of any compliance phase in this dispute.

providing for the additional customs duty on alcoholic beverages remain in force, despite India’s announcement that it has “withdrawn” the additional customs duty on alcoholic beverages.⁶⁴

B. The Additional Customs Duty on Alcoholic Beverages Is Inconsistent with GATT Article II:1

1. GATT Article II:1(b)

40. Article II:1(b) concerns “ordinary customs duties” and “all other duties and charges of any kind imposed on or in connection with ...importation” (ODCs) and requires that imports be exempted from such duties or charges “in excess of those set forth and provided in” the relevant Member’s Schedule.

(a) Ordinary Customs Duty or Other Duty or Charge

41. The additional customs duty is an ordinary customs duty within the meaning of Article II:1(b). The WTO Agreement does not define “ordinary customs duty.”

42. Consistent with the rule of interpretation of public international law reflected in Article 31 of the Vienna Convention, the term “ordinary customs duties” must be interpreted in accordance with its ordinary meaning in context and in light of the agreement’s object and purpose.⁶⁵ The ordinary meaning of the term “customs duty” is a duty imposed on a product upon its importation into the customs territory of a Member. The term “ordinary” suggests a customs duty that is “normal, customary, usual”, “belonging to or occurring in regular custom or practice”, “of the usual kind, not singular or exceptional; commonplace, mundane.”⁶⁶ Thus, an ordinary customs duty is a type of customs duty that is common and occurring most regularly. Determination of whether a measure constitutes an ordinary customs duty should be based on the structure, design and application of the measure; the name or stated purpose the Member imposing may have ascribed to it is not determinative.⁶⁷

⁶⁴ Further, the United States highlights the statement in the Indian press release that India’s “withdrawal” of additional customs duty on alcoholic beverages is “in lieu of” state excise duties on imported alcoholic beverages. *See supra* Section III.B.2.

⁶⁵ *See Vienna Convention on the Law of Treaties* (“Vienna Convention” or “VCLT”) Art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”).

⁶⁶ *New Shorter Oxford English Dictionary* (1993) at 2018.

⁶⁷ In *Chile – Price Bands*, the Appellate Body examined whether Chile’s price band system constituted a variable import levy, minimum import price or other similar measure such that pursuant to Article 4.2 of the Agricultural Agreement Chile had an obligation to convert its price band system to “ordinary customs duties.” In making findings on this issue, both the 21.5 and original Appellate Body based its findings on an examination of the structure, design and effect of Chile’s price band system as compared to minimum import prices and variable import levies. *See* 21.5 Appellate Body Report, *Chile – Price Bands*, para. 189 (noting that its examination should entail an analysis of the measure’s characteristics and that “[s]uch characteristics can be identified from an analysis of both

43. By far the most common and regularly occurring types of customs duties in terms of structure, design and application are *ad valorem*, specific or a combination thereof, calculated on the value or quantity respectively of a good at the time of importation. Ordinary customs duties are not applied on a case-by-case basis or in response to a singular or exceptional event or set of circumstances. Instead, Members apply ordinary customs duties as a matter of course upon importation of a product into its customs territory. Ordinary customs duties in this sense are generally marked by a greater sense of transparency and predictability than other types of border measures.⁶⁸ It follows 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.

44. With respect to the additional customs duty on alcoholic beverages, it applies (i) at the time of importation, (ii) exclusively to imports (i.e., not to domestic products), and (iii) as an *ad valorem* or specific duty, depending on the CIF value of the import. In this regard, the additional customs duty is no different than the basic customs duty, which likewise applies at the time of importation, exclusively to imports and as an *ad valorem* or specific duty.⁶⁹ Accordingly, the additional customs duty appears to be of the kind normally or commonly imposed on imports, and consequently “ordinary” within the meaning of GATT Article II:1(b).

45. The structure of India’s customs duty regime further supports this latter point. As explained in Section III above, Section 12(1) of the Customs Act requires the collection of customs duties as specified under any Indian law: “Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under [the Customs Tariff Act, 1975 (51 of 1975)], or any other law for the time being in force, on goods imported into, or exported from India.” This language requires the collection of both the basic customs duty and the additional customs duty, both of which are specified under the Customs Tariff Act. Further, Section 25 of the Customs Act provides authority to exempt certain imports from any “dut[y] of customs” and is the authority used to exempt imports from either (or both) the basic customs duty or additional customs duty.⁷⁰ Thus, the structure of India’s

the structure and design of a measure as well as the effects of that measure.”); *id* paras. 149, 162; Appellate Body Report, *Chile – Price Bands*, para. 252 (emphasizing the that it focused on the “design” and “overall nature of” Chile’s price band system in examining Chile’s price band system); *see also id.*, paras. 227, 239, 226. In making its findings, the Appellate Body notably did not rely - either in the original or 21.5 proceeding – on the name or stated purpose of Chile’s price band system. Appellate Body Report, *Chile – Price Bands*, paras. 205- 288; 21.5 Appellate Body Report, *Chile – Price Bands*, paras. 149- 226. In other contexts, for example in examining internal tax measures under GATT Article III, panels and the Appellate Body have emphasize 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.*, Appellate Body Report, *Japan – Alcohol*, p. 29-31; Appellate Body Report, *Chile – Alcohol*, para. 61.

⁶⁸ *See, e.g.*, 21.5 Appellate Body Report, *Chile – Price Bands*, para. 156; Appellate Body Report, *Chile – Price Bands*, para. 200.

⁶⁹ *See, e.g.*, Customs Tariff Act, First Schedule, Chapter 22, Exhibit US-3B.

⁷⁰ Customs Act, Section 25, Exhibit US-2.

own customs duty regime appears to regard both the additional customs duty and basic customs duty as ordinary customs duties.⁷¹

46. For each of these reasons, the additional customs duty, like the basic custom duty, is an ordinary customs duty within the meaning of GATT Article II:1(b).

47. In any event, the additional customs duty would be inconsistent with GATT Article II:1(b) even if it were an ODC within the meaning of the second sentence of that article. ODCs are defined in relation to ordinary customs duties in that “other duties or charges” mean those duties or charges that are not “ordinary” customs duties but are nonetheless imposed on or in connection a product’s importation. With respect to the additional customs duty, the second sentence of GATT Article II:1(b) would ensure that India may not avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may not be characterized as an “ordinary” customs duty but nonetheless results in other duties or charges that exceed those set out in its Schedule. In this dispute, determining whether the additional customs duty is either an ordinary customs duty or ODC within the meaning of GATT Article II:1(b), however, is not determinative of the outcome of this dispute, as in either case, the additional customs duty would exceed the rates set out in India’s Schedule, as discussed below.⁷²

(b) In Excess of

48. The additional customs duty subjects imports of alcoholic beverages to ordinary customs duties “in excess of” those provided for in India’s Schedule. Part 1 of India’s Schedule sets forth the following bound rates of duty on beer, wine and distilled sprits as follows:⁷³

| Product | WTO Bound Rate (<i>ad valorem</i>) |
|---------------------------------|---|
| Beer (HS No. 2203) | 150 percent |
| Wine (HS Nos. 2204, 2205, 2206) | 150 percent |
| Distilled Spirits (HS No. 2208) | 150 percent |

⁷¹ In this regard, it is relevant to note that Section 3(1) of the Customs Tariff Act states that the additional customs duty is to “hav[e] regard to the excise duty for the time being leviable on like alcoholic [beverages] produced ...in India”. Customs Tariff Act, Section3(1), Exhibit US-3A. This statement does not change the appropriateness of characterizing the additional customs duty as an ordinary customs duty as the purpose or intent a Member attributes to a tax or duty is not determinative; otherwise a Member could avoid the commitments made in its Schedule simply by its own characterization of the duty under domestic law. See GATT Panel Report, *EEC – Parts and Components*, para. 5.7.

⁷² Accordingly, the United States will refer to the additional customs duty as an ordinary customs duty although the same analysis would apply if it were an ODC.

⁷³ GATT 1994, Marakesh Protocol, Schedule XII: India, Exhibit US-12.

India’s Schedule does not identify any other duties or charges applicable to alcoholic beverages.

49. India applies a 100 percent basic customs duty on beer and, prior to July 3, 2007, also a 100 percent basic customs duty on wine.⁷⁴ On July 3, 2007, the basic customs duty on wine increased to 150 percent.⁷⁵ With respect to distilled spirits, India applies a basic customs duty equal to its 150 percent WTO bound rate.⁷⁶

50. As explained in Section III, in addition to the basic customs duty, Section 3(1) of the Customs Tariff Act requires the imposition of the additional customs duty on imports and Customs Notification 32/2003 set outs the rates of additional customs duty on imports of alcoholic beverages. As also explained in Section III, Section 3(2) of the Customs Tariff Act requires that the additional customs duty be calculated on the value of the import inclusive of the basic customs duty owed.⁷⁷ As a result, the additional customs duty required under those measures results not only in ordinary customs duties that exceed India’s WTO bound rates for beer, wine and distilled spirits, but exceeds them by as much as 400 percentage points.⁷⁸

| Value | BC | AD (% or USD) | BC Owed (USD) | AD Owed (USD) | Total Duties (USD) | Effective Rate of AD | Effective Rate of Duty | WTO Bound Rate |
|---------------------|------|---------------------|---------------------|---------------------|--------------------------|----------------------------|------------------------------|----------------------|
| Beer and Wine | | | | | | | | |
| 41 | 100% | 40* | 41.00 | 40 | 81.00 | 97.6% | 197.6% | 150% |
| 100 | 100% | 20% | 100.00 | 40 | 140.00 | 40% | 140.0% | 150% |
| 26 | 100% | 37* | 25.00 | 37 | 62.00 | 148% | 248.0% | 150% |

⁷⁴ Customs Notification 20/1997 (March 1, 1997), Exhibit US-4.

⁷⁵ Customs Notification 81/2007 (July 3, 2007). Prior to July 3, 2007, the basic customs duty on wine was 100 percent per Customs Notification 20/1997 and the First Schedule to the Customs Tariff Act.

⁷⁶ Customs Notification 11/2005 (March 1, 2005), Exhibit US-5. Customs Notification 11/2005 replaces Customs Notification 5/2004 (January 8, 2004) which was rescinded by Customs Notification 12/2005 (March 1, 2005). Customs Notification 5/2004 also established a basic customs duty of 150 percent *ad valorem* for distilled spirits.

⁷⁷ For example, an additional customs duty of 150 percent applied on the value of an import with a CIF value of 1 USD and a basic customs duty of 150 percent or 1.50 USD results in an additional customs duty of 3.75 USD or, in percentage terms, an effective rate of 375 percent, and aggregate customs duties of 5.25 USD or, in percentage terms, effective rate of 525 percent.

⁷⁸ With respect to beer and wine with a CIF value of 100 USD, the fact that the aggregate effective duty rate is 140 percent for such imports does not affect the WTO-inconsistency of the additional customs duty. By its structure and design the additional customs duty in conjunction with the basic customs duty results in customs duties in excess of those set forth in India’s WTO Schedule and as such are inconsistent with Article II:1(b). See Appellate Body Report, *Argentina - Textiles*, para. 55, 62 (finding a duty inconsistent with GATT Article II:1(b) because by its structure and design it resulted for a “certain range of import prices” in duties in excess of Argentina’s WTO bound rates).

| | | | | | | | | |
|---------|------|-------|--------|-------|--------|--------|--------|------|
| 37 | 100% | 50% | 37.00 | 37 | 74.00 | 100% | 200.0% | 150% |
| 1 | 100% | 75% | 1.00 | 1.5 | 2.50 | 150% | 250% | 150% |
| Spirits | | | | | | | | |
| 41 | 150% | 53.2* | 61.50 | 53.2 | 114.70 | 129.8% | 279.8% | 150% |
| 86 | 150% | 25% | 129.00 | 53.75 | 182.75 | 62.5% | 212.5% | 150% |
| 20 | 150% | 53.2* | 30.00 | 53.2 | 83.20 | 266% | 416.0% | 150% |
| 39 | 150% | 50% | 58.50 | 53.2 | 111.70 | 136.4% | 286.4% | 150% |
| 10 | 150% | 40* | 15.00 | 40 | 55.00 | 400% | 550.0% | 150% |
| 16 | 150% | 100% | 24.00 | 40 | 64.00 | 250% | 400.0% | 150% |
| 1 | 150% | 150% | 1.50 | 3.75 | 5.25 | 375% | 525.0% | 150% |

* Numbers are U.S. dollars (USD) per case unless followed by a percent symbol (%). The table shows the effective rate of additional customs duty and aggregate duties on wine prior to the July 3, 2007 increase in the basic customs duty rate for wine from 100 to 150 percent.

51. As the above table demonstrates, with respect to beer and wine, all but the lowest rate of additional customs duty – 20 percent on imports of wine or beer over 100 USD per case – results in ordinary customs duties on imports of beer and wine that exceed India’s 150 percent WTO bound rate. With respect to distilled spirits, the additional customs duty at all rates results in ordinary customs duties that exceed India’s WTO bound rates. In fact, since the basic customs duty on distilled spirits is already equal to India’s WTO bound rate, any ordinary customs duty imposed in addition to the basic customs duty on imports of distilled spirits would exceed India’s WTO bound rate.

52. Thus, applied in conjunction with the basic customs duty, the additional customs duty results in ordinary customs duties that far exceed India’s WTO bound rates for alcoholic beverages.

53. Accordingly, the additional customs duty as imposed pursuant to Section 3(1) of the Customs Tariff Act and Customs Notification 32/2003 is, as such, inconsistent with Article II:1(b) as an ordinary customs duty in excess of those duties specified in India’s Schedule.

2. The Additional Customs Duty Is Inconsistent with GATT 1994 Article II:1(a)

54. GATT Article II:1(a) requires each WTO Member to “accord the commerce of [other Members] treatment no less favourable than that provided for in” the Member’s Schedule. As explained above, the additional customs duty imposed pursuant to Section 3(1) of the Customs Tariff Act and Customs Notification 32/2003 results in ordinary customs duties on imports of alcoholic beverages that exceed those set out in India’s WTO Schedule. By imposing ordinary customs duties on imports of alcoholic beverages from the United States in excess of those set forth in India’s Schedule, the additional customs duty accords imports from the United States less

favorable treatment than provided for in India’s Schedule and,⁷⁹ as such, is inconsistent with GATT Article II:1(a).

C. The Extra-Additional Customs Duty Is Inconsistent with GATT Article II:1

55. Like the additional customs duty, the extra-additional customs duty results in ordinary customs duties that exceed those set forth in India’s WTO Schedule. The extra-additional customs duty is, as such, also inconsistent with GATT Article II:1(a) and (b). The extra-additional customs duty is inconsistent with these provisions with respect to alcoholic beverages as well as a number of other imports, as elaborated below.

1. The Extra-Additional Customs Duty is Inconsistent with GATT Article II:1(b)

(a) Ordinary Customs Duty or Other Duty or Charge

56. As reviewed in Section V.B above, an “ordinary customs duty” within the meaning of GATT Article II:1(b) is a duty – either *ad valorem*, specific or mixed – imposed on a good upon its importation (and not on domestic products), and calculated based on the quantity or value of the good at the time of importation, while an ODC (other duty or charge) within the meaning of GATT Article II:1(b) is a duty or charge imposed on the importation of a good other than an ordinary customs duty.

57. The extra-additional customs duty is an ordinary customs duty for many of the same reasons as the additional customs duty is. First, the extra-additional customs duty applies (i) at the time of importation, (ii) exclusively to imports, and (iii) as an *ad valorem* duty on the CIF value of the import. In this regard, the extra-additional customs duty, like the additional customs duty, is no different than the basic customs duty,⁸⁰ and likewise appears to be of the kind normally or commonly imposed on imports. The extra-additional customs duty is thus “ordinary” within the meaning of GATT Article II:1(b).

58. As with the additional customs duty, the structure of India’s customs duty regime bolsters this latter point. Section 12(1) of the Customs Act likewise requires the collection of both the basic customs duty and the extra-additional customs duty and Section 25 of the Customs Act likewise provides the authority to exempt imports from “any duty of customs” including the basic customs duty or the extra-additional customs duty.⁸¹ Thus, India’s own customs duty

⁷⁹ See Appellate Body Report, *Argentina – Textiles*, para. 47 (“It is evident to us that the application of customs duties in excess of those provided for in a Members’s Schedule, inconsistent with the first sentence of Article II:1(b), constitutes “less favourable” treatment under the provisions of Article II:1(a)”; see also *id.*, para. 45 (“Paragraph (b) prohibits a specific type of practice that will always be inconsistent with paragraph (a)”...)).

⁸⁰ See *supra* Section IV.B.1(a).

⁸¹ Customs Act, Section 25, Exhibit US-2.

regime appears to regard both the extra-additional customs duty and the basic customs duty as ordinary customs duties.⁸²

59. For each of these reasons, the extra-additional customs duty, like the basic customs duty and the additional customs duty, is an ordinary customs duty within the meaning of GATT Article II:1(b).

60. Similarly, even if the extra-additional customs duty were not an ordinary customs duty but were instead an ODC, it would be in breach of Article II:1(b) of the GATT 1994. As explained above, ODCs are defined in relation to ordinary customs duties in that “other duties or charges” mean those duties or charges that are not “ordinary” customs duties but are nonetheless imposed on or in connection with a product’s importation. With respect to the extra-additional customs duty, the second sentence of GATT Article II:1(b) would ensure that India may not avoid its tariff commitments simply by imposing a duty or other charge on the importation of alcoholic beverages that may not meet the technical definition of an “ordinary” customs duty, but nonetheless results in customs duties or other charges that exceed those set out in India’s Schedule. In this dispute, as is the case with the additional customs duty, determining whether the extra-additional customs duty is either an ordinary customs duty or ODC within the meaning of GATT Article II:1(b) is not determinative of the outcome in this dispute as, in either case, the extra-additional customs duty would exceed the rates set out in India’s Schedule, as discussed below.⁸³

(b) In Excess Of

61. The extra-additional customs duty subjects imports of alcoholic beverages as well as other imports to ordinary customs duties “in excess of” those provided for in India’s Schedule. As explained in Section III, in addition to the basic customs duty and the additional customs duty, Section 3(5) of the Customs Tariff Act provides for the imposition of the extra-additional customs duty on imports and Customs Notification 19/2006 requires that the extra-additional customs duty be levied on imports at four percent *ad valorem*. In contrast to Customs Notification 32/2003 setting out the rates of additional customs duty for alcoholic beverages, Customs Notification 19/2006 is broadly drafted, requiring the collection of the extra-additional customs duty on “all goods specified under the Chapter, heading, sub-heading or tariff item of the First Schedule to [the Customs Tariff] Act.”⁸⁴ Section 3(6) of the Customs Tariff Act requires that the extra-

⁸² Again, the purpose a Member attributes to a duty or tax is not decisive in determining whether that duty or tax constitutes an ordinary customs duty. Thus, Section 3(5)’s statement that the extra-additional customs duty is to counter-balance sales or other indirect taxes imposed on like domestic products does not affect whether the extra-additional customs duty may be regarded as an ordinary customs duty within the meaning of GATT Article II:1(b). See *supra* footnote 71.

⁸³ Accordingly, the United States will refer to the extra-additional customs duty as an ordinary customs duty although the same analysis would apply if it were an ODC.

⁸⁴ Customs Notification 19/2006, Exhibit US-7.

additional customs duty be calculated on the value of the import inclusive of the basic customs duty owed and the additional customs duty owed.⁸⁵

(i) Alcoholic Beverages

62. Part of 1 of India’s WTO Schedule binds ordinary customs duties on beer, wine and distilled spirits (HS Nos. 2203-2206 and 2208) at 150 percent *ad valorem* and does not identify any other duties or charges applicable to alcoholic beverages. India’s basic customs duty on beer and wine is 100 percent *ad valorem* whereas the basic customs duty on distilled spirits is 150 percent *ad valorem*.⁸⁶

63. Even factoring out the cumulative effect of the additional customs duty, the extra-additional customs duty, when imposed in conjunction with the basic customs duty, results in ordinary customs duties on distilled spirits that exceed those set forth in India’s WTO Schedule:⁸⁷

| Extra-Additional Customs Duty on Distilled Spirits* | | | | | | | | |
|---|-----|------|---------|----------|-----------------------|--------------|------------------------------|----------------|
| Value | EAD | BC | BC Owed | EAD Owed | Effective Rate of EAD | Total Duties | Effective Rate of Total Duty | WTO Bound Rate |
| 100 | 4% | 150% | 150.00 | 10 | 10.0% | 160.00 | 160% | 150% |

* Numbers are U.S. dollars (USD) unless followed by a percent symbol (%). The table shows the effective rate of additional customs duty and aggregate duties on wine prior to the July 3, 2007 increase in the basic customs duty rate for wine from 100 to 150 percent.

⁸⁵ For example, an additional customs duty of 150 percent applied on the value of an import with a CIF value of 1 USD and a basic customs duty of 150 percent or 1.50 USD results in an additional customs duty of 3.75 USD or, in percentage terms, an effective rate of 375 percent, and aggregate customs duties of 5.25 USD or, in percentage terms, effective rate of 525 percent.

⁸⁶ Customs Notification 20/1997 (March 1, 1997), Exhibit US-4 (beer and wine); Customs Notification 11/2005 (March 1, 2005), Exhibit US-5 (distilled spirits). As noted above, Customs Notification 81/2007 (July 3, 2007) raised the applied basic customs duty on wine to 150 percent *ad valorem* on July 3, 2007. Thus, the extra-additional customs duty would result in customs duties in excess of India’s bound rates on wine as well when imposed in conjunction with a basic customs duty of 150 percent, for the same reasons the extra-additional customs duty results in customs duties in excess of India’s bound rates for distilled spirits and products listed in Exhibit US-1. Because India raised the basic customs duty on wine to 150 percent after the date of the Panel’s establishment, we have not included that argument here.

⁸⁷ The above table does not include the effect of the additional customs duty; U.S. claims concerning the extra-additional customs duty do not rely on its imposition in conjunction with the additional customs to demonstrate that the extra-additional customs duty results in ordinary customs duties in excess of those set forth in India’s Schedule. If the above table were to include imposition of the additional customs duty the effective rate of extra-additional customs duty would be much higher as, pursuant to Section 3(6) of the Customs Tariff Act, the extra-additional customs duty applies in addition to and is calculated on top of both the basic customs duty and the additional customs duty.

64. As noted, Section 3(6) of the Customs Tariff Act requires that the extra-additional customs duty be calculated on the value of the import inclusive of the basic customs duty owed,⁸⁸ such that the effective rate of the extra-additional customs duty on imports of distilled spirits is 10 percent and the effective rate of aggregate duties (extra-additional customs duty in conjunction with the basic customs duty) is 160 percent, ten percentage points over India's 150 percent WTO bound rate for wine and spirits. This would similarly be the case for other values; 100 USD as the value in the above table is simply illustrative.

65. With respect to beer and wine, although imposition of the extra-additional customs duty in conjunction with the basic customs duty on beer and wine has not exceeded India's WTO bound rates of "ordinary customs duty", India's Schedule does not specify any ODCs within the meaning of GATT Article II:1(b) for beer or wine (or for distilled spirits). Thus, to the extent the extra-additional customs duty is an ODC, the extra-additional customs duty on beer and wine would exceed the ODCs set out in India's Schedule. In fact, to the extent the extra-additional customs duty is an ODC, the extra-additional customs duty on beer, wine, spirits and every other product for which India took commitments in its Schedule would exceed the ODCs set out in India's Schedule, as India has not scheduled the extra-additional customs duty for any product included in its Schedule, including those products listed in Exhibit US-1.

(ii) Other Imports

66. Exhibit US-1 lists a number of agricultural and industrial products. For each product listed, Exhibit US-1 identifies India's WTO bound rate along with the effective ordinary customs duty or ODC that results from application of the extra-additional customs duty in conjunction with the basic customs duty on that product. The WTO bound rates listed reflect India's Uruguay Round commitments inclusive of any subsequent modifications in accordance with GATT Article XXVIII.

67. The applied rates of basic customs duties for products in Exhibit US-1 are at India's WTO bound rates for those products, and none of the products are indicated in India's Schedule as ones subject to an ODC. As a result, application of the extra-additional customs duty in conjunction with the basic customs duty⁸⁹ results in ordinary customs duties on those products that exceed those set forth in India's Schedule.

68. As with alcoholic beverages, the extra-additional customs duty on other products applies in addition to and is calculated on top of the basic customs duty. Thus, for example, a product subject to the extra-additional customs duty of four percent and a basic customs duty of 60

⁸⁸ Section 3(6) of the Customs Tariff Act also requires that the extra-additional customs duty be calculated in addition to and on top of the additional customs duty, but as noted, the effect of the additional customs duty has not been taken into account in the above table.

⁸⁹ See Customs Tariff Act, Section 3(6), Exhibit US-3A (requiring calculation of the extra-additional customs duty on the value of the import inclusive of the basic customs duty owed).

percent (e.g., milk) would be subject to aggregate customs duties of 66.4 percent. If India's WTO bound rate for that product were 60 percent (as it is, for example, for milk) imposition of the extra-additional customs duty would result in ordinary customs duties that are 6.4 percentage points above the bound rate set out forth for that product in India's Schedule.

69. Exhibit US-1 is an illustrative list; there may be products in addition to those listed in Exhibit US-1 for which imposition of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule. The United States has challenged the extra-additional customs duty as such. Accordingly, the U.S. claims concern the extra-additional customs duty itself and therefore any instance for which application of the extra-additional customs duty in conjunction with the basic customs duty results in ordinary customs duties in excess of those set forth in India's Schedule.

**(c) The Extra-Additional Customs Duty on Alcoholic Beverages
and Other Products is Inconsistent with GATT Article II:1(b)**

70. As demonstrated above, the extra-additional customs duty, imposed in conjunction with the basic customs duty, subjects alcoholic beverages as well as other products to ordinary customs duties in excess of those set forth in India's WTO Schedule. GATT Article II:1(b), however, requires India to exempt imports from ordinary customs duties or ODCs in excess of those set forth in its Schedule. Accordingly, the extra-additional customs duty as imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 is, as such, inconsistent with India's obligations under GATT Article II:1(b).

**2. The Extra-Additional Customs Duty is Inconsistent with GATT Article
II:1(a)**

71. As noted above, GATT Article II:1(a) requires each WTO Member to "accord the commerce of [other Members] treatment no less favourable than that provided for in" the Member's Schedule. Because the extra-additional customs duty results in customs duties on imports of alcoholic beverages and other products (including those in Exhibit US-1) that exceed those set out in India's Schedule, it accords imports from the United States less favorable treatment than provided for in India's Schedule. Consequently, the extra-additional customs duty imposed pursuant to Section 3(5) of the Customs Tariff Act and Customs Notification 19/2006 is, as such, inconsistent with GATT Article II:1(a).

VI. CONCLUSION

72. For the reasons set out above, the United States respectfully requests the Panel to find that:

- (1) the additional customs duty is:

- (a) inconsistent with GATT Article II:1(b) as an ordinary customs duty that subjects imports of alcoholic beverages to ordinary customs duties in excess of those set forth in India's WTO Schedule; and
 - (b) inconsistent with GATT Article II:1(a) as an ordinary customs duty that affords imports of alcoholic beverages from the United States less favorable treatment than that provided for in India's WTO Schedule; and
- (2) the extra-additional customs duty is:
- (a) inconsistent with GATT Article II:1(b) as an ordinary customs duty that subjects imports, including alcoholic beverages and products listed in Exhibit US-1, to ordinary customs duties in excess of those set forth in India's WTO Schedule; and
 - (b) inconsistent with GATT Article II:1(a) as an ordinary customs duty that affords import from the United States, including alcoholic beverages and products listed in Exhibit US-1, less favorable treatment than that provided for in India's WTO Schedule.

Accordingly, the United States also respectfully requests that the Panel recommend, pursuant to Article 19.1 of the DSU, that India bring its measures into conformity with the covered agreements.

TABLE OF EXHIBITS

| Exhibit US- | |
|------------------------|---|
| 1A | Extra-Additional Customs Duty on Agricultural Products |
| 1B | Extra-Additional Customs Duty on Industrial Products |
| 2 | Customs Act, 1962, Sections 12-25 |
| 3A | Customs Tariff Act, 1975 |
| 3B | First Schedule to Customs Tariff Act, 1975 |
| 4 | Customs Notification 20/1997 (March 1, 1997) |
| 5 | Customs Notification No. 11/2005 (March 1, 2005) |
| 6 | Customs Notification 32/2003 (March 1, 2003) |
| 7 | Customs Notification 19/2006 (March 1, 2006) |
| 8 | Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 |
| 9 | Customs Notification 21/2002 (March 1, 2002) |
| 10 | Government of India, Press Release: “Withdrawal of Additional Duty of Customs (In Lieu of State Excises on Wines, Spirits and Liquors) on Wines Spirits and Liquors” (July 3, 2007) |
| 11 | Customs Notification 20/2006 (March 1, 2006) |
| 12A | Schedule XII: India, Part I, Section 1A |
| 12B | Schedule XII: India, Part I, Section IIA |
| 12C | Schedule XII: India, Part I, Section IIB |
| 12D | Schedule XII: India, Certified Modification 2003 |
| 12E | Schedule XII: India, Certified Modification 1997, Part I |
| 12F | Schedule XII: India, Certified Modification 1997, Part 2 |
| 12G | Schedule XII: India, Certified Modification 1997, Part 3 |
| 12H | Schedule XII: India, Certified Modification 1997, Part 4 |
| 13 | <i>Jim Beam’s Ready to Cheer Spirits Here</i> |
| 14 | <i>India Beats US to Become World’s Largest Whisky Market</i> |
| 15 | <i>India Uncorks a Thirst for Wine</i> |

| | |
|----|--|
| 16 | <i>The Great Indian Beer Rush</i> |
| 17 | <i>Beer Consumption in Country Hits New High</i> |